Court File No.: CV-20-00643158-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ROBERTS COMPANY CANADA LIMITED

FACTUM OF THE APPLICANT
(Returnable October 26, 2020)

October 20, 2020

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Applicant

FACTUM OF THE APPLICANT

PART I: INTRODUCTION

1. This factum is filed in support of a motion by Roberts Company Canada Limited (the "**Applicant**" or "**RCCL**") for an order (the "**Sanction Order**"), *inter alia*:

(a) declaring that the meeting of the Affected Creditors Class (defined below) on October 16, 2020 (the "**Meeting**") was duly convened, held and conducted in conformity with the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "**CCAA**"), the Meeting Order and all other orders of the Court (each as defined below) in these CCAA proceedings (the "**CCAA Proceedings**");

(b) sanctioning and approving the Plan of Compromise and Arrangement pursuant to the CCAA concerning, affecting and involving RCCL dated September 28, 2020 (the "**Plan**");

(c) granting certain releases to the Released Parties (defined below);

(d) authorizing the Applicant and Richter Advisory Group Inc. ("**Richter**") in its capacity as the Court-appointed monitor of the Applicant (in such capacity, the "**Monitor**") to perform their obligations in respect of the Plan to facilitate the implementation of the Plan and to complete all matters incidental to the termination of the CCAA Proceedings;

(e) providing mechanisms to terminate the CCAA Charges (as defined in the Plan) and the CCAA Proceedings, and discharge Richter as Monitor; and

(f) extending the Stay Period (defined below) in respect of the Applicant until the date of the Monitor's Second Certificate (as defined in the Sanction Order).

2. The Plan and the restructuring of the Applicant to be effected thereby is the result of significant efforts by the Applicant and the Monitor. The Plan is fair and reasonable and has been approved by 98% in number representing 94% in value of the Affected Creditors Class that were present in person or by proxy at the Meeting. The Plan is supported by the Monitor and represents the best available outcome for the Applicant and its stakeholders. The Sanction Order will enable the Applicant and the Monitor to take the steps necessary to implement the Plan.

PART II: FACTS

3. The facts with respect to this motion are more fully set out in the Affidavit of Ravi Williams-Singh sworn October 20, 2020 (the "**Williams-Singh Affidavit**") and the Fifth Report of the Monitor dated October 20, 2020 (the "**Fifth Report**").[1]

[1] Affidavit of Ravi Williams-Singh sworn October 20, 2020 [Williams-Singh Affidavit], Applicant's Motion Record at Tab 2; Fifth Report of the Monitor Richter Advisory Inc. dated October 20, 2020 [Fifth Report].

4. Capitalized terms not defined herein have the meaning ascribed to them in the Williams-Singh Affidavit, the Plan, or the Sanction Order. All dollar amounts expressed herein, unless otherwise noted, are in Canadian currency.

A. Background

5. RCCL is a privately held company that is in the business of manufacturing, marketing and distributing a comprehensive range of flooring, installation tools, adhesives, accessories and other flooring-related products in Canada. RCCL is a direct wholly-owned subsidiary of Roberts Consolidated Industries, Inc. ("**RCI**"). RCI was a leading participant in the carpet installation market in 1997 when all of its outstanding shares, including those of RCCL, were acquired by Q.E.P. Co. Inc. (together with RCI, the "**Parent**").[2]

6. RCCL was granted creditor protection and related relief under the CCAA pursuant to an initial order (the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated June 29, 2020. The Initial Order granted a stay of proceedings up to and including July 9, 2020 (the "**Stay Period**"), appointed Richter as Monitor of RCCL, and granted an Administration Charge and a Directors' Charge (each as defined in the Initial Order) over RCCL's assets, property and undertakings (the "**Property**").[3]

7. The Initial Order also provided that the ABL Lender (as defined in the Initial Order) shall be treated as unaffected in any plan of compromise or arrangement filed by the Applicant under the CCAA with respect to any outstanding obligations as of the date of the Initial Order or arising

[2] Williams-Singh Affidavit, *ibid* at para 6, Applicant's Motion Record at Tab 2.
[3] *Ibid* at para 7, Applicant's Motion Record at Tab 2.

thereafter under the ABL Credit Agreement or the ABL Forbearance Agreement (each as defined in the Initial Order).[4]

8. On July 8, 2020, the Court granted an order (the "**Amended and Restated Initial Order**"), which, among other things:

(a) expanded RCCL's restructuring authority and the Monitor's ability to assist with RCCL's restructuring efforts;

(b) extended the Stay Period to and including August 31, 2020;

(c) approved the KERP and the KERP Charge (each as defined in the Amended and Restated Initial Order);

(d) authorized RCCL, with the consent of the Monitor and in consultation with the ABL Lender (as defined in the Initial Order), to pay amounts owing for goods and services actually supplied to RCCL prior to the date of the Initial Order by third party suppliers, up to an aggregate amount of $700,000, if in RCCL's opinion, the supplier is critical to its business, its ongoing operations, or the preservation of RCCL's Property, and the payment is required to ensure ongoing supply; and

(e) granted the ABL Lender's DIP Charge (as defined in the Amended and Restated Initial Order) in favour of the ABL Lender over RCCL's Property as security for all of the obligations of RCCL to the ABL Lender relating to advances made to

[4] *Ibid* at para 8, Applicant's Motion Record at Tab 2.

RCCL under the ABL Credit Agreement from and after the date of the Amended and Restated Initial Order.[5]

9. On July 28, 2020, RCCL sought and obtained an order (the "**Claims Procedure Order**"), which established a procedure for the identification and quantification of certain claims against the Applicant and its current and former directors and officers. The Claims Procedure Order also authorized, directed and empowered the Applicant and the Monitor to take such actions as contemplated by the Claims Procedure Order.[6]

B. The Plan

10. The Plan is the product of significant effort on the part of the Applicant and the Monitor to maximize proceeds from the Applicant's assets and reflects negotiations between the Applicant and certain of its stakeholders, including the ABL Lender.[7]

11. The purposes of the Plan are to:

(a) complete a restructuring of the Applicant;

(b) provide for a compromise of and consideration for Affected Claims that are Proven Claims with distributions as set out in Section 4.1 of the Plan; and

(c) effect a release and discharge of all Affected Claims and Released Claims and give effect to the releases in favour of the Released Parties.[8]

[5] *Ibid* at para 9, Applicant's Motion Record at Tab 2.
[6] *Ibid* at para 11, Applicant's Motion Record at Tab 2.
[7] *Ibid* at para 18, Applicant's Motion Record at Tab 2.
[8] *Ibid* at para 19, Applicant's Motion Record at Tab 2; Fifth Report, *ibid* at para 22.

12. A description of the Plan is provided in the Williams-Singh Affidavit.[9] The salient features of the Plan include the following:

(a) Affected Creditors with a Proven Claim in an amount less than or equal to $7,000, or those Affected Creditors who have delivered to the Monitor a Convenience Creditor Election (each a "**Convenience Creditor**"), shall receive from the Applicant, with the support of the Parent using its existing facilities (as may be amended, modified or restated), an amount in Cash equal to the lesser of (a) $7,000 and (b) the value of such Convenience Creditor's Proven Claim;

(b) each Affected Creditor with a Proven Claim who is not a Convenience Creditor shall receive:

(i) from the Applicant, with the support of the Parent using its existing facilities, the Initial Distribution Amount, being a Cash distribution equal to 20 cents ($0.20) for every dollar of such Affected Creditor's Proven Claim; and

(ii) a promissory note distributed by the Applicant (each a "**Promissory Note**") with a face value equal to 30 cents ($0.30) for every dollar of such Affected Creditor's Proven Claim, which will be payable by the Applicant in eighteen (18) equal consecutive monthly installments on the last day of each calendar month, commencing on January 31, 2021, in accordance with the terms and conditions of the Promissory Note and the Plan; and

[9] Williams-Singh Affidavit, *ibid* at paras 18-30, Applicant's Motion Record at Tab 2.

(c) no distributions will be made pursuant to the Plan in respect of Intercompany Claims and all such Intercompany Claims will be fully preserved and not released, discharged or extinguished pursuant to the Plan.[10]

13. The Plan does not affect the following unaffected claims (collectively, the "**Unaffected Claims**"): (a) any Claim secured by any of the CCAA Charges; (b) any claims for amounts required to be paid by subsections 6(3), (5) and (6) of the CCAA ("**CCAA Priority Payment Claims**"); (c) any Secured Claim; (d) any BOA Claim; (e) any Claim that cannot be compromised pursuant to subsections 5.1(2) and 19(2) of the CCAA; (f) any Post-Filing Claims; and (g) any Intercompany Claims.[11]

14. To the extent not already paid, any Unaffected Claim that is a Claim secured by one of the CCAA Charges or a CCAA Priority Payment Claim, shall be paid within five (5) Business Days of the Effective Date by the Applicant from the Administrative Reserve Fund. All other Unaffected Claims will be satisfied in accordance with the applicable agreements and other arrangements between creditors with Unaffected Claims and the Applicant.[12]

15. Taken together, the Plan represents a fair, equitable and reasonable balance of the interests of the Applicant's stakeholders in the circumstances, all in the expectation that Affected Creditors will derive a greater benefit from implementation of the Plan than they would derive from the Applicant's liquidation or bankruptcy.[13]

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[10] *Ibid* at para 20, Applicant's Motion Record at Tab 2.
[11] *Ibid* at para 21, Applicant's Motion Record at Tab 2.
[12] *Ibid* at para 22, Applicant's Motion Record at Tab 2.
[13] *Ibid* at para 38, Applicant's Motion Record at Tab 2; Fourth Report of the Monitor Richter Advisory Inc. dated September 23, 2020 at para 39 [Fourth Report].

C. The Releases Under the Plan

16. The Plan provides for releases in favour of: (a) the Applicant; (b) the Affiliates, including for greater certainty, the Parent; (c) the Monitor; (d) any Person claimed to be liable derivatively through any or all of the foregoing Persons; and (e) the respective Representatives of any or all of the foregoing Persons (including the "**Responsible Persons**") (together, the "**Released Parties**"). At the Effective Time, the Released Parties shall be fully, finally and irrevocably released and discharged from all Released Claims, which will be fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred.[14]

17. The Plan does not release or discharge the following:

(a) any Unaffected Claim or the Applicant's obligations to Affected Creditors under the Plan;

(b) a Released Party in respect of a claim whereby the Released Party is adjudged by the express terms of a judgment rendered on a final determination on the merits by the Court or by a court of competent jurisdiction in a judgment recognized by the Court to have committed fraud or willful misconduct or to have been grossly negligent or, in the case of Directors, in respect of any claim referred to in section 5.1(2) of the CCAA; and

(c) any BOA Claim.[15]

[14] Williams-Singh Affidavit, *ibid* at para 26, Applicant's Motion Record at Tab 2.
[15] *Ibid* at para 27, Applicant's Motion Record at Tab 2.

D. The Meeting Order and Conduct of the Meeting

18. On September 28, 2020, the Court granted an order (the "**Meeting Order**") authorizing the Applicant to, among other things, file the Plan and convene the Meeting of the Applicant's Affected Creditors to vote on a resolution to approve the Plan (the "**Resolution**").[16]

19. The Plan and the Meeting Order provided that all Affected Creditors with Affected Claims would constitute a single class for the purpose of considering and voting on the Plan (the "**Affected Creditors Class**").[17]

20. The Meeting was held on October 16, 2020 by videoconference in accordance with the Meeting. The Monitor's Fifth Report summarizes the results of the voting at the Meeting to the Court. The Fifth Report was served on the Service List, and posted on the Monitor's Website.[18] In summary, 98% in number representing 94% in value of the Affected Creditors Class that were present in person or by proxy at the Meeting voted to pass the Resolution approving the Plan.[19]

PART III: ISSUES

21. The issues on this motion are whether:

(a) the Court should sanction the Plan;

(b) the Court's approval of the third party releases contemplated by the Plan is appropriate in the circumstances; and

[16] *Ibid* at para 15, Applicant's Motion Record at Tab 2.
[17] *Ibid* at para 16, Applicant's Motion Record at Tab 2.
[18] *Ibid* at paras 17, 31, Applicant's Motion Record at Tab 2; Fifth Report, *supra* note 1 at paras 25, 28.
[19] Williams-Singh Affidavit, *ibid* at para 34, Applicant's Motion Record at Tab 2; Fifth Report, *ibid* at para 33.

(c) the Stay Period should be extended.

PART IV: LAW & ARGUMENT

A. The Sanction Order Should be Granted

22. Pursuant to subsection 6(1) of the CCAA, the Court has the discretion to sanction a plan of compromise or arrangement where the required double majority of creditors (i.e. a majority in number representing two-thirds in value of the creditors present and voting in person or by proxy at the meeting of creditors) has approved the plan. The effect of the Court's approval is to bind the debtor company and its creditors.[20]

23. Prior to sanctioning a plan of compromise or arrangement, the court must be satisfied of the following well-established criteria:

(a) there must be strict compliance with all statutory requirements;

(b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.[21]

24. Each of these requirements are satisfied here.

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[20] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 6(1) [*CCAA*].

[21] *Olympia & York Developments Ltd v Royal Trust* Co, [1993] 12 OR (3d) 500 at para 17 [*Olympia & York*]; *Canadian Airlines Corp, Re*, 2000 ABQB 442 at para 60 [leave to appeal refused 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal refused [2001] SCCA No 60] [*Canadian Airlines*]; *Canwest Global Communications Corp, Re*, 2010 ONSC 4209 at para 14 [*Canwest Global*].

1. All Statutory Requirements Have Been Complied With

25. When determining whether a plan strictly complies with all statutory requirements, courts have typically considered, among other things, whether:

(a) the applicant meets the definition of a "debtor company" under section 2 of the CCAA;

(b) the total claims against the applicant exceed $5 million;

(c) the notice calling the meeting of creditors was sent in accordance with the order of the court prescribing the same;

(d) the creditors were properly classified;

(e) the meeting of creditors was properly constituted;

(f) the voting at the meeting of the creditors was properly carried out; and

(g) the plan was approved by the requisite double majority.[22]

26. The statutory requirements have been met. Specifically:

(a) at the time that the Initial Order was granted, this Court found that the CCAA applied to the Applicant and that the Applicant's liabilities exceeded the $5 million threshold under the CCAA;

[22] *Olympia & York*, *ibid* at paras 19-21; *Canadian Airlines*, *ibid* at paras 62-63.

(b) as described in the Monitor's Fifth Report, notice of the Meeting was effected in accordance with the Meeting Order;[23]

(c) the classification of Affected Creditors with Affected Claims as a single class for the purpose of considering and voting on the Plan was approved by the Court pursuant to the Meeting Order.[24] This classification was not opposed at the hearing, nor was the Meeting Order appealed;[25]

(d) the Meeting was properly constituted,[26] and voting on the Plan at the Meeting was properly carried out in accordance with the Meeting Order;[27] and

(e) the Plan received overwhelming and nearly unanimous approval, satisfying the required majority set out in section 6 of the CCAA.[28]

27. Subsections 6(3), 6(5) and 6(6) of the CCAA provide that the Court may not sanction a plan of compromise or arrangement unless it contains certain specified provisions concerning Crown claims, employee claims and pension claims.[29] Such claims constitute CCAA Priority Claims, which are unaffected under the Plan. These Unaffected Claims will not be compromised under the Plan and will be paid in accordance with the CCAA. Further, in compliance with subsection 6(8) of the CCAA,[30] the Plan does not provide for any recovery to holders of equity claims.

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[23] Fifth Report, *supra* note 1 at para 25; Williams-Singh Affidavit, *supra* note 1 at para 17, Applicant's Motion Record at Tab 2.
[24] Fifth Report, *ibid*, at paras 23, 26, 36.
[25] Williams-Singh Affidavit, *supra* note 1 at para 38, Applicant's Motion Record at Tab 2.
[26] Fifth Report, *supra* note 1 at paras 26-30.
[27] Williams-Singh Affidavit, *supra* note 1 at paras 31-32, Applicant's Motion Record at Tab 2.
[28] *Ibid* at paras 33-34, Applicant's Motion Record at Tab 2; Fifth Report, *supra* note 1 at paras 33-34.
[29] *CCAA*, *supra* note 20, ss 6(3), 6(5), 6(6).
[30] *Ibid*, s 6(6).

28. For the foregoing reasons, the statutory prerequisites to approval of the Plan have been satisfied.

2. Nothing Has Been Done That Was Not Authorized by the CCAA or the Court

29. To assess whether a debtor company has done or purported to do anything not authorized by the CCAA, courts rely on the reports of the monitors as well as the parties and their stakeholders.[31]

30. The Applicant has, throughout the CCAA Proceedings, filed affidavits to keep this Court apprised of all material aspects of the Applicant's restructuring. In addition, the Monitor has provided regular reports to this Court, and has opined repeatedly that the Applicant has acted and continues to act in good faith and with due diligence.[32] Accordingly, the Applicant submits that the second requirement of the test relating to the sanctioning of a plan has been satisfied.

3. The Plan is Fair and Reasonable

31. The final element of the test requires the Court to consider whether the Plan represents a fair and reasonable balancing of interests, in light of: (i) the relative degrees of prejudice that would flow from sanctioning or refusing to sanction the Plan; (ii) the other commercial alternatives available; and (iii) the context of the CCAA proceedings.[33]

32. This inquiry is to be informed by the objectives of the CCAA, including facilitating a debtor company's restructuring for its benefit and the benefit of its stakeholders.[34]

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[31] *Canadian Airlines*, *supra* note 21 at para 64; *Canwest Global*, *supra* note 21 at para 17.
[32] Fifth Report, *supra* note 1 at para 54; Third Report of the Monitor Richter Advisory Inc. dated August 21, 2020 at para 27; Second Report of the Monitor Richter Advisory Inc. dated July 23, 2020 at para 44.
[33] *Olympia & York*, *supra* note 21 at paras 28-31.
[34] *Canwest Global*, *supra* note 21 at para 20.

33. An important measure of whether a plan is fair and reasonable is the degree to which it is supported by the creditors and relevant stakeholders of the debtor companies. Their support reflects the business judgment of the participants, namely that their interests are treated equitably under the Plan, creating an inference that the arrangement is fair and reasonable to those that may be affected by it.[35]

34. Courts have also been guided by the following additional considerations in deciding whether a plan of compromise or arrangement fairly balances the interests of all stakeholders and is fair and reasonable:

(a) classification of creditors and creditor approval;

(b) what creditors would receive on liquidation or bankruptcy compared to the plan;

(c) alternatives to the plan and bankruptcy;

(d) the oppression rights of certain creditors;

(e) unfairness to shareholders; and

(f) the public interest.[36]

35. Each of these factors supports the approval of the Plan by this Court. In particular:

(a) ***Classification of Creditors:*** The classification of Affected Creditors in a single class based on their commonality of interest, for purposes of voting on the Plan,

[35] *Canadian Airlines*, *supra* note 21 at para 97.
[36] *Canwest Global*, *supra* note 21 at para 21; *Sino-Forest Corporation, Re*, 2012 ONSC 7050 at para 61.

was appropriate in the circumstances. The classification was approved by this Court pursuant to the Meeting Order, and was not opposed by any party.

(b) ***Creditor Approval:*** The Plan received overwhelming support at the Meeting, with 98% in number representing 94% in value of the Affected Creditors Class that were present in person or by proxy at the Meeting voting in favour of the Resolution to approve the Plan. These results are indicative of the Affected Creditors' belief, in exercising their business judgment, that the Plan is fair, reasonable, and economically feasible.[37]

(c) ***Liquidation Recovery:*** The Monitor has indicated that the recoveries under the Plan exceed those that the Applicant's Affected Creditors could expect to receive in the event of the Applicant's bankruptcy or liquidation. [38]

(d) ***Alternatives to the Plan*****:** The Applicant believes that the Plan is the best available outcome for the Applicant and its stakeholders generally. The Plan is the product of significant efforts on the part of the Applicant, its stakeholders, and the Monitor to maximize proceeds from the Applicant's assets. If the Plan is not approved, it is more than likely that there will be minimal or no distributions that would be available to the general body of unsecured creditors.[39]

(e) ***No Oppression to Creditors:*** It is clear that the Plan does not oppress creditors given the relative recoveries for Affected Creditors under the Plan in comparison to a liquidation scenario. The Plan is expected to result in the greatest possible and

[37] *Olympia & York*, *supra* note 21 at para 36; *Canadian Airlines*, *supra* note 21 at para 97.
[38] Fourth Report, *supra* note 13 at para 39; Fifth Report, *supra* note 1 at para 36.
[39] Fifth Report, *ibid.*

most timely recovery for the Applicant's Affected Creditors in the circumstances, given the alternatives available to the Applicant.[40]

(f) ***The Plan is in the Public Interest*:** The Plan efficiently resolves the universe of Claims against the Applicant, effects a comprehensive restructuring of the Applicant, and avoids the effects of bankruptcy. The Plan will enable the Applicant to continue as a going concern with a deleveraged balance sheet. Approval of the Plan therefore serves the public interest and broader purposes of the CCAA.

36. In light of the foregoing, the Applicant submits that the Plan is fair, equitable and reasonable in the circumstances, and that the Court should exercise its discretion to grant the Sanction Order.

B. The Releases Granted by The Plan Are Appropriate

37. The Plan provides for full and final releases in favour of the Released Parties. These releases are fair, reasonable, appropriate in the circumstances, and do not preclude the sanctioning of the Plan.

38. It is well established that courts have the jurisdiction to sanction plans of compromise or arrangement under the CCAA containing third party releases, notwithstanding the fact that the CCAA does not expressly authorize or contemplate them. Courts have exercised their jurisdiction to release "claims against the Applicant and other parties against whom such claims or related claims are made" where there is a reasonable factual connection between the third party claim and

[40] *Ibid*.

the restructuring achieved by the plan.[41] Such releases are not uncommon in CCAA plans of compromise or arrangement.[42]

39. In *Re Metcalfe & Mansfield Laternative Investments II Corp*. ("***Metcalfe***"), the Ontario Court of Appeal held that a "release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring" falls within the CCAA's facilitative framework.[43]

40. When determining whether to authorize a plan of compromise or arrangement containing third party releases, the Ontario Court of Appeal in *Metcalfe* directed courts to consider whether:

(a) the parties to be released are necessary and essential to the restructuring of the debtor;

(b) the claims to be released are rationally related to the purpose of the plan and necessary for it;

(c) the plan would fail without the releases;

(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the plan;

(e) the plan would benefit not only the debtor company, but creditors generally;

(f) the creditors voting on the plan had knowledge of the nature and effect of the releases; and

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[41] *Muscletech Research and Development Inc, Re* (2007), 30 CBR (5th) 59 at paras 23 and 26.
[42] *Muscletech Research and Development Inc, Re* (2006), 25 CBR (5th) 231 at para 8.
[43] *Re Metcalfe & Mansfield Laternative Investments II Corp* (2008), 92 OR (3d) 513 at paras 61, 73-74 [*Metcalfe*].

(g) the releases are fair and reasonable and not overly broad.[44]

41. The releases in favour of the Released Parties were negotiated among various constituents as part of the overall framework of the compromises in the Plan. As such, the releases constitute a fundamental element of the Plan and are necessary to facilitate its successful implementation. The releases in favour of the Released Parties are not overly broad and contain the necessary and appropriate carve-outs.[45]

42. The releases are also reflective of the material contributions made by each of the Released Parties in the CCAA Proceedings.[46] Specifically, the releases in favour of the Released Parties are fair, reasonable and appropriate in the circumstances given that:

(a) Richter, in particular, has played an important role in overseeing the Applicant's restructuring including, without limitation: (i) resolving all outstanding Claims on commercially reasonable terms, thereby avoiding significant costs to arbitrate or litigate such Claims; and (ii) providing guidance and stability throughout the restructuring process, to the extent that restructuring could not have been successfully achieved without their contribution;

(b) the Representatives – which include, among others, Responsible Persons such as the current and former directors, officers, partners, employees, consultants, legal counsel, actuaries, advisers and agents – have been involved in the Applicant's restructuring, before or during the CCAA Proceedings, including the exploration of

[44] *Metcalfe*, *ibid* at para 70. See also, *Kitchener Frame Ltd, Re*, 2012 ONSC 234 at para 80.
[45] Fifth Report, *supra* note 1 at para 36; Williams-Singh Affidavit, *supra* note 1 at para 28, Applicant's Motion Record at Tab 2.
[46] Williams-Singh Affidavit, *ibid* at paras 28-29, Applicant's Motion Record at Tab 2.

restructuring alternatives, resolution of Claims, and the development and negotiation of the Plan;

(c) the releases in favour of the Affiliates and the Parent are justified given the contributions they have made in the development of the Plan, including, foregoing distributions in respect of Intercompany Claims in order to maximize distributions to Affected Creditors;

(d) all Released Parties have contributed fully to the development of the Plan by providing guidance and stability throughout the restructuring process and the CCAA Proceedings, and/or by continuing to support the Plan's implementation; and

(e) the releases in favour of the Released Parties were disclosed in the Meeting Materials circulated by the Monitor as required by the Meeting Order and in the motion materials served in support of this motion and have not been opposed by any party.[47]

43. For the foregoing reasons, the Applicant submits that the releases provided by the Plan are fair, reasonable and rationally connected to the overall purpose of the Plan. As such, the proposed releases are not an impediment to sanctioning the Plan and the Applicant submits that all of the criteria required for the granting of the Sanction Order have thus been satisfied.

[47] *Ibid* at paras 28-30, Applicant's Motion Record at Tab 2.

C. The Stay Period Should be Extended

44. The Stay Period will expire on October 30, 2020. Pursuant to the Sanction Order, the Applicant seeks an extension of the Stay Period to and until the time at which the Monitor's Second Certificate is filed.

45. Subsection 11.02(2) of the CCAA authorizes the Court to order an extension to a stay of proceedings afforded to a debtor company where it is satisfied that circumstances exist that make the order appropriate and that the applicant has acted, and is acting, in good faith and with due diligence.[48]

46. As described in greater detail in the Williams-Singh Affidavit and the Monitor's Fifth Report, the Applicant has acted, and continues to act, in good faith and with due diligence throughout the CCAA Proceedings, including by, among other things:

(a) providing notice of the Meeting, the Plan and the Sanction Hearing;

(b) conducting the Meeting in accordance with the Meeting Order; and

(c) finalizing arrangements with certain creditors of the Applicant in order to promptly proceed towards implementation of the Plan.[49]

47. The extension of the Stay Period sought pursuant to the Sanction Order will provide the Applicant and the Monitor with an opportunity to complete the necessary steps to implement the Plan and fulfill the Monitor's duties under the Claims Procedure Order.[50]

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[48] *CCAA*, *supra* note 20, s 11.02(2), s 11.02(3); *U.S. Steel Canada Inc, Re*, 2017 ONSC 1967 at para 23.
[49] Williams-Singh Affidavit, *supra* note 1 at para 46, Applicant's Motion Record at Tab 2; Fifth Report, *supra* note 1 at paras 54.
[50] Williams-Singh Affidavit, *ibid* at para 47, Applicant's Motion Record at Tab 2; Fifth Report, *ibid*.

48. The Applicant is forecasted to have sufficient cash on hand to continue their operations and the CCAA Proceedings during the proposed extensions to the Stay Period.[51]

49. The Monitor is supportive of the granting of the proposed extension to the Stay Period.[52]

PART V: RELIEF REQUESTED

50. The Applicant submits that it meets all of the qualifications required to obtain the relief sought and respectfully requests that this Court grant the proposed Sanction Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of October, 2020.

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[51] Williams-Singh Affidavit, *ibid* at para 48, Applicant's Motion Record at Tab 2; Fifth Report, *ibid* at paras 53-53.
[52] Fifth Report, *ibid* at para 54.

SCHEDULE "A"
LIST OF AUTHORITIES

Cases Cited

1. *Canadian Airlines Corp., Re*, [2000] AJ No. 1693

2. *Canwest Global Communications Corp, Re*, 2010 ONSC 4209

3. *Kitchener Frame Ltd, Re*, 2012 ONSC 234

4. *Metcalfe & Mansfield Alternative Investments II Corp, (Re)*, 2008 ONCA 587

5. *Muscletech Research and Development Inc, Re* (2007), 30 CBR (5th) 59

6. *Muscletech Research and Development Inc, Re* (2006), 25 CBR (5th) 231

7. *Olympia & York Developments Ltd v Royal Trust* Co, [1993] 12 OR (3d) 500

8. *Sino-Forest Corporation, Re*, 2012 ONSC 7050

9. *U.S. Steel Canada Inc, Re*, 2017 ONSC 1967

SCHEDULE "B"
STATUTES RELIED ON

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

Section 6

Compromises to be Sanctioned by Court
(1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment
(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims
(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a provincial pension plan as defined in that subsection.

Restriction — default of remittance to Crown
(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.
(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan
(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims
(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Section 11.02

Stays, etc. – initial application
(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application
(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application
(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction
(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

IN THE MATTER OF THE *COMPANIES CREDITORS' ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OR COMPROMISE OR ARRANGEMENT OF ROBERTS COMPANY CANADA LIMITED

Court File No.: CV-20-00643158-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced in Toronto

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