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JUDICIAL CENTRE OF CALGARY

COURT FILE NUMBER	1601-03126
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF(S)	CALLIDUS CAPITAL CORPORATION
DEFENDANT(S)	ALKEN BASIN DRILLING LTD.
DOCUMENT	**RECEIVER'S THIRD REPORT TO COURT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Gowling WLG (Canada) LLP Suite 1600 421 – 7 Ave SW Calgary, AB T2P 4K9 Telephone: (403) 298-1938 / (403) 298-1092 Fax: (403) 607-4592 **Attention: Tom Cumming**

INTRODUCTION

1. MNP Ltd. was appointed Receiver (in such capacity, the "**Receiver**") without security, of all of the assets, undertakings, and properties (the "**Property**") of Alken Basin Drilling Ltd. ("**Alken**" or the "**Debtor**") in accordance with an April 1, 2016 Court of Queen's Bench of Alberta (the "**Court**") Receivership Order, as subsequently amended by the Amended & Restated Receivership Order issued by the Court (together, the "**Receivership Order**"). A copy of the Receivership Order is attached hereto as **Appendix "A"**.

2. Prior to its appointment as Receiver, MNP Ltd. had been engaged by Alken as an Advisor (the "**Advisor**") to conduct an *en bloc* sales process of the Property (the "**Sales Process**"). In accordance with the Receivership Order, the Receiver was

authorized to continue with the Sales Process initiated prior to its appointment by the Court.

3. On April 26, 2016, the Receiver filed its First Report to Court (the "**First Report**") in connection with its application seeking, among other things, an Approval and Vesting Order, as further defined and detailed below. A copy of the First Report (without Appendices) is attached hereto as **Appendix "B"**.

4. On May 4, 2016, the Court issued an Approval and Vesting Order (the "**Approval and Vesting Order**"), which, among other things, approved the transaction (the "**Transaction**") entered into between the Receiver and Altair Water and Drilling Services Ltd. (the "**Purchaser**") and the vested in the Purchaser Alken's right, title, and interest in and to the Purchased Assets. A copy of the Approval and Vesting Order is attached hereto as **Appendix "C"**.

5. On May 17, 2016, the Receiver filed its Second Report to Court (the "**Second Report**") in connection with its application seeking, among other things, Court intervention directing Link Ventures to return certain personal property of Alken.

PURPOSE OF THIRD REPORT

6. The purpose of this Third Report to Court of the Receiver (the "**Third Report**") is to:

    a. provide the Court with information in respect of:

        (i) the Receiver's ongoing activities;
        (ii) the Receiver's statement of receipts and disbursements ("**Statement of Receipts and Disbursements**") for the period ending April 25, 2017; and

    b. to seek an Order of this Honourable Court, *inter alia*:

        (i) approving the First, Second, as previously filed, and the Third Report and the Receiver's activities and conduct outlined herein, including the Statement of Receipts and Disbursements;

(ii) approving the final fees and disbursements of the Receiver and its legal counsel; and

(iii) discharging the Receiver and releasing the Receiver from any and all liability arising out of its activities as Receiver, save and except arising out of gross negligence or wilful misconduct on the part of the Receiver.

DISCLAIMER

7. In preparing the Third Report and making the comments herein, the Receiver has been provided with, and has relied upon, certain unaudited, draft, and/or internal financial information, the Debtor's books and records, discussions with employees and management of the Debtor and information from other third-party sources (collectively, the "**Information**"). Except as described in the Third Report, the Receiver has not audited, reviewed, or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Generally Accepted Assurance Standards of the Chartered Professional Accountants of Canada.

ACTIVITIES OF THE RECEIVER

8. Since the filing of the First Report, the Receiver has:

   a. Attended the Court application to obtain the Approval and Vesting Order;

   b. Filed the Second Report;

   c. Completed the Transaction;

   d. On July 5 2016, filed with the Court the Receiver's Certificate in accordance with paragraph 8 of the Approval and Vesting Order;

   e. Oversaw a meeting at Alken terminating the employment of certain staff;

f. Administered the Wage Earner Protection Program on behalf of one (1) former Alken employee;

g. Responded to inquiries of former employees and creditors;

h. As detailed below, responded to complaints filed with the Office of the Superintendent of Bankruptcy ("**OSB**") and the Alberta Ombudsman by Mr. Kevin Baumann, Alken's former President, against the Receiver and Callidus; and

i. assisted the Purchaser in retrieving a vehicle and related equipment that was being improperly retained by an unsecured creditor in connection with a pre-receivership debt.

9. Should the Court approve the Receiver's activities and issue the Order requested herein, the Receiver's remaining duties would be limited to various minor administrative matters, including the filing of the s.246(3) Report pursuant to the *Bankruptcy and Insolvency Act* (the "**Act**")

RESPONDING TO COMPLAINTS

10. On November 22, 2016, the Receiver received from the OSB a complaint (the "**Complaint**") filed with it by Mr. Kevin Baumann ("**Mr. Baumann**"), a copy of which is attached hereto as **Appendix "D"**.

11. While a significant part of the Complaint related to Mr. Baumann's relationship and dealings with Callidus and Alken prior to the date of the Appointment Order or MNP's involvement with Alken, portions of the Complaint made allegations against the Receiver. The Receiver provided the OSB with a written response to these allegations.

12. The matters raised in the Complaint largely replicated the content of Mr. Baumann's correspondence dated May 4, 2016. The Receiver's counsel made the Court aware of Mr. Baumann's correspondence on May 4, 2016 as part of the Receiver's application in support of the Approval and Vesting Order. The Honourable Mr. Justice

D. B. Nixon, the presiding Judge, chose to hear directly from Mr. Baumann, who was in attendance at the Court hearing. Mr. Baumann made submissions to the Court as to the reasons the Transaction should be rejected before the Court proceeded to issue the Approval and Vesting Order. The Court considered Mr. Baumann's submissions and the contents of his May 4th correspondence prior to issuing the Approval and Vesting Order.

13. In its response to the Complaint, dated December 7, 2016, the OSB noted that:

    a. Mr. Baumann's concerns relating to Callidus in its file; but indicated, however, that the OSB will not be pursuing the matter further; and

    b. The receivership process is a court-supervised process and the Court is the appropriate venue to seek redress for any matters relating to the receivership or the receiver's duties and made Mr. Baumann aware of section 215 of the BIA.

14. In January, 2017, Mr. Baumann also filed a complaint with the Alberta Ombudsman. As of the date of this Third Report, the Receiver has not received any correspondence from the Alberta Ombudsman in respect of this matter.

15. In February, 2017, Mr. Baumann sought from the Receiver delivery of Alken's books and records - including prior year comparisons - that were provided by Alken or Callidus relating to Alken's indebtedness to Callidus.

16. On April 25, 2017, Mr. Baumann sent email correspondence (the "**April 25th Email**") to the Receiver, a copy of which April 25th Email is attached hereto as **Appendix "E"**.

17. On May 6, 2017, the Receiver responded to the April 25th Email by sending Mr. Baumann an email, a copy of which email is attached hereto as **Appendix "F"**.

18. On April 28, 2017, Mr. Baumann sent the April 25th Email to various media outlets and others, under the cover of an additional message from Mr. Baumann in respect of Callidus, a copy of which message is attached hereto as **Appendix "G"**.

19. On May 8, 2017, Mr. Baumann sent further email correspondence (the "**May 8th Email**") to the Receiver which contained, among other things, further statements and inquiries, a copy of which is attached hereto as **Appendix "H"**. In order to meet its Court filing obligations in respect of timing in connection with this Application, the Receiver will provide its response to Mr. Baumann's May 8th Email in a Supplemental Report, to be filed with this Honourable Court.

RECEIVER'S STATEMENT OF RECEIPTS AND DISBURSEMENTS

20. The Receiver's Statement of Receipts and Disbursements for the period ending April 25, 2017 (the "**R&D**") is attached hereto as **Appendix "I"**. As noted on the R&D, the sale of the Property was in the form of a credit bid with no cash consideration. The fees and disbursements of the Receiver and its counsel were, and are being paid directly by Callidus.

RECEIVER'S FEES AND DISBURSEMENTS

21. The Receiver has issued an invoice for the period from December 4 to May 4, 2016 totalling $57,814.79, inclusive of disbursements, but exclusive of HST.

22. The Receiver has issued a further invoice for the period from May 5, 2016 to April 25, 2017 for fees and disbursements in the total amount of $20,314.06 plus HST. Attached hereto as **Appendix "J"** is the Affidavit of Sheldon Title sworn May 9, 2017, in respect of the fees and disbursements of the Receiver.

23. Subject to there being no complexities or complications, the Receiver estimates additional fees and expenses of $10,000 plus HST to complete its administration of the receivership.

24. The Receiver is of the view that the fees and disbursements of the Receiver are fair and reasonable and justified in the circumstances and accurately reflect the work done by the Receiver in connection with the receivership.

LEGAL FEES AND DISBURSEMENTS

25. The Receiver's legal counsel, Gowling WLG (Canada) LLP ("**Gowling WLG**") has issued five (5) invoices for the period from December 8, 2015 to December 31, 2016 totalling $117,441, exclusive of GST. Attached as **Appendix "K"** is the Affidavit of Chris Dennehy sworn May 9, 2017 as to the fees of the Gowling WLG.

26. Subject to there being no complexities or complications, Gowling WLG estimates additional fees and expenses of $10,000 plus HST to complete its remaining duties.

27. It is the Receiver's opinion that the fees and disbursements of Gowling WLG are fair and reasonable and justified in the circumstances and accurately reflect the work done on behalf of the Receiver by legal counsel in connection with the receivership.

RECOMMENDATIONS AND CONCLUSION

28. On the basis of the foregoing the Receiver respectfully requests that this Court issue an Order:

    a. approving the First Report, Second Report, Third Report and the Receiver's activities and conduct reported therein, including the Statement of Receipts and Disbursements;
    b. approving the final fees and disbursements of the Receiver and its counsel;
    c. Discharging the Receiver and releasing the Receiver from any and all liability arising out of its activities as Receiver, save and except arising out of gross negligence or wilful misconduct on the part of the Receiver; and
    d. Such further and other relief as the Receiver may advise and this Honourable Court deem just.

All of which is respectfully submitted this 9th day of May 2017.

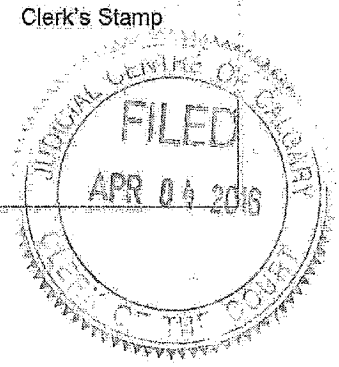
MNP Ltd.,
Solely in its capacity as Receiver of
Alken Basin Drilling Ltd.,
and not in its personal or corporate capacity

Per: _____
Sheldon Title
Senior Vice President

Appendix "A"

I hereby certify this to be a true copy of
the original ORDER
Dated this 4 day of April 2016
for Clerk of the Court

Clerk's Stamp



COURT FILE NUMBER	1601-03126
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT:	CALLIDUS CAPITAL CORPORATION
RESPONDENT:	ALKEN BASIN DRILLING LTD.
DOCUMENT:	**RECEIVERSHIP ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	LAWSON LUNDELL LLP, Barristers & Solicitors 3700, 205 - 5th Avenue S.W. Calgary, Alberta T2P 2V7 Attention: William L. Roberts / Sarah J. Nelligan Telephone: (403) 269-6900 Fax: (403) 269-9494

DATE ON WHICH ORDER WAS PRONOUNCED: April 1, 2016

NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Mr. Justice D.B. Nixon

LOCATION OF HEARING: Calgary, Alberta

UPON the application of Callidus Capital Corporation ("**Callidus**") in respect of Alken Basin Drilling Ltd. ("**Alken**"); **AND UPON** having read the Application, the Affidavit of Craig Boyer sworn March 21, 2016; **AND UPON** reading the Report dated March 23, 2016 of MNP Ltd. (the "**Receiver**") filed; **AND UPON** hearing William L. Roberts, counsel for Callidus **IT IS HEREBY ORDERED AND DECLARED THAT:**

SERVICE

1. The time for service of the notice of application for this order is hereby abridged and service thereof is deemed good and sufficient.

APPOINTMENT

2. Pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**"), and sections 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2, 99(a) of the *Business Corporations Act*, R.S.A. 2000, c.B-9, and 65(7) of the *Personal Property Security Act*, R.S.A. 2000, c.P-7, MNP Ltd. is hereby appointed Receiver, without security, of all of Alken's current and future assets, undertakings and properties, including all proceeds thereof as set out herein (the "**Property**").

RECEIVER'S POWERS

3. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

   (a) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

   (b) to market any or all the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

   (c) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

      (i) without the approval of this Court in respect of any transaction not exceeding $50,000, provided that the aggregate consideration for all such transactions does not exceed $150,000; and

      (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,

and in each such case notice under subsection 60(8) of the *Personal Property Security Act*, R.S.A. 2000, c. P-7 shall not be required, provided that, for greater certainty, Alken will be permitted to continue to sell individual items of equipment from time to time with the prior written consent of the Receiver;

(d) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(e) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(f) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(g) to enter into agreements with any trustee in bankruptcy appointed in respect of Alken, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by Alken; and

(h) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including Alken, and without interference from any other Person. For greater certainty, except to the extent subsequently ordered by this Court, the Receiver is not appointed as manager and shall not take possession or control of the Property or operate the business of Alken or employ any of Alken's employees, and Alken shall remain in possession and control of the Property (until, for greater certainty, such time as the Property is sold).

4. Notwithstanding the above, Alken shall remain in possession of and exercise control over any and all proceeds, receipts and disbursements arising out of or from the Property (other than as a result of the sale of all or any portion of the Property by the Receiver).

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

5. (i) Alken, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver.

6. All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of Alken, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

7. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance

in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

8. No proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST ALKEN OR THE PROPERTY

9. No Proceeding against or in respect of Alken or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of Alken or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph 9; and (ii) affect a Regulatory Body's investigation in respect of Alken or an action, suit or proceeding that is taken in respect of Alken by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "**Regulatory Body**" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province.

NO EXERCISE OF RIGHTS OF REMEDIES

10. All rights and remedies (including, without limitation, set-off rights) against Alken, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or Alken to carry on any business which Alken is not lawfully entitled to carry on, (ii) exempt the Receiver or Alken from

compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

11. No Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by Alken, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

12. All Persons having oral or written agreements with Alken or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to Alken are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by Alken, and this Court directs that Alken shall be entitled to the continued use of Alken's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by Alken in accordance with normal payment practices of Alken or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

13. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net

of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

EMPLOYEES

14. Subject to employees' rights to terminate their employment, all employees of Alken shall remain the employees of Alken until such time as the Receiver, on Alken's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, S.C. 2005, c.47 ("**WEPPA**").

15. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by Alken, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. (a) Notwithstanding anything in any federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

    (i) before the Receiver's appointment; or

(ii) after the Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts a Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any federal or provincial law, but subject to sub-paragraph (a) hereof, where an order is made which has the effect of requiring the Receiver to remedy any environmental condition or environmental damage affecting the Property, the Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Receiver:

A. complies with the order, or

B. on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, by,

A. the court or body having jurisdiction under the law pursuant to which the order was made to enable the Receiver to contest the order; or

B. the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

LIMITATION ON THE RECEIVER'S LIABILITY

17. Except for gross negligence or wilful misconduct, as a result of its appointment or carrying out the provisions of this Order the Receiver shall incur no liability or obligation that exceeds an amount for which it may obtain full indemnity from the Property. Nothing in this Order shall derogate from any limitation on liability or other protection afforded to the Receiver under any applicable law, including, without limitation, Section 14.06, 81.4(5) or 81.6(3) of the BIA.

RECEIVER'S ACCOUNTS

18. The Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges. The Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, incurred both before and after the making of this Order in respect of these proceedings, and the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person but subject to section 14.06(7), 81.4(4) and 81.6(2) of the BIA.

19. The Receiver and its legal counsel shall pass their accounts from time to time.

20. Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

ALLOCATION

21. Any interested party may apply to this Court on notice to any other party likely to be affected, for an order allocating the Receiver's Charge and Receiver's Borrowings Charge amongst the various assets comprising the Property.

GENERAL

22. The Receiver and its counsel are at liberty to serve or distribute this Order, any other orders, and any other materials as may be reasonably required in these proceedings, including any notices or other correspondence, by forwarding true copies thereof by electronic message to Alken's creditors, other interested parties, potential purchasers and their respective advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation and notice requirements, and the right to provide notice of existing or pending court orders, within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations* of Canada.

23. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

24. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Receiver will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence.

25. Nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of Alken.

26. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

27. The Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

28. The Plaintiff shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis to be paid by the Receiver from Alken's estate with such priority and at such time as this Court may determine.

29. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

FILING

30. The Receiver shall establish and maintain a website in respect of these proceedings and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publically available; and

(b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

Justice of the Court of Queen's Bench of Alberta

Appendix "B"

Clerk's Stamp

CLERK OF THE COURT
FILED
APR 26 2016
CALGARY, ALBERTA

COURT FILE NUMBER	1601-03126
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF(S)	CALLIDUS CAPITAL CORPORATION
DEFENDANT(S)	ALKEN BASIN DRILLING LTD.
DOCUMENT	**RECEIVER'S FIRST REPORT TO COURT**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Gowling WLG (Canada) LLP Suite 1600 421 – 7the Ave SW Calgary, AB T2P 4K9 Attention: Tom Cumming, BA, LLB, LLM / Frank Lamie, BA, LLB Telephone: (403) 298-1938 / (403) 298-1092 Fax: (403) 607-4592

INTRODUCTION

1. MNP Ltd. was appointed Receiver (in such capacity, the "**Receiver**") without security, of all of the assets, undertakings and properties (the "**Property**") owned by Alken Basin Drilling Ltd. ("**Alken**" or the "**Debtor**") in accordance with an April 1, 2016 Court of Queen's Bench of Alberta (the "**Court**") Receivership Order, as subsequently amended by the Amended & Restated Receivership Order issued by the Court (together, the "**Receivership Order**"). A copy of the Receivership Order is attached as **Schedule "A"**.

2. Prior to its appointment as Receiver, MNP Ltd. had been engaged by Alken as an Advisor (the "**Advisor**") to conduct an *en bloc* sales process of the Property (the "**Sales Process**"). In accordance with the Receivership Order, the Receiver was authorized to continue with the Sales Process initiated prior to its appointment.

PURPOSE OF THE REPORT

3. The purpose of this First Report to Court (the "**First Report**") is to provide the Court with information in respect of:

    a. the Receiver's Activities;
    b. the Sales Process;
    c. Analysis of Offers to Purchase;
    d. Individual Asset Sales; and
    e. an Order authorizing the sale of the Property.

DISCLAIMER

4. In preparing the First Report and making the comments herein, the Receiver has been provided with, and has relied upon, certain unaudited, draft and/or internal financial information, the Debtor's books and records, discussions with employees and management of the Debtor and information from other third-party sources (collectively, the "**Information**"). Except as described in the First Report, the Receiver has not audited, reviewed, or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Generally Accepted Assurance Standards of the Chartered Professional Accountants of Canada.

ACTIVITIES OF THE RECEIVER

5. In accordance with the Receivership Order, Alken remained in possession of the Property and exercised control over any proceeds, receipts, and disbursements arising out of or from the Property.

6. The Receiver continued the administration of the ongoing Sales Process, as described in greater detail below.

7. The Notice and Statement of the Receiver pursuant to Sections 245 (1) and 246 (1) of the *Bankruptcy and Insolvency Act* was distributed to the known creditors of Alken. A copy of the Notice and Statement of the Receiver is attached as **Schedule "B"**.

SALES PROCESS

8. In accordance with the Receivership Order, the Receiver continued to administer the Sales Process initiated on March 21, 2016 by the Advisor.

9. The Sales Process was advertised in the following publications and websites:

   - The Calgary Herald;
   - The Globe and Mail;
   - Daily Oil Bulletin;
   - National Driller Website;
   - MNP Ltd. Website;
   - MNP Ltd. Oilfield Services Linkedin;
   - MNP Ltd. Linkedin; and
   - Insolvency Insider

10. The Sales Process directly marketed the Property to individuals and companies through:

    - Distribution of the Information Summary to all MNP partners (over 400 across Canada) for distribution to contacts and clients;
    - Distribution of the Information Summary to auction companies and networks of distressed asset purchasers; and
    - Distribution of the Information Summary by Range Advisors (advisors to Alken) to approximately one thousand and sixty (1,060) individual companies operating in the Oilfield Services and Water Well Drilling industries in Canada and the United States. Of the one thousand and sixty (1,060) companies, four hundred (400) were contacted directly by Range Advisors of which seventy (70) requested the list of Property.

11. The Receiver received twenty-seven (27) requests for Confidentiality Agreements, Twenty-four (24) signed Confidentiality Agreements were received by the Receiver and the Receiver provided those twenty-four (24) parties with the Information Memorandum.

12. Of the twenty-four (24) parties who signed Confidentiality Agreements, ten (10) attended the Alken premises to view the assets and conducted due diligence.

13. The Receiver was advised by Alken during the Sales Process that a Memorandum of Understanding ("**MOU**") was signed with the potential for a contract for the drilling of a substantial amount of water wells in Egypt. The Receiver advised the parties who had signed

Confidentiality Agreements of the MOU and six (6) parties requested and were provided with a copy of the MOU.

14. On April 13, 2016 the Receiver notified the parties who had signed Confidentiality Agreements that the deadline to submit Offers to Purchase had been extended from April 13, 2016 to April 18, 2016 at 5:00 PM MST.

15. The Sales Process concluded on April 18, 2016, after active marketing of the Property in both Canada and the United States.

ANALYSIS OF OFFERS TO PURCHASE

16. A total of four (4) Offers to Purchase and/or auction proposals (the "**Offers**") were submitted to the Receiver in accordance with the Sales Process.

17. The Offers comprised three (3) auction proposals and one (1) *en bloc* Offer to Purchase.

The Receiver has prepared an analysis of the Offers within the Confidential Addendum to the First Report to Court (the "**Confidential Addendum**"). The Confidential Addendum is the subject of a request by the Receiver for a sealing Order as it contains commercially sensitive information the disclosure of which would prejudice the Sales Process and any future sales processes. Accordingly, the Receiver requests that the Confidential Addendum to the First Report be sealed so as to not adversely affect the Sales Process and potential future sales processes.

18. Based upon the analysis in the Confidential Addendum, the Receiver recommends the acceptance of the Offer to Purchase submitted by Callidus Capital Corporation.

19. Counsel for the Receiver has provided the Receiver with an opinion that Callidus Capital Corporation's security is valid and enforceable. At this time, the Receiver is not aware of any outstanding amounts owed to priority creditors other than the Receiver's charge granted in the Receivership Order.

INDIVIDUAL ASSET SALES

20. Alken has continued to market the sale of individual pieces of equipment during the Sales Process, however, to date no formal Offers to Purchase have been submitted.

RECOMMENDATIONS AND CONCLUSION

21. Based upon the Offers to Purchase and Auction Proposals submitted as further outlined in the Confidential Addendum, the Receiver is of the opinion that the Callidus Offer provides for the highest net realization to the Receivership estate and it is unlikely that further marketing of the Property will result in a higher realization. Accordingly, the Receiver is of the view that the Callidus Offer is the highest and best offer in the circumstances.

22. On the basis of the foregoing and the information set out in the Confidential Addendum, the Receiver respectfully requests that this Court issue an Order:

    a. Approving the administration of the Sales Process;
    b. Authorizing the acceptance of the Offer to Purchase submitted by Callidus Capital Corporation;
    c. Sealing the Confidential Addendum to the First Report to Court; and
    d. Such further and other relief as this Court deems just.

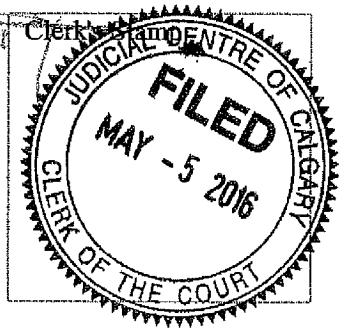
All of which is respectfully submitted this 26th day of April, 2016.

MNP Ltd.
In its capacity as Receiver of
Alken Basin Drilling Ltd.
And not in its personal capacity

Per: _____
Eric Sirrs
Senior Vice President

Appendix "C"

I hereby certify this to be a true copy of the original Order
dated this 5 day of May 2016
for Clerk of the Court



COURT FILE NUMBER	1601-03126
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	Calgary
PLAINTIFF	CALLIDUS CAPITAL CORPORATION
DEFENDANT	ALKEN BASIN DRILLING LTD.

DOCUMENT	**APPROVAL AND VESTING ORDER** **(Sale by Receiver)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Gowling WLG (Canada) LLP 1600, 421 – 7th Avenue S.W. Calgary, AB. T2P 4K9 Telephone (403) 298-1938 / (403) 298-1092 Facsimile (403) 695-3538 **Attention: Tom Cumming / Frank Lamie**

DATE ON WHICH ORDER WAS PRONOUNCED: May 4, 2016

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: The Honourable Mr. Justice D.B. Nixon

UPON THE APPLICATION by MNP Ltd. in its capacity as the Court-appointed receiver (in such capacity, the "**Receiver**") of the undertaking, property, and assets of Alken Basing Drilling Ltd. (the "**Debtor**") for an Order approving the sale transaction (the "**Transaction**") contemplated by an asset purchase agreement (the "**Sale Agreement**") between the Receiver and Altair Water and Drilling Services Ltd. (the "**Purchaser**"), and vesting in the Purchaser (or its nominee) the Debtor's right, title, and interest in and to the Transferred Assets, as defined in the in the Sale Agreement (the "**Purchased Assets**");

AND UPON HAVING READ the Receivership Order dated April 1, 2016 (the "**Receivership Order**"), the First Report of the Receiver dated April 26, 2016 (the "**First Report**"), the Confidential Addendum (the "**Confidential Addendum**") appended to the First Report dated April 26, 2016, and the Affidavit of Service; **AND UPON HEARING** the submissions of counsel for the Receiver, and counsel for those other parties listed on the counsel slip, no one appearing for any other person on the service list, although properly served as appears from the Affidavit of Service, filed;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. Service of notice of this application and supporting materials is hereby declared to be good and sufficient, and no other person is required to have been served with notice of this application, and time for service of this application is abridged to that actually given.

APPROVAL OF TRANSACTIONS

2. The Transaction is hereby approved, and the execution of the Sale Agreement by the Receiver is hereby authorized and approved, with such minor amendments as the Receiver may deem necessary. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction or for the conveyance of the Purchased Assets to the Purchaser (or its nominee).

VESTING OF PROPERTY

3. Upon the delivery of a Receiver's certificate to the Purchaser (or its nominee) substantially in the form set out in **Schedule "A"** hereto (the "**Receiver's Certificate**"), all of the Debtor's right, title, and interest in and to the Purchased Assets shall vest absolutely in the name of the Purchaser (or its nominee), free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, caveats, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing:

   (a) any encumbrances or charges created by the Receivership Order;

(b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Alberta) or any other personal property registry system; and (all of which are collectively referred to as the "**Encumbrances**"),

for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

Notwithstanding the foregoing, the following security interests, charges, and liens against the Purchased Assets shall not be expunged or discharged as against the Purchased Assets:

(a) the Priority Charges, as defined in the Sale Agreement;

(b) the Callidus Security, as defined in the Sale Agreement; and

(c) the Ford Security, as defined in the Sale Agreement.

4. From and after the closing of the Transaction (including the payment of the purchase price by the Purchaser to the Receiver), the Receiver is authorized to discharge from the Personal Property Registry any claim registered against any of the Personal Property being purchased by the Purchaser, to the extent the security interest is registered against the interest of the Debtor.

5. The Purchaser (and its nominee, if any) shall, by virtue of the completion of the Transaction, have no liability of any kind whatsoever in respect of any Claims against the Debtor. For clarity, notwithstanding the definition of Claims in this Order, this paragraph is of no force and effect and shall not apply in relation to (a) the Priority Charges, as defined in the Sale Agreement, (b) the Callidus Security, as defined in the Sale Agreement, and (c) the Ford Security, as defined in the Sale Agreement.

6. The Debtor and all persons who claim by, through or under the Debtor in respect of the Purchased Assets, shall stand absolutely barred and foreclosed from all estate, right, title, interest, royalty, rental and equity of redemption of the Purchased Assets and, to the extent that any such persons remains in possession or control of any of the Purchased Assets, they shall forthwith deliver possession thereof to the Purchaser (or its nominee).

7. The Purchaser (or its nominee) shall be entitled to enter into and upon, hold and enjoy the Purchased Assets for its own use and benefit without any interference of or by the Debtor, or any person claiming by or through or against the Debtor.

8. The Receiver is to file with the Court a copy of the Receiver's Certificate, forthwith after delivery thereof to the Purchaser (or its nominee).

9. Pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act* and section 20(e) of the Alberta *Personal Information Protection Act*, the Receiver is authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Debtor's records pertaining to the Debtor's past and current employees, including personal information of those employees listed in the Sale Agreement. The Purchaser (or its nominee) shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Debtor.

10. Notwithstanding:

(a) The pendency of these proceedings;

(b) Any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Debtor and any bankruptcy order issued pursuant to any such applications; and

(c) Any assignment in bankruptcy made in respect of the Debtor

the vesting of the Purchased Assets in the Purchaser (or its nominee) pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

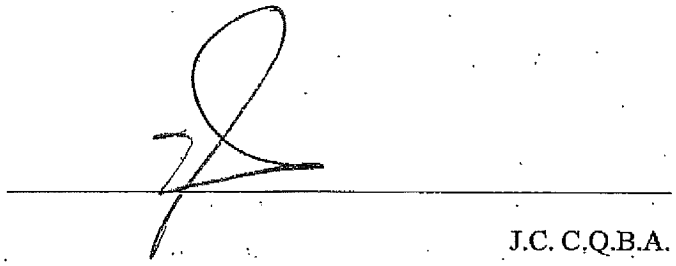
11. The Receiver, the Purchaser (or its nominee) and any other interested party, shall be at liberty to apply for further advice, assistance and directions as may be necessary in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing the Transaction.

MISCELLANEOUS MATTERS

12. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals regulatory and administrative bodies are hereby respectfully requested to make such orders as to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

13. This Order must be served only upon those interested parties attending or represented at the within application and service may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following the transmission or delivery of such documents.

14. Service of this Order on any party not attending this application is hereby dispensed with.



J.C. C.Q.B.A.

Schedule "A"

Form of Receiver's Certificate

COURT FILE NUMBER	1601-03126	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	Calgary	
PLAINTIFF	CALLIDUS CAPITAL CORPORATION	
DEFENDANT	ALKEN BASIN DRILLING LTD.	
DOCUMENT	**RECEIVER'S CERTIFICATE**	

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Gowling WLG (Canada) LLP 1600, 421 – 7th Avenue S.W. Calgary, AB T2P 4K9 Telephone (403) 298-1938 Facsimile (403) 695-3538 File No. A152711 **Attention: Tom Cumming / Frank Lamie**

RECITALS

A. Pursuant to an Order of the Honourable Mr. Justice D.B. Nixon of the Court of Queen's Bench of Alberta, Judicial District of Calgary (the "**Court**") dated April 1, 2016, MNP Ltd. was appointed as the receiver (the "**Receiver**") of the undertaking, property, and assets of Alken Basin Drilling Ltd. (the "**Debtor**").

B. Pursuant to an Order of the Court dated May 4, 2016, the Court approved the asset purchase agreement made as of May 3, 2016 (the "**Sale Agreement**") between the Receiver and Altair Water and Drilling Services Ltd.(the "**Purchaser**") and provided for the vesting in the Purchaser

of the Debtor's right, title, and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Receiver to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Purchased Assets; (ii) that the conditions to Closing as set out in the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchaser (or its nominee) has paid and the Receiver has received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the Sale Agreement;

2. The conditions to Closing as set out in section • of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser (or its nominee); and

3. The Transaction has been completed to the satisfaction of the Receiver.

4. This Certificate was delivered by the Receiver at **[Time]** on **[Date]**.

MNP Ltd., in its capacity as Receiver of the undertaking, property, and assets of Alken Basin Drilling Ltd., and not in its personal capacity.

Per:_____

Name:

Title:

Appendix "D"

From: Tang, Terence (IC) [mailto:terence.tang@canada.ca]
Sent: November 22, 2016 2:50 PM
To: Eric Sirrs <Eric.Sirrs@mnp.ca>
Cc: Tang, Terence (IC) <terence.tang@canada.ca>
Subject: Alken Basin Drilling Ltd.

Hello Mr. Sirrs,

The OSB received a complaint from Mr. Kevin Baumann (former director of Alken) against the receiver/trustee.

I understand that the complaint was also sent directly to you and your firm with the following allegations:

- Callidus's intention was to willfully withhold rightful funding availability, then insist on installing management to operate the business, obtaining all equity, falsely obtaining credit and filing for receivership
    - What action did the trustee take?
    - Please forward a copy of an independent legal opinion on the validity and enforceability of these secured creditors. Along with their proof of claims.

- The trustee assisted Callidus without independent financial transparency of the filing company
    - Please advise. Also please provide reason why the company did not provide financial statements due on March 31, 2014 and March 31, 2015?

- Callidus called on Alken's loan in March 2015 even though debt payments to Callidus were current.
    - Please advise.

- Callidus falsely obtained credit from suppliers to a total in excess of $1million of trade payables while the shares were held by Alken owners by providing false promises that suppliers would paid as a lender.
    - Please advise.

- A portion of Alken's assets were assigned to Altair Water and Drilling Services inc (also owned by Callidus). The complainant alleges that this is a "bogus" amount and has led to foreclosure of the complainant's personal property.
    - Please advise.

I would also like to know if there is a pending lawsuit between the complainant and the secured creditors. And please update us on the current situation including your response to Mr. Baumann.

Thank you for your cooperation.

Regards,

Terence Tang

Senior Bankruptcy Analyst, Outreach and Service Innovation, West, Office of the Superintendent of Bankruptcy Canada
Industry Canada / Government of Canada
Terence.Tang@ic.gc.ca / Tel: 604-376-8559 / TTY: 1-866-694-8389

Analyste Principal de failites, Relations externes et Innovation, Ouest, Bureau du surintendant des faillites Canada
Industrie Canada / Gouvernement du Canada
Terence.Tang@ic.gc.ca / Tél: 604-376-8559 / ATS: 1-866-694-8389

Appendix "E"

Jessie Hue

From: Kevin Baumann <kevin.baumann@whiteswanltd.com>
Sent: April 25, 2017 1:29 PM
To: Eric Sirrs; Sheldon Title
Subject: Alken Basin discharge of receiver and information request
Attachments: Esco Callidus Decision Denying Callidus MSJ 040717.pdf; ATT00001.txt

Considering all that transpired during the Alken receivership , I believe that MNP as a professional corporation owes me an explanation regarding the following , being I was a guarantor of certain Alken debt that was blatantly ignored and subjected to what I believe was abuse of process .

1. certain items were sealed and confidential in the receivership at Callidus's clever request . Was one of them a consent to judgement by Scott Sinclair on behalf of Alken ? Which would explain a judgement as the first item on the docket . If this was the case why as a guarantor was I not notified of Sinclair's consent or no contest ?

2. When does MNP expect to be discharged as the receiver ? and will all sealed information be unsealed or will an application be required to do so?

3. Has this receivership which has been investigated by the superintendent of bankruptcy brought procedural changes to MNP when a receivership is controlled by a lender placement who's appointment by Callidus as Alken's sole director is confirmed by Callidus counsel letter of June 15 2015 ? It is disturbing that MNP knew full well that Matthew Sinclair was in no way independent of Callidus considering MNP acted for Callidus in concert with Sinclair whereby Sinclair represented Callidus in the Leader Energy NOI and bankruptcy . It is disturbing that my letter to MNP raising improprieties was not considered by MNP but only acknowledged to the court on transcript although was not disclosed to justice Nixon at a critical point when the assets were to be sold to the lenders own company and the receivership utilized an alleged debt number that included guarantees with no independent financial information

For Your review I have enclosed a recent Texas ruling denying summary judgement to Callidus, all familiar patterns with the exception that Esco did not have a lender placement with an OSC conviction and two names , and Callidus did not operate the business for a year like Alken. Breach of contract and fraudulent inducement findings may make for an interesting eventual jury trial in Texas .

I would like to point out from precedent research that a bankruptcy trustee is not immune or indemnified from certain actions by the court . Therefore if i am unsuccessful in defending the Callidus summary judgement attempt I will be seeking damages from MNP

A reply would be appreciated

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CALLIDUS CAPITAL CORPORATION,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL NO. 1:14-CV-270
	§	
ESCO MARINE, INC., *et al*,	§	
	§	
Defendants.	§	

SEALED ORDER

BE IT REMEMBERED that on March 30, 2017 the Court **GRANTED** Defendants' Opposed Motion for Leave to File Defendants' Sur-Reply in Opposition to Plaintiff's Motion for Partial Summary Judgment, Dkt. No. 97; **GRANTED IN PART AND DENIED IN PART** Defendants' Opposed Motion for Leave to Supplement Evidence in Opposition to Plaintiff's Motion for Summary Judgment, Dkt. No. 108; **GRANTED IN PART AND DENIED IN PART** Defendants' Objections to Plaintiff's Summary Judgment Evidence, Dkt. No. 87; **DENIED** Defendants' Motion to Remove "Attorneys' Eyes Only" Designation from Certain Documents Produced by Plaintiff, Dkt. No. 101; and **GRANTED IN PART AND DENIED IN PART** Plaintiff's Motion for Summary Judgment as to Defendants' Amended Counterclaims/Affirmative Defenses and for Partial Summary Judgment as to Count 1 of Plaintiff's Amended Complaint, Dkt. No. 69.

I. Relevant Procedural History[1]

This litigation arises from a dispute over the liabilities attached to emergency loan funding provided by Callidus Capital Corporation ("Callidus"), a Canadian company, to Esco Marine, Inc., a marine yard and recycling business formerly operating in Brownsville, Texas. On December 30, 2014, Callidus filed suit against Esco Marine, Inc. and affiliated defendants, raising breach of contract, foreclosure

[1] Throughout this opinion, the Court refers to the parties' pleadings and summary judgment exhibits by the docket numbers they have been assigned under the Federal Judiciary's Case Management / Electronic Case File (CM/ECF) system.

of security interests, conversion, and theft of property claims related to this funding. Dkt. No. 1 at 9-12. Specifically, Callidus filed its initial complaint against Defendants Esco Marine, Inc., Esco Metals, LLC, Esco Shredding, LLC, Texas Best Recycling, LLC, Texas Best Equipment, LLC, Richard Jaross, EMJ Holdings, LLC, Elka Jaross, Andrew Levy, Redstone Capital Corp., Alberto Garcia, and John Kristopher Wood. Dkt. No. 1. On August 17, 2015, the Court dismissed Defendant/Counter-Plaintiff John Kristopher Wood ("Wood"), pursuant to Federal Rule of Civil Procedure 41(a) and the parties' stipulation. Dkt. No. 51. On December 11, 2015, the Court dismissed all of Callidus's claims against Defendants Esco Marine, Inc., Esco Metals, LLC, Esco Shredding, LLC, Texas Best Recycling, LLC, and Texas Best Equipment, LLC, as these Defendants' claims were resolved in bankruptcy proceedings. Dkt. No. 57 at 2-3. Defendants now remaining in this litigation therefore include Richard Jaross, EMJ Holdings, LLC, Elka Jaross, Andrew Levy, and Redstone Capital Corporation, and Alberto Garcia ("Defendants").

Callidus filed its first amended complaint against these remaining Defendants on March 4, 2016. Dkt. No. 64. In this complaint, Callidus raises breach of guaranty, conversion, theft of property, fraud, and conspiracy claims, and seeks declaratory judgment that any claims and defenses Defendants might assert are barred under various theories. On March 18, 2016 Defendants filed an answer and affirmative defenses to this complaint, Dkt. No. 66, as well as amended counterclaims against Callidus, Dkt. No. 67. Defendants' counterclaims raise fraudulent inducement and breach of contract claims against Callidus, and seek declaratory judgment that Callidus's claims are barred on the basis of fraudulent inducement, economic duress, and unconscionability. Callidus filed its answer and affirmative defenses to Defendants' counterclaims on March 31, 2016, Dkt. No. 68, which echo the declaratory judgment claims in its complaint seeking to bar Defendants' counterclaims.

On June 29, 2016, Callidus filed a motion for summary judgment as to Defendants' amended counterclaims and certain affirmative defenses, which also

seeks partial summary judgment in favor of Callidus as to the first count in its amended complaint alleging breach of guaranty. Dkt. No. 69. Defendants, excepting Alberto Garcia ("Garcia"), timely responded to this motion on November 30, 2016, Dkt. No. 88, and on this date also filed objections to Callidus's summary judgment evidence, Dkt. No. 87.[2] Callidus replied to Defendants' summary judgment response on December 14, 2016, Dkt. No. 91, and to Defendants' objections on December 20, 2016, Dkt. No. 92. On December 28, 2016 the Court entered an agreed protective order stipulated to by the parties, governing the disclosure of certain materials produced through discovery in this litigation. Dkt. No. 94. On January 13, 2017 Defendants filed an opposed motion for leave to file a sur-reply to Callidus's motion for summary judgment, Dkt. No. 97, to which Callidus did not respond. On January 23, 2017 Defendants filed an opposed motion to remove an "attorneys' eyes only" designation from certain materials produced by Callidus pursuant to the parties' agreed protective order. Dkt. No. 101. Callidus responded to this motion on February 13, 2017, Dkt. No. 110, and Defendants replied on February 20, 2017, Dkt. No. 113. Finally, on January 27, 2017, Defendants filed an opposed motion for leave to file supplemental evidence in opposition to Callidus's summary judgment motion, Dkt. No. 108, to which Callidus responded on February 17, 2017, Dkt. No. 112.

Addressed here Court are Defendants' objections to Callidus's summary judgment evidence, Dkt. No. 87; Defendants' motion for leave to file a sur-reply, Dkt. No. 97; Defendants' motion to supplement its summary judgment evidence, Dkt. No. 108; Defendants' motion to remove the "attorneys' eyes only" designation from certain discovery documents, Dkt. No. 101; and Callidus's motion for summary judgment, which seeks a declaration that Defendants' amended counterclaims and affirmative defenses are barred or fail as a matter of law, as well as summary

[2] Although Garcia remains a party to this action, he is not actually implicated in these motions. However for ease of reference, with respect to the summary judgment motions now under consideration, the Court will continue to refer to "Defendants" when citing the parties asserting counterclaims and defending against Callidus's claims.

judgment on the first count of Callidus's amended complaint, which alleges that Defendants have breached the Jaross and Levy Guaranties. Dkt. No. 69.

II. Statement of Undisputed Facts[3]

Esco Marine, Inc. and its affiliate entities[4] (collectively "ESCO") formerly operated a marine yard and scrap metal recycling business in Brownsville, Texas. In early 2014, ESCO's primary lender cut off its flow of funds to the company, leaving ESCO in need of new financing. Among other potential investors, ESCO and its leadership—including Esco's President Richard Jaross ("R. Jaross") and Andrew Levy ("Levy"), Esco's CEO and President of Redstone Capital Corporation ("Redstone")[5]—met with representatives of Callidus, both in Brownsville and in Canada, to discuss its potential role as a source of replacement financing. These meetings resulted in Callidus's production of a term sheet listing potential loan terms, which ESCO signed and on which it paid a $50,000 deposit.

On June 30, 2014, Callidus agreed to loan ESCO up to $33,990,000 under a series of loan documents. A Loan Agreement (the "Original Agreement") was signed by both parties on this date. Section 2 of the Original Agreement calls for Callidus to loan ESCO funds through Facility Loans A through F, each backed by a Demand Facility Note dated June 30, 2014. The Original Agreement is backed by the personal guaranties of all Defendants except Garcia. R. Jaross, Elka Jaross ("E. Jaross"), and EMJ Holdings, LLC (collectively "the Jaross Guarantors") guaranteed payment of ESCO's indebtedness up to an aggregate amount of $2,000,000, plus "all fees, charges, and costs incurred" in the collection of this guaranteed amount "including reasonable attorneys' fees" (the "Jaross Guaranty"). *See* Dkt. No. 69-1. Levy and Redstone (collectively "the Levy Guarantors") guaranteed payment of ESCO's indebtedness up to an aggregate amount of $600,000 plus "all fees, charges,

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[3] Unless otherwise noted, this history is taken from Callidus's first amended complaint, Dkt. No. 64; Defendants' answer, Dkt. No. 66; Defendants' amended counterclaims, Dkt. No. 67; and Callidus's answer and affirmative defenses to these counterclaims, Dkt. No. 68.

[4] These affiliated entities include Esco Metals LLC, Esco Shredding LLC, Texas Best Recycling, LLC, and Texas Best Equipment LLC.

[5] *See* Dkt. Nos. 1 and 30.

and costs incurred" in the collection of this guaranteed amount "including reasonable attorneys' fees" (the "Levy Guaranty").

Also signed on June 30, 2014 by the parties were a number of loan and security documents including a "Security Agreement," a "Deed of Trust," "Leasehold Deeds of Trust," and "Demand Facility Notes" (collectively the "Loan and Security Documents"). The Security Agreement grants Callidus a first priority and continuing security interest in certain ESCO's property (the "Collateral"). Additionally, among other terms, these Loan and Security Documents include stipulations by the parties that Texas law governs the construction and enforcement of the contracts signed on June 30, 2014, and that venue before this Court is proper.

On June 30 and July 2, 2014, pursuant to the Original Agreement, Callidus paid out $22,689,725.16 to third parties on ESCO's behalf.[6] In September of 2014 the U.S. Maritime Administration awarded ESCO a contract to dismantle two U.S. Navy ships, the USS Shenandoah and the USS Yellowstone, which ESCO required capital to purchase. Callidus, ESCO, the Jaross Guarantors, and the Levy Guarantors signed an amendment to the Original Agreement (the "Amendment") on October 16, 2014, which purported to provide ESCO with certain financial advances, including an additional $1,111,208.85, and to release Callidus from liability for any breaches of the Original Agreement. The Amendment also required ESCO to pay a fee of $900,000 to Callidus. On November 18, 2014, Callidus mailed a letter to ESCO alleging it was in default under Section 23 of the Original Agreement, which governs and defines "Events of Default." One of the specified defaults was ESCO's failure to deposit loan funds received from Callidus into a "Blocked Account," as required by the Original Agreement. On December 3, 2014, Callidus provided ESCO with written notice of its failure to cure the defaults alleged, and declared ESCO's outstanding indebtedness accelerated and payable. Callidus demanded payment by 5:00 p.m. on December 10, 2014.

On December 30, 2014, Callidus filed the instant lawsuit. On March 7, 2015, ESCO initiated voluntary petitions in bankruptcy. The Jaross and the Levy

[6] *See* Dkt. No. 91-2 at 1, Aff. of David Reese, President and COO of Callidus.

Guarantors were not parties to the resulting bankruptcy proceedings. In the bankruptcy proceedings both R. Jaross and Levy admitted that ESCO failed to deposit funds in the "Blocked Account" as required pursuant to the Original Agreement. On July 21, 2015, the U.S. Bankruptcy Court for the Southern District of Texas, Corpus Christi Division (the "Bankruptcy Court") issued an order in Case No. 15-20107 establishing Callidus's maximum allowable claim against ESCO. The Bankruptcy Court also issued an order approving a credit bid by Callidus to purchase certain of ESCO's assets, for less than the amount of Callidus's maximum allowable claim against ESCO. In the instant litigation, Callidus seeks to recover this difference, which it alleges is a deficiency it is owed, from the Jaross and Levy Guarantors. To date, the Jaross and Levy Guarantors have failed to perform under the Guaranties.

III. Preliminary Pending Motions

As an initial matter, the Court addresses here four of Defendants' pending motions, all related to Callidus's motion for summary judgment. For the reasons discussed below, the Court grants Defendants' Opposed Motion for Leave to File Defendants' Sur-Reply in Opposition to Plaintiff's Motion for Partial Summary Judgment, Dkt. No. 97; grants in part and denies in part Defendants' Opposed Motion for Leave to Supplement Evidence in Opposition to Plaintiff's Motion for Summary Judgment, Dkt. No. 108; grants in part and denies in part Defendants' Objections to Plaintiff's Summary Judgment Evidence, Dkt. No. 87; and denies Defendants' Motion to Remove "Attorneys' Eyes Only" Designation from Certain Documents Produced by Plaintiff, Dkt. No. 101.

a. Leave to file a sur-reply

According to the undersigned's civil procedures, "once a motion, response, and reply are filed, the Court will not entertain any additional or supplemental filings unless they are accompanied by a motion for leave to file explaining why the additional filing is necessary in the interests of justice." L.R. 5.E. Pursuant to this local rule, Defendants have filed an opposed motion for leave to file a sur-reply to

Callidus's summary judgment motion, on the basis that, in its reply brief, Callidus has allegedly "raised a number of issues that were not initially set forth in [its] motion for summary judgment and has mischaracterized [Callidus's] counter-claims and affirmative defenses." Dkt. No. 97 at 2. In their motion, Defendants identify specific portions of Callidus's reply brief that they allege misconstrue Defendants' arguments or misstate facts in this case, and state their grounds for objecting as to each. *See* Dkt. No. 87. Without opining here on the merits of Defendants' sur-reply, the Court therefore finds that the interests of justice are served by, and little prejudice to Callidus will result from, granting Defendants' opposed motion to file this sur-reply.

b. Objections to summary judgment evidence

Defendants' objections to Callidus's summary judgment evidence do not in fact object to evidence proffered by Callidus. Defendants instead assert that "[d]espite presenting eight pages of purported 'material facts,' [Callidus's] Motion for Summary Judgment fails to comply with the federal rules requirements to support its factual assertions with authenticated evidence." Dkt. No. 87 at 2. Defendants conflate two sub-sections of Federal Rule of Civil Procedure 56 here, 56(c)(1) and 56(c)(2), and misstate the requirement imposed by 56(c)(2). Rule 56(c)(1)(A) and (B) describe how "[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion." Fed. R. Civ. P. 56(c)(1)(A)-(B).[7] Rule 56(c)(2), meanwhile, provides that "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). It does not require the authentication of evidence, since "[a]t the summary judgment stage, materials cited to support or dispute a fact need only be *capable* of being 'presented in a form that would be

[7] In its entirely, these subsections provide that, with respect to summary judgment motions: "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."

admissible in evidence.'" *LSR Consulting, LLC v. Wells Fargo Bank, N.A.*, 835 F.3d 530, 534 (5th Cir. 2016) (emphasis original). The Court reads Defendants' objections, therefore, as alleging that certain of the "material facts" cited by Callidus: (i) are in fact genuinely disputed, and (ii) are unsupported by citations to materials in the record that could be presented in admissible form.

Defendants object to seven specific factual assertions made by Callidus in its motion for summary judgment. Dkt. No. 87 at 3-4. Defendants also object to two long series of paragraphs in this motion, on the basis that they are comprised solely of unsupported conclusory allegations. *Id.* at 4. It is beyond peradventure, as Defendants note, that "[m]ere conclusory allegations are not competent summary judgment evidence." *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). For this reason, with or without Defendants' objections to consider, the Court would account only for undisputed, material facts supported by competent evidence in analyzing the merits of Callidus's instant motion. Yet as Defendants have enumerated their objections to certain of Callidus's factual assertions and Callidus has responded to them, the Court will decide here which of these assertions Callidus has adequately supported pursuant to Rule 56(c)(1).[8]

The first two "unsupported statements" cited by Defendants regard ESCO's need for "non-conventional" financing "[d]ue to its precarious financial situation," and the "nearly $23 million" dollars loaned by Callidus to ESCO on execution of the Original Agreement. Dkt. No. 87 at 3. The Court finds that the key factual assertions of both of these statements are adequately supported by affidavits cited to by Callidus in its response to Defendants' objections. *See* Dkt. No. 92 at 2. The Court also notes that, in addition to affidavits, Callidus cites to statements made by Defendants in their own pleadings as support for its challenged statements. "Normally, factual assertions in pleadings . . . are considered to be judicial admissions conclusively binding on the party who made them." *White v. ARCO/Polymers*, 720 F.2d 1391, 1396 (5th Cir. 1983) (citations and footnote

[8] The Court will not address Defendants' non-specific objections to "the entirety of Paragraphs 3-11 and Paragraphs 13-24" of Callidus's motion, as any allegations unsupported by citations to materials in the record will simply not be accounted for in the Court's analysis of undisputed material facts.

omitted). While a judicial admission itself is not evidence, "a judicial admission has the effect of withdrawing it from contention." *Martinez v. Bally's Louisiana, Inc.*, 244 F.3d 474, 476 (5th Cir. 2001); *see also Davis v. A.G. Edwards and Sons, Inc.*, 823 F.2d 105, 107 ("Facts that are admitted in the pleadings 'are no longer at issue.'") (quoting *Ferguson v. Neighborhood Housing Services, Inc.*, 780 F.2d 549, 551 (6th Cir. 1986)). For all of these reasons, the Court overrules Defendants' objections to these first two assertions.

In the third factual assertion Defendants object to, Callidus claims that "ESCO failed to meet several of the conditions precedent to borrowing set forth in the Loan Agreement" after it was signed, "and sought various forbearances and accommodations from [Callidus] in order to continue borrowing."[9] Dkt. No. 87 at 3. Callidus does not cite to any materials in the record that could be admissible as evidence to support this assertion. Callidus does, however, cite to a statement from one of Defendants' pleadings that admits the Original Agreement "required that ESCO establish a hedging program" and that "ESCO had previously tried to establish such a program but failed due to its financial condition[.]"[10] Dkt. No. 92 at 3; Dkt. No. 29 at 4. The Court notes that Defendants also effectively admit in their amended counterclaims to never having established such a program. Dkt. No. 67 at 16. Yet section 19(a)(xii) of the Original Agreement, which stipulates that within 30 days of the closing of the agreement, "ESCO shall have entered into and implemented a metal commodity hedging program" is not explicitly listed as a "condition precedent" pursuant to section 15(a) of the Original Agreement, Dkt. No. 69-3 at 38, Ex. 3 at 33, and Callidus does not explain how this covenant might

[9] "Under Texas law, '[c]onditions precedent to an obligation to perform are those acts or events, which occur subsequently to the making of a contract, that must occur before there is a right to immediate performance[.]" *Matter of Pirani*, 824 F.3d 483, 497 (5th Cir. 2016) (quoting *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976)).

[10] The Court notes that in its amended complaint, Callidus additionally alleges that it "did not have an obligation to fund Facility F because [ESCO] never met the Section 15 conditions to borrowing because of insufficient financial statements (Section 15(a)(xii) or projections (Section 15(a)(xv))." Dkt. No. 64 ¶ 33. Yet Callidus does not reference these additional conditions precedent elsewhere in its pleadings, nor cite to any materials pursuant to its motion for summary judgment that would support its claim that ESCO failed to satisfy sections 15(a)(xii) and 15(a)(xv) of the Agreement.

otherwise come under the terms of this section.[11] *See* Dkt. 69-3 at 30-31, Ex. 3 at 25-26. Further, in the Amendment to the Original Agreement, signed by all parties, ESCO and the Defendants to this action represented that no default under the Agreement was ongoing at the date of signing. Dkt. No. 69-5 at 4; Dkt. No. 69, Ex. 4 at 3. The Court therefore sustains Defendants' objections to this third assertion.[12]

The fourth assertion Defendants object to states that "ESCO defaulted under the Loan Agreement" and its Amendment—an assertion the Court finds is adequately supported by affidavit, as well as citations to admissions made in Defendants' own pleadings. *See* Dkt. No. 92. In alleging ESCO's default, Callidus highlights section 23(e) of the Original Agreement, which states that an "Event of Default" will occur under the agreement when ESCO "does not deposit funds from any source" into a designated "Blocked Account," "or deposits any funds from any source into an account other than the Blocked Account." Dkt. No. 69-3 at 44, Ex. 3 at 39. In support of this allegation, Callidus cites to the affidavit of Wood, ESCO's former Vice President, which was attached as an exhibit to a pleading filed by ESCO and Defendants in the instant action. *See* Dkt. No. 92 at 3. In his affidavit, Wood states that following amendment of the Original Agreement "ESCO was forced to use some money to pay certain essential business expenses prior to depositing the money into the Blocked Account." *Id.*; Dkt. No. 29-1 at 4, Wood Aff. at ¶ 11. Callidus cites further to a pleading filed by Defendants admitting that ESCO was required to deposit all funds into the Blocked Account, that Callidus was not required to let ESCO use the funds it loaned on operating expenses, and that ESCO had not, in fact, deposited all funds provided by Callidus immediately into the Blocked Account as their agreement required. Dkt. No. 92 at 3. Whether

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[11] The difference is not immaterial. *See Pirani*, 824 F.3d at 497 ("Because of their harshness in operation, conditions are not favorites of the law. . . [w]hen the intent of the parties is doubtful or where a condition would impose an absured [*sic*] or impossible result[,] then the agreement will be interpreted as creating a covenant rather than a condition.") (citations omitted.)

[12] In so doing the Court does not opine on whether, as Callidus alleges, Defendants ultimately failed to implement a hedging program. *See* Dkt. No. 69-6 at 3, Dkt. No. 69, Ex. 5 at 3. The Court simply sustains Defendants' objection to Callidus's assertion that, prior to the signing of the Amendment, ESCO had "failed to meet several of the conditions precedent to borrowing set forth in the Loan Agreement" and sought forbearance from Callidus, as this assertion is not supported by materials in the summary judgment record.

Defendants can offer an excuse or defense to breach, or successfully pinpoint a prior breach or repudiation on Callidus's part, is a separate inquiry from whether the challenged statement about ESCO's failure to deposit all funds in the Blocked Account is adequately supported here. The Court finds that it is, and overrules Defendants' objection to this fourth assertion.

The fifth assertion Defendants object to states that ESCO never paid its debts to Callidus, and that the Jaross and Levy Guarantors have not 'honored' their guaranties. Dkt. No. 87 at 4. As Callidus notes, the Jaross and Levy Guarantors have admitted to signing personal guaranties on ESCO's loans. Dkt. No. 92 at 4. These signed guaranties have also been submitted as evidence in support of Callidus's motion for summary judgment. *See* Dkt. No. 69-1 and 69-2. Defendants also object to Callidus's motion for partial summary judgment "on liability for a breach of contract claim related to the Guaranties" by alleging, inter alia, that "there is nothing owing on the Guaranties." Dkt. No. 88 at 30, 32. To the extent Defendants object to Callidus's statement on the basis that it asserts, as a conclusion of fact, that the Jaross and Levy Guaranties are enforceable for a certain sum, the Court sustains Defendants' objection to this statement. Yet to the extent Defendants object to the assertion that they guaranteed the Original Agreement and Amendment, or the claim that they have not paid Callidus pursuant to their Guaranties, their objection is overruled.

The sixth assertion Defendants object to states that ESCO filed for bankruptcy on March 7, 2015 "to avoid [a] receivership hearing." Dkt. No. 87 at 4. The Court will not consider the intent Callidus imputes to ESCO here, but does take judicial notice of the bankruptcy filing, overruling in part Defendants' objection. Finally, the seventh assertion Defendants object to states that the Amendment to the Original Agreement signed by the parties was bargained for at "arms' length between sophisticated parties." Dkt. No. 87 at 4. The Court overrules Defendants' objection to this statement, as the Jaross and Levy Guarantors are

industry specialists[13] who actively negotiated the terms of their Guaranties with Callidus.[14]

c. Leave to supplement evidence

Defendants seek leave to supplement under Local Rule 5.E evidence of "internal communications and memorandum" only recently provided by Callidus through discovery. Dkt. No. 108. Callidus represents that—granting conformity with an agreed protective order, Dkt. No. 94, which designates these documents either as "confidential" or "for attorneys' eyes only"—it does not object to Defendants supplementing the record, but does object to how Defendants have characterized the relevance of the additional evidence they seek to admit. *See* Dkt. No. 112. The Court therefore construes Callidus's response as objecting to Defendants' assertions on the basis that they are unsupported by the material they cite to, contrary to the requirements of Rule 56(c)(1). Accordingly, the Court grants Defendants' motion for leave to supplement, but will also directly address Callidus's objections here.

Defendants' first factual assertion reads: "Defendants made clear and Callidus understood that ESCO's financial needs required the at-issue loan be closed quickly." Dkt. No. 108 at 2. The Court overrules Callidus's objection to this statement, finding it is adequately supported by the newly admitted materials to which Defendants cite. Callidus alleges that Defendants' own conduct was to blame for "the delay in completing the loan," Dkt. No. 112 at 1, but even if true, this statement has no bearing on what Callidus knew about the necessary timing of the loan ESCO required. The evidence is undisputed that an internal report prepared by Callidus as it was contemplating a deal with ESCO states that "[ESCO] needs a

[13] R. Jaross was a long-time CEO and President of ESCO, while E. Jaross was an ESCO shareholder who additionally has stipulated that she and her husband Richard had run ESCO "as owners and/or operators, since its founding in 1996." *See* Dkt. No. 88, Exs. 1 and 2. Meanwhile, "Levy, who guaranteed $600,000 of the ESCO debt, is an attorney licensed in New York with a bachelor's degree from Yale and a law degree from Harvard," Dkt. No. 91 at 1, was a "significant shareholder" and a Director at ESCO before becoming its CEO in 2014. *See* Dkt. No. 88, Ex. 3.

[14] *See, e.g.*, Dkt. No. 88 at 33, Ex. 4 at 122-125, Dep. of Mark Wilk, recounting an email exchange between Levy and Callidus management, in which Levy raises issues regarding the personal guarantees and interest rates proposed by the Original Agreement, weeks before it was ultimately signed.

fast close," Dkt. No. 109 at 32 (Callidus 0097349). Defendants have also cited to an email sent by Levy (one of the defendant Guarantors in this action) informing Callidus months before it signed the Original Agreement with ESCO that it was "imperative" the parties "proceed expeditiously" in making a deal, Dkt. No. 109 at 46 (Callidus 0097756).

Defendants' second objected-to assertion reads: "Although Callidus represented that personal guaranties of the principles would not be required, Plaintiff knowingly contemplated personal guaranties from the start." Dkt. No. 108 at 2. Callidus objects that this statement is not supported by the material cited to by Defendants. The Court agrees that the specific document Defendants cite to is insufficient to support the allegation that Callidus contemplated personal guaranties, and sustains Callidus's objection to this assertion.

The third and final statement from Defendants' motion to supplement that Callidus objects to alleges that "Callidus understood that funding of the purchase *and* towing of the Saratoga, the Shenandoah, and the Yellowstone (the "Vessels") was essential to ESCO's financial health and [Callidus], in fact, agreed to fund the towing of the vessels." Dkt. No. 108 at 2 (emphasis original). Defendants have cited to adequate materials in the summary judgment record to support the assertion about Callidus's understanding. Defendants cite to a Callidus email noting that ESCO's profitability hinged on the award of the Saratoga, Dkt. No. 109 at 24 (Callidus 0096857-58), and to a company memorandum on the total costs affiliated with the purchase, dismantling, and sale of the Saratoga that explicitly contemplates "tow and arrival costs," Dkt. No. 109 at 5 (Callidus 0096746). Defendants cite to an unsigned internal Callidus memorandum noting that the award of the Shenandoah and the Yellowstone was key to ESCO's ability "to operate profitably," and which contemplated extending a loan facility to ESCO that would have covered "acquisition, towing, and cleaning costs of the two new vessels," Dkt. No. 109 at 19 (Callidus 0096811). Finally, Defendants cite to a Callidus memorandum signed by the company's credit committee days before the Original Agreement was executed that includes "towing and purchase costs" in Callidus's

calculation of how much money ESCO would be able to borrow under the parties' eventual loan agreement. Dkt. No. 109 at 20 (Callidus 0096812). What Defendants have not definitively shown through citation to materials in the record, however, is that Callidus "in fact agreed" to fund towing costs for all three of these vessels—although the Court acknowledges Defendants' claim that the Original Agreement should have provided enough funding to cover this cost, Dkt. No. 88 at n.6, and notes that towing costs for the Shenandoah and the Yellowstone are explicitly provided for in section 1.4 of the Amendment. Dkt. No. 69-5 at 3.

d. Motion to remove "attorneys' eyes only" designation

As to Defendants' motion to remove the "attorneys' eyes only" designation from certain documents produced by Callidus, the Court finds no good cause to grant this motion. The parties stipulated to an agreed protective order that gives Callidus discretion to label documents either "confidential" or "for attorneys' eyes only" as long as a document meets certain criteria justifying heightened protection. *See* Dkt. No. 94. Defendants move to have the "attorneys' eyes only" designation removed from 51 documents provided by Callidus in recent discovery, on the basis that the inability of individual Defendants to "review and potentially contravene information included in these documents would detrimentally affect their ability to defend [Callidus's] claims and prosecute their own." Dkt. No. 101 at 3. Callidus answers that it has discretion under the protective order to label these documents as "for attorneys' eyes only;" that Defendants have not alleged that this designation is inappropriate under the terms of the protective order; that Defendants fail to cite to a specific or serious harm that results from this designation; and that the protective order cannot prevent Defendants' counsel from conveying to their clients, in a general way, the contents of documents designated "for attorneys' eyes only." *See* Dkt. No. 110. Defendants' counsel have demonstrated in their motion a sufficient ability to understand the import of documents marked "attorneys eyes only" to the litigation prerogatives of their clients. Additionally, the parties' protective order does not prevent Defendants' counsel from rendering advice to Defendants that conveys a general evaluation of the contents of protected material.

Therefore, absent a showing of specific and prejudicial harm to Defendants from the use of this designation with respect to the specific contents of particular documents the Court finds that good cause does not exist, at this time, to modify the parties' agreed protective order.

IV. Callidus's Pending Summary Judgment Motions

a. Summary Judgment Legal Standard

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. "A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant." *Piazza's Seafood World, L.L.C. v. Odom*, 448 F.3d 744, 752 (5th Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court must view all evidence in the light most favorable to the non-moving party. *Brumfield*, 551 F.3d 322, 326 (5th Cir. 2008) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986)). Factual controversies must be resolved in favor of the non-movant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc, per curiam).

The party moving for summary judgment bears the "burden of showing this Court that summary judgment is appropriate." *Brumfield*, 551 F.3d at 326 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The burden of production a party must initially carry depends upon the allocation of the burden of proof at trial. *See Shanze Enters., Inc. v. Am. Cas. Co. of Reading*, 150 F.Supp.3d 771, 776 (N.D.Tex. 2015) ("Each party's summary judgment burden depends on whether it is addressing a claim or defense for which it will have the burden of proof at trial.") "Thus, if the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant

judgment in his favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (emphasis original).

"Once the moving party has initially shown 'that there is an absence of evidence to support the non-moving party's cause,' the non-movant must come forward with 'specific facts' showing a genuine factual issue for trial." *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir. 2002) (quoting *Celotex*, 477 U.S. at 325). In other words, when a moving party has discharged its burden, the non-moving party must then "go beyond the pleadings," and by its own affidavits or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. The non-movant's burden is not satisfied by "conclusory allegations," "unsubstantiated assertions," or "by only a scintilla of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (citations omitted). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial and mandates the entry of summary judgment for the moving party." *United States ex rel. Farmer v. City of Houston*, 523 F.3d 333, 337 (5th Cir. 2008) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)) (citations omitted).

b. Analysis

Callidus filed suit against Defendants in order to recover payments, fees, and costs it claims it is owed under the Jaross and Levy Guaranties. Dkt. No. 69 at 1. In its instant motion, Callidus seeks summary judgment as to Defendants' amended counterclaims and affirmative defenses, as well as to the first count of Callidus's amended complaint, which alleges that Defendants have breached the Jaross and Levy Guaranties. *See* Dkt. No. 69. Specifically, Callidus alleges that Defendants' claims are completely barred as a result of ratifications and releases they made pursuant to the Amendment, and that, as a matter of law, Defendants cannot avail themselves of any fraudulent inducement, economic duress, or unconscionability claims. *Id.* In the alternative, Callidus argues that Defendants' counterclaims are derivative of ESCO's claims resolved in bankruptcy, and are for this reason

impermissible. *Id.* Callidus further urges that if the Court grants its request for summary judgment as to Defendants' claims, it should also hold that Defendants have materially breached, and are liable under, the Jaross and Levy Guaranties. *Id.*

Defendants respond that the Amendment to the Original Agreement is not enforceable for lack of consideration, or, in the alternative, that its enforceability is affected by a failure of consideration, as a result of Callidus's breach of the Amendment. *See* Dkt. No. 88. Accordingly, Defendants disclaim the release language contained in this Amendment, and the allegation that the Amendment ratified Callidus's performance under the Original Agreement. *Id.* Yet they also claim, additionally and independently, that this language is legally ineffective. Specifically, Defendants argue that the Amendment's release language is insufficient under Texas law to bar their fraudulent inducement and unconscionability claims, and that Callidus cannot show facts demonstrating they effectively ratified the Original Agreement by signing the Amendment. *Id.* Defendants further argue that genuine issues of material fact exist as to their fraud, economic duress, and unconscionability claims sufficient to preclude the summary judgment Callidus seeks. *Id.* Defendants also deny that their claims are solely derivative of ESCO's bankruptcy claims, asserting instead that their claims as guarantors of ESCO's debts are personal and direct, and resulted in harms particular to them. *Id.* Finally, Defendants argue that Callidus has not even attempted to make out a breach of contract claim pursuant to the Jaross and Levy Guaranties that would justify granting summary judgment in Callidus's favor. *Id.*

i. Defendants' liability under the Jaross and Levy Guaranties (Count I of Callidus's Amended Complaint)

Callidus urges the Court to find Defendants are liable to Callidus on the Jaross and Levy Guaranties based on their "plain and unambiguous language." Dkt. No. 69. Defendants respond that such relief would be inappropriate on the basis of Callidus's motion for summary judgment, both because it fails to even name the essential elements of a breach of guaranty claim and because "there is evidence

before the Court that [Callidus] materially breached the [Original Agreement]." Dkt. No. 88 at 39-40.

In Texas, "[a] plaintiff who sues for recovery on a promissory note does not have to prove all essential elements for a breach of contract but rather need only establish the note in question, that the defendant signed it, that the plaintiff was the legal owner and holder thereof, and that a certain balance is due and owing on the note." *Rockwall Commons Associates, Ltd. v. MRC Mortg. Grantor Trust I*, 331 S.W.3d 500, 505 (Tex.App.–El Paso 2010, no pet.); *see also Lee v. Martin Marietta Materials Sw., Ltd.*, 141 S.W.3d 719, 720 (Tex.App.–San Antonio 2004, no pet.) ("To support a claim for breach of a guaranty, a party must show proof of (1) the existence and ownership of a guaranty contract; (2) the terms of the underlying contract by the holder; (3) the occurrence of the conditions upon which liability is based; and (4) the failure or refusal to perform by the guarantor.") Texas law "recognizes two distinct types of guaranty: a guaranty of collection (or conditional guaranty) and a guaranty of payment (or unconditional guaranty)." *Cox v. Lerman*, 949 S.W.2d 527, 530 (Tex.App.–Houston 1997, no pet.). "[A] guaranty of payment is an obligation to pay the debt when due if the debtor does not and requires no condition precedent to its enforcement against the guarantor other than a default by the principal debtor." *Chahadeh v. Jacinto Medical Group, P.A.*, 2017 WL 976071 at *3 (Tex.App.–Houston 2017.).

In support of its motion for summary judgment Callidus submits copies of the executed Jaross and Levy Guaranties, demonstrating the existence of these Guaranties and its ownership of them. Dkt. Nos. 69-1, 69-2. Callidus also submits copies of the Original Agreement and its Amendment, signed by the Jaross and Levy Guarantors. Dkt. No. 69-3. The Original Agreement specifically references the Guarantors' obligations under the contract as "limited guarant[ies] of payment" of "up to a maximum amount" of $2,000,000 in the case of the Jaross Guarantors, and $600,000 in the case of the Levy Guarantors. Dkt. No. 69-3 at 28. Additionally, the Jaross and Levy Guaranties each warrant that they are "a guaranty of payment as to monetary obligations and not of collection." Dkt. Nos. 69-1 ¶ 7, 69-2 ¶ 7. They

also note the Guarantors are not entitled to assert a setoff or reduction defense, and that their obligations will not be diminished in the event of ESCO's bankruptcy. Dkt. Nos. 69-1 ¶ 9, 69-2 ¶ 9. Finally, each Guarantor agrees to fulfill his obligation under the Guaranties, "until [ESCO's] obligations are indefeasibly paid in full," on demand and in the event of ESCO's default under the Agreement. Dkt. Nos. 69-1 ¶¶ 1, 3, 10, 69-2 ¶¶ 1, 3, 10. Callidus submits the affidavit of Wood attesting to ESCO's failure to deposit all funds advanced by Callidus into a Blocked Account, which constitutes a breach by ESCO of the Original Agreement. *See* Dkt. No. 29-1, Aff. of Wood at ¶ 11. Callidus also submits copies of letters it sent to ESCO and the Jaross and Levy Guarantors demanding payment of ESCO's debt as a result of ESCO's default. Dkt. Nos. 69-6 and 69-7. Finally, the fact that the Jaross and Levy Guarantors have failed to perform under the Guaranties is not a matter of disputed fact.

However, despite the undisputed fact that the Guarantors have failed to perform under the Guaranties, Callidus has not met its burden to show it is entitled to summary judgment as to the liability of the Jaross and Levy Guarantors. Defendants have pled a fraudulent inducement affirmative defense as to the enforceability of the Guaranties sufficient to survive summary judgment. For this reason, Callidus's motion for summary judgment as to Count I of its amended complaint is denied.

ii. Enforceability of the Amendment

Callidus seeks a declaration that Defendants' counterclaims and affirmative defenses are completely barred on the basis that the Amendment released certain claims Defendants might otherwise have raised, and ratified the Original Agreement. As an affirmative defense to enforcement of the Amendment's terms, Defendants argue that the Amendment lacked consideration at its inception, and, in the alternative, that a failure of consideration occurred when Callidus refused to perform under this Amendment. *See* Dkt. No. 88 at 14-16.

Consideration is a fundamental element of every valid contract." *Burges v. Mosley*, 304 S.W.3d 623, 628 (Tex.App.–Tyler 2010, no pet.). It consists of "either a

benefit to the promisor or a loss or detriment to the promisee." *Northern Natural Gas Co. v. Conoco, Inc.*, 986 S.W.2d 603, 607 (Tex. 1998). "Consideration is a present exchange bargained for in return for a promise." *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 496 (Tex. 1991). Accordingly, consideration is required not only to create an enforceable agreement, but also to render modifications to contracts enforceable. *Barnhill v. Moore*, 630 S.W.2d 817, 820 (Tex.App.–Corpus Christi 1982, no pet.) ("To modify an existing contract, consideration is required[.]") *See also Travelers Indem. Co. v. Edwards*, 451 S.W.2d 313, 317 (Tex.Civ.App.–El Paso 1970) ("[U]nder general principles of contract law, the modification of an existing contract imposing heavier burdens on one of the contracting parties must be supported by an additional consideration.")[15]

"A contract that lacks consideration lacks mutuality of obligation and is unenforceable." *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997). "Lack of consideration for a contract is an affirmative defense to its enforcement[.]" *McLernon v. Dynegy, Inc.*, 347 S.W.3d 315, 335 (Tex.App.–Houston 2011, no pet.) "A lack of consideration occurs when a contract, at its inception, does not impose obligations on both parties." *Cheung-Loon, LLC v. Cergon, Inc.*, 392 S.W.3d 738, 747 (Tex.App.–Dallas 2012, no pet.). Failure of consideration, too, is an affirmative defense. *See Philadelphia Indem. Ins. Co. v. White*, 490 S.W.3d 468, 485 (Tex. 2016); *McGraw v. Brown Realty*, 195 S.W.3d 271, 276 (Tex.App.–Dallas 2006) ("A complete failure of consideration constitutes a defense to an action on a written agreement.") "[F]ailure of consideration occurs when, because of some supervening cause arising after the contract is formed, the promised performance fails." *Cheung-Loon, LLC*, 392 S.W.3d at 747.

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[15] These principles apply equally to guaranties backing underlying contracts entered into contemporaneously with these contracts. *See First Commerce Bank v. Palmer*, 226 S.W.3d 396, 398 (Tex. 2007) ("If the guarantor's promise is given as part of the transaction that creates the guaranteed debt, the consideration for the debt likewise supports the guaranty."); *see also Barclay v. Waxahachie Bank & Trust Co.*, 568 S.W.2d 721, 724 (Tex.Civ.App.–Waco 1978, no pet.) ("It is not necessary that consideration for the guaranty pass to the guarantor, for it is sufficient consideration if the primary debtor receives some benefit.")

In all cases, "there is a presumption that a written contract is supported by consideration," and in general, the burden to show otherwise is on the party pleading lack or failure of consideration. *ABB Kraftwerke Aktlengesellschaft v. Brownsville Barge & Crane, Inc.*, 115 S.W.3d 287, 292 (Tex.App.–Corpus Christi 2003, pet. denied.); *see also Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 107 (Tex.App.–Dallas, 1987, no pet.) ("[W]here a contract of guaranty is in writing and signed by the guarantor, its existence imports a consideration.") Yet "parol evidence is admissible to show want or failure of consideration and establish the actual consideration given for the instrument." *McLernon*, 347 S.W.3d at 335.

1. Lack of Consideration

As to whether the Amendment lacked consideration, Defendants allege that the Amendment did not impose any new legal obligations on Callidus, but instead, mischaracterized Callidus's pre-existing duties under the Original Agreement as new concessions. Specifically, Defendants argue that ESCO, and by extension the Jaross and Levy Guarantors, "gained nothing by the First Amendment" because Callidus should have advanced $3,500,000 pursuant to Facility F under the Original Agreement, but purported to make this advance discretionary in the terms of the Amendment. Dkt. No. 88 at 25. It is Defendants' burden to show that the Amendment lacks consideration if they seek to avoid ratification and the release language the Amendment contains. At the summary judgment stage, as Callidus is the movant, Defendants are therefore required to show at least a genuine dispute of material fact as to whether the Amendment lacks consideration.

Section 5(a) of the Original Agreement requires that "[o]n the Effective Date, [Callidus] shall advance, and [ESCO] shall borrow the collective amount of Twenty-Two Million, Six Hundred Thousand Dollars ($22,600,000) under Facility B Loan, Facility C Loan, Facility D Loan, and Facility F Loan[.]" Dkt. No. 69-3 at 21, Ex. 3 at 16. The Original Agreement defines "Effective Date" as "[t]he date of satisfaction of all conditions precedent," which are enumerated and described at section 15(a) of the contract. Dkt. No. 69-3 at 30, Ex. 3 at 25. The "Facility F Loan" is defined at section 2(f) of the Original Agreement as "[a] demand single advance non-revolving

loan facility in the maximum principal amount of up to Three Million, Five Hundred Thousand Dollars ($3,500,000)." Dkt. No. 69-3 at 19, Ex. 3 at 14. The Amendment alters these terms. Specifically, it removes Facility F from section 5(a) of the Original Agreement. *See* Dkt. No. 69-5, Ex. 4. It also states that on the Effective Date Facility F is to be funded in the amount of "$1,111,208.85," and states that "all releases of funds under Facility F are discretionary." *See id.*

Callidus argues that "allowing Esco to immediately access an additional $1.11 million in funding" under the revised "Facility F Loan" provided by the Amendment constituted consideration.[16] Dkt. No. 69 at 11. Callidus additionally argues that because the Amendment established that all loans advanced by Callidus were "discretionary," and because all of the loans contemplated by the Original Agreement and Amendment were "demand loans" callable by Callidus at any time, its decision to loan money to ESCO and forbear calling its loans was consideration. Dkt. No. 91 at 2-3. Finally, Callidus asserts that consideration existed to support the Amendment as a result of "changes to the 'borrowing base' formulas set forth in the [Original Agreement] to make them more favorable to ESCO." *Id.* at 3.

Defendants argue that the Facility Loan F did not constitute consideration for the Amendment, as it was required under the Original Agreement. In support of this argument, they cite to the affidavits of Jaross Guaranty signatories R. and E. Jaross, each of whom state that "Plaintiff refused and failed to advance the $3,500,000" provided for by the Facility F Loan under the Original Agreement. *See* Dkt. No. 88 at 16; Dkt. No. 88-1 at 4, R. Jaross Aff. at ¶ 14; Dkt. No. 88-2 at 3-4, E.

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[16] In its reply brief filed subsequent to Defendants' response to its summary judgment motion, Callidus references a larger loan figure in arguing that the Amendment was supported by consideration. Namely, Callidus notes that "Plaintiff loaned ESCO an additional $3,910,852.22 million in reliance on the First Amendment" after it was signed, and cites to the affidavit of David Reese, Callidus President and COO to support this claim. Dkt. No. 91 at 2. Yet the affidavit and its attached Exhibit do not support the contention that the full $3.9 million advanced after the Amendment was signed was newly provided for by the Amendment, as opposed to by the terms of the Original Agreement. *See* Dkt. 91-2, Ex. 2, Aff. of Reese. As such, and given Callidus's initial summary judgment claim that the Amendment did not lack consideration because it "allowed ESCO to immediately access an additional $1.111 million in funding from [Callidus] ESCO would otherwise not have been able to access," Dkt. No. 69 at 11, the Court will account only for this $1.111 million in funding in considering whether loans made pursuant to the Amendment constitute consideration.

Jaross Aff. at ¶ 9. Defendants also cite to email correspondence between Callidus management and counsel for ESCO suggesting that by mid-September, 2014, more than two months after the Original Agreement was signed, Callidus had, by its own admission, not loaned funds under Facility F. *See* Dkt. No. 88-15 at 8 (Callidus 0076344). Indeed in this correspondence Callidus suggests that it had no obligation to loan these funds, on the basis that the "Effective Date" under the Original Agreement on which it was to transfer the Facility F Loan had never occurred, as a result of ESCO's alleged failure to satisfy certain "conditions precedent" under section 15(a) of the Original Agreement. *See* Dkt. No. 88-15 at 8, Ex. 15. Yet, as discussed herein, including at n.8, Callidus has not cited to materials in the record to support its claim that ESCO failed to satisfy any condition precedent under the Original Agreement.[17] Additionally, while in its summary judgment pleadings Callidus does not directly address Defendants' argument that it was required to advance funds under Facility F pursuant to the Original Agreement, Callidus admits in its amended complaint that it "did not fund Facility F" on the date it funded all other 'demand single advance non-revolving loan facilities' provided for in section 5(a) of the Original Agreement, and instead "ma[de] up the difference through the revolver," i.e. the Facility A Loan, presumably after the Amendment was signed. Dkt. No. 64 ¶¶ 18, 32. Accordingly, the Court finds that Defendants have carried their burden at this summary judgment stage to show that a genuine dispute of material fact exists as to whether any Facility F Loan funds transferred under the Amendment constitute consideration for the Amendment. *See McCallum Highlands v. Washington Capital Dus, Inc.*, 66 F.3d 89, 93 (5th Cir. 1995) ("In general, under the 'pre-existing duty rule,' an agreement to do what one is already bound to do cannot serve as 'sufficient consideration to support a supplemental contract or modification'") (quoting *Signs v. Bankers Life & Casualty Co.*, 340 S.W.2d 67, 73 (Tex.App.–Dallas 1960, no pet.); *see also Trevino & Gonzalez*, 949

[17] Indeed, materials cited by Defendants suggest that Callidus may not even have communicated to ESCO, when the company inquired, which condition precedent to the Original Agreement it allegedly failed to satisfy. *See* Dkt. No. 88-15 at 8 (Callidus 0076344).

S.W.2d 39, 42 (Tex.App.–San Antonio 1997, no pet.) ("The discharge of a duty one is already bound to perform is not consideration.")

Callidus also argues that the Amendment is supported by consideration because it "made a number of changes to the 'borrowing base' formulas set forth in the [Original Agreement] to make them more favorable to ESCO." Dkt. No. 69 at 11; *see also* Dkt. No. 91 at 3. In support of this statement Callidus points to three separate provisions of the Amendment: 1.2, 1.3, and 1.4. On review of the Amendment and the Original Agreement, the Court notes that section 1.3 of the Amendment does not actually revise, as it purports to, section 3(e) of the Original Agreement. Sections 1.2 and 1.4 of the Amendment, however, do contain revised terms that both appear to increase the borrowing base applicable to the revolving "Facility A Loan" contemplated by the Original Agreement.[18] Under Texas law, the restructuring of existing debt can confer a benefit constituting consideration on a guarantor. *See Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 107 (Tex.App.–Dallas 1987, writ ref'd n.r.e.).[19] Enlarging the borrowing base and consequently, the size of the loans potentially available to ESCO, might therefore feasibly constitute consideration under the Amendment. Yet Defendants have raised a question of fact as to whether the two provisions of the Amendment enlarging the borrowing base under Loan Facility A actually conferred a new benefit on ESCO, or simply accounted for funds Callidus was already bound to loan under the Original Agreement. Defendants admit that at least section 1.4 of the Amendment purported to make material changes to ESCO's borrowing base. Dkt. No. 88 at 18 ("*See* [Amendment] at 1.4 (adding towing costs to available funds under Facility A in [the Original Agreement].") But they allege that Callidus "agreed to do nothing by the

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[18] Specifically, section 1.2 amends section 3(d) of the Original Agreement to increase the percentage of nonferrous metal "Eligible Finished Goods Inventory" accounted for in calculating the maximum loan amount available to ESCO under the Facility A Loan, while section 1.4 amends section 3(g) of the Original Agreement to increase the percentage of costs resulting from the acquisition and towing of two ships, the USS Shenandoah and the USS Yellowstone, accounted for in this calculation. *Compare* Dkt. No. 69-5 at 5 with Dkt. No. 69-3 at 20.

[19] Often, such restructuring extends the repayment term for a loan obligation. *See First Commerce Bank*, 226 S.W.3d at 398-99; *McLernon*, 347 S.W.3d at 335. In this case, however, the Amendment actually shortened the repayment term for loans contemplated by the Original Agreement and Amendment. *Compare* Dkt. No. 69-5 at 3, section 1.6 with Dkt. No. 69-3 at 23, section 7.

[Amendment] other than what it was already contractually obligated to do (loan certain funds)." Dkt. No. 88 at 11.

To support this assertion, Defendants cite to the affidavit of R. Jaross, in which he states that if Callidus "had funded [Facility Loan F] of $3.5M and had advanced 80-85% of receivables under Facility A, ESCO would have had plenty of funds to purchase and tow the two Vessels [the USS Shenandoah and the USS Yellowstone] without any need for the amendment to the [Original Agreement]." Dkt. No. 88-1 at 5, R. Jaross Aff. at ¶ 19. Defendants also cite to an internal Callidus memorandum, Dkt. No. 109 at 21 (Callidus 0096813), and an email sent from Craig Boyer, a former Callidus Vice President, to Levy, Dkt. No. 88-5 at 2 (Callidus 008908), which both understate the amount of funding Callidus was obligated to advance under Facility A. *See* Dkt. No. 69-4 at 20, section 3(d). Callidus's borrowing base calculations under sections 1.2 and 1.4 of the Amendment directly affected the availability of funds to ESCO under Loan Facility A, and were revised in the Amendment in part to account for the advance of Funds under Facility F.[20] Accordingly, if the advance of funds under Facility Loan F cannot constitute consideration, neither can changes to the borrowing base made pursuant to sections 1.2 and 1.4 of the Amendment. The Court therefore finds that Defendants have identified genuine issues of material fact as to whether changes to the borrowing base calculations in sections 1.2 and 1.4 of the Amendment constitute consideration.

Callidus also argues that its decision to loan funds that were made universally "discretionary" by the terms of Amendment constitutes consideration. The language of the Amendment itself, however, does not support this argument. In support of its position, Callidus cites to section 6.1 of the Amendment, which reads, in pertinent part: "This is a discretionary loan, and Lender may place reserves upon any facility under the Loan Agreement[.]" Dkt. No. 69-5 at 6; Dkt. No. 69, Ex. 4 at 5.

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[20] Callidus acknowledges this relationship between the borrowing base calculations and funds available to Defendants under Facility Loans A and F in its amended complaint, where it states: "Per Section 2.1 of the Amendment, [Callidus] did fund Facility F by transferring money from the revolver [i.e. Facility Loan A] to Facility F, opening up availability for ESCO to purchase and tow the two new ships." *See* Dkt. No. 64 at ¶ 18.

Yet this section of the Amendment is entitled "Release and Covenant Not to Sue," and does not substantively address the terms of loans referenced elsewhere in the document or in the Original Amendment—whereas in other sections, Callidus's purported discretionary authority as a lender under the Amendment is referenced in much more specific terms, and in relation to particular, named loan facilities. Section 2.1, for instance, states that "all releases of funds under Facility F loan are discretionary by Lender," while section 1.5, which modifies section 5(a) of the Original Agreement, states that "Lender may in its discretion" advance funds under Facility Loans B through E. *See* Dkt. No. 69-5; Dkt. No 69, Ex. 4. By contrast, no particular reference to discretion is made in section 3(g) of the Original Agreement, as purportedly modified by section 1.4 of the Amendment, which establishes the maximum amount Callidus will loan under the Facility A Loan.[21] Under Texas law, a court construing a written contract must "consider the entire writing and attempt to harmonize and give effect to all the provisions of the contract by analyzing the provisions with reference to the whole agreement." *Hackberry Creek Country Club, Inc. v. Hackberry Creek Homeowners Ass'n*, 205 S.W.3d 46, 54 (Tex.App.–Dallas 2006). Where provisions of a contract "arguably conflict, Texas courts employ canons of construction as tools to harmonize them." *Matter of Pirani*, 824 F.3d 483, 494 (5th Cir. 2016). "Those canons include the rules that (1) specific provisions control over general provisions; (2) provisions stated earlier in an agreement are favored over subsequent provisions; and (3) the interpretation of an agreement should not render any material terms meaningless." *Id.* (citations omitted.) All three of these canons refute Callidus's interpretation of section 6.1 of the Amendment as a grant of overriding 'express discretion' to refuse to loan any funds under the Original Agreement and Amendment, as (1) this is a general provision in a contract containing more specific references to discretion, (2) which appears later in the Amendment than these other references, and (3) finding that this term

[21] Further, as Defendants note, the terms of this Facility A Loan were specifically revised in the Amendment to account for "one hundred percent (100%)" of the costs relating to the acquisition of the USS Shenandoah and the USS Yellowstone, "and for transportation thereof[.]" *See* Dkt. No. 69-5 at 3; Dkt. No 69, Ex. 4, Amendment at section 1.4.

applies universally to the entire Amendment would obviate the need for its other references to discretion. The Court therefore finds, as a matter of law, that Callidus's decision to make loans to ESCO pursuant to the Amendment notwithstanding section 6.1's references to discretion does not constitute consideration.

Finally, Callidus also alleges that its decision to forbear collecting on its loans to ESCO constitutes consideration. Under Texas law, "[a] forbearance of any legal right may be a consideration." *Security Drilling Co. v. Rathke Oil Co.*, 41 S.W.2d 1019, 1022 (Tex.Civ.App.–1931, pet. denied). Yet "forbearance by the creditor to sue is not consideration, unless based upon an agreement to that effect." *Travelers Indem. Co.*, 451 S.W.2d at 317 (citing *Wilkins v. Carter*, 19 S.W. 997 (Tex. 1892)) ("The mere omission of the creditor to sue is not sufficient, in the absence of such agreement, for in such case he may proceed at his pleasure.") Callidus has not established that it had demanded payment on any loan at the time the Amendment was signed, and by the terms of the Amendment Defendants represent that no default or "Event of Default" had occurred or was continuing as of the date it was signed. Dkt. No. 69-5 at 4, section 3.4 Additionally, the Amendment's terms do not provide for forbearance on the collection of any loan. *See* Dkt. No. 69-5, Ex. 4. The Court therefore finds, as a matter of law, that Callidus's decision to forbear on the collection of demand loans made to ESCO prior to signing the Amendment does not constitute consideration.

As Defendants have identified material, disputed fact issues as to each of the possible grounds for consideration supporting the Amendment Callidus has offered, they have met their burden at this summary judgment stage to support their invocation of the affirmative defense of lack of consideration.

2. Failure of Consideration

Defendants have also alleged that, even if the Amendment does not lack consideration, Callidus "materially breached" the Amendment when it did not advance funds to tow the USS Shenandoah and the USS Yellowstone—and that this alleged breach constituted a failure of consideration. Dkt. No. 88 at 25. Yet as the

Court has already found that Defendants have sufficiently identified a genuine dispute of material fact as to the enforceability of the Amendment pursuant to their lack of consideration defense, the Court declines to address here Defendants' additional allegation regarding failure of consideration as to the Amendment.

iii. Ratification and release

Callidus argues that the releases the Levy and Jaross Guarantors signed in the Amendment, and the Amendment's ratification of the Original Agreement, act as a "complete bar" to their counterclaims and affirmative defenses. Dkt. No. 69 at 7. Yet as Defendants have shown that a genuine dispute of fact exists as to the enforceability of the Amendment, Callidus is not entitled to summary judgment on its ratification or release claims. The Court declines at this summary judgment stage to find, as Callidus requests in its instant motion, that Defendants' counterclaims and affirmative defenses are per se barred as a result of their "express ratification of the Loan Agreement and their Guaranties, and/or by [their] express releases of those claims/affirmative defenses" under the Amendment. *See* Dkt. No. 69 at 6. Similarly, the Court declines to consider Defendants' argument that the release language of the Amendment is insufficient as a matter of Texas law to effectively bar any fraudulent inducement or unconscionability claims Defendants seek to bring, or to analyze here whether the Amendment did, as a matter of law, ratify the Original Agreement.

iv. Defendants' Fraudulent Inducement, Duress, and Unconscionability Counterclaims

In their amended counterclaims, Defendants bring fraudulent and inducement and breach of contract claims against Callidus, and seek declaratory judgment that the Original Agreement, its Amendment, the Jaross and Levy Guaranties, and other loan documents implicated in this litigation are void or unenforceable as a result of fraudulent inducement, economic duress, and unconscionability. Dkt. No. 67 at 13. Callidus argues that, separate from Defendants' release and ratification of their claims pursuant to the Amendment, Defendants cannot, as a matter of law, avail themselves of any fraudulent

inducement, economic duress, or unconscionability counterclaims or affirmative defenses with respect to the Original Agreement and the Amendment. Accordingly, Defendants must raise a fact issue as to each element of these claims for each to survive summary judgment.

1. Fraudulent Inducement

"Fradulent inducement . . . involves a promise of future performance made with no intention of performing at the time it was made." *Zorrilla v. Aypco Construction II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015); *see also Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986) ("A promise to do an act in the future is actionable fraud when made with the intention, design and purpose of deceiving and with no intention of performing the act.") "Fraudulent inducement 'is a particular species of fraud that arises only in the context of a contract.'" *Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 423 (Tex. 2015). "A party asserting that it was fraudulently induced into entering an agreement must show that (1) the other party made a material representation, (2) the representation was false and was either known to be false when made or made without knowledge of its truth, (3) the representation was intended to be and was relied upon by the injured party, and (4) the injury complained of was caused by the reliance." *In re Int'l Profit Associates, Inc.*, 274 S.W.3d 672, 678 (Tex. 2009). While typically the clear terms of a contract control its interpretation, in Texas "extrinsic evidence is permissible to show fraud in the inducement of a note" where there is "a showing of some type of trickery, artifice, or device employed by the payee." *Town North Nat. Bank v. Broaddus*, 569 S.W.2d 489, 494 (Tex. 1978).

Defendants' fraudulent inducement claim is based on the allegation that Callidus represented "it had no intention of owning ESCO's assets" when its true intent "was to strip ESCO of its assets." Dkt. No. 67 at 9. More specifically, Defendants allege that Callidus made extrinsic misrepresentations relating, for instance, to Callidus's alleged claims that it could loan funds quickly to ESCO without personal guaranties, as well as "misrepresentations in the loan documents themselves" relating to the amount of funds Callidus agreed to transfer under the

Original Agreement. *Id.* at 10. Callidus argues that such allegations cannot be sustained as a result of the Amendment's release and ratification of these claims, but does little to address Defendants' fraudulent inducement claim as to the Original Agreement.[22] Callidus does, however, detail clauses contained in the Jaross and Levy Guaranties in which Defendants "expressly waived all suretyship and guarantor's defenses generally," and agreed that their Guaranties were fully enforceable irrespective of claims ESCO could assert, including "fraud." Dkt. No. 69 at 10. Additionally, the Court notes that the Jaross and Levy Guaranties also contain a general merger clause, as well as a clause in which each Guarantor "represents and warrants that he or she has relied exclusively on his or her own independent investigation of Borrower and the collateral for his or her decision to guaranty" ESCO's debt. *See* Dkt. Nos. 69-1 at 5-7, 69-2 at 5-7.

"Though a valid fraudulent inducement claim generally precludes parties from relying on a contract's terms, including its releases, the contract itself may preclude a valid fraudulent inducement claim if it (1) clearly expresses the parties' intent to waive fraudulent inducement claims," or (2) "disclaims reliance on representations about specific matters in dispute." *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 369 (Tex.App.–Houston 2012, pet. granted, judgm't vacated w.r.m.). As to this second basis for finding that a contract precludes a fraudulent inducement claim, the Texas Supreme Court has established a standard for assessing the effect of "disclaimer-of-reliance" clauses that requires "clear and unequivocal language" to disclaim reliance on the representations of another party. *Italian Cowboy Partners, Ltd.*, 341 S.W.3d 323, 336 (Tex. 2011). In a series of cases, contract language explicitly referencing reliance, "either in terms of relying on the other party's representations, or in relying solely on one's own judgment," has been upheld as sufficient to serve as a release of fraudulent inducement claims as to the

[22] The Court will not consider any fraudulent inducement claim with respect to the Amendment here, as Callidus argues, and the Court agrees, that Defendants failed to adequately plead fraudulent inducement as to the Amendment in their Amended Counterclaims. *See* Dkt. No. 91 at 5, Dkt. No. 67 at 9-10.

contracts containing this language. *Id.; see also Allen,* 367 S.W.3d at 368-381 (collecting cases).

The identical clauses in the Jaross and Levy Guaranties in which each guarantor "represents and warrants that he or she has relied exclusively on his or her own independent investigation" in deciding to guaranty ESCO's debt seem, superficially at least, to satisfy this "disclaimer-of-reliance" standard. *See* Dkt. No. 69, Exs. 1, 2 ¶16. These clauses, for instance, reference the Guarantors' 'exclusive' 'reliance' on their own investigations of ESCO, and state that each Guarantor "agrees that he or she has sufficient knowledge of [ESCO] and the collateral to make an informed decision about this Guaranty, and that Lender has no duty or obligation to disclose any information in its possession or control about Borrower and the collateral to [each] Guarantor." *Id.* Yet they disclaim only those representations made by Callidus with respect to ESCO and its financial condition and collateral; they do not act as "all-embracing disclaimer[s]" as to "any representations or omissions" made by Callidus. *See Forest Oil Corp. v. McAllen,* 268 S.W.3d 51, 58 (Tex. 2008). Further, the Guaranties were signed concurrently with the Original Agreement, and were not designed primarily as releases or settlements of disputed claims.[23] This places them in contrast with prominent Texas cases finding fraudulent inducement claims barred on the basis of disclaimer-of-reliance clauses. *See Schlumberger Tech. Corp. v. Swanson,* 959 S.W.2d 171, 181 (Tex. 1997); *Forest Oil Corp. v. McAllen,* 268 S.W.3d 51, 61 (Tex. 2008). In particular, where an agreement "is the initiation of a business relationship," Texas contract law holds that it "should be all the more clear and unequivocal in effectively disclaiming reliance and precluding a claim for fraudulent inducement, lest we 'forgive intentional lies regardless of context.'" *Italian Cowboy,* 341 S.W.3d at 335 (quoting *Forest Oil,* 268 S.W.3d at 61).

Having established that Defendants' fraudulent inducement claims are not per se barred according to the terms of the Jaross and Levy Guaranties, the Court

[23] The fact that Callidus included specific release and ratification language in the Amendment, following a dispute between the parties over their obligations under the Original Agreement, only serves to underscore this point.

turns to the substantive issue of whether Defendants have raised sufficient fact issues on each element of fraudulent inducement as to the Original Agreement to survive summary judgment. Defendants' primary misrepresentation claims allege that Callidus represented to them that personal guaranties would not be required to close a deal with ESCO, that the deal would close quickly, that the Facility F Loan would be funded through the Original Agreement, and that Callidus would loan 80-85% of the value of inventory and receivables under Facility Loan A pursuant to the Original Agreement. *See* Dkt. Nos. 67, 88; Dkt. No. 88-1, R. Jaross Aff.. First, the Court finds here that any misrepresentations made by Callidus to Defendants with respect to personal guaranties and the timing of the deal cannot, standing alone, serve as the basis for a fraudulent inducement claim. Clearly, Defendants could not have relied on any such misrepresentations by the time they signed the Jaross and Levy Guaranties. Yet the Court finds that Defendants have raised a sufficient fact issue as to whether Callidus's alleged failure to fully fund Facility Loan F and Facility Loan A under the Original Agreement might, in concert with other circumstantial evidence, establish its fraudulent intent.

"Mere failure to perform contractual obligations as promised does not constitute fraud but is instead a breach of contract." *Kevin M. Ehringer Enterprises, Inc. v. McData Services Corp.*, 646 F.3d 321, 325 (5th Cir. 2011) (citing *Spoljaric,* 708 S.W.2d at 435.) Yet a breach of contract can still "be actionable as fraudulent inducement" when "coupled with a showing that the promisor never intended to perform under the contract." *Id. (citing Spoljaric,* 708 S.W.2d at 434). As "intent to deceive or defraud is not susceptible to direct proof, it invariably must be proven by circumstantial evidence." *Id.; see also Tony Gullo Motors, I, L.P. v. Chapa* 212 S.W.3d 299 (Tex. 2006) ("[W]hile breach alone is no evidence of fraudulent intent, breach combined with 'slight circumstantial evidence' of fraud is enough to support a verdict for fraudulent inducement.") Further, "[a]lthough a party's intent to defraud is determined at the time the party made the representation, it may be inferred from the party's subsequent acts after the representation is made." *IKON Office Solutions, Inc. v. Eifert,* 125 S.W.3d 113,

125 (Tex.App.–Houston 2003, no pet.) "Intent is a fact question uniquely within the realm of the trier of fact because it so depends upon the credibility of the witnesses and the weight to be given to their testimony." *Spoljaric*, 708 S.W.2d at 434.

Defendants cite to material in the summary judgment record that establishes a genuine dispute of material fact as to whether Callidus breached the Original Agreement with respect to the transfer of funds under the Facility F Loan, and the calculation of the maximum possible loan available to ESCO under the Facility A Loan. For instance, Guarantor R. Jaross states in his affidavit provided by Defendants that, in addition to Callidus's failure to advance "$3,500,000 under Term Facility F" pursuant to the Original Agreement, Callidus never met its obligation to fully fund the revolving Facility A Loan the contract provided for:

> In addition to the term advances, the Loan Agreement also included a revolving credit line, Facility A, which was tied to the value of the inventory and receivables. The Loan Agreement called for [Callidus] to loan 80-85% of the value of inventory and receivables. However, [Callidus] refused to comply with its own agreement, failing to ever advance 80-85%, instead only advancing 65% of inventory and receivables value, further shorting ESCO's working capital position.
> Dkt. No. 88-1 at ¶ 15, Aff. of R. Jaross

Affidavit evidence of this breach alone is not enough for Defendants' fraudulent inducement claim to survive summary judgment. But Defendants also introduce summary judgment evidence in support of their claims that Callidus never intended to perform under the Original Agreement. Namely, they submit an internal "Credit Approval Memorandum" signed by Callidus management on June 27, 2014—days before the execution of the Original Agreement—in which the percentage of the value of certain inventory Callidus represents it will advance under Facility Loan A is listed as 65-85% of receivables, not 80-85%, as section 3(d) of the Original Agreement requires. Dkt. No. 109 at 21 (Callidus 0096813). Defendants also submit email correspondence sent by former Callidus Vice President Craig Boyer to Guarantor Levy on October 17, 2014—months after the Original Agreement was signed—in which Boyer communicates to Levy that the lower of these percentages was "always supposed to be 65%." Dkt. No. 88-5 (Callidus 0089008). Texas courts considering fraud claims "have held a party's

denial that he ever made a promise is a factor showing no intent to perform when he made the promise." *Spoljaric*, 708 S.W.2d at 435. Taken together, therefore, Boyer's email and the internal Callidus memorandum Defendants provide could support an inference that Callidus never intended to honor the 80-85% calculation represented in the Original Agreement. As this calculation directly affected the maximum loan available to ESCO under Facility Loan A, a misrepresentation about the calculation of this loan would be material.

Defendants have established that a genuine dispute of material fact exists as to each element of fraudulent inducement. Regarding any material representation made by Callidus, Defendants cite to the affidavits of R. and E. Jaross and Levy, who state that Callidus's contractual promises and subsequent verbal assurances of performance on the Original Agreement (and then the Amendment) were misrepresentations.[24] *See* Dkt. Nos. 88-1, Aff. of R. Jaross; 88-2, Aff. of E. Jaross and 88-3, Aff. of Levy. As to whether Callidus knowingly made false representations, Defendants cite to the internal Callidus memorandum and Boyer email that raise fact issues as to whether Callidus intended to perform under the Original Agreement. Regarding whether Callidus intended Defendants to rely on its representations, the terms of the Original Agreement and verbal assurances made to ESCO about Callidus's interest in ESCO's continued profitability were clearly meant to be relied on by ESCO and the Jaross and Levy Guarantors, while the Guarantors have stated they did indeed rely on Callidus's representations in committing to personally guarantee ESCO's debt. *See* Dkt. Nos. 88-1, Aff. of R.

[24] While not all representations were uniformly made directly by Callidus to individual Guarantors, under Texas law "fraud jurisprudence has traditionally focused not on whether a misrepresentation is directly transmitted to a known person alleged to be in privity with the fraudfeasor, but on whether the misrepresentation was intended to reach a third person and induce reliance." *Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 578 (Tex. 2011). Here, Guarantors R. Jaross, E. Jaross, and Levy all state in affidavits that Callidus was aware Defendants were sharing its representations regarding the Original Agreement and Guaranties with each other as these documents were negotiated. *See* Dkt. Nos. 88-1, Aff. of R. Jaross at ¶ 25; 88-2, Aff. of E. Jaross at ¶ 3; and 88-3, Aff. of Levy at ¶ 26. For instance, R. Jaross states: "While Callidus may not have made every representation directly to me, I received such information and relied on it. At various times I communicated Callidus's representations to Andrew Levy and Elka Jaross, as part of the course of dealing with Callidus. Callidus knew I was sharing their representations with Mr. Levy and Mrs. Jaross." Dkt. No. 88-1, Aff. of R. Jaross at ¶ 25.

Jaross at ¶ 25; 88-2, Aff. of E. Jaross at ¶ 3; and 88-3, Aff. of Levy at ¶ 26. Finally, Defendants establish that their alleged injuries, including their alleged liability on the Guaranties themselves, were caused by their reliance on Callidus's representations. Dkt. No. 67 at 9-10; Dkt. No. 88-1, Aff. of R. Jaross at ¶¶ 27, 28; Dkt. No. 88-2, Aff. of E. Jaross at ¶¶ 19, 20; Dkt. No. 88-3, Aff. of Levy at ¶¶ 27, 28. Accordingly, the Court finds that Defendants have provided more than a "scintilla" of evidence extrinsic to the contract itself that raises a genuine dispute of material fact as to whether Callidus fraudulently induced Defendants to sign the Original Agreement and Guaranties sufficient for this claim and affirmative defense to survive summary judgment. *See In re Perry*, 423 B.R. 215, 283 (Bkrtcy. S.D. Tex. 2010).

2. Economic Duress

"Economic duress occurs when one party takes unjust advantage of the other party's economic necessity or distress to coerce the other party into making an agreement." *In re RLS Legal Solutions*, LLC, 156 S.W.3d 160, 163 (Tex.App.–Beaumont 2005, no pet.) "The elements of economic duress are: (1) a threat to do something that a party has no legal right to do; (2) illegal exaction or some fraud or deception; and (3) imminent restraint such as to destroy free agency without present means of protection." *ABB Kraftwerke*, 115 S.W.3d at 294 (citing *King v. Bishop*, 879 S.W.2d 222, 223 (Tex.App.–Houston 1999, no pet.); *see also Schlotsky's, Ltd. v. Sterling Purchasing and Nat. Distribution Co., Inc.*, 520 F.3d 393, 404 (5th Cir. 2008). The Texas Supreme Court has "characterized duress as the result of threats which render persons incapable of exercising their free agency and which destroy the power to withhold consent." *Dallas County Comm. College Dist. v. Bolton*, 185 S.W.3d 868, 877 (Tex. 2005). It serves as a defense to the enforcement of a contract. *In re RLS*, 156 S.W. at 163. "However, a contract will not be invalidated when the duress emanates from a third person who has no involvement with the opposite party to the contract." *King*, 879 S.W.2d at 224; *see also MCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 91, n.1 (5th Cir. 1995)

(citing the requirement that a party show its financial distress was caused by its partner in contract as an element of economic duress under Texas law.)

Defendants allege that the Original Agreement, Guaranties, and the Amendment were all signed under coercive economic pressure. Dkt. No. 67 at 15. Callidus responds that no agreement between the parties can be invalidated on this theory, as at all times "Defendants' free agency was not destroyed and they had a present means of protection." Dkt. No. 91. As to the Original Agreement, the Court finds that Defendants cannot avail themselves of an economic duress counterclaim or affirmative defense. Defendants admit that ESCO was in immediate need of funding when it initiated talks with Callidus because its prior lender cut off the company's flow of funds. Dkt. No. 29, Ex. A at ¶ 3. It was this prior lender, not Callidus, that put pressure on ESCO to identify a new source of financing, and its suit against ESCO for foreclosure that lent new urgency to ESCO's negotiations with Callidus. *See* Dkt. No. 88, Dkt. No. 29-1. Moreover, Callidus was well within its legal rights to negotiate the terms of the Original Agreement with ESCO and the Jaross and Levy Guarantors, including by delaying its execution and insisting on personal guarantees as a condition of lending. Prior to the execution of the Original Agreement and Guaranties, the parties had signed only a term sheet that did not bind Callidus to anything but the completion of a due diligence review in advance of a possible loan agreement with ESCO. *See* Dkt. No. 88-3 ("If this term sheet is acceptable to you we will commence with the completion of our due diligence review immediately on receipt of the signed copy of this term sheet together with the deposit as detailed below.") For all of these reasons, the Court finds that Defendants cannot avail themselves of an economic duress counterclaim or affirmative defense as to the Original Agreement.

Similar considerations preclude Defendants from proceeding with an economic duress counterclaim or affirmative defense with respect to the Amendment. Defendants claim that Callidus "had no legal right to continually and repeatedly refuse to advance amounts required under the Loan Agreement," Dkt. No. 88 at 33, and that ESCO, and by extension Defendants, would have faced

extreme financial consequences if they had failed to sign the Amendment, Dkt. No. 88 at 17, n.6. Yet even though Defendants have identified a dispute of material fact as to Callidus's obligations under the Original Agreement, Defendants have not cited to material in the record to sufficiently support their claim that any such breach 'imminently restrained' them or 'destroyed their free agency'. *See ABB Kraftwerke*, 115 S.W.3d at 294. Indeed, Defendants have not suggested or substantiated a claim that they had no reasonable alternative to signing the Amendment, such as filing suit against Callidus for breach of the Original Agreement. *See id.* at 505; *McCallum*, 66 F.3d at 93; *see also Palmer Barge Line, Inc. v. Southern Petroleum Trading Co., Ltd.*, 776 F.2d 502, 506 (5th Cir. 1985) (holding that the existence of an agreement negotiated between parties represented by counsel is strong evidence that no duress in fact existed).

3. Unconscionability

"Under Texas law, the party asserting unconscionability of contract bears the burden of proving both the substantive unconscionability and the procedural unconscionability of the contract at issue." *American Stone Diamond, Inc. v. Lloyds of London*, 934 F. Supp. 839, 844 (S.D. Tex. 1996). Procedural unconscionability arises at contract formation, and relates to the ability of one party to bargain freely and fairly, while substantive unconscionability restrains parties' abilities to enter into contracts that are so one-sided they are patently unreasonable. *Lindemann v. Eli Lilly and Co.*, 816 F.2d 199, 203 (5th Cir. 1987). In Texas, "[u]nconscionability has been found when there is a 'gross disparity in the values exchanged' and the 'grounds for substantive abuse [are] sufficiently shocking or gross to compel the court to intercede.'" *Besteman v. Petcock*, 272 S.W.3d 777, 789 (Tex.App.–Texarkana 2008) (quoting *Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 136 (Tex.App.–Waco 2005, pet. denied)). "The principles of unconscionability do not negate a bargain because one party to the agreement may have been in a less advantageous bargaining position." Instead, "[u]nconscionability principles are applied to prevent unfair surprise or oppression." *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 678 (Tex. 2006). "The ultimate question of unconscionability of a contract is one of law,

to be decided by the court." *Ski River*, 167 S.W.3d at 136 (Tex.App.-Waco 2005, pet. denied).

Defendants claim that the Original Agreement are that it was procured through economic duress; that it placed a lien on ESCO's assets; that it placed loans funds into a blocked account controlled by Callidus; and that it was a demand loan. Dkt. No. 88 at 36-37. Defendants' claim as to economic duress cannot lie, as the Court here has granted Callidus's instant summary judgment motion as to this counterclaim and affirmative defense. Thus Defendants have no procedural unconscionability claim with respect to the Original Agreement. Neither are the remainder of Defendants' claims with respect to the substantive unconscionability of the Original Agreement availing. Simply put, Defendants do not cite to any material or even argument suggesting that, given their commercial backgrounds and ESCO's particular financing needs, any of the aspects of the Original Agreement they object to is "so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." *In re Palm Harbor Homes*, 195 S.W.3d at 678.

Defendants' claims with respect to the Amendment are equally infirm. With respect to procedural unconscionability, Defendants allege that "they had no choice but to sign the First Amendment in order to prevent their own financial ruin." Dkt. No. 88 at 36. Defendants allege that Callidus "at the last possible moment" forced them to sign the Amendment, knowing that ESCO was in dire financial condition due to Callidus's alleged failure to advance loans required by the Original Amendment needed to purchase the USS Shenandoah and Yellowstone. *See* Dkt. No. 88 at 17. However procedural unconscionability also focuses on whether unequal bargaining power, a lack of access to counsel, and a lack of negotiation in coming to agreement force a disadvantaged party into an unacceptably one-sided contract. *See Ski River*, 167 S.W.3d at 137-38. There is no evidence in the summary judgment record that Defendants were ignorant of the terms proposed by the Amendment, that they lacked counsel in their negotiations with Callidus, or that they were without power to decline to sign the Amendment. Neither does the

Amendment as a whole suffer from substantive unconscionability. Defendants object in particular to a "usurious $900,000 fee" the Amendment required ESCO to pay, which has since been refunded by Callidus, *see* Dkt. No. 88-9, and in any case could simply be struck without invalidating the entire Amendment on substantive unconscionability grounds. They also object to the fact that the Amendment contains a "litany of variables and terms and conditions" and purports to make loans it authorized discretionary, but do not substantiate why these terms are so patently one-sided and unreasonable as to vitiate the Amendment. The Court therefore finds that Defendants' unconscionability counterclaims and affirmative defenses are unavailing as to both the Original Agreement and the Amendment.

v. ESCO's bankruptcy and the issue of derivative claims

Callidus additionally argues that Defendants' fraudulent inducement and breach of contract counterclaims are derivative of ESCO's claims resolved in bankruptcy, and are for this reason impermissible.[25] *Id.* Defendants, who were non-debtor parties uninvolved in their personal capacities in ESCO's bankruptcy proceedings, respond that they have "alleged, and shown by affidavit proof, personal loss of income and damage to the business reputation, each of which is substantial, personal and not derivative." Dkt. No. 88 at 39.

Under the Bankruptcy Code, a bankruptcy estate consists of, among other things, "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). "The phrase 'all legal or equitable interests of the debtor in property' has been construed broadly, and includes 'rights of action' such as claims based on state or federal law." *In re Seven Seas Petroleum, Inc.*, 522 F.3d 575, 584 (5th Cir. 2008). "If a cause of action belongs to the

[25] To the extent Callidus also asks the Court to find that Defendants are barred from raising the affirmative defenses of fraudulent inducement and breach of contract on the basis that ESCO released these affirmative defenses in bankruptcy, the Court declines to consider this request. Affirmative defenses raised by Defendants in their personal capacity are not causes of action that could, under any set of facts, be "owned by the bankruptcy estate." *See Hern Family Ltd. P'ship v. Compass Bank*, 863 F.Supp.2d 613, 620 (S.D. Tex. 2012); *see also Rucker v. Bank One Texas, N.A.*, 36 S.W.3d 649 (Tex.App.–Waco 2000). Defendants' fraudulent inducement and breach of contract affirmative defenses mirror their counterclaims for declaratory judgment, but the method of addressing these affirmative defenses is through analysis of their legal sufficiency on the merits.

[bankruptcy] estate, then the trustee has exclusive standing to assert the claim." *Schertz–Cibolo–Universal City, Indep. School District v. Wright (In re Educators Group Health Trust)*, 25 F.3d 1281, 1284 (5th Cir. 1994). The Bankruptcy Code empowers this authority because a trustee's "actions are designed to benefit the debtor's estate, which ultimately will benefit the debtor's creditors upon distribution." *In re E.F. Hutton Southwest Properties II, Ltd.*, 103 B.R. 808, 812 (Bank.N.D.Tex. 1989). Yet "the trustee lacks standing to bring personal claims of creditors. . . [as] personal claims are not property of the estate." *Id.*

"Whether a particular state law cause of action belongs to the estate depends on whether under applicable state law the debtor could have raised the claim as of the commencement of the case." *In re Educators Group Health Trust*, 25 F.3d at 1284. This inquiry is a matter of law, which "requires the court to 'look to the injury for which relief is sought and consider whether it is peculiar and personal to the claimant or general and common to the corporation and creditors.'" *In re E.F. Hutton Southwest Properties II, Ltd.*, 103 B.R. 808, 812 (Bank.N.D.Tex. 1989) (quoting *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1348 (7th Cir. 1987)). "If a cause of action alleges only indirect harm to a creditor (i.e., an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate." *In re Educators Group Health Trust*, 25 F.3d at 1284. Yet "it is entirely possible for a bankruptcy estate and a creditor to own separate claims against a third party arising out of the same general series of events and broad course of conduct." *In re Seven Seas*, 522 F.3d at 585.

Whether Defendants are precluded from bringing their fraudulent inducement and breach of contract counterclaims depends on whether, under Texas law, ESCO could have brought these claims directly on their behalf. Defendants assert that "as investors and/or shareholders in ESCO," and "as a result of being guarantors," they can "bring claims against Plaintiff for Plaintiff's wrongful actions against ESCO." Dkt. No. 67 at 9. This is true, however, only to the extent that the claims Defendants seek to bring are personal to them, as creditors and Guarantors.

Of their two counterclaims, the Court finds first, that Defendants' breach of contract counterclaim is derivative of any breach of contract claim ESCO might have raised as a debtor in property, and so belonged exclusively to ESCO's bankruptcy estate.[26] The injuries Defendants complain of as a result of Callidus's alleged breach of the Original Agreement—namely, general damages resulting from breach and "loss of compensation from ESCO"—are also derivative of ESCO's injuries. Dkt. No. 67 at 13. Yet the Court finds that Defendants' fraudulent inducement counterclaim is a direct claim that belongs solely to them, not to ESCO's bankruptcy estate. Defendants have adequately pled in their amended counterclaim that Callidus fraudulently induced them, as Guarantors, to personally guarantee ESCO's debt under the Original Agreement, and have identified personal damages they allege they have "suffered as a result of being guarantors to the agreement." Dkt. No. 67 at 11; Dkt. No. 88-1, Aff. of R. Jaross at ¶¶ 27, 28; Dkt. No. 88-2, Aff. of E. Jaross at ¶¶ 19, 20; Dkt. No. 88-3, Aff. of Levy at ¶¶ 27, 28. Further, Callidus has identified no relevant precedent that precludes Defendants from bringing this claim, while a number of cases arising under Texas law have explicitly allowed guarantors and other creditors to proceed with similar, and even identical, claims. *See, e.g., Siddiqui v. Fancy Bites, LLC*, 504 S.W.3d 349 (Tex.App.–Houston 2016); *In re Seven Seas*, 522 F.3d 575; *In re Educators Group Health Trust*, 25 F.3d 1281.

V. Conclusion

For the foregoing reasons, the Court:

- **GRANTS** Defendants' Opposed Motion for Leave to File Defendants' Sur-Reply in Opposition to Plaintiff's Motion for Partial Summary Judgment, Dkt. No. 97;
- **GRANTS IN PART AND DENIES IN PART** Defendants' Opposed Motion for Leave to Supplement Evidence in Opposition to Plaintiff's Motion for Summary Judgment, Dkt. No. 108;

[26] This is evident on the face of Defendants' amended complaint, which alleges that Callidus breached the Original Agreement while Defendants, "met all conditions precedent for performance of the provisions breached by Plaintiff and committed no breach prior to Plaintiff's breach on the effective date." Dkt. No. 67 at 12.

- **GRANTS IN PART AND DENIES IN PART** Defendants' Objections to Plaintiff's Summary Judgment Evidence, Dkt. No. 87;
- **DENIES** Defendants' Motion to Remove "Attorneys' Eyes Only" Designation from Certain Documents Produced by Plaintiff, Dkt. No. 101; and
- **GRANTS IN PART AND DENIES IN PART** Plaintiff's Motion for Summary Judgment as to Defendants' Amended Counterclaims/Affirmative Defenses and for Partial Summary Judgment as to Count 1 of Plaintiff's Amended Complaint, Dkt. No. 69.

The Court further informs the parties that while this Order is filed under seal in deference to the parties' Agreed Protective Order signed by the Court on December 28, 2016, Dkt. No. 94, it will be unsealed no sooner than ten (10) days following entry of this Order unless prior to this date Callidus files specific objections showing good cause why the Order should remain under seal.

It is so ORDERED.

SIGNED this 30th day of March, 2017.

Hilda Tagle
Senior United States District Judge

Appendix "F"

Jessie Hue

From: Sheldon Title
Sent: May 6, 2017 9:19 AM
To: 'Kevin Baumann'
Cc: Eric Sirrs
Subject: RE: Alken Basin discharge of receiver and information request
Attachments: Sealing Order re; Confidential Appendices to Pre-Filing Report of MNP Ltd., dated April 1, 2016.pdf; Sealing Order of Justice D.B. Nixon dated May 4, 2016.pdf; Callidus Capital - Alken Basin - Receiver's Certificate (filed July 5, 2....pdf; OSB Response to Baumann complaint final.pdf

Good morning Kevin,

Thank you for your email correspondence dated April 25, 2017. For your ease of reference, we respond to your numbered inquiries and the specific questions outlined therein, though we note we disagree with some of your statements. In this regard, MNP reserves all its rights and remedies.

1. The Receiver is unaware of the contents of any material which may have been the subject of the secured creditor's sealing request to the Court prior to our appointment as the Receiver of Alken Basin Drilling Ltd. ("Alken"). Regardless, prior to its appointment by the Court, we note that the Receiver is not in a position to provide notification to creditors.

As Proposed Receiver, however, MNP sought, and the Court ordered the sealing of certain appendices on the basis that it contained commercially sensitive information. These appendices were identified in the pre-filing report as being the appraisals requisitioned by Callidus in respect of Alken's assets and the Information Memorandum that was provided to prospective purchasers. The Sealing Order, dated April 4, 2016 (the "April 4th Sealing Order"), a copy of which is enclosed, orders that "The Confidential Appendices shall, until the discharge of the receiver or further order of the Court, be sealed and kept confidential, to be shown only to a Justice of the Court of Queen's Bench of Alberta". To date, the Receiver has not been discharged, and this information remains sealed. The April 4th Sealing Order provides that "any party may apply to set aside this Order upon providing Callidus and all other interested parties with five (5) days notice of such application."

2. Once the administration of the receivership of Alken is complete, the Receiver will provide the Court, creditors, and interested parties with its Report as a component of the Receiver's application to the Court of Queen's Bench of Alberta [Commercial List] (the "Court") seeking, among other things, approval of its Report, conduct, final distribution, and its discharge as Receiver. All parties on the Service List in this proceeding will be provided notice of this application. The application is scheduled to take place before the Court on Friday, May 19, 2017, at 10am MT. As is customary in insolvency sales transactions with a view to protecting the integrity of sale proceedings and the commercial interests of the parties involved, the Receiver obtained a Sealing Order from the Honourable Mr. Justice D.B. Nixon on May 4, 2017 (the "May 4th Sealing Order"), a copy of which is enclosed for your ease of reference, in connection with the sale of transaction contemplated by an asset purchase agreement (the "Sale Agreement") between the Receiver and Altair Water and Drilling Services Ltd in respect of certain assets of Alken. Please note that Paragraph 4 of the May 4th Sealing Order provides, in part, the conditions in respect of sealing as follows: "4. The Confidential Addendum, together with its Schedules, and the unredacted Sale Agreement, shall, until such time as the receiver confirms the transaction has closed by filing a Certificate with the Court substantially in the form of the Certificate attached to the Approval and Vesting Order, or further Order of this Honourable Court, be sealed and kept confidential, to be shown only to a Justice of the Court of Queen's Bench of Alberta..." In accordance with the May 4th Sealing Order, following the Closing of the sale transaction and satisfaction of other conditions, the Receiver filed the Receiver's Certificate with the Court on July

5, 2016, a copy of which is also enclosed for your ease of reference. As such, this material is publicly available for access. The Receiver may refer to information contained therein if it deems it to be relevant to its discharge application.

3. The Office of the Superintendent of Bankruptcy did not direct any changes to MNP's approach to receivership proceedings. We enclose, for your ease of reference, the Letter of the Office of the Superintendent of Bankruptcy Canada dated December 7, 2016, which responded to your Letter to the OSB dated November 10, 2016.

Should you require any further information, please let us know.

Regards,
Sheldon

-----Original Message-----
From: Kevin Baumann [mailto:kevin.baumann@whiteswanltd.com]
Sent: April 25, 2017 1:29 PM
To: Eric Sirrs <Eric.Sirrs@mnp.ca>; Sheldon Title <Sheldon.Title@mnp.ca>
Subject: Alken Basin discharge of receiver and information request

Considering all that transpired during the Alken receivership , I believe that MNP as a professional corporation owes me an explanation regarding the following , being I was a guarantor of certain Alken debt that was blatantly ignored and subjected to what I believe was abuse of process .

1. certain items were sealed and confidential in the receivership at Callidus's clever request . Was one of them a consent to judgement by Scott Sinclair on behalf of Alken ? Which would explain a judgement as the first item on the docket . If this was the case why as a guarantor was I not notified of Sinclair's consent or no contest ?

2. When does MNP expect to be discharged as the receiver ? and will all sealed information be unsealed or will an application be required to do so?

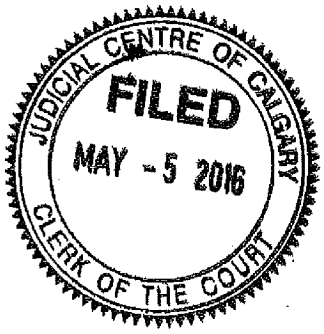
3. Has this receivership which has been investigated by the superintendent of bankruptcy brought procedural changes to MNP when a receivership is controlled by a lender placement who's appointment by Callidus as Alken's sole director is confirmed by Callidus counsel letter of June 15 2015 ? It is disturbing that MNP knew full well that Matthew Sinclair was in no way independent of Callidus considering MNP acted for Callidus in concert with Sinclair whereby Sinclair represented Callidus in the Leader Energy NOI and bankruptcy . It is disturbing that my letter to MNP raising improprieties was not considered by MNP but only acknowledged to the court on transcript although was not disclosed to justice Nixon at a critical point when the assets were to be sold to the lenders own company and the receivership utilized an alleged debt number that included guarantees with no independent financial information

For Your review I have enclosed a recent Texas ruling denying summary judgement to Callidus, all familiar patterns with the exception that Esco did not have a lender placement with an OSC conviction and two names , and Callidus did not operate the business for a year like Alken. Breach of contract and fraudulent inducement findings may make for an interesting eventual jury trial in Texas .

I would like to point out from precedent research that a bankruptcy trustee is not immune or indemnified from certain actions by the court . Therefore if i am unsuccessful in defending the Callidus summary judgement attempt I will be seeking damages from MNP

A reply would be appreciated

I hereby certify this to be a true copy of the original Order
dated this 5 day of May 2016
for Clerk of this Court



COURT FILE NO.:	1601-03126
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	CALLIDUS CAPITAL CORPORATION
RESPONDENT	ALKEN BASIN DRILLING LTD.
DOCUMENT	**SEALING ORDER - CONFIDENTIAL ADDENDUM TO THE FIRST REPORT OF THE RECEIVER, MNP LTD.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	GOWLING WLG (CANADA) LLP Suite 1600, 7th Ave SW Calgary, Alberta T2P 4K9 Telephone (403) 298-1938 / (403) 298-1092 Facsimile (403) 607-4592 **Attention: Tom Cumming / Frank Lamie**

DATE ON WHICH ORDER WAS PRONOUNCED:	May 4, 2016
LOCATION AT WHICH ORDER WAS MADE:	Calgary, Alberta
NAME OF JUSTICE WHO MADE THIS ORDER:	The Honourable Mr. Justice D.B. Nixon

UPON THE APPLICATION of MNP Ltd. in its capacity as Receiver (in such capacity, the "**Receiver**") of Alken Basin Drilling Ltd. for a sealing order in relation to the Confidential Addendum (the "**Confidential Addendum**") to the First Report of the Receiver, filed April 26, 2016 (collectively, the "**First Report**") and the Asset Purchase Agreement made among Altair Water and Drilling Services Inc. and the Receiver (the "**Sale Agreement**"); **AND UPON HEARING** counsel for the Receiver, counsel for Callidus Capital Corporation, and any other

parties present; **AND UPON HAVING READ** the Application, the First Report, the Confidential Addendum, the Sale Agreement, and the Affidavit of Nicole Dickie, sworn May 2, 2016, filed;

IT IS HEREBY ORDERED THAT:

SERVICE

1. All parties entitled to notice of this application have been served with notice of this application and that the time for service is hereby abridged such that service effected on the parties served with notice of this application shall be good and sufficient notice of this application.

2. Division 4 of Part 6 of the Alberta Rules of Court does not apply to this Application.

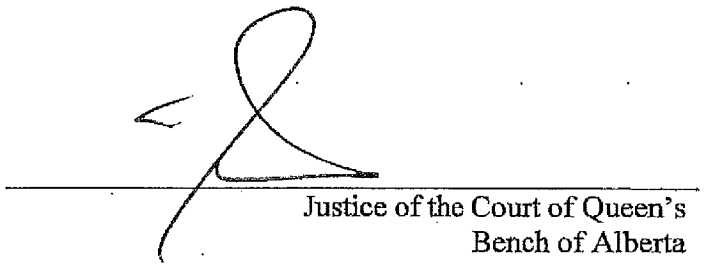
APPROVAL OF ACTIVITIES OF THE RECEIVER

3. The First Report and the activities of the Receiver outlined therein are hereby approved.

SEALING OF THE CONFIDENTIAL ADDENDUM & SALE AGREEMENT

4. The Confidential Addendum, together with its Schedules, and the unredacted Sale Agreement, shall, until such time as the Receiver confirms the transaction has closed by filing a Certificate with the Court substantially in the form of the Certificate attached to the Approval and Vesting Order, or further Order of this Honourable Court, be sealed and kept confidential, to be shown only to a Justice of the Court of Queen's Bench of Alberta, and accordingly, shall be filed with the Clerk of the Court who shall keep the Confidential Appendices in a sealed envelope, which shall clearly be marked "SEALED PURSUANT TO THE ORDER OF THE HON. MR. JUSTICE D.B. NIXON DATED MAY 4, 2016".

5. Any party may apply to set aside this Order upon providing the Receiver and Callidus and all other interested parties with five (5) days notice of such application.



Justice of the Court of Queen's
Bench of Alberta

I hereby certify this to be a true copy of the original ORDER
Dated this 4 day of April 2016
for Clerk of the Court

Form 27
Rule 6.3 and 10.52(1)

Clerk's Stamp
JUDICIAL CENTRE OF CALGARY
FILED
APR 04 2016
OF THE COURT

COURT FILE NO.:	1601-03126
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	CALLIDUS CAPITAL CORPORATION
RESPONDENT	ALKEN BASIN DRILLING LTD.
DOCUMENT	**SEALING ORDER - CONFIDENTIAL APPENDICES TO THE PRE-FILING REPORT OF MNP LTD.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

LAWSON LUNDELL LLP
Barristers & Solicitors
3700, 205 – 5th Avenue S.W.
Calgary, Alberta T2P 2V7

Attention: William L. Roberts / Sarah J. Nelligan

Telephone (403) 269-6900
Facsimile (403) 269-9494

DATE ON WHICH ORDER WAS PRONOUNCED:	April 1, 2016
LOCATION AT WHICH ORDER WAS MADE:	Calgary, Alberta
NAME OF JUSTICE WHO MADE THIS ORDER:	The Honourable Madam Justice D.B. Nixon

UPON THE APPLICATION of Callidus Capital Corporation ("**Callidus**") for a sealing order in relation to the Confidential Appendices (the "**Confidential Appendices**") to the Pre-Filing Report of MNP Ltd., dated March 23, 2016 (the "**Pre-Filing Report**"); **AND UPON**

HEARING counsel for Callidus and any other parties present; **AND UPON HAVING READ** the Pre-Filing Report and Confidential Appendices thereto;

IT IS HEREBY ORDERED THAT:

1. All parties entitled to notice of this application have been served with notice of this application and that the time for service is hereby abridged such that service effected on the parties served with notice of this application shall be good and sufficient notice of this application.

2. Division 4 of Part 6 of the Alberta Rules of Court does not apply to this Application.

3. The Confidential Appendices shall, until the discharge of the receiver or further order of this Honourable Court, be sealed and kept confidential, to be shown only to a Justice of the Court of Queen's Bench of Alberta, and accordingly, shall be filed with the Clerk of the Court who shall keep the Confidential Appendices in a sealed envelope, which shall clearly be marked "SEALED PURSUANT TO THE ORDER OF THE HON. MADAM JUSTICE D.B. NIXON DATED APRIL 1, 2016".

4. Any party may apply to set aside this Order upon providing Callidus and all other interested parties with five (5) days notice of such application.

Justice of the Court of Queen's
Bench of Alberta

COURT FILE NUMBER	1601-03126
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	Calgary
PLAINTIFF	CALLIDUS CAPITAL CORPORATION
DEFENDANT	ALKEN BASIN DRILLING LTD.
DOCUMENT	RECEIVER'S CERTIFICATE
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY. FILING THIS DOCUMENT	Gowling WLG (Canada) LLP 1600, 421 7th Avenue S.W. Calgary, AB T2P 4K9 Telephone (403) 298-1938 Facsimile (403) 695-3538 File No. A152711 Attention: Tom Cumming / Frank Lamie

RECITALS

A. Pursuant to an Order of the Honourable Mr. Justice D.B. Nixon of the Court of Queen's Bench of Alberta, Judicial District of Calgary (the **"Court"**) dated April 1, 2016, MNP Ltd. was appointed as the receiver (the "Receiver") of the undertaking, property, and assets of Alken Basin Drilling Ltd. (the **"Debtor"**).

B. Pursuant to an Order of the Court dated May 4, 2016, the Court approved the asset purchase agreement made as of May 3, 2016 (the **"Sale Agreement"**) between the Receiver and Altair Water and Drilling Services Ltd.(the **"Purchaser"**) and provided for the vesting in the Purchaser of the Debtor's right, title, and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Receiver to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Purchased Assets; (ii) that the conditions to Closing as set out in the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchaser (or its nominee) has paid and the Receiver has received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the Sale Agreement;

2. The conditions to Closing as set out in sections of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser (or its nominee); and

3. The Transaction has been completed to the satisfaction of the Receiver.

4. This Certificate was delivered by the Receiver at ___ AM on June 8, 2016.

MNP Ltd., in its capacity as Receiver of the undertaking, property, and assets of Alken Basin Drilling Ltd., and not in its personal capacity.

Per:

Name: Sheldon Title

Title: Senior Vice-President

Innovation, Science and Economic Development Canada
Office of the Superintendent of Bankruptcy Canada

300 West Georgia Street, Suite 2000
Vancouver, British Columbia
V6B 6E1
osb.ic.gc.ca

Innovation, Sciences et Développement économique Canada
Bureau du surintendant des faillites Canada

300, rue West Georgia, bureau 2000
Vancouver (Colombie-Britannique)
V6B 6E1
bsf.ic.gc.ca

December 7, 2016 Ref# 659690

Kevin Baumann
Box 109
Bluffton, Alberta T0C 0M0

Dear Sir:

RE: In the Matter of the Receivership of Alken Basin Drilling Ltd.
Estate No. 24-115792

This is in response to your letter received on November 10, 2016 filed with the Office of the Superintendent of Bankruptcy ("OSB") in which you raised issues concerning the duties of the Receivership executed by Meyers Norris Penney ("MNP"). You also have some concerns regarding the actions of secured creditor, Callidus Capital Corporation ("Callidus").

We have reviewed the relevant documents relating to the estate including your documents, contacted the trustee to obtain his comments and considered the issues that you raised. The results of our review are summarized below. Please note that reference is occasionally made to the Bankruptcy and Insolvency Act (BIA), which can be found online for your review at http://laws.justice.gc.ca/en/B-3.

Court Appointed Receivership

The matter of receiverships is dealt with in sections 243 to 252 of the BIA. It should be noted that part XI of the Act was intended to give the bankruptcy court control over the receiverships that involve all or substantially all of the property of an insolvent person or a bankrupt. It was also intended that the persons who conduct a receivership have a duty to disclose, a duty to act in good faith and a duty to account for their conduct of the receivership.

Furthermore, Section 248 of the BIA is designed to permit the court to enforce the duties imposed on receivers by Sections 244 to 247. If the court orders the receiver to perform a particular duty and it fails to do so, the court can make use of the powers conferred by Section 248(1) or commit the receiver for contempt. A court appointed receiver derives its powers and authority wholly from the order of the court appointing it. It is not subject to the control and direction of the parties who had it appointed or of anyone, except the court which appointed it.

We have reviewed relevant documents relating to the estate and documents presented by the trustee as well as correspondences that you have provided to our office and have concluded that the issues you have raised pertain to the receiver's duties. If you require further clarification from the trustee, Mr. Sheldon Title is available for your assistance.

As the receiver was a court appointment, the receiver must act in accordance with the terms of the security agreement under which it was appointed. It must act without ulterior motive, ensure that a fair sale is made of the assets and render a proper accounting to the debtor of its realization of the assets: *Royal Bank V. First Pioneer Investments Ltd.*

In addition to this, the receivership process is a court-supervised process and the Court is the appropriate venue to seek redress for any matters relating the receivership or the receiver's duties. Please note that under Section 215 of the BIA specifies that no action lies against the trustee with respect to any report made hereunder, or any action taken pursuant to the BIA except by leave of court.

Secured Creditor

You expressed concerns relating to the actions of Callidus in your letter. We discussed your concerns with the trustee and he advised that comments related to the pre-receivership period should be addressed to the secured creditor as the complaints relate to issues outside the purview of the Receiver.

Your concern for the conduct of the secured creditor is noted in our file; however, the OSB will not be pursuing the matter further.

Please be advised that the role of the Office of the Superintendent of Bankruptcy (OSB) is to supervise the administration of estates and matters to which the Bankruptcy and Insolvency Act (BIA) applies. This includes ensuring that each party understands and performs their respective duties as outlined in the BIA. Trustees in bankruptcy are private sector practitioners, licensed by the OSB, who carry out the administration of insolvency estates in accordance with the provisions of the BIA.

Please note that the above-mentioned references to the provisions of the BIA are of a general nature only and not intended to constitute our advice for any specific situation. The OSB is not in a position to provide legal advice or guidance to any parties. The noted provision may or may not be applicable in your situation. We strongly encourage you to consult with your lawyer or trustee for information on your options.

If you require additional information about the insolvency system, we invite you to visit the OSB website at http://osb.ic.gc.ca. Thank you for bringing your concerns to our attention.

Sincerely,

Terence Tang
Senior Bankruptcy Analyst
Outreach and Service Innovation, West Region
Office of the Superintendent of Bankruptcy Canada

Cc: Sheldon Title, MNP Ltd.

Appendix "G"

Jessie Hue

From:	Kevin Baumann <kevin.baumann@whiteswanltd.com>
Sent:	April 28, 2017 12:02 PM
To:	julieanne.head@tmx.com; jdowty@globeandmail.com; john.tilak@thomsonreuters.com; kimd@atollfinancial.com; kcarscallen@kpmg.ca; Alan.Merskey@nortonrosefulbright.com; lori@aestimo.ca; inquiries@osc.gov.on.ca; hawkesr@jssbarristers.ca; sdeveau2@bloomberg.net; Sheldon Title; Valerie.Douville@tmx.com; wnowak@altacorpcapital.com; zach.dubinsky@cbc.ca; Eric Sirrs; cherylkelly@xplornet.com; dean@drsenergy.ca; darcyl@linkventures.ca
Subject:	Fwd: Alken Basin discharge of receiver and information request
Attachments:	Esco Callidus Decision Denying Callidus MSJ 040717.pdf; ATT00001.htm

Subject: Fwd: Alken Basin discharge of receiver and information request

Has your firm ever considered following Callidus capital . This company is a true loan to own and is considered by a borrowers group as the Bre Ex of the financial services sector .

A company I owned was a borrower , in spite of being profitable and not being in default Callidus took this 30 year old business . This group is extremely crafty and may be fraudulent as recently determined by a Texas court . In short they lie their way into loans , withhold funds , act on borrowers power of attorney , install management that pretends to be independent , abuses all stakeholders , obtains credit while operating the company while in the borrower/ guarantors name with no plan of paying incurred supplier debt ,files the company into receivership with no independent financial confirmation , and with assistance from certain trustees buys the assets for the debt less personal guarantees . Then takes a big bump up on non realized yield enhancements which appears to be the true end game . Callidus was so brazen they even transferred the 20 year old widely known Alken toll free number that was not included in the receivership offering to their new Altair water and Drilling Services Inc for no consideration (competitors were prepared to buy this number)
Please read the attached Texas ruling which may be the start of the rightful destruction of Callidus .

Call me anytime
Thanks

Kevin Baumann

403-505-7784

Begin forwarded message:

> **From:** "Kevin Baumann" <kevin.baumann@whiteswanltd.com>
> **To:** "Eric.Sirrs@mnp.ca" <Eric.Sirrs@mnp.ca>, "sheldon.title@mnp.ca" <sheldon.title@mnp.ca>
> **Subject: Alken Basin discharge of receiver and information request**

Considering all that transpired during the Alken receivership , I believe that MNP as a professional corporation owes me an explanation regarding the following , being I was a guarantor of certain Alken debt that was blatantly ignored and subjected to what I believe was abuse of process .

1. certain items were sealed and confidential in the receivership at Callidus's clever request . Was one of them a consent to judgement by Scott Sinclair on behalf of Alken ? Which would explain a judgement as the first item on the docket . If this was the case why as a guarantor was I not notified of Sinclair's consent or no contest ?

2. When does MNP expect to be discharged as the receiver ? and will all sealed information be unsealed or will an application be required to do so?

3. Has this receivership which has been investigated by the superintendent of bankruptcy brought procedural changes to MNP when a receivership is controlled by a lender placement who's appointment by Callidus as Alken's sole director is confirmed by Callidus counsel letter of June 15 2015 ?.

It is disturbing that MNP knew full well that Matthew Sinclair or Scott Sinclair was in no way independent of Callidus considering MNP acted for Callidus in concert with Sinclair whereby Sinclair represented Callidus in the Leader Energy NOI and bankruptcy . It is disturbing that my letter to MNP raising improprieties was not considered by MNP but only acknowledged to the court on transcript although was not disclosed to justice Nixon at a critical point when the assets were to be sold to the lenders own company and the receivership utilized an alleged debt amount that included guarantees with no independent financial information or confirmation .

For Your review I have enclosed a recent Texas ruling denying summary judgement to Callidus, all familiar patterns with the exception that Esco did not have a lender placement with an OSC conviction and two names , and Callidus did not operate the business for a year like Alken. Breach of contract and fraudulent inducement findings may make for an interesting eventual jury damages trial in Texas .

I would like to point out from precedent research that a bankruptcy trustee is not immune or indemnified from certain actions by the court . Therefore if i am unsuccessful in defending the Callidus summary judgement attempt I will be seeking damages from MNP

A reply would be appreciated

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CALLIDUS CAPITAL CORPORATION,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL NO. 1:14-CV-270
	§	
ESCO MARINE, INC., *et al*,	§	
	§	
Defendants.	§	

SEALED ORDER

BE IT REMEMBERED that on March 30, 2017 the Court **GRANTED** Defendants' Opposed Motion for Leave to File Defendants' Sur-Reply in Opposition to Plaintiff's Motion for Partial Summary Judgment, Dkt. No. 97; **GRANTED IN PART AND DENIED IN PART** Defendants' Opposed Motion for Leave to Supplement Evidence in Opposition to Plaintiff's Motion for Summary Judgment, Dkt. No. 108; **GRANTED IN PART AND DENIED IN PART** Defendants' Objections to Plaintiff's Summary Judgment Evidence, Dkt. No. 87; **DENIED** Defendants' Motion to Remove "Attorneys' Eyes Only" Designation from Certain Documents Produced by Plaintiff, Dkt. No. 101; and **GRANTED IN PART AND DENIED IN PART** Plaintiff's Motion for Summary Judgment as to Defendants' Amended Counterclaims/Affirmative Defenses and for Partial Summary Judgment as to Count 1 of Plaintiff's Amended Complaint, Dkt. No. 69.

I. Relevant Procedural History[1]

This litigation arises from a dispute over the liabilities attached to emergency loan funding provided by Callidus Capital Corporation ("Callidus"), a Canadian company, to Esco Marine, Inc., a marine yard and recycling business formerly operating in Brownsville, Texas. On December 30, 2014, Callidus filed suit against Esco Marine, Inc. and affiliated defendants, raising breach of contract, foreclosure

[1] Throughout this opinion, the Court refers to the parties' pleadings and summary judgment exhibits by the docket numbers they have been assigned under the Federal Judiciary's Case Management / Electronic Case File (CM/ECF) system.

of security interests, conversion, and theft of property claims related to this funding. Dkt. No. 1 at 9-12. Specifically, Callidus filed its initial complaint against Defendants Esco Marine, Inc., Esco Metals, LLC, Esco Shredding, LLC, Texas Best Recycling, LLC, Texas Best Equipment, LLC, Richard Jaross, EMJ Holdings, LLC, Elka Jaross, Andrew Levy, Redstone Capital Corp., Alberto Garcia, and John Kristopher Wood. Dkt. No. 1. On August 17, 2015, the Court dismissed Defendant/Counter-Plaintiff John Kristopher Wood ("Wood"), pursuant to Federal Rule of Civil Procedure 41(a) and the parties' stipulation. Dkt. No. 51. On December 11, 2015, the Court dismissed all of Callidus's claims against Defendants Esco Marine, Inc., Esco Metals, LLC, Esco Shredding, LLC, Texas Best Recycling, LLC, and Texas Best Equipment, LLC, as these Defendants' claims were resolved in bankruptcy proceedings. Dkt. No. 57 at 2-3. Defendants now remaining in this litigation therefore include Richard Jaross, EMJ Holdings, LLC, Elka Jaross, Andrew Levy, and Redstone Capital Corporation, and Alberto Garcia ("Defendants").

Callidus filed its first amended complaint against these remaining Defendants on March 4, 2016. Dkt. No. 64. In this complaint, Callidus raises breach of guaranty, conversion, theft of property, fraud, and conspiracy claims, and seeks declaratory judgment that any claims and defenses Defendants might assert are barred under various theories. On March 18, 2016 Defendants filed an answer and affirmative defenses to this complaint, Dkt. No. 66, as well as amended counterclaims against Callidus, Dkt. No. 67. Defendants' counterclaims raise fraudulent inducement and breach of contract claims against Callidus, and seek declaratory judgment that Callidus's claims are barred on the basis of fraudulent inducement, economic duress, and unconscionability. Callidus filed its answer and affirmative defenses to Defendants' counterclaims on March 31, 2016, Dkt. No. 68, which echo the declaratory judgment claims in its complaint seeking to bar Defendants' counterclaims.

On June 29, 2016, Callidus filed a motion for summary judgment as to Defendants' amended counterclaims and certain affirmative defenses, which also

seeks partial summary judgment in favor of Callidus as to the first count in its amended complaint alleging breach of guaranty. Dkt. No. 69. Defendants, excepting Alberto Garcia ("Garcia"), timely responded to this motion on November 30, 2016, Dkt. No. 88, and on this date also filed objections to Callidus's summary judgment evidence, Dkt. No. 87.[2] Callidus replied to Defendants' summary judgment response on December 14, 2016, Dkt. No. 91, and to Defendants' objections on December 20, 2016, Dkt. No. 92. On December 28, 2016 the Court entered an agreed protective order stipulated to by the parties, governing the disclosure of certain materials produced through discovery in this litigation. Dkt. No. 94. On January 13, 2017 Defendants filed an opposed motion for leave to file a sur-reply to Callidus's motion for summary judgment, Dkt. No. 97, to which Callidus did not respond. On January 23, 2017 Defendants filed an opposed motion to remove an "attorneys' eyes only" designation from certain materials produced by Callidus pursuant to the parties' agreed protective order. Dkt. No. 101. Callidus responded to this motion on February 13, 2017, Dkt. No. 110, and Defendants replied on February 20, 2017, Dkt. No. 113. Finally, on January 27, 2017, Defendants filed an opposed motion for leave to file supplemental evidence in opposition to Callidus's summary judgment motion, Dkt. No. 108, to which Callidus responded on February 17, 2017, Dkt. No. 112.

Addressed here Court are Defendants' objections to Callidus's summary judgment evidence, Dkt. No. 87; Defendants' motion for leave to file a sur-reply, Dkt. No. 97; Defendants' motion to supplement its summary judgment evidence, Dkt. No. 108; Defendants' motion to remove the "attorneys' eyes only" designation from certain discovery documents, Dkt. No. 101; and Callidus's motion for summary judgment, which seeks a declaration that Defendants' amended counterclaims and affirmative defenses are barred or fail as a matter of law, as well as summary

[2] Although Garcia remains a party to this action, he is not actually implicated in these motions. However for ease of reference, with respect to the summary judgment motions now under consideration, the Court will continue to refer to "Defendants" when citing the parties asserting counterclaims and defending against Callidus's claims.

judgment on the first count of Callidus's amended complaint, which alleges that Defendants have breached the Jaross and Levy Guaranties. Dkt. No. 69.

II. Statement of Undisputed Facts[3]

Esco Marine, Inc. and its affiliate entities[4] (collectively "ESCO") formerly operated a marine yard and scrap metal recycling business in Brownsville, Texas. In early 2014, ESCO's primary lender cut off its flow of funds to the company, leaving ESCO in need of new financing. Among other potential investors, ESCO and its leadership—including Esco's President Richard Jaross ("R. Jaross") and Andrew Levy ("Levy"), Esco's CEO and President of Redstone Capital Corporation ("Redstone")[5]—met with representatives of Callidus, both in Brownsville and in Canada, to discuss its potential role as a source of replacement financing. These meetings resulted in Callidus's production of a term sheet listing potential loan terms, which ESCO signed and on which it paid a $50,000 deposit.

On June 30, 2014, Callidus agreed to loan ESCO up to $33,990,000 under a series of loan documents. A Loan Agreement (the "Original Agreement") was signed by both parties on this date. Section 2 of the Original Agreement calls for Callidus to loan ESCO funds through Facility Loans A through F, each backed by a Demand Facility Note dated June 30, 2014. The Original Agreement is backed by the personal guaranties of all Defendants except Garcia. R. Jaross, Elka Jaross ("E. Jaross"), and EMJ Holdings, LLC (collectively "the Jaross Guarantors") guaranteed payment of ESCO's indebtedness up to an aggregate amount of $2,000,000, plus "all fees, charges, and costs incurred" in the collection of this guaranteed amount "including reasonable attorneys' fees" (the "Jaross Guaranty"). *See* Dkt. No. 69-1. Levy and Redstone (collectively "the Levy Guarantors") guaranteed payment of ESCO's indebtedness up to an aggregate amount of $600,000 plus "all fees, charges,

---

[3] Unless otherwise noted, this history is taken from Callidus's first amended complaint, Dkt. No. 64; Defendants' answer, Dkt. No. 66; Defendants' amended counterclaims, Dkt. No. 67; and Callidus's answer and affirmative defenses to these counterclaims, Dkt. No. 68.

[4] These affiliated entities include Esco Metals LLC, Esco Shredding LLC, Texas Best Recycling, LLC, and Texas Best Equipment LLC.

[5] *See* Dkt. Nos. 1 and 30.

and costs incurred" in the collection of this guaranteed amount "including reasonable attorneys' fees" (the "Levy Guaranty").

Also signed on June 30, 2014 by the parties were a number of loan and security documents including a "Security Agreement," a "Deed of Trust," "Leasehold Deeds of Trust," and "Demand Facility Notes" (collectively the "Loan and Security Documents"). The Security Agreement grants Callidus a first priority and continuing security interest in certain ESCO's property (the "Collateral"). Additionally, among other terms, these Loan and Security Documents include stipulations by the parties that Texas law governs the construction and enforcement of the contracts signed on June 30, 2014, and that venue before this Court is proper.

On June 30 and July 2, 2014, pursuant to the Original Agreement, Callidus paid out $22,689,725.16 to third parties on ESCO's behalf.[6] In September of 2014 the U.S. Maritime Administration awarded ESCO a contract to dismantle two U.S. Navy ships, the USS Shenandoah and the USS Yellowstone, which ESCO required capital to purchase. Callidus, ESCO, the Jaross Guarantors, and the Levy Guarantors signed an amendment to the Original Agreement (the "Amendment") on October 16, 2014, which purported to provide ESCO with certain financial advances, including an additional $1,111,208.85, and to release Callidus from liability for any breaches of the Original Agreement. The Amendment also required ESCO to pay a fee of $900,000 to Callidus. On November 18, 2014, Callidus mailed a letter to ESCO alleging it was in default under Section 23 of the Original Agreement, which governs and defines "Events of Default." One of the specified defaults was ESCO's failure to deposit loan funds received from Callidus into a "Blocked Account," as required by the Original Agreement. On December 3, 2014, Callidus provided ESCO with written notice of its failure to cure the defaults alleged, and declared ESCO's outstanding indebtedness accelerated and payable. Callidus demanded payment by 5:00 p.m. on December 10, 2014.

On December 30, 2014, Callidus filed the instant lawsuit. On March 7, 2015, ESCO initiated voluntary petitions in bankruptcy. The Jaross and the Levy

[6] *See* Dkt. No. 91-2 at 1, Aff. of David Reese, President and COO of Callidus.

Guarantors were not parties to the resulting bankruptcy proceedings. In the bankruptcy proceedings both R. Jaross and Levy admitted that ESCO failed to deposit funds in the "Blocked Account" as required pursuant to the Original Agreement. On July 21, 2015, the U.S. Bankruptcy Court for the Southern District of Texas, Corpus Christi Division (the "Bankruptcy Court") issued an order in Case No. 15-20107 establishing Callidus's maximum allowable claim against ESCO. The Bankruptcy Court also issued an order approving a credit bid by Callidus to purchase certain of ESCO's assets, for less than the amount of Callidus's maximum allowable claim against ESCO. In the instant litigation, Callidus seeks to recover this difference, which it alleges is a deficiency it is owed, from the Jaross and Levy Guarantors. To date, the Jaross and Levy Guarantors have failed to perform under the Guaranties.

III. Preliminary Pending Motions

As an initial matter, the Court addresses here four of Defendants' pending motions, all related to Callidus's motion for summary judgment. For the reasons discussed below, the Court grants Defendants' Opposed Motion for Leave to File Defendants' Sur-Reply in Opposition to Plaintiff's Motion for Partial Summary Judgment, Dkt. No. 97; grants in part and denies in part Defendants' Opposed Motion for Leave to Supplement Evidence in Opposition to Plaintiff's Motion for Summary Judgment, Dkt. No. 108; grants in part and denies in part Defendants' Objections to Plaintiff's Summary Judgment Evidence, Dkt. No. 87; and denies Defendants' Motion to Remove "Attorneys' Eyes Only" Designation from Certain Documents Produced by Plaintiff, Dkt. No. 101.

a. Leave to file a sur-reply

According to the undersigned's civil procedures, "once a motion, response, and reply are filed, the Court will not entertain any additional or supplemental filings unless they are accompanied by a motion for leave to file explaining why the additional filing is necessary in the interests of justice." L.R. 5.E. Pursuant to this local rule, Defendants have filed an opposed motion for leave to file a sur-reply to

Callidus's summary judgment motion, on the basis that, in its reply brief, Callidus has allegedly "raised a number of issues that were not initially set forth in [its] motion for summary judgment and has mischaracterized [Callidus's] counter-claims and affirmative defenses." Dkt. No. 97 at 2. In their motion, Defendants identify specific portions of Callidus's reply brief that they allege misconstrue Defendants' arguments or misstate facts in this case, and state their grounds for objecting as to each. *See* Dkt. No. 87. Without opining here on the merits of Defendants' sur-reply, the Court therefore finds that the interests of justice are served by, and little prejudice to Callidus will result from, granting Defendants' opposed motion to file this sur-reply.

b. Objections to summary judgment evidence

Defendants' objections to Callidus's summary judgment evidence do not in fact object to evidence proffered by Callidus. Defendants instead assert that "[d]espite presenting eight pages of purported 'material facts,' [Callidus's] Motion for Summary Judgment fails to comply with the federal rules requirements to support its factual assertions with authenticated evidence." Dkt. No. 87 at 2. Defendants conflate two sub-sections of Federal Rule of Civil Procedure 56 here, 56(c)(1) and 56(c)(2), and misstate the requirement imposed by 56(c)(2). Rule 56(c)(1)(A) and (B) describe how "[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion." Fed. R. Civ. P. 56(c)(1)(A)-(B).[7] Rule 56(c)(2), meanwhile, provides that "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). It does not require the authentication of evidence, since "[a]t the summary judgment stage, materials cited to support or dispute a fact need only be *capable* of being 'presented in a form that would be

[7] In its entirely, these subsections provide that, with respect to summary judgment motions: "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."

admissible in evidence.'" *LSR Consulting, LLC v. Wells Fargo Bank, N.A.*, 835 F.3d 530, 534 (5th Cir. 2016) (emphasis original). The Court reads Defendants' objections, therefore, as alleging that certain of the "material facts" cited by Callidus: (i) are in fact genuinely disputed, and (ii) are unsupported by citations to materials in the record that could be presented in admissible form.

Defendants object to seven specific factual assertions made by Callidus in its motion for summary judgment. Dkt. No. 87 at 3-4. Defendants also object to two long series of paragraphs in this motion, on the basis that they are comprised solely of unsupported conclusory allegations. *Id.* at 4. It is beyond peradventure, as Defendants note, that "[m]ere conclusory allegations are not competent summary judgment evidence." *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). For this reason, with or without Defendants' objections to consider, the Court would account only for undisputed, material facts supported by competent evidence in analyzing the merits of Callidus's instant motion. Yet as Defendants have enumerated their objections to certain of Callidus's factual assertions and Callidus has responded to them, the Court will decide here which of these assertions Callidus has adequately supported pursuant to Rule 56(c)(1).[8]

The first two "unsupported statements" cited by Defendants regard ESCO's need for "non-conventional" financing "[d]ue to its precarious financial situation," and the "nearly $23 million" dollars loaned by Callidus to ESCO on execution of the Original Agreement. Dkt. No. 87 at 3. The Court finds that the key factual assertions of both of these statements are adequately supported by affidavits cited to by Callidus in its response to Defendants' objections. *See* Dkt. No. 92 at 2. The Court also notes that, in addition to affidavits, Callidus cites to statements made by Defendants in their own pleadings as support for its challenged statements. "Normally, factual assertions in pleadings . . . are considered to be judicial admissions conclusively binding on the party who made them." *White v. ARCO/Polymers*, 720 F.2d 1391, 1396 (5th Cir. 1983) (citations and footnote

[8] The Court will not address Defendants' non-specific objections to "the entirety of Paragraphs 3-11 and Paragraphs 13-24" of Callidus's motion, as any allegations unsupported by citations to materials in the record will simply not be accounted for in the Court's analysis of undisputed material facts.

omitted). While a judicial admission itself is not evidence, "a judicial admission has the effect of withdrawing it from contention." *Martinez v. Bally's Louisiana, Inc.*, 244 F.3d 474, 476 (5th Cir. 2001); *see also Davis v. A.G. Edwards and Sons, Inc.*, 823 F.2d 105, 107 ("Facts that are admitted in the pleadings 'are no longer at issue.'") (quoting *Ferguson v. Neighborhood Housing Services, Inc.*, 780 F.2d 549, 551 (6th Cir. 1986)). For all of these reasons, the Court overrules Defendants' objections to these first two assertions.

In the third factual assertion Defendants object to, Callidus claims that "ESCO failed to meet several of the conditions precedent to borrowing set forth in the Loan Agreement" after it was signed, "and sought various forbearances and accommodations from [Callidus] in order to continue borrowing."[9] Dkt. No. 87 at 3. Callidus does not cite to any materials in the record that could be admissible as evidence to support this assertion. Callidus does, however, cite to a statement from one of Defendants' pleadings that admits the Original Agreement "required that ESCO establish a hedging program" and that "ESCO had previously tried to establish such a program but failed due to its financial condition[.]"[10] Dkt. No. 92 at 3; Dkt. No. 29 at 4. The Court notes that Defendants also effectively admit in their amended counterclaims to never having established such a program. Dkt. No. 67 at 16. Yet section 19(a)(xii) of the Original Agreement, which stipulates that within 30 days of the closing of the agreement, "ESCO shall have entered into and implemented a metal commodity hedging program" is not explicitly listed as a "condition precedent" pursuant to section 15(a) of the Original Agreement, Dkt. No. 69-3 at 38, Ex. 3 at 33, and Callidus does not explain how this covenant might

[9] "Under Texas law, '[c]onditions precedent to an obligation to perform are those acts or events, which occur subsequently to the making of a contract, that must occur before there is a right to immediate performance[.]" *Matter of Pirani*, 824 F.3d 483, 497 (5th Cir. 2016) (quoting *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976)).

[10] The Court notes that in its amended complaint, Callidus additionally alleges that it "did not have an obligation to fund Facility F because [ESCO] never met the Section 15 conditions to borrowing because of insufficient financial statements (Section 15(a)(xii) or projections (Section 15(a)(xv))." Dkt. No. 64 ¶ 33. Yet Callidus does not reference these additional conditions precedent elsewhere in its pleadings, nor cite to any materials pursuant to its motion for summary judgment that would support its claim that ESCO failed to satisfy sections 15(a)(xii) and 15(a)(xv) of the Agreement.

otherwise come under the terms of this section.[11] *See* Dkt. 69-3 at 30-31, Ex. 3 at 25-26. Further, in the Amendment to the Original Agreement, signed by all parties, ESCO and the Defendants to this action represented that no default under the Agreement was ongoing at the date of signing. Dkt. No. 69-5 at 4; Dkt. No. 69, Ex. 4 at 3. The Court therefore sustains Defendants' objections to this third assertion.[12]

The fourth assertion Defendants object to states that "ESCO defaulted under the Loan Agreement" and its Amendment—an assertion the Court finds is adequately supported by affidavit, as well as citations to admissions made in Defendants' own pleadings. *See* Dkt. No. 92. In alleging ESCO's default, Callidus highlights section 23(e) of the Original Agreement, which states that an "Event of Default" will occur under the agreement when ESCO "does not deposit funds from any source" into a designated "Blocked Account," "or deposits any funds from any source into an account other than the Blocked Account." Dkt. No. 69-3 at 44, Ex. 3 at 39. In support of this allegation, Callidus cites to the affidavit of Wood, ESCO's former Vice President, which was attached as an exhibit to a pleading filed by ESCO and Defendants in the instant action. *See* Dkt. No. 92 at 3. In his affidavit, Wood states that following amendment of the Original Agreement "ESCO was forced to use some money to pay certain essential business expenses prior to depositing the money into the Blocked Account." *Id.*; Dkt. No. 29-1 at 4, Wood Aff. at ¶ 11. Callidus cites further to a pleading filed by Defendants admitting that ESCO was required to deposit all funds into the Blocked Account, that Callidus was not required to let ESCO use the funds it loaned on operating expenses, and that ESCO had not, in fact, deposited all funds provided by Callidus immediately into the Blocked Account as their agreement required. Dkt. No. 92 at 3. Whether

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[11] The difference is not immaterial. *See Pirani*, 824 F.3d at 497 ("Because of their harshness in operation, conditions are not favorites of the law. . . [w]hen the intent of the parties is doubtful or where a condition would impose an absured [*sic*] or impossible result[,] then the agreement will be interpreted as creating a covenant rather than a condition.") (citations omitted.)

[12] In so doing the Court does not opine on whether, as Callidus alleges, Defendants ultimately failed to implement a hedging program. *See* Dkt. No. 69-6 at 3, Dkt. No. 69, Ex. 5 at 3. The Court simply sustains Defendants' objection to Callidus's assertion that, prior to the signing of the Amendment, ESCO had "failed to meet several of the conditions precedent to borrowing set forth in the Loan Agreement" and sought forbearance from Callidus, as this assertion is not supported by materials in the summary judgment record.

Defendants can offer an excuse or defense to breach, or successfully pinpoint a prior breach or repudiation on Callidus's part, is a separate inquiry from whether the challenged statement about ESCO's failure to deposit all funds in the Blocked Account is adequately supported here. The Court finds that it is, and overrules Defendants' objection to this fourth assertion.

The fifth assertion Defendants object to states that ESCO never paid its debts to Callidus, and that the Jaross and Levy Guarantors have not 'honored' their guaranties. Dkt. No. 87 at 4. As Callidus notes, the Jaross and Levy Guarantors have admitted to signing personal guaranties on ESCO's loans. Dkt. No. 92 at 4. These signed guaranties have also been submitted as evidence in support of Callidus's motion for summary judgment. *See* Dkt. No. 69-1 and 69-2. Defendants also object to Callidus's motion for partial summary judgment "on liability for a breach of contract claim related to the Guaranties" by alleging, inter alia, that "there is nothing owing on the Guaranties." Dkt. No. 88 at 30, 32. To the extent Defendants object to Callidus's statement on the basis that it asserts, as a conclusion of fact, that the Jaross and Levy Guaranties are enforceable for a certain sum, the Court sustains Defendants' objection to this statement. Yet to the extent Defendants object to the assertion that they guaranteed the Original Agreement and Amendment, or the claim that they have not paid Callidus pursuant to their Guaranties, their objection is overruled.

The sixth assertion Defendants object to states that ESCO filed for bankruptcy on March 7, 2015 "to avoid [a] receivership hearing." Dkt. No. 87 at 4. The Court will not consider the intent Callidus imputes to ESCO here, but does take judicial notice of the bankruptcy filing, overruling in part Defendants' objection. Finally, the seventh assertion Defendants object to states that the Amendment to the Original Agreement signed by the parties was bargained for at "arms' length between sophisticated parties." Dkt. No. 87 at 4. The Court overrules Defendants' objection to this statement, as the Jaross and Levy Guarantors are

industry specialists[13] who actively negotiated the terms of their Guaranties with Callidus.[14]

c. Leave to supplement evidence

Defendants seek leave to supplement under Local Rule 5.E evidence of "internal communications and memorandum" only recently provided by Callidus through discovery. Dkt. No. 108. Callidus represents that—granting conformity with an agreed protective order, Dkt. No. 94, which designates these documents either as "confidential" or "for attorneys' eyes only"—it does not object to Defendants supplementing the record, but does object to how Defendants have characterized the relevance of the additional evidence they seek to admit. *See* Dkt. No. 112. The Court therefore construes Callidus's response as objecting to Defendants' assertions on the basis that they are unsupported by the material they cite to, contrary to the requirements of Rule 56(c)(1). Accordingly, the Court grants Defendants' motion for leave to supplement, but will also directly address Callidus's objections here.

Defendants' first factual assertion reads: "Defendants made clear and Callidus understood that ESCO's financial needs required the at-issue loan be closed quickly." Dkt. No. 108 at 2. The Court overrules Callidus's objection to this statement, finding it is adequately supported by the newly admitted materials to which Defendants cite. Callidus alleges that Defendants' own conduct was to blame for "the delay in completing the loan," Dkt. No. 112 at 1, but even if true, this statement has no bearing on what Callidus knew about the necessary timing of the loan ESCO required. The evidence is undisputed that an internal report prepared by Callidus as it was contemplating a deal with ESCO states that "[ESCO] needs a

[13] R. Jaross was a long-time CEO and President of ESCO, while E. Jaross was an ESCO shareholder who additionally has stipulated that she and her husband Richard had run ESCO "as owners and/or operators, since its founding in 1996." *See* Dkt. No. 88, Exs. 1 and 2. Meanwhile, "Levy, who guaranteed $600,000 of the ESCO debt, is an attorney licensed in New York with a bachelor's degree from Yale and a law degree from Harvard," Dkt. No. 91 at 1, was a "significant shareholder" and a Director at ESCO before becoming its CEO in 2014. *See* Dkt. No. 88, Ex. 3.

[14] *See, e.g.*, Dkt. No. 88 at 33, Ex. 4 at 122-125, Dep. of Mark Wilk, recounting an email exchange between Levy and Callidus management, in which Levy raises issues regarding the personal guarantees and interest rates proposed by the Original Agreement, weeks before it was ultimately signed.

fast close," Dkt. No. 109 at 32 (Callidus 0097349). Defendants have also cited to an email sent by Levy (one of the defendant Guarantors in this action) informing Callidus months before it signed the Original Agreement with ESCO that it was "imperative" the parties "proceed expeditiously" in making a deal, Dkt. No. 109 at 46 (Callidus 0097756).

Defendants' second objected-to assertion reads: "Although Callidus represented that personal guaranties of the principles would not be required, Plaintiff knowingly contemplated personal guaranties from the start." Dkt. No. 108 at 2. Callidus objects that this statement is not supported by the material cited to by Defendants. The Court agrees that the specific document Defendants cite to is insufficient to support the allegation that Callidus contemplated personal guaranties, and sustains Callidus's objection to this assertion.

The third and final statement from Defendants' motion to supplement that Callidus objects to alleges that "Callidus understood that funding of the purchase *and* towing of the Saratoga, the Shenandoah, and the Yellowstone (the "Vessels") was essential to ESCO's financial health and [Callidus], in fact, agreed to fund the towing of the vessels." Dkt. No. 108 at 2 (emphasis original). Defendants have cited to adequate materials in the summary judgment record to support the assertion about Callidus's understanding. Defendants cite to a Callidus email noting that ESCO's profitability hinged on the award of the Saratoga, Dkt. No. 109 at 24 (Callidus 0096857-58), and to a company memorandum on the total costs affiliated with the purchase, dismantling, and sale of the Saratoga that explicitly contemplates "tow and arrival costs," Dkt. No. 109 at 5 (Callidus 0096746). Defendants cite to an unsigned internal Callidus memorandum noting that the award of the Shenandoah and the Yellowstone was key to ESCO's ability "to operate profitably," and which contemplated extending a loan facility to ESCO that would have covered "acquisition, towing, and cleaning costs of the two new vessels," Dkt. No. 109 at 19 (Callidus 0096811). Finally, Defendants cite to a Callidus memorandum signed by the company's credit committee days before the Original Agreement was executed that includes "towing and purchase costs" in Callidus's

calculation of how much money ESCO would be able to borrow under the parties' eventual loan agreement. Dkt. No. 109 at 20 (Callidus 0096812). What Defendants have not definitively shown through citation to materials in the record, however, is that Callidus "in fact agreed" to fund towing costs for all three of these vessels—although the Court acknowledges Defendants' claim that the Original Agreement should have provided enough funding to cover this cost, Dkt. No. 88 at n.6, and notes that towing costs for the Shenandoah and the Yellowstone are explicitly provided for in section 1.4 of the Amendment. Dkt. No. 69-5 at 3.

d. Motion to remove "attorneys' eyes only" designation

As to Defendants' motion to remove the "attorneys' eyes only" designation from certain documents produced by Callidus, the Court finds no good cause to grant this motion. The parties stipulated to an agreed protective order that gives Callidus discretion to label documents either "confidential" or "for attorneys' eyes only" as long as a document meets certain criteria justifying heightened protection. *See* Dkt. No. 94. Defendants move to have the "attorneys' eyes only" designation removed from 51 documents provided by Callidus in recent discovery, on the basis that the inability of individual Defendants to "review and potentially contravene information included in these documents would detrimentally affect their ability to defend [Callidus's] claims and prosecute their own." Dkt. No. 101 at 3. Callidus answers that it has discretion under the protective order to label these documents as "for attorneys' eyes only;" that Defendants have not alleged that this designation is inappropriate under the terms of the protective order; that Defendants fail to cite to a specific or serious harm that results from this designation; and that the protective order cannot prevent Defendants' counsel from conveying to their clients, in a general way, the contents of documents designated "for attorneys' eyes only." *See* Dkt. No. 110. Defendants' counsel have demonstrated in their motion a sufficient ability to understand the import of documents marked "attorneys eyes only" to the litigation prerogatives of their clients. Additionally, the parties' protective order does not prevent Defendants' counsel from rendering advice to Defendants that conveys a general evaluation of the contents of protected material.

Therefore, absent a showing of specific and prejudicial harm to Defendants from the use of this designation with respect to the specific contents of particular documents the Court finds that good cause does not exist, at this time, to modify the parties' agreed protective order.

IV. Callidus's Pending Summary Judgment Motions

a. Summary Judgment Legal Standard

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. "A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant." *Piazza's Seafood World, L.L.C. v. Odom*, 448 F.3d 744, 752 (5th Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court must view all evidence in the light most favorable to the non-moving party. *Brumfield*, 551 F.3d 322, 326 (5th Cir. 2008) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986)). Factual controversies must be resolved in favor of the non-movant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc, per curiam).

The party moving for summary judgment bears the "burden of showing this Court that summary judgment is appropriate." *Brumfield*, 551 F.3d at 326 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The burden of production a party must initially carry depends upon the allocation of the burden of proof at trial. *See Shanze Enters., Inc. v. Am. Cas. Co. of Reading*, 150 F.Supp.3d 771, 776 (N.D.Tex. 2015) ("Each party's summary judgment burden depends on whether it is addressing a claim or defense for which it will have the burden of proof at trial.") "Thus, if the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant

judgment in his favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (emphasis original).

"Once the moving party has initially shown 'that there is an absence of evidence to support the non-moving party's cause,' the non-movant must come forward with 'specific facts' showing a genuine factual issue for trial." *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir. 2002) (quoting *Celotex*, 477 U.S. at 325). In other words, when a moving party has discharged its burden, the non-moving party must then "go beyond the pleadings," and by its own affidavits or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. The non-movant's burden is not satisfied by "conclusory allegations," "unsubstantiated assertions," or "by only a scintilla of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (citations omitted). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial and mandates the entry of summary judgment for the moving party." *United States ex rel. Farmer v. City of Houston*, 523 F.3d 333, 337 (5th Cir. 2008) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)) (citations omitted).

b. Analysis

Callidus filed suit against Defendants in order to recover payments, fees, and costs it claims it is owed under the Jaross and Levy Guaranties. Dkt. No. 69 at 1. In its instant motion, Callidus seeks summary judgment as to Defendants' amended counterclaims and affirmative defenses, as well as to the first count of Callidus's amended complaint, which alleges that Defendants have breached the Jaross and Levy Guaranties. *See* Dkt. No. 69. Specifically, Callidus alleges that Defendants' claims are completely barred as a result of ratifications and releases they made pursuant to the Amendment, and that, as a matter of law, Defendants cannot avail themselves of any fraudulent inducement, economic duress, or unconscionability claims. *Id.* In the alternative, Callidus argues that Defendants' counterclaims are derivative of ESCO's claims resolved in bankruptcy, and are for this reason

impermissible. *Id.* Callidus further urges that if the Court grants its request for summary judgment as to Defendants' claims, it should also hold that Defendants have materially breached, and are liable under, the Jaross and Levy Guaranties. *Id.*

Defendants respond that the Amendment to the Original Agreement is not enforceable for lack of consideration, or, in the alternative, that its enforceability is affected by a failure of consideration, as a result of Callidus's breach of the Amendment. *See* Dkt. No. 88. Accordingly, Defendants disclaim the release language contained in this Amendment, and the allegation that the Amendment ratified Callidus's performance under the Original Agreement. *Id.* Yet they also claim, additionally and independently, that this language is legally ineffective. Specifically, Defendants argue that the Amendment's release language is insufficient under Texas law to bar their fraudulent inducement and unconscionability claims, and that Callidus cannot show facts demonstrating they effectively ratified the Original Agreement by signing the Amendment. *Id.* Defendants further argue that genuine issues of material fact exist as to their fraud, economic duress, and unconscionability claims sufficient to preclude the summary judgment Callidus seeks. *Id.* Defendants also deny that their claims are solely derivative of ESCO's bankruptcy claims, asserting instead that their claims as guarantors of ESCO's debts are personal and direct, and resulted in harms particular to them. *Id.* Finally, Defendants argue that Callidus has not even attempted to make out a breach of contract claim pursuant to the Jaross and Levy Guaranties that would justify granting summary judgment in Callidus's favor. *Id.*

i. Defendants' liability under the Jaross and Levy Guaranties (Count I of Callidus's Amended Complaint)

Callidus urges the Court to find Defendants are liable to Callidus on the Jaross and Levy Guaranties based on their "plain and unambiguous language." Dkt. No. 69. Defendants respond that such relief would be inappropriate on the basis of Callidus's motion for summary judgment, both because it fails to even name the essential elements of a breach of guaranty claim and because "there is evidence

before the Court that [Callidus] materially breached the [Original Agreement]." Dkt. No. 88 at 39-40.

In Texas, "[a] plaintiff who sues for recovery on a promissory note does not have to prove all essential elements for a breach of contract but rather need only establish the note in question, that the defendant signed it, that the plaintiff was the legal owner and holder thereof, and that a certain balance is due and owing on the note." *Rockwall Commons Associates, Ltd. v. MRC Mortg. Grantor Trust I*, 331 S.W.3d 500, 505 (Tex.App.–El Paso 2010, no pet.); *see also Lee v. Martin Marietta Materials Sw., Ltd.*, 141 S.W.3d 719, 720 (Tex.App.–San Antonio 2004, no pet.) ("To support a claim for breach of a guaranty, a party must show proof of (1) the existence and ownership of a guaranty contract; (2) the terms of the underlying contract by the holder; (3) the occurrence of the conditions upon which liability is based; and (4) the failure or refusal to perform by the guarantor.") Texas law "recognizes two distinct types of guaranty: a guaranty of collection (or conditional guaranty) and a guaranty of payment (or unconditional guaranty)." *Cox v. Lerman*, 949 S.W.2d 527, 530 (Tex.App.–Houston 1997, no pet.). "[A] guaranty of payment is an obligation to pay the debt when due if the debtor does not and requires no condition precedent to its enforcement against the guarantor other than a default by the principal debtor." *Chahadeh v. Jacinto Medical Group, P.A.*, 2017 WL 976071 at *3 (Tex.App.–Houston 2017.).

In support of its motion for summary judgment Callidus submits copies of the executed Jaross and Levy Guaranties, demonstrating the existence of these Guaranties and its ownership of them. Dkt. Nos. 69-1, 69-2. Callidus also submits copies of the Original Agreement and its Amendment, signed by the Jaross and Levy Guarantors. Dkt. No. 69-3. The Original Agreement specifically references the Guarantors' obligations under the contract as "limited guarant[ies] of payment" of "up to a maximum amount" of $2,000,000 in the case of the Jaross Guarantors, and $600,000 in the case of the Levy Guarantors. Dkt. No. 69-3 at 28. Additionally, the Jaross and Levy Guaranties each warrant that they are "a guaranty of payment as to monetary obligations and not of collection." Dkt. Nos. 69-1 ¶ 7, 69-2 ¶ 7. They

also note the Guarantors are not entitled to assert a setoff or reduction defense, and that their obligations will not be diminished in the event of ESCO's bankruptcy. Dkt. Nos. 69-1 ¶ 9, 69-2 ¶ 9. Finally, each Guarantor agrees to fulfill his obligation under the Guaranties, "until [ESCO's] obligations are indefeasibly paid in full," on demand and in the event of ESCO's default under the Agreement. Dkt. Nos. 69-1 ¶¶ 1, 3, 10, 69-2 ¶¶ 1, 3, 10. Callidus submits the affidavit of Wood attesting to ESCO's failure to deposit all funds advanced by Callidus into a Blocked Account, which constitutes a breach by ESCO of the Original Agreement. *See* Dkt. No. 29-1, Aff. of Wood at ¶ 11. Callidus also submits copies of letters it sent to ESCO and the Jaross and Levy Guarantors demanding payment of ESCO's debt as a result of ESCO's default. Dkt. Nos. 69-6 and 69-7. Finally, the fact that the Jaross and Levy Guarantors have failed to perform under the Guaranties is not a matter of disputed fact.

However, despite the undisputed fact that the Guarantors have failed to perform under the Guaranties, Callidus has not met its burden to show it is entitled to summary judgment as to the liability of the Jaross and Levy Guarantors. Defendants have pled a fraudulent inducement affirmative defense as to the enforceability of the Guaranties sufficient to survive summary judgment. For this reason, Callidus's motion for summary judgment as to Count I of its amended complaint is denied.

ii. Enforceability of the Amendment

Callidus seeks a declaration that Defendants' counterclaims and affirmative defenses are completely barred on the basis that the Amendment released certain claims Defendants might otherwise have raised, and ratified the Original Agreement. As an affirmative defense to enforcement of the Amendment's terms, Defendants argue that the Amendment lacked consideration at its inception, and, in the alternative, that a failure of consideration occurred when Callidus refused to perform under this Amendment. *See* Dkt. No. 88 at 14-16.

Consideration is a fundamental element of every valid contract." *Burges v. Mosley*, 304 S.W.3d 623, 628 (Tex.App.–Tyler 2010, no pet.). It consists of "either a

benefit to the promisor or a loss or detriment to the promisee." *Northern Natural Gas Co. v. Conoco, Inc.*, 986 S.W.2d 603, 607 (Tex. 1998). "Consideration is a present exchange bargained for in return for a promise." *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 496 (Tex. 1991). Accordingly, consideration is required not only to create an enforceable agreement, but also to render modifications to contracts enforceable. *Barnhill v. Moore*, 630 S.W.2d 817, 820 (Tex.App.–Corpus Christi 1982, no pet.) ("To modify an existing contract, consideration is required[.]") *See also Travelers Indem. Co. v. Edwards*, 451 S.W.2d 313, 317 (Tex.Civ.App.–El Paso 1970) ("[U]nder general principles of contract law, the modification of an existing contract imposing heavier burdens on one of the contracting parties must be supported by an additional consideration.")[15]

"A contract that lacks consideration lacks mutuality of obligation and is unenforceable." *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997). "Lack of consideration for a contract is an affirmative defense to its enforcement[.]" *McLernon v. Dynegy, Inc.*, 347 S.W.3d 315, 335 (Tex.App.–Houston 2011, no pet.) "A lack of consideration occurs when a contract, at its inception, does not impose obligations on both parties." *Cheung-Loon, LLC v. Cergon, Inc.*, 392 S.W.3d 738, 747 (Tex.App.–Dallas 2012, no pet.). Failure of consideration, too, is an affirmative defense. *See Philadelphia Indem. Ins. Co. v. White*, 490 S.W.3d 468, 485 (Tex. 2016); *McGraw v. Brown Realty*, 195 S.W.3d 271, 276 (Tex.App.–Dallas 2006) ("A complete failure of consideration constitutes a defense to an action on a written agreement.") "[F]ailure of consideration occurs when, because of some supervening cause arising after the contract is formed, the promised performance fails." *Cheung-Loon, LLC*, 392 S.W.3d at 747.

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[15] These principles apply equally to guaranties backing underlying contracts entered into contemporaneously with these contracts. *See First Commerce Bank v. Palmer*, 226 S.W.3d 396, 398 (Tex. 2007) ("If the guarantor's promise is given as part of the transaction that creates the guaranteed debt, the consideration for the debt likewise supports the guaranty."); *see also Barclay v. Waxahachie Bank & Trust Co.*, 568 S.W.2d 721, 724 (Tex.Civ.App.–Waco 1978, no pet.) ("It is not necessary that consideration for the guaranty pass to the guarantor, for it is sufficient consideration if the primary debtor receives some benefit.")

In all cases, "there is a presumption that a written contract is supported by consideration," and in general, the burden to show otherwise is on the party pleading lack or failure of consideration. *ABB Kraftwerke Aktlengesellschaft v. Brownsville Barge & Crane, Inc.*, 115 S.W.3d 287, 292 (Tex.App.–Corpus Christi 2003, pet. denied.); *see also Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 107 (Tex.App.–Dallas, 1987, no pet.) ("[W]here a contract of guaranty is in writing and signed by the guarantor, its existence imports a consideration.") Yet "parol evidence is admissible to show want or failure of consideration and establish the actual consideration given for the instrument." *McLernon*, 347 S.W.3d at 335.

1. Lack of Consideration

As to whether the Amendment lacked consideration, Defendants allege that the Amendment did not impose any new legal obligations on Callidus, but instead, mischaracterized Callidus's pre-existing duties under the Original Agreement as new concessions. Specifically, Defendants argue that ESCO, and by extension the Jaross and Levy Guarantors, "gained nothing by the First Amendment" because Callidus should have advanced $3,500,000 pursuant to Facility F under the Original Agreement, but purported to make this advance discretionary in the terms of the Amendment. Dkt. No. 88 at 25. It is Defendants' burden to show that the Amendment lacks consideration if they seek to avoid ratification and the release language the Amendment contains. At the summary judgment stage, as Callidus is the movant, Defendants are therefore required to show at least a genuine dispute of material fact as to whether the Amendment lacks consideration.

Section 5(a) of the Original Agreement requires that "[o]n the Effective Date, [Callidus] shall advance, and [ESCO] shall borrow the collective amount of Twenty-Two Million, Six Hundred Thousand Dollars ($22,600,000) under Facility B Loan, Facility C Loan, Facility D Loan, and Facility F Loan[.]" Dkt. No. 69-3 at 21, Ex. 3 at 16. The Original Agreement defines "Effective Date" as "[t]he date of satisfaction of all conditions precedent," which are enumerated and described at section 15(a) of the contract. Dkt. No. 69-3 at 30, Ex. 3 at 25. The "Facility F Loan" is defined at section 2(f) of the Original Agreement as "[a] demand single advance non-revolving

loan facility in the maximum principal amount of up to Three Million, Five Hundred Thousand Dollars ($3,500,000)." Dkt. No. 69-3 at 19, Ex. 3 at 14. The Amendment alters these terms. Specifically, it removes Facility F from section 5(a) of the Original Agreement. *See* Dkt. No. 69-5, Ex. 4. It also states that on the Effective Date Facility F is to be funded in the amount of "$1,111,208.85," and states that "all releases of funds under Facility F are discretionary." *See id.*

Callidus argues that "allowing Esco to immediately access an additional $1.11 million in funding" under the revised "Facility F Loan" provided by the Amendment constituted consideration.[16] Dkt. No. 69 at 11. Callidus additionally argues that because the Amendment established that all loans advanced by Callidus were "discretionary," and because all of the loans contemplated by the Original Agreement and Amendment were "demand loans" callable by Callidus at any time, its decision to loan money to ESCO and forbear calling its loans was consideration. Dkt. No. 91 at 2-3. Finally, Callidus asserts that consideration existed to support the Amendment as a result of "changes to the 'borrowing base' formulas set forth in the [Original Agreement] to make them more favorable to ESCO." *Id.* at 3.

Defendants argue that the Facility Loan F did not constitute consideration for the Amendment, as it was required under the Original Agreement. In support of this argument, they cite to the affidavits of Jaross Guaranty signatories R. and E. Jaross, each of whom state that "Plaintiff refused and failed to advance the $3,500,000" provided for by the Facility F Loan under the Original Agreement. *See* Dkt. No. 88 at 16; Dkt. No. 88-1 at 4, R. Jaross Aff. at ¶ 14; Dkt. No. 88-2 at 3-4, E.

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[16] In its reply brief filed subsequent to Defendants' response to its summary judgment motion, Callidus references a larger loan figure in arguing that the Amendment was supported by consideration. Namely, Callidus notes that "Plaintiff loaned ESCO an additional $3,910,852.22 million in reliance on the First Amendment" after it was signed, and cites to the affidavit of David Reese, Callidus President and COO to support this claim. Dkt. No. 91 at 2. Yet the affidavit and its attached Exhibit do not support the contention that the full $3.9 million advanced after the Amendment was signed was newly provided for by the Amendment, as opposed to by the terms of the Original Agreement. *See* Dkt. 91-2, Ex. 2, Aff. of Reese. As such, and given Callidus's initial summary judgment claim that the Amendment did not lack consideration because it "allowed ESCO to immediately access an additional $1.111 million in funding from [Callidus] ESCO would otherwise not have been able to access," Dkt. No. 69 at 11, the Court will account only for this $1.111 million in funding in considering whether loans made pursuant to the Amendment constitute consideration.

Jaross Aff. at ¶ 9. Defendants also cite to email correspondence between Callidus management and counsel for ESCO suggesting that by mid-September, 2014, more than two months after the Original Agreement was signed, Callidus had, by its own admission, not loaned funds under Facility F. *See* Dkt. No. 88-15 at 8 (Callidus 0076344). Indeed in this correspondence Callidus suggests that it had no obligation to loan these funds, on the basis that the "Effective Date" under the Original Agreement on which it was to transfer the Facility F Loan had never occurred, as a result of ESCO's alleged failure to satisfy certain "conditions precedent" under section 15(a) of the Original Agreement. *See* Dkt. No. 88-15 at 8, Ex. 15. Yet, as discussed herein, including at n.8, Callidus has not cited to materials in the record to support its claim that ESCO failed to satisfy any condition precedent under the Original Agreement.[17] Additionally, while in its summary judgment pleadings Callidus does not directly address Defendants' argument that it was required to advance funds under Facility F pursuant to the Original Agreement, Callidus admits in its amended complaint that it "did not fund Facility F" on the date it funded all other 'demand single advance non-revolving loan facilities' provided for in section 5(a) of the Original Agreement, and instead "ma[de] up the difference through the revolver," i.e. the Facility A Loan, presumably after the Amendment was signed. Dkt. No. 64 ¶¶ 18, 32. Accordingly, the Court finds that Defendants have carried their burden at this summary judgment stage to show that a genuine dispute of material fact exists as to whether any Facility F Loan funds transferred under the Amendment constitute consideration for the Amendment. *See McCallum Highlands v. Washington Capital Dus, Inc.*, 66 F.3d 89, 93 (5th Cir. 1995) ("In general, under the 'pre-existing duty rule,' an agreement to do what one is already bound to do cannot serve as 'sufficient consideration to support a supplemental contract or modification'") (quoting *Signs v. Bankers Life & Casualty Co.*, 340 S.W.2d 67, 73 (Tex.App.–Dallas 1960, no pet.); *see also Trevino & Gonzalez*, 949

[17] Indeed, materials cited by Defendants suggest that Callidus may not even have communicated to ESCO, when the company inquired, which condition precedent to the Original Agreement it allegedly failed to satisfy. *See* Dkt. No. 88-15 at 8 (Callidus 0076344).

S.W.2d 39, 42 (Tex.App.–San Antonio 1997, no pet.) ("The discharge of a duty one is already bound to perform is not consideration.")

Callidus also argues that the Amendment is supported by consideration because it "made a number of changes to the 'borrowing base' formulas set forth in the [Original Agreement] to make them more favorable to ESCO." Dkt. No. 69 at 11; *see also* Dkt. No. 91 at 3. In support of this statement Callidus points to three separate provisions of the Amendment: 1.2, 1.3, and 1.4. On review of the Amendment and the Original Agreement, the Court notes that section 1.3 of the Amendment does not actually revise, as it purports to, section 3(e) of the Original Agreement. Sections 1.2 and 1.4 of the Amendment, however, do contain revised terms that both appear to increase the borrowing base applicable to the revolving "Facility A Loan" contemplated by the Original Agreement.[18] Under Texas law, the restructuring of existing debt can confer a benefit constituting consideration on a guarantor. *See Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 107 (Tex.App.–Dallas 1987, writ ref'd n.r.e.).[19] Enlarging the borrowing base and consequently, the size of the loans potentially available to ESCO, might therefore feasibly constitute consideration under the Amendment. Yet Defendants have raised a question of fact as to whether the two provisions of the Amendment enlarging the borrowing base under Loan Facility A actually conferred a new benefit on ESCO, or simply accounted for funds Callidus was already bound to loan under the Original Agreement. Defendants admit that at least section 1.4 of the Amendment purported to make material changes to ESCO's borrowing base. Dkt. No. 88 at 18 ("*See* [Amendment] at 1.4 (adding towing costs to available funds under Facility A in [the Original Agreement].") But they allege that Callidus "agreed to do nothing by the

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[18] Specifically, section 1.2 amends section 3(d) of the Original Agreement to increase the percentage of nonferrous metal "Eligible Finished Goods Inventory" accounted for in calculating the maximum loan amount available to ESCO under the Facility A Loan, while section 1.4 amends section 3(g) of the Original Agreement to increase the percentage of costs resulting from the acquisition and towing of two ships, the USS Shenandoah and the USS Yellowstone, accounted for in this calculation. *Compare* Dkt. No. 69-5 at 5 with Dkt. No. 69-3 at 20.

[19] Often, such restructuring extends the repayment term for a loan obligation. *See First Commerce Bank*, 226 S.W.3d at 398-99; *McLernon*, 347 S.W.3d at 335. In this case, however, the Amendment actually shortened the repayment term for loans contemplated by the Original Agreement and Amendment. *Compare* Dkt. No. 69-5 at 3, section 1.6 with Dkt. No. 69-3 at 23, section 7.

[Amendment] other than what it was already contractually obligated to do (loan certain funds)." Dkt. No. 88 at 11.

To support this assertion, Defendants cite to the affidavit of R. Jaross, in which he states that if Callidus "had funded [Facility Loan F] of $3.5M and had advanced 80-85% of receivables under Facility A, ESCO would have had plenty of funds to purchase and tow the two Vessels [the USS Shenandoah and the USS Yellowstone] without any need for the amendment to the [Original Agreement]." Dkt. No. 88-1 at 5, R. Jaross Aff. at ¶ 19. Defendants also cite to an internal Callidus memorandum, Dkt. No. 109 at 21 (Callidus 0096813), and an email sent from Craig Boyer, a former Callidus Vice President, to Levy, Dkt. No. 88-5 at 2 (Callidus 008908), which both understate the amount of funding Callidus was obligated to advance under Facility A. *See* Dkt. No. 69-4 at 20, section 3(d). Callidus's borrowing base calculations under sections 1.2 and 1.4 of the Amendment directly affected the availability of funds to ESCO under Loan Facility A, and were revised in the Amendment in part to account for the advance of Funds under Facility F.[20] Accordingly, if the advance of funds under Facility Loan F cannot constitute consideration, neither can changes to the borrowing base made pursuant to sections 1.2 and 1.4 of the Amendment. The Court therefore finds that Defendants have identified genuine issues of material fact as to whether changes to the borrowing base calculations in sections 1.2 and 1.4 of the Amendment constitute consideration.

Callidus also argues that its decision to loan funds that were made universally "discretionary" by the terms of Amendment constitutes consideration. The language of the Amendment itself, however, does not support this argument. In support of its position, Callidus cites to section 6.1 of the Amendment, which reads, in pertinent part: "This is a discretionary loan, and Lender may place reserves upon any facility under the Loan Agreement[.]" Dkt. No. 69-5 at 6; Dkt. No. 69, Ex. 4 at 5.

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[20] Callidus acknowledges this relationship between the borrowing base calculations and funds available to Defendants under Facility Loans A and F in its amended complaint, where it states: "Per Section 2.1 of the Amendment, [Callidus] did fund Facility F by transferring money from the revolver [i.e. Facility Loan A] to Facility F, opening up availability for ESCO to purchase and tow the two new ships." *See* Dkt. No. 64 at ¶ 18.

Yet this section of the Amendment is entitled "Release and Covenant Not to Sue," and does not substantively address the terms of loans referenced elsewhere in the document or in the Original Amendment—whereas in other sections, Callidus's purported discretionary authority as a lender under the Amendment is referenced in much more specific terms, and in relation to particular, named loan facilities. Section 2.1, for instance, states that "all releases of funds under Facility F loan are discretionary by Lender," while section 1.5, which modifies section 5(a) of the Original Agreement, states that "Lender may in its discretion" advance funds under Facility Loans B through E. *See* Dkt. No. 69-5; Dkt. No 69, Ex. 4. By contrast, no particular reference to discretion is made in section 3(g) of the Original Agreement, as purportedly modified by section 1.4 of the Amendment, which establishes the maximum amount Callidus will loan under the Facility A Loan.[21] Under Texas law, a court construing a written contract must "consider the entire writing and attempt to harmonize and give effect to all the provisions of the contract by analyzing the provisions with reference to the whole agreement." *Hackberry Creek Country Club, Inc. v. Hackberry Creek Homeowners Ass'n*, 205 S.W.3d 46, 54 (Tex.App.–Dallas 2006). Where provisions of a contract "arguably conflict, Texas courts employ canons of construction as tools to harmonize them." *Matter of Pirani*, 824 F.3d 483, 494 (5th Cir. 2016). "Those canons include the rules that (1) specific provisions control over general provisions; (2) provisions stated earlier in an agreement are favored over subsequent provisions; and (3) the interpretation of an agreement should not render any material terms meaningless." *Id.* (citations omitted.) All three of these canons refute Callidus's interpretation of section 6.1 of the Amendment as a grant of overriding 'express discretion' to refuse to loan any funds under the Original Agreement and Amendment, as (1) this is a general provision in a contract containing more specific references to discretion, (2) which appears later in the Amendment than these other references, and (3) finding that this term

[21] Further, as Defendants note, the terms of this Facility A Loan were specifically revised in the Amendment to account for "one hundred percent (100%)" of the costs relating to the acquisition of the USS Shenandoah and the USS Yellowstone, "and for transportation thereof[.]" *See* Dkt. No. 69-5 at 3; Dkt. No 69, Ex. 4, Amendment at section 1.4.

applies universally to the entire Amendment would obviate the need for its other references to discretion. The Court therefore finds, as a matter of law, that Callidus's decision to make loans to ESCO pursuant to the Amendment notwithstanding section 6.1's references to discretion does not constitute consideration.

Finally, Callidus also alleges that its decision to forbear collecting on its loans to ESCO constitutes consideration. Under Texas law, "[a] forbearance of any legal right may be a consideration." *Security Drilling Co. v. Rathke Oil Co.*, 41 S.W.2d 1019, 1022 (Tex.Civ.App.–1931, pet. denied). Yet "forbearance by the creditor to sue is not consideration, unless based upon an agreement to that effect." *Travelers Indem. Co.*, 451 S.W.2d at 317 (citing *Wilkins v. Carter*, 19 S.W. 997 (Tex. 1892)) ("The mere omission of the creditor to sue is not sufficient, in the absence of such agreement, for in such case he may proceed at his pleasure.") Callidus has not established that it had demanded payment on any loan at the time the Amendment was signed, and by the terms of the Amendment Defendants represent that no default or "Event of Default" had occurred or was continuing as of the date it was signed. Dkt. No. 69-5 at 4, section 3.4 Additionally, the Amendment's terms do not provide for forbearance on the collection of any loan. *See* Dkt. No. 69-5, Ex. 4. The Court therefore finds, as a matter of law, that Callidus's decision to forbear on the collection of demand loans made to ESCO prior to signing the Amendment does not constitute consideration.

As Defendants have identified material, disputed fact issues as to each of the possible grounds for consideration supporting the Amendment Callidus has offered, they have met their burden at this summary judgment stage to support their invocation of the affirmative defense of lack of consideration.

2. Failure of Consideration

Defendants have also alleged that, even if the Amendment does not lack consideration, Callidus "materially breached" the Amendment when it did not advance funds to tow the USS Shenandoah and the USS Yellowstone—and that this alleged breach constituted a failure of consideration. Dkt. No. 88 at 25. Yet as the

Court has already found that Defendants have sufficiently identified a genuine dispute of material fact as to the enforceability of the Amendment pursuant to their lack of consideration defense, the Court declines to address here Defendants' additional allegation regarding failure of consideration as to the Amendment.

iii. Ratification and release

Callidus argues that the releases the Levy and Jaross Guarantors signed in the Amendment, and the Amendment's ratification of the Original Agreement, act as a "complete bar" to their counterclaims and affirmative defenses. Dkt. No. 69 at 7. Yet as Defendants have shown that a genuine dispute of fact exists as to the enforceability of the Amendment, Callidus is not entitled to summary judgment on its ratification or release claims. The Court declines at this summary judgment stage to find, as Callidus requests in its instant motion, that Defendants' counterclaims and affirmative defenses are per se barred as a result of their "express ratification of the Loan Agreement and their Guaranties, and/or by [their] express releases of those claims/affirmative defenses" under the Amendment. *See* Dkt. No. 69 at 6. Similarly, the Court declines to consider Defendants' argument that the release language of the Amendment is insufficient as a matter of Texas law to effectively bar any fraudulent inducement or unconscionability claims Defendants seek to bring, or to analyze here whether the Amendment did, as a matter of law, ratify the Original Agreement.

iv. Defendants' Fraudulent Inducement, Duress, and Unconscionability Counterclaims

In their amended counterclaims, Defendants bring fraudulent and inducement and breach of contract claims against Callidus, and seek declaratory judgment that the Original Agreement, its Amendment, the Jaross and Levy Guaranties, and other loan documents implicated in this litigation are void or unenforceable as a result of fraudulent inducement, economic duress, and unconscionability. Dkt. No. 67 at 13. Callidus argues that, separate from Defendants' release and ratification of their claims pursuant to the Amendment, Defendants cannot, as a matter of law, avail themselves of any fraudulent

inducement, economic duress, or unconscionability counterclaims or affirmative defenses with respect to the Original Agreement and the Amendment. Accordingly, Defendants must raise a fact issue as to each element of these claims for each to survive summary judgment.

1. Fraudulent Inducement

"Fradulent inducement . . . involves a promise of future performance made with no intention of performing at the time it was made." *Zorrilla v. Aypco Construction II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015); *see also Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986) ("A promise to do an act in the future is actionable fraud when made with the intention, design and purpose of deceiving and with no intention of performing the act.") "Fraudulent inducement 'is a particular species of fraud that arises only in the context of a contract.'" *Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 423 (Tex. 2015). "A party asserting that it was fraudulently induced into entering an agreement must show that (1) the other party made a material representation, (2) the representation was false and was either known to be false when made or made without knowledge of its truth, (3) the representation was intended to be and was relied upon by the injured party, and (4) the injury complained of was caused by the reliance." *In re Int'l Profit Associates, Inc.*, 274 S.W.3d 672, 678 (Tex. 2009). While typically the clear terms of a contract control its interpretation, in Texas "extrinsic evidence is permissible to show fraud in the inducement of a note" where there is "a showing of some type of trickery, artifice, or device employed by the payee." *Town North Nat. Bank v. Broaddus*, 569 S.W.2d 489, 494 (Tex. 1978).

Defendants' fraudulent inducement claim is based on the allegation that Callidus represented "it had no intention of owning ESCO's assets" when its true intent "was to strip ESCO of its assets." Dkt. No. 67 at 9. More specifically, Defendants allege that Callidus made extrinsic misrepresentations relating, for instance, to Callidus's alleged claims that it could loan funds quickly to ESCO without personal guaranties, as well as "misrepresentations in the loan documents themselves" relating to the amount of funds Callidus agreed to transfer under the

Original Agreement. *Id.* at 10. Callidus argues that such allegations cannot be sustained as a result of the Amendment's release and ratification of these claims, but does little to address Defendants' fraudulent inducement claim as to the Original Agreement.[22] Callidus does, however, detail clauses contained in the Jaross and Levy Guaranties in which Defendants "expressly waived all suretyship and guarantor's defenses generally," and agreed that their Guaranties were fully enforceable irrespective of claims ESCO could assert, including "fraud." Dkt. No. 69 at 10. Additionally, the Court notes that the Jaross and Levy Guaranties also contain a general merger clause, as well as a clause in which each Guarantor "represents and warrants that he or she has relied exclusively on his or her own independent investigation of Borrower and the collateral for his or her decision to guaranty" ESCO's debt. *See* Dkt. Nos. 69-1 at 5-7, 69-2 at 5-7.

"Though a valid fraudulent inducement claim generally precludes parties from relying on a contract's terms, including its releases, the contract itself may preclude a valid fraudulent inducement claim if it (1) clearly expresses the parties' intent to waive fraudulent inducement claims," or (2) "disclaims reliance on representations about specific matters in dispute." *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 369 (Tex.App.–Houston 2012, pet. granted, judgm't vacated w.r.m.). As to this second basis for finding that a contract precludes a fraudulent inducement claim, the Texas Supreme Court has established a standard for assessing the effect of "disclaimer-of-reliance" clauses that requires "clear and unequivocal language" to disclaim reliance on the representations of another party. *Italian Cowboy Partners, Ltd.*, 341 S.W.3d 323, 336 (Tex. 2011). In a series of cases, contract language explicitly referencing reliance, "either in terms of relying on the other party's representations, or in relying solely on one's own judgment," has been upheld as sufficient to serve as a release of fraudulent inducement claims as to the

[22] The Court will not consider any fraudulent inducement claim with respect to the Amendment here, as Callidus argues, and the Court agrees, that Defendants failed to adequately plead fraudulent inducement as to the Amendment in their Amended Counterclaims. *See* Dkt. No. 91 at 5, Dkt. No. 67 at 9-10.

contracts containing this language. *Id.; see also Allen*, 367 S.W.3d at 368-381 (collecting cases).

The identical clauses in the Jaross and Levy Guaranties in which each guarantor "represents and warrants that he or she has relied exclusively on his or her own independent investigation" in deciding to guaranty ESCO's debt seem, superficially at least, to satisfy this "disclaimer-of-reliance" standard. *See* Dkt. No. 69, Exs. 1, 2 ¶16. These clauses, for instance, reference the Guarantors' 'exclusive' 'reliance' on their own investigations of ESCO, and state that each Guarantor "agrees that he or she has sufficient knowledge of [ESCO] and the collateral to make an informed decision about this Guaranty, and that Lender has no duty or obligation to disclose any information in its possession or control about Borrower and the collateral to [each] Guarantor." *Id.* Yet they disclaim only those representations made by Callidus with respect to ESCO and its financial condition and collateral; they do not act as "all-embracing disclaimer[s]" as to "any representations or omissions" made by Callidus. *See Forest Oil Corp. v. McAllen,* 268 S.W.3d 51, 58 (Tex. 2008). Further, the Guaranties were signed concurrently with the Original Agreement, and were not designed primarily as releases or settlements of disputed claims.[23] This places them in contrast with prominent Texas cases finding fraudulent inducement claims barred on the basis of disclaimer-of-reliance clauses. *See Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997); *Forest Oil Corp. v. McAllen,* 268 S.W.3d 51, 61 (Tex. 2008). In particular, where an agreement "is the initiation of a business relationship," Texas contract law holds that it "should be all the more clear and unequivocal in effectively disclaiming reliance and precluding a claim for fraudulent inducement, lest we 'forgive intentional lies regardless of context.'" *Italian Cowboy*, 341 S.W.3d at 335 (quoting *Forest Oil,* 268 S.W.3d at 61).

Having established that Defendants' fraudulent inducement claims are not per se barred according to the terms of the Jaross and Levy Guaranties, the Court

[23] The fact that Callidus included specific release and ratification language in the Amendment, following a dispute between the parties over their obligations under the Original Agreement, only serves to underscore this point.

turns to the substantive issue of whether Defendants have raised sufficient fact issues on each element of fraudulent inducement as to the Original Agreement to survive summary judgment. Defendants' primary misrepresentation claims allege that Callidus represented to them that personal guaranties would not be required to close a deal with ESCO, that the deal would close quickly, that the Facility F Loan would be funded through the Original Agreement, and that Callidus would loan 80-85% of the value of inventory and receivables under Facility Loan A pursuant to the Original Agreement. *See* Dkt. Nos. 67, 88; Dkt. No. 88-1, R. Jaross Aff.. First, the Court finds here that any misrepresentations made by Callidus to Defendants with respect to personal guaranties and the timing of the deal cannot, standing alone, serve as the basis for a fraudulent inducement claim. Clearly, Defendants could not have relied on any such misrepresentations by the time they signed the Jaross and Levy Guaranties. Yet the Court finds that Defendants have raised a sufficient fact issue as to whether Callidus's alleged failure to fully fund Facility Loan F and Facility Loan A under the Original Agreement might, in concert with other circumstantial evidence, establish its fraudulent intent.

"Mere failure to perform contractual obligations as promised does not constitute fraud but is instead a breach of contract." *Kevin M. Ehringer Enterprises, Inc. v. McData Services Corp.*, 646 F.3d 321, 325 (5th Cir. 2011) (citing *Spoljaric,* 708 S.W.2d at 435.) Yet a breach of contract can still "be actionable as fraudulent inducement" when "coupled with a showing that the promisor never intended to perform under the contract." *Id. (citing Spoljaric,* 708 S.W.2d at 434). As "intent to deceive or defraud is not susceptible to direct proof, it invariably must be proven by circumstantial evidence." *Id.; see also Tony Gullo Motors, I, L.P. v. Chapa* 212 S.W.3d 299 (Tex. 2006) ("[W]hile breach alone is no evidence of fraudulent intent, breach combined with 'slight circumstantial evidence' of fraud is enough to support a verdict for fraudulent inducement.") Further, "[a]lthough a party's intent to defraud is determined at the time the party made the representation, it may be inferred from the party's subsequent acts after the representation is made." *IKON Office Solutions, Inc. v. Eifert*, 125 S.W.3d 113,

125 (Tex.App.–Houston 2003, no pet.) "Intent is a fact question uniquely within the realm of the trier of fact because it so depends upon the credibility of the witnesses and the weight to be given to their testimony." *Spoljaric*, 708 S.W.2d at 434.

Defendants cite to material in the summary judgment record that establishes a genuine dispute of material fact as to whether Callidus breached the Original Agreement with respect to the transfer of funds under the Facility F Loan, and the calculation of the maximum possible loan available to ESCO under the Facility A Loan. For instance, Guarantor R. Jaross states in his affidavit provided by Defendants that, in addition to Callidus's failure to advance "$3,500,000 under Term Facility F" pursuant to the Original Agreement, Callidus never met its obligation to fully fund the revolving Facility A Loan the contract provided for:

> In addition to the term advances, the Loan Agreement also included a revolving credit line, Facility A, which was tied to the value of the inventory and receivables. The Loan Agreement called for [Callidus] to loan 80-85% of the value of inventory and receivables. However, [Callidus] refused to comply with its own agreement, failing to ever advance 80-85%, instead only advancing 65% of inventory and receivables value, further shorting ESCO's working capital position.
> Dkt. No. 88-1 at ¶ 15, Aff. of R. Jaross

Affidavit evidence of this breach alone is not enough for Defendants' fraudulent inducement claim to survive summary judgment. But Defendants also introduce summary judgment evidence in support of their claims that Callidus never intended to perform under the Original Agreement. Namely, they submit an internal "Credit Approval Memorandum" signed by Callidus management on June 27, 2014—days before the execution of the Original Agreement—in which the percentage of the value of certain inventory Callidus represents it will advance under Facility Loan A is listed as 65-85% of receivables, not 80-85%, as section 3(d) of the Original Agreement requires. Dkt. No. 109 at 21 (Callidus 0096813). Defendants also submit email correspondence sent by former Callidus Vice President Craig Boyer to Guarantor Levy on October 17, 2014—months after the Original Agreement was signed—in which Boyer communicates to Levy that the lower of these percentages was "always supposed to be 65%." Dkt. No. 88-5 (Callidus 0089008). Texas courts considering fraud claims "have held a party's

denial that he ever made a promise is a factor showing no intent to perform when he made the promise." *Spoljaric*, 708 S.W.2d at 435. Taken together, therefore, Boyer's email and the internal Callidus memorandum Defendants provide could support an inference that Callidus never intended to honor the 80-85% calculation represented in the Original Agreement. As this calculation directly affected the maximum loan available to ESCO under Facility Loan A, a misrepresentation about the calculation of this loan would be material.

Defendants have established that a genuine dispute of material fact exists as to each element of fraudulent inducement. Regarding any material representation made by Callidus, Defendants cite to the affidavits of R. and E. Jaross and Levy, who state that Callidus's contractual promises and subsequent verbal assurances of performance on the Original Agreement (and then the Amendment) were misrepresentations.[24] *See* Dkt. Nos. 88-1, Aff. of R. Jaross; 88-2, Aff. of E. Jaross and 88-3, Aff. of Levy. As to whether Callidus knowingly made false representations, Defendants cite to the internal Callidus memorandum and Boyer email that raise fact issues as to whether Callidus intended to perform under the Original Agreement. Regarding whether Callidus intended Defendants to rely on its representations, the terms of the Original Agreement and verbal assurances made to ESCO about Callidus's interest in ESCO's continued profitability were clearly meant to be relied on by ESCO and the Jaross and Levy Guarantors, while the Guarantors have stated they did indeed rely on Callidus's representations in committing to personally guarantee ESCO's debt. *See* Dkt. Nos. 88-1, Aff. of R.

[24] While not all representations were uniformly made directly by Callidus to individual Guarantors, under Texas law "fraud jurisprudence has traditionally focused not on whether a misrepresentation is directly transmitted to a known person alleged to be in privity with the fraudfeasor, but on whether the misrepresentation was intended to reach a third person and induce reliance." *Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 578 (Tex. 2011). Here, Guarantors R. Jaross, E. Jaross, and Levy all state in affidavits that Callidus was aware Defendants were sharing its representations regarding the Original Agreement and Guaranties with each other as these documents were negotiated. *See* Dkt. Nos. 88-1, Aff. of R. Jaross at ¶ 25; 88-2, Aff. of E. Jaross at ¶ 3; and 88-3, Aff. of Levy at ¶ 26. For instance, R. Jaross states: "While Callidus may not have made every representation directly to me, I received such information and relied on it. At various times I communicated Callidus's representations to Andrew Levy and Elka Jaross, as part of the course of dealing with Callidus. Callidus knew I was sharing their representations with Mr. Levy and Mrs. Jaross." Dkt. No. 88-1, Aff. of R. Jaross at ¶ 25.

Jaross at ¶ 25; 88-2, Aff. of E. Jaross at ¶ 3; and 88-3, Aff. of Levy at ¶ 26. Finally, Defendants establish that their alleged injuries, including their alleged liability on the Guaranties themselves, were caused by their reliance on Callidus's representations. Dkt. No. 67 at 9-10; Dkt. No. 88-1, Aff. of R. Jaross at ¶¶ 27, 28; Dkt. No. 88-2, Aff. of E. Jaross at ¶¶ 19, 20; Dkt. No. 88-3, Aff. of Levy at ¶¶ 27, 28. Accordingly, the Court finds that Defendants have provided more than a "scintilla" of evidence extrinsic to the contract itself that raises a genuine dispute of material fact as to whether Callidus fraudulently induced Defendants to sign the Original Agreement and Guaranties sufficient for this claim and affirmative defense to survive summary judgment. *See In re Perry*, 423 B.R. 215, 283 (Bkrtcy. S.D. Tex. 2010).

2. Economic Duress

"Economic duress occurs when one party takes unjust advantage of the other party's economic necessity or distress to coerce the other party into making an agreement." *In re RLS Legal Solutions,* LLC, 156 S.W.3d 160, 163 (Tex.App.–Beaumont 2005, no pet.) "The elements of economic duress are: (1) a threat to do something that a party has no legal right to do; (2) illegal exaction or some fraud or deception; and (3) imminent restraint such as to destroy free agency without present means of protection." *ABB Kraftwerke,* 115 S.W.3d at 294 (citing *King v. Bishop*, 879 S.W.2d 222, 223 (Tex.App.–Houston 1999, no pet.); *see also Schlotsky's, Ltd. v. Sterling Purchasing and Nat. Distribution Co., Inc.*, 520 F.3d 393, 404 (5th Cir. 2008). The Texas Supreme Court has "characterized duress as the result of threats which render persons incapable of exercising their free agency and which destroy the power to withhold consent." *Dallas County Comm. College Dist. v. Bolton,* 185 S.W.3d 868, 877 (Tex. 2005). It serves as a defense to the enforcement of a contract. *In re RLS*, 156 S.W. at 163. "However, a contract will not be invalidated when the duress emanates from a third person who has no involvement with the opposite party to the contract." *King*, 879 S.W.2d at 224; *see also MCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 91, n.1 (5th Cir. 1995)

(citing the requirement that a party show its financial distress was caused by its partner in contract as an element of economic duress under Texas law.)

Defendants allege that the Original Agreement, Guaranties, and the Amendment were all signed under coercive economic pressure. Dkt. No. 67 at 15. Callidus responds that no agreement between the parties can be invalidated on this theory, as at all times "Defendants' free agency was not destroyed and they had a present means of protection." Dkt. No. 91. As to the Original Agreement, the Court finds that Defendants cannot avail themselves of an economic duress counterclaim or affirmative defense. Defendants admit that ESCO was in immediate need of funding when it initiated talks with Callidus because its prior lender cut off the company's flow of funds. Dkt. No. 29, Ex. A at ¶ 3. It was this prior lender, not Callidus, that put pressure on ESCO to identify a new source of financing, and its suit against ESCO for foreclosure that lent new urgency to ESCO's negotiations with Callidus. *See* Dkt. No. 88, Dkt. No. 29-1. Moreover, Callidus was well within its legal rights to negotiate the terms of the Original Agreement with ESCO and the Jaross and Levy Guarantors, including by delaying its execution and insisting on personal guarantees as a condition of lending. Prior to the execution of the Original Agreement and Guaranties, the parties had signed only a term sheet that did not bind Callidus to anything but the completion of a due diligence review in advance of a possible loan agreement with ESCO. *See* Dkt. No. 88-3 ("If this term sheet is acceptable to you we will commence with the completion of our due diligence review immediately on receipt of the signed copy of this term sheet together with the deposit as detailed below.") For all of these reasons, the Court finds that Defendants cannot avail themselves of an economic duress counterclaim or affirmative defense as to the Original Agreement.

Similar considerations preclude Defendants from proceeding with an economic duress counterclaim or affirmative defense with respect to the Amendment. Defendants claim that Callidus "had no legal right to continually and repeatedly refuse to advance amounts required under the Loan Agreement," Dkt. No. 88 at 33, and that ESCO, and by extension Defendants, would have faced

extreme financial consequences if they had failed to sign the Amendment, Dkt. No. 88 at 17, n.6. Yet even though Defendants have identified a dispute of material fact as to Callidus's obligations under the Original Agreement, Defendants have not cited to material in the record to sufficiently support their claim that any such breach 'imminently restrained' them or 'destroyed their free agency'. *See ABB Kraftwerke*, 115 S.W.3d at 294. Indeed, Defendants have not suggested or substantiated a claim that they had no reasonable alternative to signing the Amendment, such as filing suit against Callidus for breach of the Original Agreement. *See id.* at 505; *McCallum*, 66 F.3d at 93; *see also Palmer Barge Line, Inc. v. Southern Petroleum Trading Co., Ltd.*, 776 F.2d 502, 506 (5th Cir. 1985) (holding that the existence of an agreement negotiated between parties represented by counsel is strong evidence that no duress in fact existed).

3. Unconscionability

"Under Texas law, the party asserting unconscionability of contract bears the burden of proving both the substantive unconscionability and the procedural unconscionability of the contract at issue." *American Stone Diamond, Inc. v. Lloyds of London*, 934 F. Supp. 839, 844 (S.D. Tex. 1996). Procedural unconscionability arises at contract formation, and relates to the ability of one party to bargain freely and fairly, while substantive unconscionability restrains parties' abilities to enter into contracts that are so one-sided they are patently unreasonable. *Lindemann v. Eli Lilly and Co.*, 816 F.2d 199, 203 (5th Cir. 1987). In Texas, "[u]nconscionability has been found when there is a 'gross disparity in the values exchanged' and the 'grounds for substantive abuse [are] sufficiently shocking or gross to compel the court to intercede.'" *Besteman v. Petcock*, 272 S.W.3d 777, 789 (Tex.App.–Texarkana 2008) (quoting *Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 136 (Tex.App.–Waco 2005, pet. denied)). "The principles of unconscionability do not negate a bargain because one party to the agreement may have been in a less advantageous bargaining position." Instead, "[u]nconscionability principles are applied to prevent unfair surprise or oppression." *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 678 (Tex. 2006). "The ultimate question of unconscionability of a contract is one of law,

to be decided by the court." *Ski River*, 167 S.W.3d at 136 (Tex.App.-Waco 2005, pet. denied).

Defendants claim that the Original Agreement are that it was procured through economic duress; that it placed a lien on ESCO's assets; that it placed loans funds into a blocked account controlled by Callidus; and that it was a demand loan. Dkt. No. 88 at 36-37. Defendants' claim as to economic duress cannot lie, as the Court here has granted Callidus's instant summary judgment motion as to this counterclaim and affirmative defense. Thus Defendants have no procedural unconscionability claim with respect to the Original Agreement. Neither are the remainder of Defendants' claims with respect to the substantive unconscionability of the Original Agreement availing. Simply put, Defendants do not cite to any material or even argument suggesting that, given their commercial backgrounds and ESCO's particular financing needs, any of the aspects of the Original Agreement they object to is "so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." *In re Palm Harbor Homes*, 195 S.W.3d at 678.

Defendants' claims with respect to the Amendment are equally infirm. With respect to procedural unconscionability, Defendants allege that "they had no choice but to sign the First Amendment in order to prevent their own financial ruin." Dkt. No. 88 at 36. Defendants allege that Callidus "at the last possible moment" forced them to sign the Amendment, knowing that ESCO was in dire financial condition due to Callidus's alleged failure to advance loans required by the Original Amendment needed to purchase the USS Shenandoah and Yellowstone. *See* Dkt. No. 88 at 17. However procedural unconscionability also focuses on whether unequal bargaining power, a lack of access to counsel, and a lack of negotiation in coming to agreement force a disadvantaged party into an unacceptably one-sided contract. *See Ski River*, 167 S.W.3d at 137-38. There is no evidence in the summary judgment record that Defendants were ignorant of the terms proposed by the Amendment, that they lacked counsel in their negotiations with Callidus, or that they were without power to decline to sign the Amendment. Neither does the

Amendment as a whole suffer from substantive unconscionability. Defendants object in particular to a "usurious $900,000 fee" the Amendment required ESCO to pay, which has since been refunded by Callidus, *see* Dkt. No. 88-9, and in any case could simply be struck without invalidating the entire Amendment on substantive unconscionability grounds. They also object to the fact that the Amendment contains a "litany of variables and terms and conditions" and purports to make loans it authorized discretionary, but do not substantiate why these terms are so patently one-sided and unreasonable as to vitiate the Amendment. The Court therefore finds that Defendants' unconscionability counterclaims and affirmative defenses are unavailing as to both the Original Agreement and the Amendment.

v. ESCO's bankruptcy and the issue of derivative claims

Callidus additionally argues that Defendants' fraudulent inducement and breach of contract counterclaims are derivative of ESCO's claims resolved in bankruptcy, and are for this reason impermissible.[25] *Id.* Defendants, who were non-debtor parties uninvolved in their personal capacities in ESCO's bankruptcy proceedings, respond that they have "alleged, and shown by affidavit proof, personal loss of income and damage to the business reputation, each of which is substantial, personal and not derivative." Dkt. No. 88 at 39.

Under the Bankruptcy Code, a bankruptcy estate consists of, among other things, "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). "The phrase 'all legal or equitable interests of the debtor in property' has been construed broadly, and includes 'rights of action' such as claims based on state or federal law." *In re Seven Seas Petroleum, Inc.*, 522 F.3d 575, 584 (5th Cir. 2008). "If a cause of action belongs to the

[25] To the extent Callidus also asks the Court to find that Defendants are barred from raising the affirmative defenses of fraudulent inducement and breach of contract on the basis that ESCO released these affirmative defenses in bankruptcy, the Court declines to consider this request. Affirmative defenses raised by Defendants in their personal capacity are not causes of action that could, under any set of facts, be "owned by the bankruptcy estate." *See Hern Family Ltd. P'ship v. Compass Bank*, 863 F.Supp.2d 613, 620 (S.D. Tex. 2012); *see also Rucker v. Bank One Texas, N.A.*, 36 S.W.3d 649 (Tex.App.—Waco 2000). Defendants' fraudulent inducement and breach of contract affirmative defenses mirror their counterclaims for declaratory judgment, but the method of addressing these affirmative defenses is through analysis of their legal sufficiency on the merits.

[bankruptcy] estate, then the trustee has exclusive standing to assert the claim." *Schertz–Cibolo–Universal City, Indep. School District v. Wright (In re Educators Group Health Trust)*, 25 F.3d 1281, 1284 (5th Cir. 1994). The Bankruptcy Code empowers this authority because a trustee's "actions are designed to benefit the debtor's estate, which ultimately will benefit the debtor's creditors upon distribution." *In re E.F. Hutton Southwest Properties II, Ltd.*, 103 B.R. 808, 812 (Bank.N.D.Tex. 1989). Yet "the trustee lacks standing to bring personal claims of creditors. . . [as] personal claims are not property of the estate." *Id.*

"Whether a particular state law cause of action belongs to the estate depends on whether under applicable state law the debtor could have raised the claim as of the commencement of the case." *In re Educators Group Health Trust*, 25 F.3d at 1284. This inquiry is a matter of law, which "requires the court to 'look to the injury for which relief is sought and consider whether it is peculiar and personal to the claimant or general and common to the corporation and creditors.'" *In re E.F. Hutton Southwest Properties II, Ltd.*, 103 B.R. 808, 812 (Bank.N.D.Tex. 1989) (quoting *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1348 (7th Cir. 1987)). "If a cause of action alleges only indirect harm to a creditor (i.e., an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate." *In re Educators Group Health Trust*, 25 F.3d at 1284. Yet "it is entirely possible for a bankruptcy estate and a creditor to own separate claims against a third party arising out of the same general series of events and broad course of conduct." *In re Seven Seas*, 522 F.3d at 585.

Whether Defendants are precluded from bringing their fraudulent inducement and breach of contract counterclaims depends on whether, under Texas law, ESCO could have brought these claims directly on their behalf. Defendants assert that "as investors and/or shareholders in ESCO," and "as a result of being guarantors," they can "bring claims against Plaintiff for Plaintiff's wrongful actions against ESCO." Dkt. No. 67 at 9. This is true, however, only to the extent that the claims Defendants seek to bring are personal to them, as creditors and Guarantors.

Of their two counterclaims, the Court finds first, that Defendants' breach of contract counterclaim is derivative of any breach of contract claim ESCO might have raised as a debtor in property, and so belonged exclusively to ESCO's bankruptcy estate.[26] The injuries Defendants complain of as a result of Callidus's alleged breach of the Original Agreement—namely, general damages resulting from breach and "loss of compensation from ESCO"—are also derivative of ESCO's injuries. Dkt. No. 67 at 13. Yet the Court finds that Defendants' fraudulent inducement counterclaim is a direct claim that belongs solely to them, not to ESCO's bankruptcy estate. Defendants have adequately pled in their amended counterclaim that Callidus fraudulently induced them, as Guarantors, to personally guarantee ESCO's debt under the Original Agreement, and have identified personal damages they allege they have "suffered as a result of being guarantors to the agreement." Dkt. No. 67 at 11; Dkt. No. 88-1, Aff. of R. Jaross at ¶¶ 27, 28; Dkt. No. 88-2, Aff. of E. Jaross at ¶¶ 19, 20; Dkt. No. 88-3, Aff. of Levy at ¶¶ 27, 28. Further, Callidus has identified no relevant precedent that precludes Defendants from bringing this claim, while a number of cases arising under Texas law have explicitly allowed guarantors and other creditors to proceed with similar, and even identical, claims. *See, e.g., Siddiqui v. Fancy Bites, LLC*, 504 S.W.3d 349 (Tex.App.–Houston 2016); *In re Seven Seas*, 522 F.3d 575; *In re Educators Group Health Trust*, 25 F.3d 1281.

V. Conclusion

For the foregoing reasons, the Court:

- **GRANTS** Defendants' Opposed Motion for Leave to File Defendants' Sur-Reply in Opposition to Plaintiff's Motion for Partial Summary Judgment, Dkt. No. 97;
- **GRANTS IN PART AND DENIES IN PART** Defendants' Opposed Motion for Leave to Supplement Evidence in Opposition to Plaintiff's Motion for Summary Judgment, Dkt. No. 108;

[26] This is evident on the face of Defendants' amended complaint, which alleges that Callidus breached the Original Agreement while Defendants, "met all conditions precedent for performance of the provisions breached by Plaintiff and committed no breach prior to Plaintiff's breach on the effective date." Dkt. No. 67 at 12.

- **GRANTS IN PART AND DENIES IN PART** Defendants' Objections to Plaintiff's Summary Judgment Evidence, Dkt. No. 87;
- **DENIES** Defendants' Motion to Remove "Attorneys' Eyes Only" Designation from Certain Documents Produced by Plaintiff, Dkt. No. 101; and
- **GRANTS IN PART AND DENIES IN PART** Plaintiff's Motion for Summary Judgment as to Defendants' Amended Counterclaims/Affirmative Defenses and for Partial Summary Judgment as to Count 1 of Plaintiff's Amended Complaint, Dkt. No. 69.

The Court further informs the parties that while this Order is filed under seal in deference to the parties' Agreed Protective Order signed by the Court on December 28, 2016, Dkt. No. 94, it will be unsealed no sooner than ten (10) days following entry of this Order unless prior to this date Callidus files specific objections showing good cause why the Order should remain under seal.

It is so ORDERED.

SIGNED this 30th day of March, 2017.

Hilda Tagle
Senior United States District Judge

Appendix "H"

Jessie Hue

From: Kevin Baumann <kevin.baumann@whiteswanltd.com>
Sent: May 8, 2017 1:33 PM
To: Sheldon Title
Cc: Eric Sirrs
Subject: Re: Alken Basin discharge of receiver and information request

Gentlemen , Thank you for the reply . For ease I will point out some information within the Alken process .
1. Alken did retain Sinclair and Range in December of 2014 and both were terminated in writing in January of 2015 . Sinclair's reinstatement was on a Callidus demand and further Callidus counsel letter dated June 15 2015 whereby all shareholder rights were taken by Callidus and that Callidus had appointed Sinclair as Alken's sole director, for these reasons Sinclair was not independent of Callidus in any manner .

2. Sinclair's claims of marketing Alken are extremely suspect considering interested parties were ignored . Allan Anderson Alken's former owner was interested in acquiring , when he pushed Sinclair to negotiate and at the same time asked that his shop rent be resolved Sinclair told him to back off as we = Callidus have dozens of lawyers and you will be in court for years

Rick Bredy was an 18 year Alken employee , after Sinclair missed several meetings regarding an acquisition , Bredy was called in and fired for his interest and for communicating with me

A US equipment dealer was attempting to buy rigs . Sinclair ignored him as there was no commission in it for Sinclair

3. Why was the assignment of a lawsuit included in the MNP / Altair sale agreement but not mentioned in the public offering ?
This lawsuit has no realistic value to Altair although is most likely a liability and i believe this was added only to indemnify the parties . Most importantly why was White Swan not notified of the potential transfer and indemnification ??

4. To the best of my knowledge the Superintendent of Bankruptcy is not presently aware of the details surrounding an MOU relating to the drilling of a substantial amount of water wells in Egypt . As you know this was disclosed only to the final bidding parties . Can you please tell me who's decision it was not to re advertise the assets considering this event was material ?
FYI , Callidus boasts about this contract within the Q2 2016 earnings call , and since then have taken a 65 Million bump up on the Alken assets they controlled and acquired .

Feel free to call anytime

Kevin Baumann

403-505-7784

On May 6, 2017, at 7:19 AM, Sheldon Title <Sheldon.Title@mnp.ca> wrote:

Good morning Kevin,

Thank you for your email correspondence dated April 25, 2017. For your ease of reference, we respond to your numbered inquiries and the specific questions outlined therein, though we note we disagree with some of your statements. In this regard, MNP reserves all its rights and remedies.

1. The Receiver is unaware of the contents of any material which may have been the subject of the secured creditor's sealing request to the Court prior to our appointment as the Receiver of Alken Basin Drilling Ltd. ("Alken"). Regardless, prior to its appointment by the Court, we note that the Receiver is not in a position to provide notification to creditors.

As Proposed Receiver, however, MNP sought, and the Court ordered the sealing of certain appendices on the basis that it contained commercially sensitive information. These appendices were identified in the pre-filing report as being the appraisals requisitioned by Callidus in respect of Alken's assets and the Information Memorandum that was provided to prospective purchasers. The Sealing Order, dated April 4, 2016 (the "April 4th Sealing Order"), a copy of which is enclosed, orders that "The Confidential Appendices shall, until the discharge of the receiver or further order of the Court, be sealed and kept confidential, to be shown only to a Justice of the Court of Queen's Bench of Alberta". To date, the Receiver has not been discharged, and this information remains sealed. The April 4th Sealing Order provides that "any party may apply to set aside this Order upon providing Callidus and all other interested parties with five (5) days notice of such application."

2. Once the administration of the receivership of Alken is complete, the Receiver will provide the Court, creditors, and interested parties with its Report as a component of the Receiver's application to the Court of Queen's Bench of Alberta [Commercial List] (the "Court") seeking, among other things, approval of its Report, conduct, final distribution, and its discharge as Receiver. All parties on the Service List in this proceeding will be provided notice of this application. The application is scheduled to take place before the Court on Friday, May 19, 2017, at 10am MT. As is customary in insolvency sales transactions with a view to protecting the integrity of sale proceedings and the commercial interests of the parties involved, the Receiver obtained a Sealing Order from the Honourable Mr. Justice D.B. Nixon on May 4, 2017 (the "May 4th Sealing Order"), a copy of which is enclosed for your ease of reference, in connection with the sale of transaction contemplated by an asset purchase agreement (the "Sale Agreement") between the Receiver and Altair Water and Drilling Services Ltd in respect of certain assets of Alken. Please note that Paragraph 4 of the May 4th Sealing Order provides, in part, the conditions in respect of sealing as follows: "4. The Confidential Addendum, together with its Schedules, and the unredacted Sale Agreement, shall, until such time as the receiver confirms the transaction has closed by filing a Certificate with the Court substantially in the form of the Certificate attached to the Approval and Vesting Order, or further Order of this Honourable Court, be sealed and kept confidential, to be shown only to a Justice of the Court of Queen's Bench of Alberta..." In accordance with the May 4th Sealing Order, following the Closing of the sale transaction and satisfaction of other conditions, the Receiver filed the Receiver's Certificate with the Court on July 5, 2016, a copy of which is also enclosed for your ease of reference. As such, this material is publicly available for access. The Receiver may refer to information contained therein if it deems it to be relevant to its discharge application.

3. The Office of the Superintendent of Bankruptcy did not direct any changes to MNP's approach to receivership proceedings. We enclose, for your ease of reference, the Letter of the Office of the Superintendent of Bankruptcy Canada dated December 7, 2016, which responded

to your Letter to the OSB dated November 10, 2016.

Should you require any further information, please let us know.

Regards,
Sheldon

-----Original Message-----
From: Kevin Baumann [mailto:kevin.baumann@whiteswanltd.com]
Sent: April 25, 2017 1:29 PM
To: Eric Sirrs <Eric.Sirrs@mnp.ca>; Sheldon Title <Sheldon.Title@mnp.ca>
Subject: Alken Basin discharge of receiver and information request

Considering all that transpired during the Alken receivership , I believe that MNP as a professional corporation owes me an explanation regarding the following , being I was a guarantor of certain Alken debt that was blatantly ignored and subjected to what I believe was abuse of process .

1. certain items were sealed and confidential in the receivership at Callidus's clever request . Was one of them a consent to judgement by Scott Sinclair on behalf of Alken ? Which would explain a judgement as the first item on the docket . If this was the case why as a guarantor was I not notified of Sinclair's consent or no contest ?

2. When does MNP expect to be discharged as the receiver ? and will all sealed information be unsealed or will an application be required to do so?

3. Has this receivership which has been investigated by the superintendent of bankruptcy brought procedural changes to MNP when a receivership is controlled by a lender placement who's appointment by Callidus as Alken's sole director is confirmed by Callidus counsel letter of June 15 2015 ? It is disturbing that MNP knew full well that Matthew Sinclair was in no way independent of Callidus considering MNP acted for Callidus in concert with Sinclair whereby Sinclair represented Callidus in the Leader Energy NOI and bankruptcy . It is disturbing that my letter to MNP raising improprieties was not considered by MNP but only acknowledged to the court on transcript although was not disclosed to justice Nixon at a critical point when the assets were to be sold to the lenders own company and the receivership utilized an alleged debt number that included guarantees with no independent financial information

For Your review I have enclosed a recent Texas ruling denying summary judgement to Callidus, all familiar patterns with the exception that Esco did not have a lender placement with an OSC conviction and two names , and Callidus did not operate the business for a year like Alken. Breach of contract and fraudulent inducement findings may make for an interesting eventual jury trial in Texas .

I would like to point out from precedent research that a bankruptcy trustee is not immune or indemnified from certain actions by the court . Therefore if i am unsuccessful in defending the Callidus summary judgement attempt I will be seeking damages from MNP

A reply would be appreciated

This email and any accompanying attachments contain confidential information intended only

for the individual or entity named above. Any dissemination or action taken in reliance on this email or attachments by anyone other than the intended recipient is strictly prohibited. If you believe you have received this message in error, please delete it and contact the sender by return email. In compliance with Canada's Anti-spam legislation (CASL), if you do not wish to receive further electronic communications from MNP, please reply to this email with "REMOVE ME" in the subject line."

<Sealing Order re; Confidential Appendices to Pre-Filing Report of MNP Ltd., dated April 1, 2016.pdf>

<Sealing Order of Justice D.B. Nixon dated May 4, 2016.pdf>

<Callidus Capital - Alken Basin - Receiver's Certificate (filed July 5, 2....pdf>

<OSB Response to Baumann complaint final.pdf>

Appendix "I"

MNP LTD.
COURT APPOINTED RECEIVER OF
ALKEN BASIN DRILLING LTD.

FINAL STATEMENT OF RECEIPTS AND DISBURSEMENTS
AS AT APRIL 25, 2017

Receipts		
Advances from Secured Creditor	$	189,613
Asset Realizations (Note 1)		-
		189,613
Disbursements		
Receiver's Fees and disbursements (Note 2)		88,129
Gowlings Fees and disbursements (Note 2)		130,440
HST/GST paid		17,970
Bank Charges		50
Filing fees paid to Official Receiver		70
		236,658
Excess of Receipts over disbursements	**$**	**(47,045)**

Note 1
The Receiver completed an *en-bloc* sale of the company's assets in accordance with an order of the Court of Queen's Bench of Alberta dated May 4, 2016. The transaction was in the form of a credit bid, with no cash consideration.

Note 2
The fees and disbursements of the Receiver, including an accrual of $10,000 total $88,129 + HST.

The fees and disbursements of the Receiver's legal counsel, Gowlings WLG (Canada) LLP **("Gowlings"),** including an accrual of $10,000 total $130,440 + GST.

The fees and disbursements of the Receiver and Gowlings have been paid directly by the applicant, Callidus Capital Corporation ("Callidus"). The excess of the disbursements over receipts is also to be funded by Callidus.

Appendix "J"

COURT FILE NUMBER	1601-03126
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF(S)	CALLIDUS CAPITAL CORPORATION
DEFENDANT(S)	ALKEN BASIN DRILLING LTD.

Clerk's Stamp

AFFIDAVIT OF SHELDON TITLE

I, SHELDON TITLE, of the Town of Richmond Hill, in the Province of Ontario, **MAKE OATH AND SAY**:

1. I am Senior Vice-President of MNP Ltd. ("**MNP**") and as such have personal knowledge of the matters herein deposed.

2. MNP was appointed receiver (the "**Receiver**") of Alken Basin Drilling Ltd. ("**Alken**") pursuant to the Order of this Court made on April 1, 2016.

3. The Receiver has prepared the following Statements of Account in connection with its appointment as Receiver of Alken detailing its services rendered and disbursements incurred for the period from December 4, 2015 through to the date of April 25, 2017 (the "**Receiver's Invoices**"):

Date	**Period Covered**	**Fees/Exp.**	**GST/HST**	**Total**
		$	$	$
June 13, 2016	December 4, 2015 to May 4, 2016	57,814.79	7,515.92	65,330.71
May 9, 2017	May 5, 2016 to April 25, 2017	20,314.06	2,640.83	22,954.89
	Total	**$78,128.85**	**$10,156.75**	**$88,285.60**

Attached hereto and marked as **Exhibit "A"** to this my Affidavit, are copies of the Receiver's Invoices.

4. The average hourly rate in respect of the Receiver's Invoice is $384.09, as set out in the below summary.

Professional	Hours	Rate	Total
Sheldon Title	32.80	$575.00	$18,860.00
Alan Shiner	31.30	575.00	17,997.50
Eric Sirrs	27.00	485.00	13,095.00
Evan MacKinnon	45.70	267.00	12,201.90
Aleem Merali	25.80	156.00	4,024.80
Jessie Hue	15.80	199.14	3,146.40
Grant Bazian	4.30	590.00	2,537.00
Henry Louis	3.30	338.24	1,116.20
Julie Kennedy	3.40	303.00	1,030.20
Ashanthi Au	1.60	179.00	286.40
Shelly Gamma	1.20	164.00	196.80
Echa Odeh	0.90	202.00	181.80
Reina Ainsworth	1.10	160.00	176.00
Karen Aylward	0.40	375.00	150.00
Patricia Ball	0.90	157.00	141.30
Marcie Tran	0.10	159.00	15.90
Kirsten Green	0.10	96.00	9.60
	195.70	**$384.09**	**$75,166.80**

5. The Receiver's Invoices accurately reflects the time spent by MNP professionals and the hourly rates of those professionals.

6. This Affidavit has been prepared to support a motion to, *inter alia*, approve the fees and disbursements of the Receiver and its accounts.

SWORN before me at the City of)
Toronto, in the Province of Ontario)
this 9th day of May, 2017)
)
)
)

Sheldon Title

A Commissioner, etc.

Matthew Eric Lem, a Commissioner, etc.,
Province of Ontario, for MNP Ltd. and MNP LLP.,
Expires December 30, 2019.

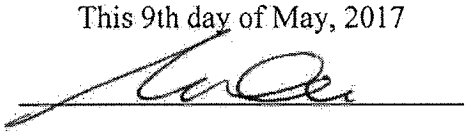
Attached is Exhibit "A"

Referred to in the

AFFIDAVIT OF SHELDON TITLE

Sworn before me

This 9th day of May, 2017



Commissioner for taking Affidavits, etc

MNP LTD

13, June 2016

Alken Basin Drilling Ltd.
c/o MNP ltd.
300-111 Richmond Street West
Toronto, ON M5H 2G4

INVOICE 7692682

MNP Ltd.
In its capacity as consultant to Alken Basin Drilling Ltd. and Court Appointed Receiver for the Period December 4, 2015 to May 6, 2016 as detailed in the attached time summary.

Fees	$ 55,621.80
Disbursements	2,192.99
Sub Total	57,814.79
HST	7,515.92
Total	**$ 65,330.71**

HST Registration Number: 103697215 RT 0001

MNP LTD.
IN THE MATTER OF THE RECEIVERSHIP OF ALKEN BASIN DRILLING LTD.
FOR THE SERVICE RENDERED FROM DECEMBER 4, 2015 TO MAY 4, 2016

DATE	PROFESSIONAL	HOURS	DESCRIPTION	HOURLY RATE	AMOUNT
04-Dec-2015	Alan Shiner	.60	conf call with P Taylor, C Boyer, S Sinclair, Will Roberts		
08-Dec-2015	Alan Shiner	.30	call with Tom Cumming, call S Title		
09-Dec-2015	Alan Shiner	.20	call with Scott Sinclair re appraisals; stalking horse form; lawyers		
14-Dec-2015	Alan Shiner	1.40	review financial info from Scott Sinclair		
16-Dec-2015	Alan Shiner	.60	call P Taylor and Will Roberts re process and timing; LVM Scott Sinclair		
17-Dec-2015	Alan Shiner	.40	call with E Sirrs re planning		
18-Dec-2015	Alan Shiner	.40	review draft court material		
21-Dec-2015	Alan Shiner	2.10	prepare for and attend meeting with S Sinclair; emails		
22-Dec-2015	Alan Shiner	.60	planning and conf call with E Sirrs and S Title		
23-Dec-2015	Alan Shiner	.40	call with Tom Cumming		
31-Dec-2015	Alan Shiner	.20	emails		
15-Jan-2016	Alan Shiner	.80	conf call with Tom Cumming, Scott Sinclair, Bill Roberts re planning appointment		
21-Jan-2016	Alan Shiner	.80	calls, planning		
26-Jan-2016	Alan Shiner	.80	potential purchaser review		
31-Jan-2016	Alan Shiner	.50	review report info; emails to Scott and Tom Cumming		
01-Feb-2016	Alan Shiner	.40	emails; conf callGowlings and MNP		
03-Feb-2016	Alan Shiner	.40	call with D Donnley		
03-Feb-2016	Alan Shiner	.40	review draft court report		
04-Feb-2016	Alan Shiner	.60	conf call Craig Boyer and Phil Taylor; call with S Title re time line		
10-Feb-2016	Alan Shiner	.20	call with Scott re stalking horse bid and court timing		
01-Mar-2016	Alan Shiner	.40	conf call P Taylor and C Boyer; email to T Cumming		
04-Mar-2016	Alan Shiner	.80	conf call C Boyer/S Sinclair; call with S Title; call with T Cumming		
08-Mar-2016	Alan Shiner	.80	conf call with Scott/Craig/Will/Phil/Tom re sale process; call with S Title; review draft appt letter re sale		
09-Mar-2016	Alan Shiner	.20	emails re engagement as sales agent		
10-Mar-2016	Alan Shiner	1.10	review sale documents; emails with T Cumming		
13-Mar-2016	Alan Shiner	.50	review draft pre report; email Scott		
15-Mar-2016	Alan Shiner	.40	emails and calls report/court date		
16-Mar-2016	Alan Shiner	.80	review draft material; conf call Title and Sirrs		
20-Mar-2016	Alan Shiner	.30	review emails; email S Title and call with S Title re sale process		
21-Mar-2016	Alan Shiner	.20	conf call Title and Sirrs re process		
24-Mar-2016	Alan Shiner	.30	emails; call C Boyer		
29-Mar-2016	Alan Shiner	.40	review emails from Scott; call with Scott re Middle East potential contract		
30-Mar-2016	Alan Shiner	.40	emails/calls re court date April 1 2016		
31-Mar-2016	Alan Shiner	.40	calls/emails including Jeff Oliver re court and disclosure		
02-Apr-2016	Alan Shiner	.60	emails re closing		
04-Apr-2016	Alan Shiner	.20	call with C Boyer re sales process and timing		
05-Apr-2016	Alan Shiner	.30	call with Scott Sinclair; call to Jeff Oliver re bill of sale LVM		
08-Apr-2016	Alan Shiner	.20	call with T Cumming		
11-Apr-2016	Alan Shiner	.30	call with Scott Sinclair re bill of sale, making draw request from Callidus, creditors from receiver appt to be paid, waiting for signing page re Egypt, break in over weekend-appears nothing stolen; emails		
12-Apr-2016	Alan Shiner	.40	emails re insurance		
13-Apr-2016	Alan Shiner	.80	calls and emails with P Taylor re Callidus credit bid; emails with e Sirrs re change date for receipt of offers		
18-Apr-2016	Alan Shiner	.80	email and call re offers		
19-Apr-2016	Alan Shiner	1.40	calls P Taylor; review draft application; email to P Taylor re offer; calls/emails with T Cumming; call S Title		
20-Apr-2016	Alan Shiner	.80	calls/emails re sale of assets P Taylor, T Cumming, S. Sinclair		
25-Apr-2016	Alan Shiner	.20	creditor call Locke Richards re landlord		
25-Apr-2016	Alan Shiner	.30	call from Scott re seized truck, confirmed with Scott post payables to be paid; call/email Evan MacKinion		
02-May-2016	Alan Shiner	.40	emails re closing; email from Scott; call S Title		
03-May-2016	Alan Shiner	.90	emails re closing and seized truck; call with Scott; call with P Taylor; call with Seth Mandel; review closing		
04-May-2016	Alan Shiner	1.40	emails re closing; call with Scott re closing and responsibilities		
		28.10		$ 575.00	$ 16,157.50
24-Mar-2016	Aleem Merali	30	Email correspondence, discussion with Eric and Evan re: site visit with Century on Tuesday in Red Deer.		
29-Mar-2016	Aleem Merali	8.00	Site visit to Alken Basin to conduct asset viewing for Century Services and Hilco. Includes travel time to and		
05-Apr-2016	Aleem Merali	8.00	Site visit to meet with prospective purchasers to show assets. Includes travel time to and from Red Deer.		
06-Apr-2016	Aleem Merali	9.50	Site visit to meet with prospective purchasers to show assets. Includes travel time to and from Red Deer. Discussions with management, Eric, Evan, Alken Basin staff, and representative of lender re: bailiff seizing		
		25.80		156.00	4,024.80
03-May-2016	Ashanthi Au	.30	Return call re: Receiver Package when creditor fax line was busy		
		.30		179.00	53.70
20-Jan-2016	Eric Sirrs	.20	Conference call		
21-Jan-2016	Eric Sirrs	4.00	Travel Edm to Red Deer (return). Meeting with management, tour office and yard, discussions re status of operations, utilization, staffing and marketing efforts.		
26-Jan-2016	Eric Sirrs	1.10	Drafting of CIM and Information Summary. Send to Gowlings for review. Emails to and from S Sinclair.		
29-Jan-2016	Eric Sirrs	.30	Email to S Sinclair re o/s information. Phone call with Gowlings re pre-filing report. Drafting of report		
01-Feb-2016	Eric Sirrs	.50	Drafting of sales process for pre filing report. Request and email PPR search.		
04-Feb-2016	Eric Sirrs	.20	Email edits to pre filing report to S Title.		
08-Feb-2016	Eric Sirrs	.20	Review spreadsheet re equipment. Email to S Title.		
04-Mar-2016	Eric Sirrs	.20	Update information summary and information memorandum, email to ST.		
09-Mar-2016	Eric Sirrs	.20	Emails from and to J Kennedy and S Title re changes to sales process.		
22-Mar-2016	Eric Sirrs	1.50	Distribution of sales process documents and response to inquires for CA. Finalizing IM and CA for distribution. Meeting with EM re tracker. Emails from and to interested parties, send out CA's and forward for tracking. Emails from and to Post Media. Emails to IT re LinkedIn set up.		
23-Mar-2016	Eric Sirrs	.50	Revisions to Pre-Filing Report to Court and appendix. Email signed copy of report to counsel.		
24-Mar-2016	Eric Sirrs	.30	Emails from and to partner re Information Package. Create original signed copy of report and request		
28-Mar-2016	Eric Sirrs	.40	Emails from and to interested parties re sales process. Email from and to Range Advisors re attendance at the property. Correspondence with National Driller and PSAC.		
30-Mar-2016	Eric Sirrs	.30	Phone call with potential purchaser re process. Email to National Driller re add. Email from and to A		
31-Mar-2016	Eric Sirrs	.20	Email from and to counsel re release of information.		
06-Apr-2016	Eric Sirrs	.20	Phone call with AM re bailiff at premises, email from and to Alken re bailiff. Meeting with EM re contacting bailiff. Request copy of court order.		
07-Apr-2016	Eric Sirrs	.20	Email from former owner re affidavit. Emails to and from AS.		
11-Apr-2016	Eric Sirrs	.20	Phone call with Myer Drilling, email to EM re meeting on site.		
12-Apr-2016	Eric Sirrs	.30	Phone call with Century Services. Email from and to TO office re efiling Notice and Statement. Email from and to S Sinclair re termination pay. Phone call with J Rondeau re client interested in assets.		

DATE	PROFESSIONAL	HOURS	DESCRIPTION	HOURLY RATE	AMOUNT
12-Apr-2016	Eric Sirrs	.30	Phone call with Century Services. Email from and to TO office re efiling Notice and Statement. Email from and to S Sinclair re termination pay. Phone call with J Rondeau re client interested in assets.		
13-Apr-2016	Eric Sirrs	.30	Phone call with crossborders drilling re sales process. Email contact information for Range Advisors. Email to interested parties re extension to deadline to submit offers. Review offer to purchase.		
15-Apr-2016	Eric Sirrs	.30	Emails from and to and phone call with S Sinclair re requested site visit.		
18-Apr-2016	Eric Sirrs	.20	Email from and to S Title re IM.		
19-Apr-2016	Eric Sirrs	.60	Drafting of 1st Report to Court.		
20-Apr-2016	Eric Sirrs	1.20	Drafting of First Report to Court;		
21-Apr-2016	Eric Sirrs	1.20	Drafting confidential addendum and report to court. Forward to counsel for review.		
22-Apr-2016	Eric Sirrs	.20	Phone call with Grande Prairie partner re status of assets.		
25-Apr-2016	Eric Sirrs	.80	Email from and to GP partner client re individual asset sales. Phone call with Janice (Alken) re vehicle being held by creditor. Email to and from counsel re report to court. Phone call with RCMP. Phone call with J Dixon re clients holding asset (x2). Phone call with Jeff from Alken re asset being held for payment. Email		
26-Apr-2016	Eric Sirrs	1.10	Updates to First Report and Confidential Addendum, finalize and send signed copies to counsel. Phone call with counsel re report to court. Phone call with counsel for Link Ventures. emails to counsel re asset held		
29-Apr-2016	Eric Sirrs	.20	Emails from and to counsel re equipment being held by creditor. Email from and to S Title re WEPPA.		
		17.10		485.00	8,293.50
22-Mar-2016	Evan MacKinnon	3.00	Calls from auctioneers/prospective purchasers throughout day. Provided CA. Reviewed and released Information Memorandum. Created and updated tracker of prospective purchasers. Discussed with E Sirrs.		
23-Mar-2016	Evan MacKinnon	1.00	Calls from prospective purchasers requesting CA/IM. Provided information and updated tracker.		
24-Mar-2016	Evan MacKinnon	2.50	Calls throughout day from prospective purchasers. Provided CA and IM. Set up dates/times for		
28-Mar-2016	Evan MacKinnon	3.00	Calls from prospective purchasers. Forwarded CA/IM. Discussions with A Merali setting up dates with purchasers for walkthroughs. Correspondence with J Delaney of Alken Basin.		
29-Mar-2016	Evan MacKinnon	2.00	Calls throughout day requesting information on Sales Process. Forwarded CA and CIP to prospective purchasers. Coordinated meetings on site and updated tracker.		
30-Mar-2016	Evan MacKinnon	.50	Calls from prospective purchasers, provided CA and IM.		
31-Mar-2016	Evan MacKinnon	1.00	Calls from prospective purchasers. Forwarded CA/IM. Updated tracker.		
04-Apr-2016	Evan MacKinnon	1.50	Calls from prospective purchasers throughout the day re: CA/IM.		
05-Apr-2016	Evan MacKinnon	1.50	Correspondence throughout day with prospective purchasers re: meeting on site, CA/IM.		
06-Apr-2016	Evan MacKinnon	.50	Correspondence with prospective purchasers, providing CA/IM. Updating tracker.		
06-Apr-2016	Evan MacKinnon	1.00	Correspondence with A Merali re: seizure of vehicles onsite by bailiff. Discussed with E Sirrs and contacted bailiff providing information.		
07-Apr-2016	Evan MacKinnon	6.50	Walkthrough of assets with prospective purchaser WHM Capital. Travel from Edmonton to Red Deer and		
11-Apr-2016	Evan MacKinnon	1.00	Follow up correspondence with prospective purchaser interested in purchasing trailers. Forwarded contact information to S Sinclair. Discussions with prospective purchasers looking for further information.		
12-Apr-2016	Evan MacKinnon	9.00	Meeting on site with C Federowich, D Cockx and K Myers for walkthroughs of property. Travel from Edmonton to Red Deer and back.		
13-Apr-2016	Evan MacKinnon	6.50	Meeting on site with B Lind of Ritchie Bros for walkthrough of assets. Travel from Edmonton to Red Deer		
21-Apr-2016	Evan MacKinnon	1.00	Calls throughout day from creditors re: sales process and Notice and Statement of Receiver.		
22-Apr-2016	Evan MacKinnon	1.00	Calls throughout day from creditors re: Notice and Statement. Call from Bison Capital re: Receivables		
25-Apr-2016	Evan MacKinnon	1.00	Correspondence with D Link and counsel re: alleged lien on vehicle and seizure of asset. Discussions with A Shiner and E Sirrs.		
25-Apr-2016	Evan MacKinnon	.50	Correspondence with creditors re: Notice and Statement of Receiver received.		
		44.00		267.00	11,748.00
07-Apr-2016	Henry Louis	1.00	Draft receiver's notice, review/edit creditor lists.		
08-Apr-2016	Henry Louis	.30	Edit Receiver's notice.		
		1.30		334.00	434.20
28-Mar-2016	Jessie Hue	.50	Prepare and request sale ad notice for the Globe and Mail.		
29-Mar-2016	Jessie Hue	.60	Revised ad and email revisions to the Globe and Mail.		
01-Apr-2016	Jessie Hue	.10	Request tearsheet.		
05-Apr-2016	Jessie Hue	.30	Arrange for the Globe and Mail ad to be paid by the firm.		
07-Apr-2016	Jessie Hue	2.60	Prepare the list of creditors for the Alken Notice, search for missing mailing address, set up website folder and corporate website form		
08-Apr-2016	Jessie Hue	4.50	Banking; review/analysis of information relating to compiling list of accounts payable for inclusion in s.246		
12-Apr-2016	Jessie Hue	2.10	Prepare update website corporate engagement, f/u with the TD bank account and file administration.		
13-Apr-2016	Jessie Hue	.30	Request for updating the website. T/c with TD.		
14-Apr-2016	Jessie Hue	.30	Ascend admin, enter banking info, f/u with TD re; online banking account, file admin.		
		11.30		198.00	2,237.40
30-Mar-2016	Julie Kennedy	1.20	Emails from/to E. Sirrs re: attending receivership court application; review documents; t/c w/ A. Shiner re: details of application; leave v/m for J. Oliver re: attending court application.		
01-Apr-2016	Julie Kennedy	2.20	Email to/from E. Sirrs and A. Shiner re: court application time; attend court application re: receiver's appointment; t/c w/ A. Shiner and leave v/m for E. Sirrs re: update re: same.		
		3.40		303.00	1,030.20
13-Apr-2016	Karen Aylward	.20	Call from OSB re: N&S and Receiver info		
		.20		375.00	75.00
24-Mar-2016	Reina Ainsworth	.40	Prepare cover letter to Gowlings LLP		
03-May-2016	Reina Ainsworth	.70	Printed off docs and cover for CRA, as per Evan. Two phone calls from CRA clarifying what information they		
		1.10		160.00	176.00
08-Dec-2015	Sheldon Title	.20	call with Shiner on engagement letter		
22-Dec-2015	Sheldon Title	.30	Planning call with Sirrs/Shiner		
11-Jan-2016	Sheldon Title	.20	follow up with Sirrs; Taylor on status		
12-Jan-2016	Sheldon Title	.50	conference call with Oliver, Cummings and Sirrs; email to Shiner to update		
18-Jan-2016	Sheldon Title	.40	call with Sirrs		
20-Jan-2016	Sheldon Title	.40	call with Shiner/Sirrs		
21-Jan-2016	Sheldon Title	1.20	Review of materials and start prep on pre-filing report		
26-Jan-2016	Sheldon Title	.20	review of options re: advertising email to Shiner on same		
02-Feb-2016	Sheldon Title	.50	Review of financial info		
03-Feb-2016	Sheldon Title	.80	Report preparation		
04-Feb-2016	Sheldon Title	.50	Email drafted to Lamie; call with Lamie; email from Sirrs		
04-Mar-2016	Sheldon Title	.20	call with Shiner		
08-Mar-2016	Sheldon Title	1.00	Prepare engagement letter and circulate for comments; call with Shiner		

DATE	PROFESSIONAL	HOURS	DESCRIPTION	HOURLY RATE	AMOUNT
			Update engagement letter and sent to Cumming for review; update engagement letter to reflect Taylor's		
09-Mar-2016	Sheldon Title	.40	comments; email with Sirrs re: timing		
10-Mar-2016	Sheldon Title	.30	emails with Shiner on report; email to Cumming on report;		
11-Mar-2016	Sheldon Title	.50	call with Tom Cumming re: report/other		
16-Mar-2016	Sheldon Title	2.00	internal conference call (.5), call with Cumming, review of affidavit, draft order, statement of claim and		
17-Mar-2016	Sheldon Title	.80	review with Cumming issues related to appointment order; discussion re: CASL; send info re: CASL;		
20-Mar-2016	Sheldon Title	.20	call with Shiner		
21-Mar-2016	Sheldon Title	1.00	calls with Sirrs/Shiner; emails with Lamie; review of documents; call with Lamie		
28-Mar-2016	Sheldon Title	.70	Globe Ad; call from Lyle of Site Energy and refer him to Eric Sirrs and email from Sirrs on status		
29-Mar-2016	Sheldon Title	.20	emails with Oliver, etc.		
31-Mar-2016	Sheldon Title	.20	emails with Sirrs		
02-Apr-2016	Sheldon Title	.20	discussion with Lamie re: request by Sinclair for increased borrowing limits		
03-Apr-2016	Sheldon Title	.20	email to Alan/Eric on my discussion with Lamie;		
05-Apr-2016	Sheldon Title	.30	Call with Lamie		
07-Apr-2016	Sheldon Title	.20	emails to Sirrs on file related matters (s.245 report, etc.)		
07-Apr-2016	Sheldon Title	.80	Request website be updated; review/revise of s 245/246 report; emails to/from Sirrs re: various		
08-Apr-2016	Sheldon Title	.30	Finalize s246 and opening of bank acct and other issues		
19-Apr-2016	Sheldon Title	.70	review of offer; call with Shiner		
20-Apr-2016	Sheldon Title	.40	review of draft report and provide comments thereon		
21-Apr-2016	Sheldon Title	.20	follow up with Sirrs on report/opinion; response to Aaron Johnson email		
24-Apr-2016	Sheldon Title	.10	email to Sirrs; review of opinion		
25-Apr-2016	Sheldon Title	.60	Call with Lamie on materials; review of revisions and comments thereto		
26-Apr-2016	Sheldon Title	.60	call with Frank Lamie on sale of property and call with Bruce Lyle on Hilco offer; emails re: final form of		
28-Apr-2016	Sheldon Title	.30	Call with Jonathan Kneger/ confirm with Eric his attendance		
28-Apr-2016	Sheldon Title	.20	Receipt of email on WEPPA		
29-Apr-2016	Sheldon Title	.10	Email exchange with Sirrs; email to/from Lamie		
02-May-2016	Sheldon Title	1.00	review of agreement & discussion with Lamie		
			call with Shiner; review of final A&V order and confirming email to Lamie on terms; review of Baumann		
04-May-2016	Sheldon Title	.80	letter and discussion with Lamie		
		19.70		575.00	11,327.50
04-Apr-2016	Shelly Gamma	.20	T/c w/ creditor; discussion w/ J. Kennedy re: same.		
18-Apr-2016	Shelly Gamma	.20	T/c w/ creditor.		
		.40		160.00	64.00
	Total Hours	152.70		Subtotal	$ 55,621.80
Disbursements					
Travel (attendance to Alken on March 29/30, April 5/6)					878.99
Advertisements:					
Globe & Mail Business to Business					1,058.57
BNP Media (National Driller)					45.00
Post Media (Calgary Herald)					200.48
Courier					9.95
					$ 2,192.99
				Total	$ 57,814.79

MNP LTD

Alken Basin Drilling Ltd.
c/o MNP Ltd.
300-111 Richmond Street West
Toronto, ON M5H 2G4

Invoice: 8012412

9 May, 2017

For Professional Services

MNP Ltd. In the matter of the receivership of Alken Basin Drilling Ltd. For the services rendered from May 5, 2016 to April 25, 2017		19,545.00
Disbursements		769.06
	Sub Total	20,314.06
Harmonized Sales Tax		2,640.83
	Total (CDN)	22,954.89

Invoices are due and payable upon receipt.

Account No: 0591241 ST
HST Registration Number: 103697215 RT 0001

A service charge of 1.5% per month (19.56% per annum) will be added to any invoice not paid within 30 days of billing.

MNP LTD.
IN THE MATTER OF THE RECEIVERSHIP OF ALKEN BASIN DRILLING LTD.
FOR THE SERVICE RENDERED FROM MAY 5, 2016 TO APRIL 25, 2017

DATED	PROFESSIONAL	HOURS	DESCRIPTION	Hourly Rate	Amount
05-May-2016	Alan Shiner	0.40	emails re closing		
09-May-2016	Alan Shiner	0.30	emails re closing and truck; call with Scott re employee termination		
17-May-2016	Alan Shiner	0.10	call back Locke Edwards LLB re sale of assets		
01-Jun-2016	Alan Shiner	0.20	call with Scott Sinclair re insurance claim re truck and commencing a lawsuit		
02-Jun-2016	Alan Shiner	0.10	email S Sinclair re Ford trucks		
05-Jul-2016	Alan Shiner	0.40	review Gowling invoices and email to P Taylor		
12-Sep-2016	Alan Shiner	0.20	call with P Taylor re status		
06-Apr-2017	Alan Shiner	0.70	review changes to draft report; call with Tom Cumming		
17-Apr-2017	Alan Shiner	0.60	update court report; emails with S Title		
24-Apr-2017	Alan Shiner	0.20	emails re final report		
		3.20		575.00	1,840.00
06-Jun-2016	Ashanthi Au	0.30	Listen to voicemail forwarded by Jessie, Call back creditor, Send Notice and Statement of Receiver to creditor		
29-Jul-2016	Ashanthi Au	0.10	WEPP		
02-Aug-2016	Ashanthi Au	0.30	WEPP		
11-Aug-2016	Ashanthi Au	0.30	Review and admit employee POC, Update TIF on Service Canada site and email confirmation to employee, Update WEPP tracker		
16-Aug-2016	Ashanthi Au	0.20	Listen to VM forwarded by Jessie and call back creditor		
22-Aug-2016	Ashanthi Au	0.10	WEPP Payment Confirmation		
		1.30		179.00	232.70
08-Jun-2016	Echa Odeh	0.20	Made amendments to receivership certificate and fixed formatting.		
11-Aug-2016	Echa Odeh	0.10	Completed July reconciliation		
15-Aug-2016	Echa Odeh	0.20	Telephone conversation with Canadian Credit Protection Corp, emailed copy of first report.		
31-Aug-2016	Echa Odeh	0.10	Emailed receivers certificate to ST.		
11-Nov-2016	Echa Odeh	0.10	Completed Oct Bank rec		
27-Jan-2017	Echa Odeh	0.10	Scan and save bank rec to the file.		
24-Mar-2017	Echa Odeh	0.10	Scan and save Jan 2017 bank rec		
		0.90		202.00	181.80
04-May-2016	Eric Sirrs	3.00	Travel to and from Calgary. Attend Court application.		
05-May-2016	Eric Sirrs	0.20	Email from and to counsel re email from former owner.		
06-May-2016	Eric Sirrs	0.20	Phone call with Sheldon Title re closing meeting.		
06-May-2016	Eric Sirrs	0.20	Email from and to counsel re application.		
09-May-2016	Eric Sirrs	3.50	Review and sign closing documents, return to counsel. Travel to and from Red Deer, attend meetings with employees re termination.		
10-May-2016	Eric Sirrs	0.20	Email from and to S Sinclair re RCMP contact information.		
12-May-2016	Eric Sirrs	0.40	Phone calls x2 with employee re termination pay and WEPPA program. Emails to and from S Title re administration of WEPPA.		
13-May-2016	Eric Sirrs	0.20	Email from and to S Title re Ford Vehicles.		
16-May-2016	Eric Sirrs	0.30	Emails from and to management and counsel re details on equipment held by Link Ventures.		
17-May-2016	Eric Sirrs	0.20	Email from and to counsel re application.		
19-May-2016	Eric Sirrs	0.30	Emails from and to counsel and Scott Sinclair re court application and truck held by creditor.		
20-May-2016	Eric Sirrs	0.20	Email from and to counsel. Email from and to party interested in equipment.		
30-May-2016	Eric Sirrs	0.50	Email to management re insurance claim. Emails from and to management re final payroll information. Meeting with EM re employee data. Emails to management re additional payroll information required.		
14-Jun-2016	Eric Sirrs	0.20	VM from employee. Email to and from S Title re WEPPA.		
20-Mar-2017	Eric Sirrs	0.30	Review draft report and provide comments to S Title.		
		9.90		485.00	4,801.50
05-May-2016	Evan MacKinnon	0.50	Correspondence with former owner K Baumann re: status of sale and concerns with current CEO.		
06-May-2016	Evan MacKinnon	0.30	Discussions with former employee re: monies owed. Requested further information be forwarded for review.		
02-Jun-2016	Evan MacKinnon	0.20	Correspondence with E Sirrs re: Ford release letters to be drawn up.		
28-Jun-2016	Evan MacKinnon	0.30	Provided update to creditor upon request.		
20-Jul-2016	Evan MacKinnon	0.20	Correspondence with S Title re: E Bruyea WEPPA claim.		
29-Jul-2016	Evan MacKinnon	0.20	Provided BN to S Title as requested.		
		1.70		267.00	453.90
23-Nov-2016	Grant Bazian	1.00	2 e.m.s from Terence Tang (OSB) & e.m. from Eric Sirrs & 3 e.m.s from + 2 e.m.s to + call with Sheldon Title & letter from Kevin Baumann with attachments (5 e.m.s from Kevin and 1 e.m. from Eric) RE: Kevin Baumann's unjustified complaints		
28-Nov-2016	Grant Bazian	0.50	2 e.m.s from + 1 e.m. to Sheldon Title & critique response to OSB RE: misguided complaint from Mr. Baumann		
30-Nov-2016	Grant Bazian	0.20	2 e.m.s from Terence Tang (OSB) & 2 e.m.s from Sheldon Title RE: MNP Ltd. response to OSB on Mr. Baumann's complaints		
07-Dec-2016	Grant Bazian	0.70	letter from Terrance Tang (OSB) & 2 e.m.s from + 2 e.m.s to + v.m. from + call with Sheldon Title RE: OSB response to Mr. Baumann's complaints/concerns about the Receiver and the secured lender (Callidus)		

MNP LTD.
IN THE MATTER OF THE RECEIVERSHIP OF ALKEN BASIN DRILLING LTD.
FOR THE SERVICE RENDERED FROM MAY 5, 2016 TO APRIL 25, 2017

DATED	PROFESSIONAL	HOURS	DESCRIPTION	Hourly Rate	Amount
09-Dec-2016	Grant Bazian	0.40	2 e.m.s from + 2 e.m.s to Sheldon Title & critique draft letter to OSB & & review final letter to OSB RE: comments of OSB to complainant		
12-Dec-2016	Grant Bazian	0.40	e.m. from Terrance Tang (OSB) & 2 e.m.s from + 2 e.m.s to + call with Sheldon Title RE: status of OSB request to reissue their letter to complainant and release of same to secured lender, etc.		
21-Dec-2016	Grant Bazian	0.20	2 e.m.s from + 1 e.m. to Sheldon Title & e.m. from Jack Steinman (OSB) RE: Callidus complaint on OSB response to complainant about Callidus		
28-Dec-2016	Grant Bazian	0.20	2 e.m.s from + letter from Roula Eatrides (OSB) & e.m. from + e.m. to Sheldon Title & revised letter from Terrence Tang (OSB) RE: response to complainant		
19-Jan-2017	Grant Bazian	0.30	4 e.m.s from Kevin Baumann (Alken) & e.m. from Eric Sirrs & 2 e.m.s from + 1 e.m. to Sheldon Title RE: Mr. Baumann's complaints to an Ombudsman		
25-Jan-2017	Grant Bazian	0.40	e.m. from + e.m. to + call with Sheldon Title RE: Ombudsman compliant		
		4.30		590.00	2,537.00
25-Apr-2017	Henry Louis	2.00	Update 2nd report.		
		2.00		341.00	682.00
12-May-2016	Jessie Hue	0.10	Bank rec.		
13-May-2016	Jessie Hue	1.00	Chq req from Imprest account, banking various postings., chq reqs filing remittance with the OSB. Bank rec.		
30-May-2016	Jessie Hue	0.30	Request to update website with court materials.		
06-Jun-2016	Jessie Hue	0.10	T/c with creditors.		
28-Jun-2016	Jessie Hue	0.30	Prepare letter and courier to C. Dennehy @ Gowling.		
19-Jul-2016	Jessie Hue	0.30	Review of disbursement, discussion with Sharon and request to post on WIP.		
28-Jul-2016	Jessie Hue	1.40	Update WEPP schedule, prepare WEPP notification, proof of claim, schedule A for the employee.		
29-Jul-2016	Jessie Hue	0.60	WEPP administration.		
16-Aug-2016	Jessie Hue	0.20	T/c with creditor.		
19-Apr-2017	Jessie Hue	0.20	T/c with creditor. Save and enter proof of claims and respond to various emails.		
		4.50		202.00	909.00
09-May-2016	Karen Aylward	0.20	complete and return CRA document for closing		
		0.20		375.00	75.00
09-May-2016	Kirsten Green	0.10	Transferring time from Initial Account - PPR Search - Alken Basin Drilling Ltd.		
		0.10		96.00	9.60
12-Oct-2016	Marcie Tran	0.10	WEPP Statement of Accounts		
		0.10		159.00	15.90
13-Jun-2016	Patricia Ball	0.10	May bank rec		
02-Aug-2016	Patricia Ball	0.10	June bank rec		
14-Sep-2016	Patricia Ball	0.10	Aug bank rec		
12-Dec-2016	Patricia Ball	0.10	November 2016 bank rec		
18-Jan-2017	Patricia Ball	0.10	Dec 2016 bank rec		
15-Feb-2017	Patricia Ball	0.10	Jan bank rec		
17-Mar-2017	Patricia Ball	0.10	Feb bank rec		
21-Apr-2017	Patricia Ball	0.20	march bank rec		
		0.90		157.00	141.30
09-May-2016	Sheldon Title	0.30	receipt of orders; email to Lamie; email from Sur; email to Sirrs re: receiver's certificate		
10-May-2016	Sheldon Title	0.40	Prepare receiver's certificate and call to Lamie		
13-May-2016	Sheldon Title	0.30	Dealing with Ford Credit's request for a release		
17-May-2016	Sheldon Title	0.20	call with Ford, email to Shiner		
30-May-2016	Sheldon Title	0.60	Call with Todd @ field law and email him MNP link re; materials and review with him status of unsecured creditor position; call from Ford Credit and to my advice that it ought to take steps to protect itself in view of order not requiring us to take possession and given lack of cooperation of Scott Sinclair in advising of location of vehicles		
31-May-2016	Sheldon Title	0.30	Finalize billing		
08-Jun-2016	Sheldon Title	0.30	finalization of Receiver's certificate		
14-Jun-2016	Sheldon Title	0.70	exchanges with Eric Sirrs on WEPPA claims		
15-Jun-2016	Sheldon Title	0.20	emails to Sirrs re: WEPPA		
24-Jun-2016	Sheldon Title	0.20	email to Eric re: WEPPA related issues		
28-Jun-2016	Sheldon Title	0.20	email from Lamie; signing receiver's certificate		
04-Jul-2016	Sheldon Title	0.30	call and email to Rod Grimshaw re: WEPPA claims		
05-Jul-2016	Sheldon Title	0.40	call with Rod on his lack of entitlement to claim under WEPPA due to ongoing employment; send him link via email		
06-Jul-2016	Sheldon Title	0.30	Call Earl and email to Eric/Evan		
15-Jul-2016	Sheldon Title	0.30	review of email from Eric Sirrs and email to Eric on same and the employee issue		
22-Jul-2016	Sheldon Title	0.20	discuss with, and then forward to Jessie Hue request that she process WEPPA related to Earl's claim		

MNP LTD.
IN THE MATTER OF THE RECEIVERSHIP OF ALKEN BASIN DRILLING LTD.
FOR THE SERVICE RENDERED FROM MAY 5, 2016 TO APRIL 25, 2017

DATED	PROFESSIONAL	HOURS	DESCRIPTION	Hourly Rate	Amount
26-Jul-2016	Sheldon Title	0.20	call to Earl		
29-Jul-2016	Sheldon Title	0.40	Review of Alberta legislation re termination pay; request business number from Edmonton office; email to Earl		
16-Aug-2016	Sheldon Title	0.10	call re: Pitney Bowes		
07-Nov-2016	Sheldon Title	0.10	email from gas cylinder provider and email to Sinclair on request for assistance		
22-Nov-2016	Sheldon Title	0.40	receipt of email from Sirrs advising of complaint, review of complaint, email to OR asking for particulars;		
23-Nov-2016	Sheldon Title	1.60	review of complaint; email Lamie and Kroeger; develop response		
24-Nov-2016	Sheldon Title	0.70	Call with Lamie on complaint		
28-Nov-2016	Sheldon Title	0.40	finalize draft response to complaint		
28-Nov-2016	Sheldon Title	0.30	Revisions to draft response to address Grant's comments; forward same to Lamie and email to Tang on delivery of response by this week		
07-Dec-2016	Sheldon Title	0.80	receipt of OSB response, call with Terence Tang re: same, call and email with Bazian re: response		
08-Dec-2016	Sheldon Title	0.20	call with Lamie on OSB response		
12-Dec-2016	Sheldon Title	0.60	receipt of response from Tang, email exchange with Bazian, call with Tang and follow up email to confirm authorization to release letter		
20-Dec-2016	Sheldon Title	0.30	Call with Steinman on complaint letter and mails to Steinman		
19-Jan-2017	Sheldon Title	0.30	Receipt of Baumann complaint to ombudsman as directed to Sirrs and review of ombudsman's website to determine whether it has jurisdiction over matter; email to Bazian and Chaiton		
28-Feb-2017	Sheldon Title	0.30	call with Lamie on planning for discharge		
19-Mar-2017	Sheldon Title	0.80	revisions to report; send to Sirrs for clarification on one point		
17-Apr-2017	Sheldon Title	0.40	further review of report; exchanges with Shiner		
		13.10		575.00	7,532.50
07-Jun-2016	Shelly Gamma	0.20	Receive Gowlings invoice; scan to S. Title and forward hard copy in the mail.		
04-Aug-2016	Shelly Gamma	0.20	T/c from Pitney Bowes re: receivership.		
16-Aug-2016	Shelly Gamma	0.20	Receive statement from Gowling WLG; scan to S. Title; email to Gowling re: change of address.		
23-Sep-2016	Shelly Gamma	0.20	Discussions w/ L. Fritsche, V. Kroeger re: Gowlings invoice; email to/from E. Sirrs and to A. Shiner re: same.		
		0.80		166.00	132.80
Hours and Fees		43.00			19,545.00

Disbursements

Travel (attendance to Court May 4, 2016, Edmonton to Calgary flight May 2, 2016)	494.06
Advertising Sales Process (JWN Energy)	150.00
OSB filing fee	70.00
Bank charges	55.00
	$ 769.06
Total Fees and Disbursements	$ 20,314.06

Appendix "K"

Form 49
Rule 13.19

Clerk's Stamp

COURT FILE NUMBER	1601-03126
COURT	Court of Queen's Bench of Alberta
JUDICIAL CENTRE	CALGARY
PLAINTIFF(S)	CALLIDUS CAPITAL CORPORATION
DEFENDANT(S)	ALKEN BASIN DRILLING LTD.
DOCUMENT	**AFFIDAVIT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Gowling WLG (Canada) LLP 1600, 421 – 7th Avenue S.W. Calgary, AB T2P 4K9 Telephone (403) 298-1938 / (403)298-1092 Facsimile (403) 607-4592 File No. A152711 **Attention: Tom Cumming / Frank Lamie**

AFFIDAVIT OF: Chris Dennehy

SWORN OR AFFIRMED ON: May 9, 2017

I, Chris Dennehy, of Alberta, affirm AND SAY THAT:

1. I am an associate at Gowling WLG (Canada) LLP **("Gowling WLG")** and as such have personal knowledge of the matters to which I hereinafter depose, except those matters that are based expressly upon information and belief, in which case, I verily believe such information to be true.

2. On April 1, 2016, by Order of the Court of Queen's Bench of Alberta, MNP Ltd. was appointed receiver (the **"Receiver"**) without security, of all of the assets, undertakings and properties of Alken Basin Drilling Ltd. pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*.

3. Gowling WLG has provided services as counsel to the Receiver and incurred disbursements thereon as described in the detailed invoices as set out on the following dates:

   (a) May 24, 2016;

   (b) May 31, 2016;

   (c) November 30, 2016;

   (d) December 31, 3016;

   each are attached hereto and marked as **Exhibit "A"** (the **"Account"**). Where the descriptions of the invoices are subject to solicitor-client privilege, they have been redacted accordingly.

4. The Account is a fair and accurate description of the services provided and the amounts charged by Gowling WLG for the periods outlined therein.

5. Annexed hereto and marked as **Exhibit "B"** to this my affidavit is a summary of the timekeepers whose time is recorded on the account, including their billable rates (the "**Summary of Account**").

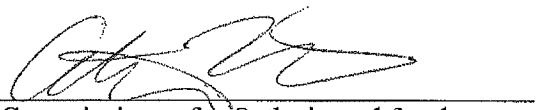
6. During the relevant period for the Account, Gowling WLG expended approximately 255.9 hours, for total fees of $117,441.00, plus GST, based on Gowling WLG's standard hourly billing rates in effect from time to time during the relevant period, as more particularly described in the Summary of Account. The hourly rates charged in the Account are the normal hourly rates charged by Gowling WLG for services rendered in respect of similar proceedings.

7. The disbursements listed in the Summary of Account are all *bona fide* disbursements incurred by Gowling WLG in providing legal services to the Receiver during the receivership proceedings.

8. Gowling WLG is requesting that its fees and disbursements be approved in the amount of $126,452.85, inclusive of GST.

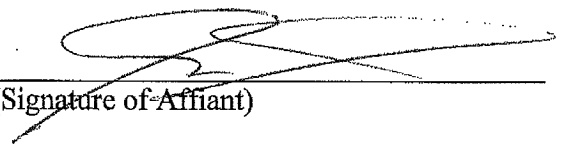
9. I swear this affidavit in support of the Receiver's motion for, among other things, the approval of the fees and disbursements of Gowling WLG as detailed in the Account and for no other or improper purpose.

AFFIRMED BEFORE ME at the City of Calgary, Alberta, this 9th day of May, 2017.



(Commissioner for Oaths in and for the Province of Alberta)

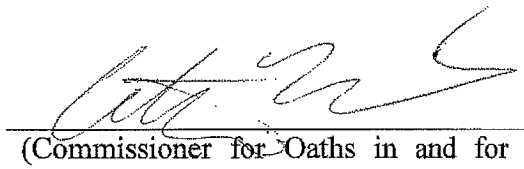
Anthony Mersich, Student-at-Law



(Signature of Affiant)

Chris Dennehy

This is Exhibit "A", referred to in the affidavit of Chris Dennehy sworn before me on May 9, 2017.



(Commissioner for Oaths in and for the Province of Alberta)

Anthony Mersich, Student-at-Law

GOWLING WLG

Invoice

MNP Ltd.
ATTN: Alan Shiner
C.A., Senior Vice-President
Suite 1500, 640 - 5th Avenue SW
Calgary AB T2P 3G4

May 24, 2016
INVOICE: 18452988

Our Matter: A152711 / 191739
RE: Receivership of Alken Basin Drilling Ltd.

		GST (5.0%)
Fees for Professional Services	**$69,207.50**	$3,460.38
Disbursements (Taxable)	1,466.68	
Disbursements (Non-Taxable)	82.35	
Other Charges (Taxable)	1,195.32	
Total Disbursements and Other Charges	**2,744.35**	133.10
Total Fees and Disbursements	71,951.85	
Total Taxes	3,593.48	3,593.48
Total Invoice	**75,545.33**	
Please remit balance due: In Canadian Dollars	**$75,545.33**	

Thomas S. Cumming Signed for & on behalf of Gowling WLG (Canada) LLP

Our services are provided in accordance with our Standard Terms of Business (www.gowlingwlg.com/TermsofBusiness), subject to any other written engagement agreement entered into between the parties.

GOWLING WLG (CANADA) LLP
1600, 421 7th Avenue SW,
Calgary, Alberta, T2P 4K9, Canada

T +1 (403) 298 1000
gowlingwlg.com

GST/HST: 11936 4511 RT

GOWLING WLG

May 24, 2016
INVOICE: 18452988

MNP Ltd.
Our Matter: A152711
Receivership of Alken Basin Drilling Ltd.

PROFESSIONAL SERVICES

Date	Hours	Timekeeper	Description
08/12/2015	0.30	Thomas S. Cumming	Discussion with A. Shiner;
05/01/2016	0.40	Thomas S. Cumming	Discussion with W. Roberts;
12/01/2016	2.10	Thomas S. Cumming	Conference call with MNP and lender's counsel;
13/01/2016	0.60	Thomas S. Cumming	Discussions with W. Roberts and J. Oliver;
15/01/2016	1.30	Thomas S. Cumming	Conference call with S. Sinclair, W. Roberts, A. Shiner, E. Shier and J. Oliver;
26/01/2016	0.20	Thomas S. Cumming	Review emails;
26/01/2016	2.10	Frank D. Lamie	Attendance to correspondence from S. Sinclair; attendance to correspondence and enclosure from J. Oliver; attendance to correspondence and enclosure from E. Sirrs; attendance to correspondence and enclosure from T. Cumming; attendance to meeting with and instructions from T. Cumming; attendance to review various correspondence and enclosures from J. Oliver and T. Cumming; attendance to meeting with D. Marechal; attendance to further meeting with T. Cumming; attendance to review draft material;
27/01/2016	2.40	Thomas S. Cumming	Review and comment upon draft materials; discussion with F. Lamie; discussion with S. Sinclair;
27/01/2016	5.10	Frank D. Lamie	Attendance to review confidential information memorandum; attendance to review stalking horse procedures; attendance to meeting with T. Cumming; attendance to correspondence and enclosure form T. Cumming; attendance to review draft receivership order and blackline; attendance to comments on draft receivership order; attendance to meeting with T. Cumming; attendance to meeting with instructions to R. Comstock; attendance to update from R. Comstock; attendance to phone call to E. Sirrs;
28/01/2016	1.10	Frank D. Lamie	Attendance to conference call with W. Roberts; attendance to correspondence with E. Sirrs; attendance to update to T. Cumming; attendance to correspondence with W. Roberts and S. Nelligan;
29/01/2016	3.20	Frank D. Lamie	Attendance to correspondence to E. Sirrs; attendance to phone call with E. Sirrs; attendance to review correspondence and enclosures from E. Sirrs; attendance to review information summary; attendance to review

Date	Hours	Timekeeper	Description
			information memorandum;
31/01/2016	2.10	Frank D. Lamie	Attendance to bidding procedures; attendance to stalking horse APA;
01/02/2016	0.30	Thomas S. Cumming	Discussion with F. Lamie;
01/02/2016	2.30	Frank D. Lamie	Attendance to meeting with T. Cumming; attendance to correspondence to A. Shiner and T. Cumming; attendance to conference call with A. Shiner, E. Sirrs, and T. Cumming; attendance to meeting with T. Cumming; attendance to conference call with A. Shiner, S. Title, E. Sirrs, and T. Cumming; attendance to correspondence from T. Cumming; attendance to correspondence with S. Nelligan; attendance to correspondence and enclosures from P. Taylor; attendance to correspondence with T. Cumming;
02/02/2016	1.60	Andrea Cowie	Conducting Corporate Registry, Personal Property Registry, Bank Act, Litigation (Civil and Appeal - BC), Land Title Office searches and forwarding search letters to WorkSafe BC Prevention and WorkSafe BC Assessment for Alken Basin Drilling Ltd., 1711760 Alberta Ltd., Kevin Baumann, Michael Baumann and Kevin Schmidt;
02/02/2016	1.30	Graeme Ireland	Reviewing loan and security documents; drafting security review opinion;
02/02/2016	0.80	Frank D. Lamie	Attendance to correspondence and enclosures to G. Ireland; attendance to meeting with and instructions to G. Ireland; Attendance to correspondence with G. Ireland; attendance to further meeting with and instructions to G. Ireland; Attendance to correspondence and update to MNP; attendance to review material;
03/02/2016	1.00	Nicole Dickie	Review searches and prepare search summary.
03/02/2016	5.10	Graeme Ireland	Reviewing loan and security documents; drafting security review opinion; reviewing search results; drafting search summary;
03/02/2016	0.60	Frank D. Lamie	Attendance to review correspondence from T. Cumming and S. Sinclair; attendance to meeting with and update form G. Ireland; attendance to further meeting with and instructions to G. Ireland; attendance to review correspondence and enclosure from G. Ireland;
04/02/2016	5.00	Graeme Ireland	Drafting security review opinion; reviewing searches; updating search summary;
04/02/2016	1.30	Frank D. Lamie	Attendance to conference call with T. Cumming and J. Oliver; attendance to correspondence and enclosure from R. Conway; attendance to meeting with and instructions to G. Ireland; attendance to voice mail from S. Title; attendance to review material; attendance to phone call to S. Title; attendance to phone call with S. Nelligan; attendance to

Date	Hours	Timekeeper	Description
			review correspondence and enclosure from G. Ireland; attendance to review enclosure from G. Ireland; attendance to conference call and update with S. Title; attendance to phone call to S. Nelligan; attendance to correspondence with S. Nelligan;
05/02/2016	2.40	Graeme Ireland	Reviewing search results; updating search summary;
05/02/2016	0.10	Frank D. Lamie	Attendance to voice mail form S. Nelligan; attendance to phone call to S. Nelligan;
12/02/2016	0.10	Frank D. Lamie	Attendance to conference call with S. Title; attendance to correspondence to D. Marechal; attendance to conference call with J. Oliver;
22/02/2016	0.30	Frank D. Lamie	Attendance to review draft security review;
29/02/2016	0.10	Frank D. Lamie	Attendance to review draft security review;
01/03/2016	0.40	Thomas S. Cumming	Discussion with A. Shiner and S. Title; message to W. Roberts;
06/03/2016	1.30	Thomas S. Cumming	Review and comment upon sales procedures;
07/03/2016	3.60	Thomas S. Cumming	Review and revise information package and agreement;
08/03/2016	3.80	Thomas S. Cumming	Conference call with Callidus; revise agreement;
08/03/2016	2.10	Frank D. Lamie	Attendance to review and comment on security review;
09/03/2016	0.80	Thomas S. Cumming	Review and comment upon engagement letter;
10/03/2016	0.60	Thomas S. Cumming	Review changes by A. Shiner to information memorandum; revise information memorandum;
11/03/2016	2.50	Thomas S. Cumming	Review and revise pre-filing report;
14/03/2016	0.70	Thomas S. Cumming	Discussions with A. Farber and W. Roberts;
14/03/2016	0.10	Frank D. Lamie	Attendance to conference call with J. Oliver;
15/03/2016	0.70	Thomas S. Cumming	Discussions with W. Roberts, S. Sinclair and A. Farber;
15/03/2016	0.50	Frank D. Lamie	Attendance to review various correspondence from T. Cumming, A. Shiner, and W. Roberts; attendance to review correspondence and enclosure from W. Roberts; attendance to correspondence from T. Cumming;
16/03/2016	1.60	Thomas S. Cumming	Review court materials; discussions with S. Title; emails to parties;
16/03/2016	1.70	Frank D. Lamie	Attendance to various correspondence from T. Cumming and W. Roberts; attendance to correspondence and enclosure from W. Roberts; attendance to review various

Date	Hours	Timekeeper	Description
			correspondence and enclosures from S. Nelligan; attendance to further correspondence and enclosures from S. Nelligan; attendance to correspondence and enclosure from S. Cumming; attendance to further correspondence and enclosure form T. Cumming;
17/03/2016	0.90	Thomas S. Cumming	Review and comment upon affidavit and order appointing receiver; revise order; discussion with S. Title;
17/03/2016	1.60	Graeme Ireland	Reviewing security review opinion; reviewing search results; updating security review opinion;
17/03/2016	1.10	Frank D. Lamie	Attendance to voice mail from T. Cumming; attendance to correspondence from B. Miller and T. Cumming; attendance to further correspondence from T. Cumming; attendance to review legislation; attendance to conference call with T. Cumming; attendance to correspondence from C. Oates;
18/03/2016	3.90	Thomas S. Cumming	Research electronic commerce issue; discussions with S. Title, C. Oates, S. Nelligan and J. Oliver; revise notice of court ordered sale;
18/03/2016	3.30	Graeme Ireland	Reviewing search results; updating security review opinion;
18/03/2016	1.10	Frank D. Lamie	Attendance to conference call with G. Ireland; attendance to conference call with J. Oliver; attendance to correspondence from S. Sinclair; attendance to correspondence to T. Cumming; attendance to detailed correspondence from C. Oates; attendance to correspondence from T. Cumming; attendance to further correspondence from C. Oates; attendance to correspondence and enclosures from T. Cumming; attendance to further correspondence and enclosures from T. Cumming; attendance to further correspondence and enclosure from T. Cumming; attendance to further correspondence and enclosure from T. Cumming; attendance to correspondence with J. Oliver;
18/03/2016	0.70	Christopher Oates	Review matters related to the use of a third party mailing list and CASL compliance for a Receivership for our T. Cummings;
19/03/2016	0.10	Frank D. Lamie	Attendance to correspondence and enclosure from S. Title;
21/03/2016	0.40	Graeme Ireland	Updating security review opinion;
21/03/2016	5.20	Frank D. Lamie	Attendance to conference call with S. Title; attendance to correspondence to S. Nelligan; attendance to correspondence and enclosure from S. Title; attendance to correspondence to S. Title; attendance to conference call with S. Nelligan; attendance to further correspondence to S. Title; Attendance to conference call with S. Title; attendance to phone call with S. Nelligan; Attendance to meeting with G. Ireland; attendance to correspondence and enclosures to G. Ireland; Attendance to correspondence and enclosures from S. Nelligan; attendance to correspondence to S. Nelligan; attendance to correspondence and enclosures from S.

Date	Hours	Timekeeper	Description
			Nelligan; attendance to correspondence and enclosures to S. Title; attendance to conference call with C. Mason; attendance to correspondence and enclosures from S. Nelligan; attendance to correspondence and enclosures to S. Title ; attendance to meeting with and instructions to R. Comstock; attendance to correspondence and enclosures to R. Comstock; attendance to correspondence and enclosure from S. Nelligan; attendance to correspondence and enclosure from R. Comstock; attendance to correspondence and instructions to R. Comstock; attendance to meeting with and further direction to R. Comstock;
22/03/2016	1.10	Frank D. Lamie	Attendance to correspondence from T. Cumming and S. Sinclair; attendance to correspondence from J. Oliver; attendance to correspondence to T. Cumming and J. Oliver; attendance to correspondence and enclosure from S. Title; attendance to correspondence form S. Nelligan; attendance to correspondence to S. Nelligan; attendance to correspondence to J. Oliver; attendance to correspondence and enclosure from E. Sirrs; attendance to correspondence and enclosure from D. Rodziniak;
23/03/2016	0.30	Frank D. Lamie	Attendance to correspondence to D. Rodzinyak; attendance to correspondence from J. Oliver; attendance to correspondence from S. Title; attendance to further correspondence from J. Oliver; attendance to correspondence and enclosures form D. Marechal; attendance to further correspondence from D. Marechal;
24/03/2016	0.30	Frank D. Lamie	Attendance various correspondence with S. Title; attendance to correspondence and enclosures from S. Title; attendance to correspondence and enclosure from R. Comstock; attendance to correspondence and enclosure to S. Title and E. Sirrs;
29/03/2016	0.20	Frank D. Lamie	Attendance to correspondence with J. Oliver; attendance to correspondence from J. Oliver; attendance to correspondence from E. Sirrs; attendance to further correspondence from J. Oliver;
30/03/2016	3.30	Frank D. Lamie	Attendance to correspondence and instructions to R. Comstock; attendance to correspondence and enclosures from R. Comstock; attendance to meeting with and instructions to F. Sasso; attendance to correspondence form J. Oliver ; attendance to review material in preparation for Court; Attendance to review material; attendance to further correspondence and enclosure to F. Sasso;
31/03/2016	8.60	Frank D. Lamie	Attendance to correspondence to R. Comstock and F. Sasso; attendance to research; attendance to review material in preparation for Court; attendance to meeting with and instructions to F. Sasso; attendance to correspondence to J. Oliver; attendance to correspondence and enclosures

Date	Hours	Timekeeper	Description
			from R. Comstock; attendance to review notice of application regarding sealing of confidential material; attendance to review order regarding sealing of confidential material; attendance to conference call with and instructions to R. Comstock; attendance to correspondence with D. Marechal; attendance to correspondence from A. Shiner; attendance to conference call with J. Oliver; attendance to conference call with J. Oliver; attendance to voice mail from J. Oliver; attendance to correspondence and enclosure from R. Comstock; attendance to correspondence from D. Marechal; attendance to correspondence and enclosure from W. Roberts; attendance to further correspondence with J. Oliver; attendance to conference call with J. Oliver; attendance to voice mail from J. Oliver; attendance to review material in preparation for Court;
01/04/2016	9.60	Frank D. Lamie	Attendance to various correspondence with and instructions to D. Marechal; attendance to various correspondence from W. Roberts; attendance to various correspondence from D. Marechal; attendance to meeting with and instructions to R. Comstock; attendance to meeting with and further instructions to D. Marechal; attendance to review correspondence from W. Roberts; attendance to preparation for Court; attendance to meeting with W. Roberts and S. Sinclair; attendance in Court before Justice Nixon; attendance to issuance of Court Orders; attendance to correspondence with and instructions to D. Marechal; attendance to correspondence and enclosures from D. Marechal; attendance to further correspondence with D. Marechal; attendance to correspondence with S. Title;
02/04/2016	0.20	Frank D. Lamie	Attendance to correspondence with S. Title; attendance to conference call with S. Title;
04/04/2016	2.30	Frank D. Lamie	Attendance correspondence from S. Title; attendance to conference call with and instructions from S. Title; attendance to correspondence from W. Roberts; attendance to correspondence from K. Lavery; attendance to correspondence from S. Title; attendance to correspondence from W. Roberts; attendance to instructions to R. Comstock; attendance to correspondence with S. Title; attendance to further correspondence from W. Roberts; attendance to further correspondence and enclosures from W. Roberts; attendance to further correspondence with R. Roberts; attendance to correspondence and enclosure from R. Comstock; attendance to further correspondence from W. Roberts; attendance to further correspondence and enclosures from W. Roberts; attendance to correspondence with S. Title; attendance to instructions to R. Comstock;
05/04/2016	1.60	Frank D. Lamie	Attendance to voice mail from S. Title; attendance to conference call with S. Title; attendance to correspondence

Date	Hours	Timekeeper	Description
			from J. Oliver; attendance to voice mail from A. Shiner; attendance to correspondence and enclosures to S. Title and A. Shiner; attendance to correspondence and enclosures from W. Roberts; attendance to further correspondence with W. Roberts; attendance to correspondence and enclosures from R. Comstock; attendance to correspondence and enclosure from W. Roberts; attendance to phone call to W. Roberts; attendance to correspondence to W. Roberts; attendance to conference call with and instructions from S. Title; attendance to material;
06/04/2016	3.70	Frank D. Lamie	Attendance to review material; attendance to blacklines; attendance to consents; attendance to correspondence to service list; Attendance to various correspondence with W. Roberts; attendance to draft bill of sale; attendance to correspondence and enclosures to T. Cumming; Attendance to review and revise Court order; attendance to correspondence and various enclosures to service list; attendance to correspondence and enclosure from W. Roberts; attendance to voice mail to A. Shiner; attendance to voice mail from A. Shiner; attendance to phone call with A. Shiner; attendance to bill of sale; Attendance to correspondence from J. Oliver and A. Shiner; attendance to voice mail to A. Shiner; attendance to phone call with A. Shiner; attendance to correspondence and enclosure from W. Roberts;
07/04/2016	1.60	Thomas S. Cumming	Review and revise bill of sale; review email from K. Bauman; discussion with A. Shiner;
07/04/2016	0.90	Frank D. Lamie	Attendance to review material; attendance to correspondence and enclosures to T. Cumming; attendance to material; attendance to correspondence and enclosures to service list; attendance to correspondence and enclosure from J. Hanley; attendance to correspondence and enclosures from T. Cumming;
08/04/2016	0.20	Thomas S. Cumming	Discussions with F. Lamie and A. Shiner;
08/04/2016	0.70	Frank D. Lamie	Attendance to correspondence with A. Shiner; attendance to correspondence with T. Cumming; attendance to correspondence and enclosures from T. Cumming and K. Baumann; attendance to attendance to correspondence and material to T. Cumming; attendance to correspondence with R. Comstock regarding Court communication; attendance to further correspondence from R. Comstock; attendance to further correspondence and enclosure from T. Cumming;
08/04/2016	1.30	Frank D. Lamie	Attendance to correspondence and enclosures to Service List; attendance to correspondence with J. Oliver; attendance to voice mail from A. Tralenberg; attendance to

Date	Hours	Timekeeper	Description
			draft material in support of Court Order; attendance to phone call to A. Tralenberg; attendance to correspondence and instructions to R. Comstock; attendance to correspondence from R. Comstock; attendance to conference call with T. Cumming; attendance to review material; attendance to correspondence and enclosures to T. Cumming; attendance to correspondence with A. Shiner; attendance to correspondence from G. Tralenberg; attendance to further and various correspondence with and instructions to R. Comstock;
11/04/2016	5.50	Frank D. Lamie	Attendance to conference call with A. Tralenberg's office; attendance to further conference call with A. Tralenberg; attendance to phone call with Justice Nixon's office; attendance to draft material in connection with Amended and Restated Receivership Order; attendance to voice mail from G. Tralenberg; attendance to correspondence from F. Sasso; attendance to correspondence from G. Tralenberg; attendance to meeting with and instructions to F. Sasso; attendance to further correspondence with G. Tralenberg; attendance to consent of K. Baumann; attendance to conference call with A. Tralenberg; attendance to correspondence from F. Sasso; attendance to draft letter to Justice Nixon; attendance to prepare package for Justice Nixon; attendance to phone call to Justice Nixon's Office; attendance to package and instructions to R. Comstock; attendance to phone call with and various further instructions to R. Comstock;
14/04/2016	0.30	Thomas S. Cumming	Discussion with J. Oliver;
15/04/2016	0.60	Thomas S. Cumming	Check timing for court appearances; email exchange with A. Shiner; prepare application for sale;
16/04/2016	0.40	Thomas S. Cumming	Emails to the group regarding timing of application; review status;
18/04/2016	2.00	Thomas S. Cumming	Prepare application to approve sale;
19/04/2016	0.40	Thomas S. Cumming	Discuss opinion with G. Ireland;
19/04/2016	1.90	Graeme Ireland	Meeting with T. Cumming to review draft security review opinion; updating security review opinion;
20/04/2016	0.60	Thomas S. Cumming	Exchange emails with A. Shiner; review asset purchase agreement;
20/04/2016	0.60	Graeme Ireland	Preparing security review opinion;
22/04/2016	2.10	Frank D. Lamie	Attendance to review material; attendance to draft Court material;
26/04/2016	0.50	Thomas S.	Discussion with F. Lamie; review and revise application;

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May 24, 2016
INVOICE: 18452988

Date	Hours	Timekeeper	Description
		Cumming	telephone conversation with S. Title; review final application and approval and vesting order;
26/04/2016	1.40	Chris Dennehy	Filing Application and Report at Courthouse; Drafting service letter;

Total Fees for Professional Services $69,207.50

DISBURSEMENTS

Taxable Costs

Scanning Service		$117.75
Colour Copy Recoveries		$400.00
Corporate Searches - Taxable		$35.00
Courier		$20.76
PPSA Online Search - Taxable		$205.00
Service Fee Associated With A Search - Taxable		$79.00
Bank Act - Section 427 Search		$150.00
Conference Call Expenses		$3.52
Messenger: West Direct		$64.44
Registered Mail		$49.47
02/02/2016	Minister of Finance - Taxable Land Title Survey Service Charge: Searches - KM64532	$1.50
02/02/2016	Minister of Finance - Taxable Land Title Survey Service Charge: Searches - CA3140284	$1.50
02/02/2016	Minister of Finance - Taxable BCOL Service Charge - Search, PPR	$9.00
02/02/2016	Minister of Finance - Taxable Land Title Survey Service Charge: Searches - CA1775482	$1.50
02/02/2016	Initial Return / Notice of Change ISC - Sask. entity search	$2.08
02/02/2016	Initial Return / Notice of Change ISC - Sask. online entity search - Alken Basin Drilling Ltd.	$6.00
02/02/2016	Initial Return / Notice of Change ISC - Sask. online entity search	$2.08
02/02/2016	Insolvency/Bankruptcy Search Alken Basin Drilling Ltd.	$8.00
02/02/2016	Insolvency/Bankruptcy Search 1711760 Alberta Ltd.	$8.00
02/02/2016	Insolvency/Bankruptcy Search Kevin Baumann	$8.00
02/02/2016	Insolvency/Bankruptcy Search	$8.00

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May 24, 2016
INVOICE: 18452988

	Michael Baumann	
02/02/2016	Insolvency/Bankruptcy Search Kevin Schmidt	$8.00
02/02/2016	Land Titles Office (Alberta) Online Searches & Registration LTO online search	$10.00
02/02/2016	Land Titles Office (Alberta) Online Searches & Registration LTO online search	$10.00
02/02/2016	Land Titles Office (Alberta) Online Searches & Registration LTO online search	$10.00
02/02/2016	Environmental Searches VENDOR: RBC Visa - Calgary1373; INVOICE#: S139970; DATE: 02/02/2016 - A152711 - Environmental Law Centre searches	$150.00
09/02/2016	City Tax & Other Certificates/Searches PAYEE: Red Deer County; REQUEST#: 1693458; DATE: 02/09/2016. Tax search	$20.00
17/03/2016	Initial Return / Notice of Change ISC online entity search - Alken Basin Drilling Ltd.	$6.00
17/03/2016	Initial Return / Notice of Change ISC online entity search - 1711760 Alberta Ltd.	$2.08
17/03/2016	Insolvency/Bankruptcy Search Kevin Baumann	$8.00
17/03/2016	Insolvency/Bankruptcy Search Michael Baumann	$8.00
17/03/2016	Insolvency/Bankruptcy Search Kevin Schmidt	$8.00
17/03/2016	Insolvency/Bankruptcy Search Alken Basin Drilling Ltd.	$8.00
17/03/2016	Insolvency/Bankruptcy Search 1711760 Alberta Ltd.	$8.00
17/03/2016	Land Titles Office (Alberta) Online Searches & Registration LTO online search	$10.00
18/03/2016	Land Titles Office (Alberta) Online Searches & Registration LTO online search	$10.00
21/03/2016	Land Titles Office (Alberta) Online Searches & Registration LTO online search	$10.00
	Total Taxable Disbursements	$1,466.68
Non-Taxable Costs		
02/02/2016	Minister of Finance - Agency BCOL - CSB Electronic Srch	$6.00
02/02/2016	Minister of Finance - Agency BCOL - CSB Electronic Srch	$6.00
02/02/2016	Minister of Finance - Agency	$9.45

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May 24, 2016
INVOICE: 18452988

	Land Title Survey Fees: Searches - CA1775482	
02/02/2016	Minister of Finance - Agency BCOL - Search, PPR	$42.00
02/02/2016	Minister of Finance - Agency Land Title Survey Fees: Searches - CA3140284	$9.45
02/02/2016	Minister of Finance - Agency Land Title Survey Fees: Searches - KM64532	$9.45
	Total Non-Taxable Disbursements	$82.35

OTHER CHARGES

Copying	$909.50
Fax Charges	$33.50
Long Distance Telephone	$0.32
Court Costs - Taxable	$252.00
Total Other Charges	$1,195.32

Terms: due upon receipt
Interest at the rate of 0.8% per annum will be charged on all amounts not paid within one month from the date of this invoice
Errors and omissions excluded

GOWLING WLG

May 24, 2016
INVOICE: 18452988

Remittance Copy

Client:	191739 MNP Ltd.
Matter:	A152711
RE:	Receivership of Alken Basin Drilling Ltd.
Amount Due:	$75,545.33

PAYMENT BY CHEQUE:

Please return this page with your payment payable to Gowling WLG (Canada) LLP

Remit to:

Gowling WLG (Canada) LLP
1600, 421 7th Avenue SW
Calgary, AB T2P 4K9
Canada

PAYMENT BY WIRE TRANSFER:

Pay by Swift MT 103 Direct to:

SWIFTCODE:	NOSCCATT
BENEFICIARY BANK:	Bank of Nova Scotia PO Box 53069, Marlborough CRO, Calgary, AB T2A 7P1
TRANSIT NUMBER:	12989-002
BENEFICIARY ACCOUNT NAME:	Gowling WLG (Canada) LLP 1600, 421 7th Avenue SW, Calgary, AB T2P 4K9
BENEFICIARY ACCOUNT NUMBER(S):	CDN Account: 10009-00902-12 USD Account: 10009-08159-18

US Corresponding Bank for US Dollar wires:
USD NOSCUS33 (ABA 026002532)

* if paying by wire or EFT please e-mail the remittance details to
payments.calgary.ca@gowlingwlg.com

Terms: due upon receipt
Interest at the rate of 0.8% per annum will be charged on all amounts not paid within one month from the date of this invoice
Errors and omissions excluded

GOWLING WLG

Invoice

MNP Ltd.
ATTN: Alan Shiner
C.A., Senior Vice-President
Suite 1500, 640 - 5th Avenue SW
Calgary AB T2P 3G4

May 31, 2016
INVOICE: 18458738

Our Matter: A152711 / 191739
RE: Receivership of Alken Basin Drilling Ltd.

		GST (5.0%)
Fees for Professional Services	**$46,166.50**	$2,308.33
Disbursements (Taxable)	76.36	
Disbursements (Non-Taxable)	100.00	
Other Charges (Taxable)	78.25	
Total Disbursements and Other Charges	**254.61**	7.73
Total Fees and Disbursements	46,421.11	
Total Taxes	2,316.06	2,316.06
Total Invoice	**48,737.17**	
Please remit balance due: In Canadian Dollars	**$48,737.17**	

Thomas S. Cumming Signed for & on behalf of Gowling WLG (Canada) LLP

Our services are provided in accordance with our Standard Terms of Business (www.gowlingwlg.com/TermsofBusiness), subject to any other written engagement agreement entered into between the parties.

GOWLING WLG (CANADA) LLP
1600, 421 7th Avenue SW,
Calgary, Alberta, T2P 4K9, Canada

T +1 (403) 298 1000
gowlingwlg.com

GST/HST: 11936 4511 RT

GOWLING WLG

May 31, 2016
INVOICE: 18458738

MNP Ltd.
Our Matter: A152711
Receivership of Alken Basin Drilling Ltd.

PROFESSIONAL SERVICES

Date	Hours	Timekeeper	Description
12/04/2016	1.30	Frank D. Lamie	Attendance to correspondence with S. Title; attendance to correspondence with and instructions to R. Comstock regarding Court material; attendance to phone call with and further instructions to R. Comstock; attendance to review material; attendance to correspondence and enclosure to S. Title and J. Hue;
13/04/2016	0.20	Frank D. Lamie	Attendance to correspondence from J. Hanley; attendance to meeting with and instructions from D. Marechal; attendance to correspondence and enclosures from D. Marechal; attendance to meeting with and update to T. Cumming; attendance to correspondence from J. Hanley; attendance to instructions to D. Marechal; attendance to correspondence and enclosure from D. Marechal;
18/04/2016	0.90	Frank D. Lamie	Attendance to correspondence from T. Cumming; attendance to review material; attendance to correspondence with T. Cumming; attendance to various correspondence with R. Comstock; attendance to correspondence from W. Roberts; attendance to further correspondence from T. Cumming; attendance to review further correspondence and enclosures from T. Cumming;
24/04/2016	1.60	Frank D. Lamie	Attendance to correspondence from T. Cumming; attendance to review material; attendance to correspondence to T. Cumming;
25/04/2016	8.80	Frank D. Lamie	Attendance to meeting with and instructions from T. Cumming; attendance to correspondence from E. Sirrs and T. Cumming; attendance to draft, review, and revise Court material; attendance to various correspondence with E. Sirrs and S. Title; attendance to various further correspondence and enclosures with and among E. Sirrs, S. Title, and T. Cumming; attendance to meeting with and further instructions from T. Cumming; attendance to phone call with J. Hanley's office; attendance to correspondence and enclosures from J. Macphee; attendance to review material; attendance to detailed correspondence to J. Hanley; attendance to correspondence to A. Tralenberg; attendance to correspondence with E. Sirrs; attendance to review correspondence from F. Sasso; attendance to review correspondence from A. Tralenberg; attendance to review material; attendance to further meeting with, comments, and material from T. Cumming; attendance to correspondence, comments, and enclosures to E. Sirrs and S. Title; attendance to correspondence from A. Tralenberg;

Date	Hours	Timekeeper	Description
			attendance to correspondence to E. Sirrs; attendance to approval and vesting order; attendance to correspondence from E. Sirrs and T. Cumming; attendance to further correspondence from E. Sirrs; attendance to correspondence to A. Tralenburg; attendance to further correspondence with E. Sirrs; attendance to correspondence from T. Cumming; attendance to further correspondence and enclosures from T. Cumming; attendance to correspondence to S. Title;
26/04/2016	7.90	Frank D. Lamie	Attendance to conference call with S. Title; Attendance to correspondence and enclosure from E. Sirrs; attendance to further correspondence and enclosure from E. Sirrs; attendance to correspondence to E. Sirrs; attendance to conference call with E. Sirrs; attendance to meeting with and material to T. Cumming; attendance to comments to T. Cumming; attendance to instructions to N. Dickie; attendance to draft letter to Judge; attendance to conference call with E> Sirrs; attendance to voice mail to P. Taylor; attendance to finalize Court material; Attendance to letters to counsel; attendance to instructions to C. Dennehy regarding service; attendance to correspondence and enclosures to E. Sirrs, S. Title, and A. Shiner; attendance to further correspondence and enclosures to E. Sirrs, S. Title, and A. Shiner; attendance to correspondence and enclosure from P. Taylor and A. Shiner; attendance to correspondence and enclosure from E. Sirrs; attendance to further correspondence and enclosure from E. Sirrs; attendance to correspondence from J. MacPhee and J. Hanley; attendance to various further correspondence from E. Sirrs; attendance to various correspondence from T. Cumming; attendance to correspondence and enclosures from N. Dickie; attendance to meeting with and update to T. Cumming; Attendance to review and revise various Court material; attendance to draft Orders; attendance to various correspondence from E. Sirrs and T. Cumming; Attendance to conference call with S. Mandell; attendance to phone call with S. Title; Attendance to letter to J. Hanley; attendance to review materials; attendance to correspondence and enclosure to J. Hanley; attendance to material and instructions to N. Dickie;
27/04/2016	3.10	Frank D. Lamie	Attendance to meeting with and further instructions to N. Dickie; attendance to correspondence and enclosure to J. Hanley; attendance to review package; attendance to further instructions to N. Dickie; attendance to meeting with and update to T. Cumming; attendance to correspondence and enclosures from N. Dickie; attendance to further instructions to N. Dickie; attendance to letter to J. Hanley; attendance to further instructions to N. Dickie; attendance to review further correspondence and enclosure from N. Dickie; attendance

Date	Hours	Timekeeper	Description
			to comments to N. Dickie; attendance to correspondence and enclosure from S. Mandell; attendance to correspondence with S. Mandell; attendance to correspondence, enclosures, and instructions to N. Dickie; attendance to letter to J. Hanley; attendance to correspondence with W. Roberts;
28/04/2016	0.10	Thomas S. Cumming	Call to lawyer for person who took equipment;
28/04/2016	1.90	Frank D. Lamie	Attendance to correspondence from A. Tralenberg; attendance to correspondence to E. Sirrs, S. Title, and A. Shiner; attendance to correspondence to A. Tralenberg; attendance to correspondence and instructions to N. Dickie; attendance to correspondence and enclosure from S. Mandell; attendance to correspondence to S. Mandell; attendance to correspondence and enclosure from N. Dickie; attendance to further correspondence and enclosures from S. Mandell; attendance to review material; attendance to correspondence, enclosure, and instructions to N. Dickie;
29/04/2016	0.30	Thomas S. Cumming	Exchange emails with E. Sirrs; discussion with J. Dixon, counsel to Link Ventures;
29/04/2016	1.10	Frank D. Lamie	Attendance to correspondence with S. Mandell; attendance to correspondence to E. Sirrs, S. Title, and A. Shiner; attendance to correspondence from S. Title; attendance to correspondence form A. Shiner; attendance to correspondence to S. Mandell;
01/05/2016	1.10	Frank D. Lamie	Attendance to review material; attendance to correspondence with S. Mandell; attendance to correspondence to E. Sirrs, S. Title, and A. Shiner; attendance to correspondence and enclosures from S. Mandell; attendance to correspondence and enclosures to E. Sirrs, S. Title, and A. Shiner; attendance to conference call with S. Mandell; attendance to further correspondence with S. Mandell; attendance to correspondence to E. Sirrs, S. Title, and A. Shiner;
02/05/2016	5.60	Frank D. Lamie	Attendance to various further correspondence from S. Mandell; attendance to conference call with E. Sirrs; attendance to meeting with and comments from T. Cumming; attendance to further correspondence with S. Mandell; attendance to conference call with S. Mandell; attendance to various correspondence and enclosures from W. Roberts; Attendance to correspondence and enclosures from S. Mandell; attendance to review material; attendance to meeting with and instructions to N. Dickie; attendance to correspondence and enclosures from S. Mandell; attendance to correspondence and enclosures to E. Sirrs, S. Title, and E. Sirrs; attendance to correspondence to S.

Date	Hours	Timekeeper	Description
			Mandell, W. Roberts, et al.; attendance to review further draft of Purchase Agreement and redlines; attendance to conference call with S. Title; attendance to conference call with W. Roberts; attendance to correspondence and enclosure to W. Roberts and S. Mandell; Attendance to conference call with S. Title; attendance to correspondence with S. Mandell; attendance to various correspondence and enclosures from S. Mandell; attendance to conference call with S. Title; attendance to correspondence and enclosure to S. Title; attendance to further conference call with and comments from S. Title; Attendance to correspondence with S. Title; attendance to conference call with S. Title; attendance to voice mail from S. Title; attendance to comments from S. Title; attendance to review and revise material; attendance to run blackline; attendance to correspondence and enclosures to S. Mandell; attendance to correspondence and enclosures to E. Sirrs, S. Title, and A. Shiner; attendance to conference call with S. Title; attendance to correspondence to S. Title and A. Shiner;
03/05/2016	1.00	Melanie Condic	Reviewing and revising stand alone indemnity;
03/05/2016	0.50	Thomas S. Cumming	Discussion with J. Dixon; email to E. Sirrs; discussion with F. Lamie;
03/05/2016	9.30	Frank D. Lamie	Attendance to correspondence and enclosure from S. Mandell; attendance to correspondence to S. Mandell; attendance to correspondence and enclosure form M. Mossip; attendance to correspondence to M. Mossip; attendance to correspondence and enclosures to E. Sirrs, S. Title, and A. Shiner; attendance to voice mail from S. Title; attendance to various correspondence from S. Title; attendance to correspondence with A. Shiner and T. Cumming; attendance to correspondence and enclosures from S. Mandell; attendance to conference call with S. Title; attendance to review and revise material; attendance to run blacklines; attendance to correspondence and enclosure to S. Title; Attendance to various materials; attendance to review and revise material; attendance to instructions to N. Dickie; attendance to blacklines; attendance to meeting with and update to T. Cumming; attendance to correspondence and enclosures to T. Cumming; attendance to further instructions to N. Dickie; attendance to further correspondence and enclosures from M. Mossip; attendance to correspondence and enclosures to E. Sirrs, S. Title, and A. Naken; attendance to phone call with M. Mossip; attendance to correspondence from E. Sirrs; attendance to correspondence and enclosure from F. Sur; attendance to correspondence and enclosures from S. Mandell; Attendance to phone call with S. Mandell; Attendance to email form W. Roberts; phone call with R. Roberts;

Date	Hours	Timekeeper	Description
			Attendance to correspondence with S. Title; attendance to review and revise material; attendance to blacklines; attendance to correspondence and enclosures to S. Mandell et al.; attendance to further correspondence and enclosures from S. Mandell; attendance to phone call with W. Roberts; attendance to numerous and various correspondence and enclosures with S. Mandell and W. Roberts; attendance to update to T. Cumming;
03/05/2016	0.80	Frank Sur	Reviewing and providing comments on asset purchase agreement; reviewing indemnity; call with M. Condic re revisions; email exchanges with F. Lamie re same;
04/05/2016	0.50	Thomas S. Cumming	Discussion with S. Sinclair; review Link Ventures claim;
04/05/2016	8.10	Frank D. Lamie	Attendance to finalize Court material; attendance to run blacklines; attendance to preparation for Court; attendance to material and instructions to G. Yu; attendance to correspondence with S. Mandell; attendance to meeting with E. Sirrs; attendance to appearance in Court; attendance to material and instructions to C. Dennehy; attendance to correspondence to S. Mandell et al.; attendance to correspondence to A. Shiner, S. Title, and E. Sirrs; attendance to update to T. Cumming; attendance to update to F. Sur;
05/05/2016	0.80	Thomas S. Cumming	Letter to J. Dixon, counsel for Link Ventures, regarding vehicle; review letter from J. Dixon; email to client;
05/05/2016	1.80	Frank D. Lamie	Attendance to correspondence to S. Mandell, F. Sur, and M. Condic; attendance to review correspondence and enclosure from T. Cumming; attendance to instructions to F. Sur; attendance to correspondence from J. Dixon; attendance to correspondence and various enclosures from M. Mossip; attendance to correspondence with E. Sirrs; attendance to further correspondence and enclosures from M. Mossip; attendance to further correspondence from M. Mossip; attendance to correspondence from T. Cumming; attendance to correspondence from S. Title; attendance to instructions to C. Dennehy;
06/05/2016	0.20	Thomas S. Cumming	Review email from J. Dixon; email to client;
06/05/2016	0.70	Frank D. Lamie	Attendance to correspondence with S. Mandell; attendance to further correspondence and enclosure from S. Mandell; attendance to correspondence and enclosure from T. Cumming; attendance to voice mail from J. Dixon; attendance to correspondence with F. Sur; attendance to further correspondence and enclosures from F. Sur; attendance to correspondence from E. Sirrs; attendance to further correspondence from T. Cumming; attendance to phone call with T. Cumming;Attendance to conference call

Date	Hours	Timekeeper	Description
			with S. Title; attendance t correspondence with F. Sur; Attendance to correspondence and enclosures to A. Shiner, S. Title, and E. Sirrs; attendance to further correspondence with A. Shiner; attendance to correspondence from T. Cumming;
07/05/2016	0.10	Frank D. Lamie	Attendance to correspondence with S. Mandell;
08/05/2016	0.20	Frank D. Lamie	Attendance to various correspondence and enclosures from S. Mandell; attendance to correspondence with S. Title; attendance to correspondence from A. Shiner;
09/05/2016	0.30	Thomas S. Cumming	Discussion with F. Lamie regarding application against Link Ventures to recover vehicle;
09/05/2016	7.20	Chris Dennehy	Drafting notice of application, brief, and order;
09/05/2016	1.90	Frank D. Lamie	Attendance to correspondence and enclosure form S. Mandell; attendance to instructions to F. Sur; attendance to review material from Court; attendance to correspondence and enclosures to A. Shiner, S. Title, and E. Sirrs; attendance to correspondence and enclosures to S. Mandell and F. Sur; attendance to correspondence and enclosures to service list; attendance to correspondence with S. Title; attendance to correspondence to F. Sur; attendance to correspondence and enclosure from C. Dennehy; attendance to correspondence and enclosure to D. Dennehy; attendance to correspondence to T. Cumming; Attendance to phone call with and instructions to C. Dennehy; attendance to correspondence and various enclosures from C. Dennehy; attendance to further correspondence from C. Dennehy; attendance to phone call with and further instructions to C. Dennehy; Attendance to conference call with C. Dennehy; attendance to review material; attendance to further conference call with C. Dennehy;
09/05/2016	1.80	Frank Sur	Attending to closing documents;
10/05/2016	1.10	Chris Dennehy	Updating Notice of Application and Brief;
10/05/2016	1.10	Frank D. Lamie	Attendance to correspondence and enclosure from C. Dennehy; attendance to review and revise notice of application, draft order, and second report to Court; attendance to correspondence and instruction to C. Dennehy and T. Cumming; Attendance to review correspondence and various enclosures from C. Dennehy; attendance to voice mail from S. Title;
11/05/2016	0.30	Thomas S. Cumming	Review materials re Link Ventures application;
11/05/2016	2.00	Chris Dennehy	Updating report, brief, and application;
11/05/2016	0.30	Frank D. Lamie	Attendance to conference call with S. Title; attendance to phone call with and instructions to C. Dennehy; attendance

GOWLING WLG

May 31, 2016
INVOICE: 18458738

Date	Hours	Timekeeper	Description
			to correspondence from C. Dennehy;
12/05/2016	0.80	Thomas S. Cumming	Review and comment upon application materials; exchange email with E. Sirrs;
12/05/2016	2.20	Chris Dennehy	Updating report, brief, and application;
12/05/2016	1.00	Chris Dennehy	Updating brief;
13/05/2016	2.40	Chris Dennehy	Updating brief;
16/05/2016	1.50	Thomas S. Cumming	Review application materials re Link Ventures; conference call with C. Dennehy and E. Sirrs; review cases;
16/05/2016	5.20	Chris Dennehy	Updating brief, application, and order; preparing materials to be filed with the court; emailing James Dixon to serve application materials;
17/05/2016	4.00	Chris Dennehy	Assembling material to be filed with the court; drafting affidavit of service; filling materials in court; serving parties with application materials; filling affidavit of service;
18/05/2016	3.60	Thomas S. Cumming	Discussions with C. Dennehy and J. Dixon; prepare for hearing;
18/05/2016	1.80	Chris Dennehy	Researching service times and serving application materials on counsel other than counsel of record;
18/05/2016	0.70	Chris Dennehy	Drafting email to Eric Sirrs of MNP outlining application scheduled for May 19, 2016;
19/05/2016	1.50	Thomas S. Cumming	Discussion with J. Dixon; attend court; discussion with J. Sinclair;
19/05/2016	1.10	Chris Dennehy	Attending application at court; scheduling new court time;
20/05/2016	0.90	Thomas S. Cumming	Attend court to report upon Link Ventures matter;
20/05/2016	1.30	Chris Dennehy	Preparing material for court; attending court with T. Cumming;

Total Fees for Professional Services $46,166.50

DISBURSEMENTS

Taxable Costs

Scanning Service	$7.50
Colour Copy Recoveries	$34.00
Courier	$20.86
PPSA Online Search - Taxable	$6.00
Service Fee Associated With A Search - Taxable	$8.00
Total Taxable Disbursements	$76.36

Non-Taxable Costs

26/04/2016	Court Filing Fees - Non Taxable	$50.00

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Interest at the rate of 0.8% per annum will be charged on all amounts not paid within one month from the date of this invoice
Errors and omissions excluded

	VENDOR: CASH; INVOICE#: 2016APR26; DATE: 04/26/2016 - A152711/C. Dennehy/Court of Queens Bench re: Interlocutory Application	
17/05/2016	Court Filing Fees - Non Taxable VENDOR: CASH; INVOICE#: 2016MAY17(A); DATE: 05/17/2016 - A152711/C. Dennehy/Court of Queens Bench re: Interlocutory Application	$50.00
	Total Non-Taxable Disbursements	$100.00
OTHER CHARGES		
Copying		$78.25
	Total Other Charges	$78.25

GOWLING WLG

May 31, 2016
INVOICE: 18458738

Remittance Copy

Client:	191739 MNP Ltd.
Matter:	A152711
RE:	Receivership of Alken Basin Drilling Ltd.
Amount Due:	$48,737.17

PAYMENT BY CHEQUE:

Please return this page with your payment payable to Gowling WLG (Canada) LLP

Remit to:

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Calgary, AB T2P 4K9
Canada

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SWIFTCODE:	NOSCCATT
BENEFICIARY BANK:	Bank of Nova Scotia PO Box 53069, Marlborough CRO, Calgary, AB T2A 7P1
TRANSIT NUMBER:	12989-002
BENEFICIARY ACCOUNT NAME:	Gowling WLG (Canada) LLP 1600, 421 7th Avenue SW, Calgary, AB T2P 4K9
BENEFICIARY ACCOUNT NUMBER(S):	CDN Account: 10009-00902-12 USD Account: 10009-08159-18

US Corresponding Bank for US Dollar wires:
USD NOSCUS33 (ABA 026002532)

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Invoice

MNP Ltd.
ATTN: Alan Shiner
C.A., Senior Vice-President
Suite 1500, 640 - 5th Avenue SW
Calgary AB T2P 3G4

November 30, 2016
INVOICE: 18574280

Our Matter: A152711 / 191739
RE: Receivership of Alken Basin Drilling Ltd.

		GST (5.0%)
Fees for Professional Services	**$742.00**	$37.10
Total Fees	742.00	
Total Taxes	37.10	37.10
Total Invoice	**779.10**	
Please remit balance due: In Canadian Dollars	**$779.10**	

Thomas S. Cumming Signed for & on behalf of Gowling WLG (Canada) LLP

Our services are provided in accordance with our Standard Terms of Business (www.gowlingwlg.com/TermsofBusiness), subject to any other written engagement agreement entered into between the parties.

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1600, 421 7th Avenue SW,
Calgary, Alberta, T2P 4K9, Canada

T +1 (403) 298 1000
gowlingwlg.com

GST/HST: 11936 4511 RT

GOWLING WLG

November 30, 2016
INVOICE: 18574280

MNP Ltd.
Our Matter: A152711
Receivership of Alken Basin Drilling Ltd.

PROFESSIONAL SERVICES

Date	Hours	Timekeeper	Description
23/11/2016	0.30	Frank D. Lamie	Attendance to correspondence and enclosure from S. Title; attendance to review material; attendance to various correspondence with S. Title;
24/11/2016	1.10	Frank D. Lamie	Attendance to review material; attendance to conference call with S. Title;

Total Fees for Professional Services $742.00

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Errors and omissions excluded

GOWLING WLG

November 30, 2016
INVOICE: 18574280

Remittance Copy

Client:	191739 MNP Ltd.
Matter:	A152711
RE:	Receivership of Alken Basin Drilling Ltd.
Amount Due:	$779.10

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TRANSIT NUMBER:	12989-002
BENEFICIARY ACCOUNT NAME:	Gowling WLG (Canada) LLP 1600, 421 7th Avenue SW, Calgary, AB T2P 4K9
BENEFICIARY ACCOUNT NUMBER(S):	CDN Account: 10009-00902-12 USD Account: 10009-08159-18

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GOWLING WLG

Invoice

MNP Ltd.
ATTN: Alan Shiner
C.A., Senior Vice-President
Suite 1500, 640 - 5th Avenue SW
Calgary AB T2P 3G4

December 31, 2016
INVOICE: 18614728

Our Matter: A152711 / 191739
RE: Receivership of Alken Basin Drilling Ltd.

		GST (5.0%)
Fees for Professional Services	**$318.00**	$15.90
Total Fees	318.00	
Total Taxes	15.90	15.90
Total Invoice	**333.90**	
Please remit balance due: In Canadian Dollars	**$333.90**	

Thomas S. Cumming Signed for & on behalf of Gowling WLG (Canada) LLP

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T +1 (403) 298 1000
gowlingwlg.com

GST/HST: 11936 4511 RT

GOWLING WLG

December 31, 2016
INVOICE: 18614728

MNP Ltd.
Our Matter: A152711
Receivership of Alken Basin Drilling Ltd.

PROFESSIONAL SERVICES

Date	Hours	Timekeeper	Description
07/12/2016	0.30	Frank D. Lamie	Attendance to correspondence and enclosure from S. Title; attendance to review material; attendance to correspondence and enclosure to T. Cumming; attendance to correspondence and comments from T. Cumming;
08/12/2016	0.30	Frank D. Lamie	Attendance to review material; attendance to conference call with S. Title; attendance to review material;

Total Fees for Professional Services $318.00

Terms: due upon receipt
Interest at the rate of 0.8% per annum will be charged on all amounts not paid within one month from the date of this invoice
Errors and omissions excluded

GOWLING WLG

December 31, 2016
INVOICE: 18614728

Remittance Copy

Client:	191739 MNP Ltd.
Matter:	A152711
RE:	Receivership of Alken Basin Drilling Ltd.
Amount Due:	$333.90

PAYMENT BY CHEQUE:

Please return this page with your payment payable to Gowling WLG (Canada) LLP

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BENEFICIARY BANK:	Bank of Nova Scotia PO Box 53069, Marlborough CRO, Calgary, AB T2A 7P1
TRANSIT NUMBER:	12989-002
BENEFICIARY ACCOUNT NAME:	Gowling WLG (Canada) LLP 1600, 421 7th Avenue SW, Calgary, AB T2P 4K9
BENEFICIARY ACCOUNT NUMBER(S):	CDN Account: 10009-00902-12 USD Account: 10009-08159-18

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Errors and omissions excluded

GOWLING WLG

Invoice

MNP Ltd.
ATTN: Alan Shiner
C.A., Senior Vice-President
Suite 1500, 640 - 5th Avenue SW
Calgary AB T2P 3G4

December 31, 2016
INVOICE: 18596519

Our Matter: A152711 / 191739
RE: Receivership of Alken Basin Drilling Ltd.

		GST (5.0%)
Fees for Professional Services	**$1,007.00**	$50.35
Total Fees	1,007.00	
Total Taxes	50.35	50.35
Total Invoice	**1,057.35**	
Please remit balance due: In Canadian Dollars	**$1,057.35**	

Thomas S. Cumming Signed for & on behalf of Gowling WLG (Canada) LLP

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Calgary, Alberta, T2P 4K9, Canada

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gowlingwlg.com

GST/HST: 11936 4511 RT

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December 31, 2016
INVOICE: 18596519

MNP Ltd.
Our Matter: A152711
Receivership of Alken Basin Drilling Ltd.

PROFESSIONAL SERVICES

Date	Hours	Timekeeper	Description
28/11/2016	0.30	Frank D. Lamie	Attendance to review material; attendance to instructions to C. Dennehy; attendance to correspondence and enclosure from S. Title; attendance to review material; attenance to correspondence to S. Title;
29/11/2016	0.70	Frank D. Lamie	Attendance to review material; attendance to correspondence form T. Cumming; attendance to correspondence from S. Title;
30/11/2016	0.90	Frank D. Lamie	Attendance to correspondence to T. Cumming; attendance to conference call with S. Title; attendance to conference call with T. Cumming; attendance to reviewing and revising material; attendance to correspondence and enclosure to S. Title and T. Cumming;

Total Fees for Professional Services $1,007.00

Terms: due upon receipt
Interest at the rate of 0.8% per annum will be charged on all amounts not paid within one month from the date of this invoice
Errors and omissions excluded

GOWLING WLG

December 31, 2016
INVOICE: 18596519

Remittance Copy

Client:	191739 MNP Ltd.
Matter:	A152711
RE:	Receivership of Alken Basin Drilling Ltd.
Amount Due:	$1,057.35

PAYMENT BY CHEQUE:

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BENEFICIARY ACCOUNT NUMBER(S):	CDN Account: 10009-00902-12 USD Account: 10009-08159-18

US Corresponding Bank for US Dollar wires:
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This is Exhibit "B", referred to in the affidavit of Chris Dennehy sworn before me on May 9, 2017.

(Commissioner for Oaths in and for the Province of Alberta)

Anthony Mersich, Student-at-Law

EXHIBIT "B"
LEGAL COSTS SUMMARY

Professional	Year of Call	Hourly Rate 2017	Hourly Rate 2016	Hourly Rate 2015
Tom Cumming	1987	$800.00	$755.00	$755.00
Jeffrey Oliver	2002	N/A	$550.00	N/A
Christopher Oates	2010	N/A	$535.00	N/A
Frank Lamie	2007	$530.00	$530.00	N/A
Frank Sur	2007	N/A	$525.00	N/A
Melanie Conic	2011	N/A	$360.00	N/A
Danielle Maréchal	2014	N/A	$260.00	N/A
Graeme Ireland	2015	N/A	$230.00	N/A
Nicol Dickie	Paralegal	N/A	$195.00	N/A
Andrea Cowie	Paralegal	N/A	$200.00	N/A
Chris Dennehy	2016	N/A	$190.00	N/A

SUMMARY OF ACCOUNTS					
No.	Date of Account	Fees	Disbursements	GST	Total
1	May 24, 2016	$69,207.50	$2,744.35	$3,593.48	$75,545.33
2	May 31, 2016	$46,166.50	254.61	2,316.06	$48,737.17
3	November 30, 2016	$742.00	N/A	$37.10	$779.10
4	December 31, 2016	$318.00	N/A	$15.90	$333.90
5	December 31, 2016	$1,007.00	N/A	$50.35	$1,057.35
	Totals	**$117,441.00**	**$2,998.96**	**$6,012.89**	**$126,452.85**
	Total Amount				**$126,452.85**