Court File No. CV-13-10279-00CL

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 PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO GROWTHWORKS CANADIAN FUND LTD.
(the "APPLICANT")

SUBMISSIONS OF ALLEN-VANGUARD CORPORATION

(Motion and Cross-Motion, returnable April 8, 2014)

April 4, 2014

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TO: **THE SERVICE LIST**

I. IN LIGHT OF THE FAILURE OF THE SISP PROCESS, THERE IS NO LONGER ANY NEED FOR A CCAA CLAIMS PROCESS

1. The basis upon which a stay of proceedings was sought and was granted was to prevent Roseway Capital S.a.r.l. ("Roseway") from instituting a fire sale of Growthworks Canadian Fund Ltd.'s ("Growthworks") assets and to permit Growthworks an opportunity to complete a merger transaction or other restructuring transaction which might arise from the implementation of the Sale and Investor Solicitation Process ("SISP").

2. The SISP failed. No merger transaction materialized. Roseway's interests have been accommodated. There remains no justifiable basis to continue a CCAA process.

3. There is also now no basis or need to deal with a portion of Allen-Vanguard Corporation's ("Allen-Vanguard") claims in summary fashion. There is no need or justification for a CCAA-type claims process. It would not further Growthworks' restructuring objectives. The Monitor acknowledged this in its Seventh Report:

> Given the outcome of the SISP, the facts of this case do not support the continuation of the claims process generally at this time as the outcome of the adjudication of the Allen-Vanguard Litigation will not have an immediate impact or assist in facilitating the restructuring of the Fund.[1]

4. Contrary to the assertion made by Mr. Ross in his Affidavit sworn March 31, 2014, the continuation of the Allen-Vanguard proceedings outside a CCAA claims process will not impede distribution to unsecured creditors or impede completion of Growthworks' Restructuring Plan,[2] which is for Roseway to manage Growthworks' assets in a runoff.

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[1] Seventh Report of the Monitor dated April 3, 2014 at para. 38.
[2] Affidavit of C. Ian Ross sworn March 31, 2014 at para. 34, Motion Record of Growthworks dated April 3, 2014 at p. 17.

5. First, aside from Roseway, there are no other creditors to whom a distribution is contemplated.

6. Second, Growthworks' business consists of the management and disposition of illiquid ownership interests in other companies. All parties recognize there is no urgency or quick fix to completing a disposition of these assets.

7. Third, a CCAA claims process is not required for Roseway to manage the Growthworks portfolio pursuant to any management agreement it may ultimately enter into.

8. Fourth, it is contemplated that Roseway will not be paid in full for another 12 to 18 months. As such, there will be no distribution to any other "valid creditors" until that time in any event. If the stay is not extended to the Allen-Vanguard Proceedings, there will be no impediment to Roseway being paid in full in accordance with the proposed Restructuring Plan.

9. In such circumstances, there must be a very high bar and an overwhelming rationale before this litigation should continue to be captured in a CCAA summary process, against the wishes of the Plaintiff, where a basis for diverting cases from the mainstream into a specialty process no longer exists.

10. Moreover, this proposed mini-trial process will not be proportional or cost effective as argued by Mr. Ross in his Affidavit. The costs associated with a mini-trial contrasted with a trial on all liability issues is detailed below.

11. Mr. Ross alleges for the first time that the costs to Growthworks and time required to address claims outside the CCAA process would "very likely impede the ability of the Fund to

complete the Restructuring Plan".[3] The Monitor disagrees. No explanation or detail is provided as to why this would be so or how the proposed Restructuring Plan will in any way be affected by Allen-Vanguard's claims.

12. The evidence before the Court demonstrates the limited involvement which Growthworks has had in the conduct of the Allen-Vanguard Proceedings to date, and will have as the litigation continues.

13. Given that Roseway is not going to be paid in full for another 12 to 18 months, the CCAA claims process and the cost and effort required to conduct a summary adjudication of only some of Allen-Vanguard's claims (and none of the related claims) in the manner proposed by the Offeree Shareholders, unfairly prejudices Allen-Vanguard and does not result in any benefit to Growthworks or to the objective of ensuring an orderly distribution to Growthworks' stakeholders.

14. There is now no urgency which would necessitate compromising or truncating Allen-Vanguard's claims or adjudicating them in a summary manner. Given that there is no merger transaction or any other bid under the SISP, it is time to get on with the litigation. Proceeding to trial on the liability issues in 2014 is the fairest, most efficient and cost effective way of doing justice to all the parties. Allen-Vanguard is hopeful that effective case management will get the parties to that point.

15. Respectfully, the Court should not be persuaded by Mr. Ross' statement that if the CCAA process did not continue, "one might expect Roseway to bring an application for the appointment

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[3] Affidavit of C. Ian Ross sworn March 31, 2014 at para. 41, Motion Record of Growthworks dated April 3, 2014 at p. 18.

of a receiver".[4] There is no evidence of any such threat from Roseway. An otherwise spent CCAA process should not in any event be employed to prevent a secured creditor from otherwise exercising its right to appoint a receiver. Presumably, if Roseway wished to appoint a receiver, it could have done so and would have done so instead of supporting a CCAA process to first see whether a merger transaction could be completed or whether there might be a qualified bid arising from the SISP.

16. If the concern about maximizing the value for Growthworks' stakeholders is to be given any credence, then the Court should take a hard look at what it has cost Growthworks (and thereby its stakeholders) to implement this failed restructuring. In the last 6 months alone, Growthworks' restructuring fees have totalled $2.23 million:

Time Period	**Restructuring Fees**
October 1, 2013 to October 25, 2013	$194,000[5]
October 26, 2013 to January 3, 2014	$1,416,000[6]
January 4, 2014 to February 28, 2014	$546,000[7]
March 1, 2014 to March 28, 2014	$75,000[8]
	Total: $2,231,000

17. The restructuring costs have already eclipsed the litigation costs of Growthworks in the Allen-Vanguard Proceedings by an order of magnitude. A continuation of these CCAA

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[4] Affidavit of C. Ian Ross sworn March 31, 2014 at para. 56, Motion Record of Growthworks dated April 3, 2014 at p. 25.
[5] Second Report of the Monitor dated October 28, 2013 at para. 40.
[6] Fifth Report of the Monitor dated January 8, 2014 at para. 45.
[7] Sixth Report of the Monitor dated March 5, 2014 at para. 32.
[8] Seventh Report of the Monitor dated April 3, 2014 at para. 40.

proceedings for another 12 to 18 months with its associated costs is not in the interest of any stakeholder.

II. FACTORS IN SUPPORT OF AN ORDER TO LIFT STAY OF PROCEEDINGS

18. Allen-Vanguard maintains its position on the motion that Growthworks bears the onus of demonstrating entitlement to an extension of the stay of the Allen-Vanguard Proceedings. Allen-Vanguard lists below the following factors which support an Order lifting the stay of proceedings as identified in *Re Canwest Global Communications*[9]:

(a) Allen-Vanguard has suffered hardship as a result of the stay. By virtue of the position taken by Growthworks and the other Offeree Shareholders, the ability to continue with the Allen-Vanguard Proceedings, including the setting of a new trial date and completing the interlocutory proceedings, which are solely those of the Offeree Shareholders, has been stopped in its tracks. Six months have already elapsed as a result of the position taken by Growthworks and the other Offeree Shareholders that nothing could occur in these actions in Ottawa in the meantime. As a result, Allen-Vanguard is being deprived of its ability to have its significant claim advanced and adjudicated;

(b) Conversely, there will be no resulting prejudice to Growthworks or the position of any creditors if the stay is lifted. The SISP failed to result in a merger transaction or any proposed other restructuring of Growthworks. Growthworks is continuing to negotiate a management agreement with its only secured creditor, Roseway, which

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[9] *Re Canwest Global Communications Corp.*, [2009] O.J. No. 5379 at para. 33 (S.C.J.), Supplementary Brief of Authorities of Allen-Vanguard Corporation ("Supplementary Authorities"), Tab 1.

does not require a stay of the Allen-Vanguard Proceedings. Indeed, aside from Roseway, there are no other creditors with claims against Growthworks for an amount greater than $1,000;

(c) Nor is there any prospect that Allen-Vanguard's claim will in any way impair Growthworks' continued negotiations with Roseway. The current plan contemplates that Growthworks will have repaid the secured debt to Roseway within 12-18 months. If Allen-Vanguard obtains a Judgment against Growthworks before the Roseway secured debt has been repaid, it has undertaken to seek leave of the Court before it enforces any such Judgment;

(d) The Allen-Vanguard Proceedings will not distract Growthworks from the Restructuring Plan. The litigation was not identified or even mentioned by Growthworks when it applied for the Initial Order. Growthworks plays a minor role in the litigation. The Allen-Vanguard Proceedings will certainly not hamper or impede Growthworks' restructuring efforts, which have come to a standstill following the failure of the SISP;

(e) Despite a stay of proceedings of 6 months to date, Growthworks is no closer to a proposal than at the commencement of the stay period;[10] and

(f) It is in the interests of justice that the stay be lifted to allow the Allen-Vanguard Proceedings to continue under the *Rules* and case management as a result of the factors identified above and as set out in Allen-Vanguard's motion material.

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[10] See, for example, *Re 3S Printers Inc.*, [2011] B.C.J. No. 895 at paras. 34-48 (S.C.), Supplementary Authorities, Tab 2.

III. PRACTICAL AND LEGAL PROBLEMS AND PREJUDICE ASSOCIATED WITH PROPOSED MINI-TRIAL

19. Growthworks and the Offeree Shareholders have not consistently articulated the issues which they say should be adjudicated in a mini-trial. As a result, Allen-Vanguard reserves all of its rights with respect to the framing of issues to be adjudicated in the event that a mini-trial is ordered.

20. Growthworks and the Offeree Shareholders seem to be proposing that the following issues be adjudicated in a mini-trial:

1. Assuming that all of Allen-Vanguard's claims of fraud and breaches of representations and warranties have been proven and are true, is Allen-Vanguard entitled under the Share Purchase Agreement to seek damages from Growthworks and the other Offeree Shareholders in excess of the Escrow Fund for the breaches and fraud committed by Med-Eng Systems Inc. ("MES")?

2. Were the claims of Allen-Vanguard extinguished at law when it amalgamated with Allen-Vanguard Technologies Inc., a wholly-owned subsidiary and corporate successor to MES, on January 1, 2011?

3. Did Allen-Vanguard release the Offeree Shareholders from any and all claims and causes of actions in its Plan of Arrangement and Reorganization in December 2009?

21. The adjudication of these issues (the "Proposed Claims Issues") as part of a mini-trial would be inefficient and unfair to Allen-Vanguard, and would not in any way advance Growthworks' Restructuring Plan.

(i) Issue #1 – Interpretation of the Share Purchase Agreement

22. Allen-Vanguard does not accept the nature of the issue put forward by the Offeree Shareholders with respect to the interpretation of the Share Purchase Agreement because it does not illuminate the difficulties inherent in conducting a mini-trial in the absence of a proper evidentiary record.

23. With respect to the first issue, the Offeree Shareholders propose that the Court interpret the Share Purchase Agreement, but presume that all of Allen-Vanguard's claims of fraud and breaches of representations and warranties have been proven and are true. This assumption actually defeats the proper and legally mandated interpretive exercise to be undertaken when the terms of a commercial agreement are in dispute.

24. The Court of Appeal has mandated time and again there are two overriding principles of contract interpretation in a case like this:

(a) First, the agreement is to be interpreted as a whole and at one time; and

(b) Second, the interpretive exercise is to be conducted within the context of the commercial setting and factual circumstances that existed at the time the agreement was made.

25. Assuming fraud, while superficially attractive as an expedient, is exactly the wrong way to proceed. What fraud? How can an assumed fraud be figured in to the meaning to be given to the language agreed to? How can an assumed fraud be squared with the task of understanding the purpose and meaning of the language and the intent of the parties reflected in the agreement?

26. In the absence of evidence regarding the commercial context (in this case, the actual evidence of the alleged fraud which was going on at the precise time the Share Purchase Agreement was being negotiated), the exercise will become one of simply looking at the language in the agreement itself and guessing what it means in a vacuum. This is essentially the same exercise that was done on the pleadings amendment motion and the appeal, where both Master MacLeod and Justice Hackland found ambiguity in the indemnification provisions of the Share Purchase Agreement.

27. Conducting an interpretive exercise in the absence of the commercial context would amount to an error of law. It is crucial that the Court not simply "assume fraud", but fully appreciate the claims of fraud, how it was committed, who benefitted from it, and when it occurred in relation to the negotiation of the agreement. This is essential to the interpretive exercise and can not be performed based on bare and undefined assumptions.

28. Interpretation of the Share Purchase Agreement must be considered within the context of the whole Transaction and with respect to all the provisions of the agreement. The Court of Appeal has summarized the basic principles of commercial contractual interpretation as follows:

> When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. **The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity.** Where a transaction involves the execution of several documents that form parts of a larger composite whole -- like a complex commercial transaction -- and each agreement is entered into on the faith of the others being executed, then assistance in the interpretation of one

> agreement may be drawn from the related agreements. See 3869130 Canada Inc. v. I.C.B. Distributing Inc. (2008), 66 C.C.E.L. (3d) 89 (Ont. C.A.), at paras. 30-34; Drumbrell v. The Regional Group of Companies Inc. (2007), 85 O.R. (3d) 616 (C.A.), at paras. 47-56; SimEx Inc. v. IMAX Corp. (2005), 11 B.L.R. (4th) 214 (Ont. C.A.), at paras. 19-23; Kentucky Fried Chicken Canada v. Scott's Food Service Inc. (1998), 41 B.L.R. (2d) 42 (Ont. C.A.), at paras. 24-27; and Professor John D. McCamus, The Law of Contracts (Toronto: Irwin Law Inc., 2005), at pp. 705-722.
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> [Emphasis added][11]

29. The Supreme Court of Canada has also held that a court may consider evidence of the surrounding circumstances when construing an agreement. In *Hill v. Nova Scotia (Attorney General)*[12], the Supreme Court cited with approval the following dicta of Justice LaForest (as he then was) in *White, Fluhman and Eddy v. Central Trust Co. and Smith Estate*:

> What the statement quoted means is that in determining what was contemplated by the parties, the words used in a document need not be looked at in a vacuum. The specific context in which a document was executed may well assist in understanding the words used. It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about.[13]

30. The role of the court in interpreting an ambiguous commercial contract was further explained by Justice Estey in *Consolidated-Bathurst Export Limited v. Mutual Boiler & Machinery Insurance Company*:

> [T]he normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly,

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[11] *Salah v. Timothy's Coffees of the World Inc.*, [2010] O.J. No. 4336 at para. 16 (C.A.), Supplementary Authorities, Tab 3.

[12] *Hill v. Nova Scotia (Attorney General)*, [1997] 1 S.C.R. 69 at para. 20, Supplementary Authorities, Tab 4.

[13] *White, Fluhman and Eddy v. Central Trust Co. and Smith Estate*, [1984] N.B.J. No. 147 at para. 33 (C.A.), Supplementary Authorities, Tab 5.

> an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.[14]

31. Careful consideration of the circumstances surrounding the making of the Share Purchase Agreement will also be required in order for the court to consider the public policy implications of interpreting the contract in the manner proposed by the Offeree Shareholders. As Justice Binnie observed in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*:

> Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause.[15]

32. The Court will need to interpret the Share Purchase Agreement as a whole, having regard to the commercial context in which it was made. If a fraud is assumed to have been committed by one of the parties (i.e. MES) in the making of the Share Purchase Agreement, then it necessarily subverts the interpretation and prevents a fair or proper adjudication of this issue.

33. Otherwise, based on an "assumption of fraud", the Court will necessarily have to give effect to the fraud if it interprets the contract in such a way that it precludes or in any way limits Allen-Vanguard's claims. This is contrary to legal principles involving fraud. As held by the

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[14] *Consolidated-Bathurst Export Limited v. Mutual Boiler & Machinery Insurance Company*, [1980] 1 S.C.R. 888 at 901, Supplementary Authorities, Tab 6.
[15] *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 S.C.R. 69 at para. 120, Supplementary Authorities, Tab 7.

Supreme Court of Canada in *Landreville v. Town of Boucherville*, citing *Lazarus Estates Ltd. v. Beasley*[16]:

> Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever.

34. In addition, quite apart from issues of contractual interpretation, a mere assumption of fraud will also deprive the Court of necessary evidence to determine the legal effect of the fraud committed by MES.

35. In particular, the Court will need to hear and assess the evidence in relation to Allen-Vanguard's pleading that the Offeree Shareholders are liable for the breaches of representations and warranties and fraudulent misrepresentations committed by MES. Allen-Vanguard has expressly pleaded that the Offeree Shareholders relied upon MES to make representations to Allen-Vanguard to induce Allen-Vanguard to purchase their shares in MES, and that the Offeree Shareholders were the ones who benefitted from the breaches and fraud.

36. This evidence must be considered as part of any determination regarding the liability of the Offeree Shareholders, and can not be made in the absence of a proper evidentiary record or by limiting the evidence on a mini-trial to the witnesses which have been selected by the Offeree Shareholders.

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[16] *Landreville v. Town of Boucherville*, [1978] 2 S.C.R. 801 at p. 814, citing *Lazarus Estates Ltd. v. Beasley*, [1956] 1 Q.B. 702 (C.A.) at para. 712, Supplementary Authorities, Tab 8.

(ii) Issue #2 – Amalgamation of MES

37. With respect to the second issue, this is simply a reiteration of the Offeree Shareholders' defence which was pleaded in their original Statement of Defence in February, 2009, and which has already been canvassed in the Examinations for Discovery.

38. In essence, the Offeree Shareholders argue that they bear no liability at all because Allen-Vanguard was required to assert its claim against MES (the purchased entity which became Allen-Vanguard's wholly-owned subsidiary following the closing of the Share Purchase Transaction) rather than as against the Offeree Shareholders. As a result, they submit that Allen-Vanguard's claims were extinguished when Allen-Vanguard subsequently amalgamated with MES.

39. This argument is commercially absurd and flies in the face of specific admissions made by the Offeree Shareholders at discovery.

40. In any event, this is again an issue of contractual interpretation which can not be separated from the interpretation of the other provisions contained in the Share Purchase Agreement relating to fraud, and the evidence of the factual matrix. It can not be hived off and interpreted in a vacuum. It must be interpreted in accordance with the commercial context.

(iii) Issue #3 – Allen-Vanguard 2009 CCAA Proceedings

41. With respect to the third issue, the Offeree Shareholders raised this argument for the very first time in their Factum on this motion on January 31, 2014 (more than 4 years after Allen-Vanguard's CCAA proceedings).

42. This defence has never been pleaded by the Offeree Shareholders nor has it been the subject of any discovery.

43. The inclusion of such an issue in the mini-trial raises the spectre that the Offeree Shareholders are trying to exploit Growthworks' CCAA proceedings to obtain a tactical and procedural advantage that they obviously determined they could not achieve prior to this time.

44. There is no license to run roughshod over the basic right of a litigant to expect any trial to proceed only in accord with the claims that are the subject of the pleadings.

45. This Honourable Court should be circumspect about the Proposed Claims Issues suggested by the Offeree Shareholders as they are not discrete issues which can be separated from the remaining issues that will inevitably require adjudication in the actions involving the Offeree Shareholders and Paul Timmis. Contrary to the assertions made by the Offeree Shareholders, an adjudication of the Proposed Claims Issues will not dispose of the actions, shorten the proceedings or avoid a second trial.

46. Finally, a fundamental principle in the *Rules of Civil Procedure* and the common law is that bifurcation of issues is not generally permitted absent consent. Nothing in the CCAA or the nature of this case overrides this fundamental principle. Nothing in a claims process permits the Court to hive off some components of a plaintiff's claim from other aspects of the claim.

IV. NO PREJUDICE WILL BE CAUSED TO GROWTHWORKS IF A TRIAL OF THE LIABILITY ISSUES ARE BIFURCATED FROM DAMAGES

47. Attached as Schedule 1 is a detailed chart which sets out the procedural options available for the Allen-Vanguard Proceedings.

48. Following the commencement of these CCAA proceedings, Allen-Vanguard has consistently proposed a bifurcation of the liability issues from the damages issues in the case. Allen-Vanguard is not proposing a full trial of liability and damages, and has not proposed that since the CCAA stay order came into effect.

49. Allen-Vanguard's proposal is the most efficient and fair way of dealing with the dispute on the merits, and it advances the Allen-Vanguard Proceedings much further than the proposed mini-trial.

50. The Ottawa Court has confirmed that 10 weeks remain available in 2014.

51. Allen-Vanguard's assessment of a liability trial is that it will not exceed 6-7 weeks and there is no reason the liability trial could not proceed in Ottawa in that available slot.

52. Aside from the damages issues, there is nothing in Allen-Vanguard's amendments to the Statement of Claim which precludes the parties from proceeding on all liability issues, including the Proposed Claims Issues described by the Offeree Shareholders. The amendments made to Allen-Vanguard's Statement of Claim in 2013 did not add any new claim or change the nature of the claims asserted by Allen-Vanguard. Rather, the amendments further particularized Allen-Vanguard's existing fraud claim and increased the quantum of damages sought. There is no new claim for fraud or "second fraudulent misrepresentation claim".

53. Contrary to the argument made by Mr. Ross in his Affidavit, there are no additional productions, discoveries or procedural steps that need to be taken on the question of fraud. The fraud claim was asserted by Allen-Vanguard in its original Statement of Claim and was fully canvassed in the discoveries.

54. The only aspect of the case which requires further production or discovery is in relation to damages.

55. If the Offeree Shareholders are of the view that this case is ready to proceed to a mini-trial on the interpretation of the Share Purchase Agreement, then there is no reason why the balance of the liability issues, including fraud, are not ready to be tried.

56. Allen-Vanguard is prepared to set these actions down for trial.

57. No explanation or evidence has been put forward by the Offeree Shareholders (including Growthworks) as to how they will be prejudiced by proceeding to a trial on all liability issues in September 2014.

58. A trial of all liability issues in the Fall of 2014 is far more efficient than, and preferable to, a mini-trial on the Proposed Claims Issues in July 2014, which timetable has its own issues.

59. A mini-trial in the manner proposed by the Offeree Shareholders will considerably delay a final adjudication of the claims made by Allen-Vanguard, the Offeree Shareholders and Paul Timmis. It will not result in an expeditious and cost-effective resolution for any of the parties.

60. There is little doubt that the determination in the mini-trial will result in an appeal, which would then delay the inevitable trial even further. After all appeals have been exhausted, it will then become clear (what is already clear now) that the mini-trial will have caused the actual trial on the merits to be delayed until 2016 at the earliest. This would be a miscarriage of justice, and is unfair to Allen-Vanguard particularly since all of the liability issues (including the Proposed Claims Issues) could have been tried by the end of 2014.

V. COSTS ASSOCIATED WITH MINI-TRIAL

61. The difference in costs between a mini-trial and a liability trial is not significant. It amounts to a difference of approximately $40,000 for Growthworks.

62. Given that the Offeree Shareholders have consistently claimed excessive costs in connection with the interlocutory steps in the Allen-Vanguard Proceedings, including claimed costs of $74,207.67 for a one-day privilege motion, their total estimate of between $100,000 and $150,000 for the mini-trial is highly suspect. There are now at least two law firms involved with multiple counsel at each. A realistic estimate of the costs for the Offeree Shareholders and Allen-Vanguard to complete the mini-trial is approximately $300,000-$350,000 each.[17]

63. Growthworks' fees and disbursements are split proportionately with the other Offeree Shareholders based on their respective former shareholdings in MES. As such, a realistic estimate of the costs for Growthworks to complete the mini-trial is $60,000-$80,000 [18] (not $15,000-$25,000 as suggested by counsel for the Offeree Shareholders).

64. By way of comparison, the costs required to complete a trial of all liability issues is just slightly more, $450,000-$600,000[19] for the Offeree Shareholders and Allen-Vanguard. This would amount to costs of approximately $100,000-$125,000 for Growthworks.

65. Further, the costs to Growthworks of a mini-trial will have to be duplicated given that a trial on the merits will still need to be pursued regardless of the disposition of the mini-trial. There

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[17] See Schedule 1.
[18] See Schedule 1.
[19] See Schedule 1.

is also a second action involving Paul Timmis which has been ordered to be tried together because the facts and legal issues in that case are inextricably intertwined with those in these other actions.

66. As set out above, an adjudication of the Proposed Claims Issues will not result in a final adjudication of the merits of the proceedings and will not result in a narrowing or shortening of the issues to be tried. The costs of proceeding to a mini-trial will therefore be significantly greater when compared to the other procedural options available. Indeed, Allen-Vanguard estimates that it will incur several hundreds of thousands of dollars in additional unnecessary costs to prepare for and complete a mini-trial and all related motions and appeals which will certainly arise.

VI. POTENTIAL SOLUTION

67. If Growthworks and the other Offeree Shareholders are genuinely of the view that the mini-trial will result in a dismissal of Allen-Vanguard's claims and a second trial on the merits is not inevitable, then the Offeree Shareholders should admit (not just assume for the limited purposes of a partial trial) the fraud and breaches of representations, warranties and covenants which have been pleaded by Allen-Vanguard.

68. A mini-trial should proceed only on the following conditions:

(a) The Offeree Shareholders admit that MES committed the fraudulent misrepresentations and breaches of representations, warranties and covenants as pleaded by Allen-Vanguard;

(b) An agreed statement of facts is made detailing the nature and substance of the fraud;

(c) The stay of proceedings is lifted for the purposes of the mini-trial and remains permanently lifted for any subsequent appeals or further steps in the Allen-Vanguard Proceedings; and

(d) If Allen-Vanguard is successful on the mini-trial, a damages trial will be adjudicated by mid-2015.

69. If the Court imposes these conditions, then the parties will be on an equal playing field with respect to the risk of winning or losing the issues on the mini-trial and the mini-trial will not simply be an academic exercise.

70. Otherwise, in the absence of such an admission and a detailed exposition of the fraud, Allen-Vanguard will be prejudiced because even if it were to succeed on the mini-trial, it will have had to expend hundreds of thousands of dollars to defend the mini-trial only to have to incur all of those costs again to prove its case on the merits on the liability trial.

71. On the other hand, if the Offeree Shareholders were to admit the claims for fraud and breach of representations and warranties, then there would be no need for a second trial on the merits. Allen-Vanguard would be put in an equal position with the Offeree Shareholders as both parties will face the same risk based on the outcome of the mini-trial.

72. If the Offeree Shareholders believe that their position on the mini-trial is such that it will result in a dismissal of Allen-Vanguard's claims, then they should be prepared to face the same risk which they are asking Allen-Vanguard to face by adjudicating Allen-Vanguard's claims in this manner.

73. If the Offeree Shareholders admit to the allegations of fraud and breaches of representations and warranties, and if Allen-Vanguard is successful on the mini-trial, a second trial would proceed only to assess the damages. Conversely, if the Offeree Shareholders are successful on the mini-trial, then there will obviously be no need for a damages assessment and the action will be dismissed.

74. If such a mini-trial were to be conducted, then the rights of appeal should not be limited by the leave requirements under the CCAA. Given that the Offeree Shareholders have already agreed to consent to a waiver of the leave requirements, it would make the most sense for the stay to be lifted for the purposes of proceeding to a mini-trial and for the stay to remain lifted for the balance of the Allen-Vanguard Proceedings regardless of the outcome of the mini-trial or any subsequent appeals.

VII. TYPES OF EVIDENCE WHICH ALLEN-VANGUARD WOULD FILE ON A MINI-TRIAL/SUMMARY HEARING

75. Allen-Vanguard does not agree to a mini-trial and does not accept the assumption that a mini-trial could be conducted in a one-week hearing in which all of the evidence in chief would be adduced by way of affidavits and in which cross-examinations would not exceed 3.5 days of hearing time. This is not a trial at all. Approximately 3 weeks would be required for any mini-trial. If a mini-trial were to be ordered, then Allen-Vanguard would seek to adduce the following evidence at the mini-trial:

(a) Affidavit evidence from David Luxton and from other members of Allen-Vanguard's board of directors and management, who will attest to Allen-Vanguard's claims of fraud, the negotiation and execution of the relevant agreements between Allen-Vanguard, MES and the Offeree Shareholders, as well

as the factual matrix surrounding the closing of the Share Purchase Transaction on September 17, 2007;

(b) Affidavit evidence from Allen-Vanguard's solicitors on the Share Purchase Transaction, which will join issue with the anticipated evidence of the Offeree Shareholders' solicitors;

(c) Expert evidence regarding mergers and acquisitions and how the structure of share purchase transactions address vendor liability for misrepresentations;

(d) Summons to witness will need to be issued pursuant to Rule 39.03 to Paul Timmis to be cross-examined by Allen-Vanguard at the hearing of the mini-trial. This evidence is necessary to demonstrate, *inter alia*, the nature and extent of the fraud that was committed against Allen-Vanguard at the time that Allen-Vanguard negotiated the terms of the Share Purchase Agreement with MES and the Offeree Shareholders and up to the closing of the Share Purchase Transaction; and

(e) Since the Offeree Shareholders have not proposed putting in an Affidavit from the other parties to the Share Purchase Agreement, summonses to witness will need to be issued pursuant to Rule 39.03 to Richard L'Abbé and a representative of Growthworks.

76. The evidence described above is necessary for a proper adjudication of the mini-trial.

77. While there may be some cases and some issues which can be neatly and creatively hived off from the rest of an action, this is not such a case. It is clear now from the discussions among counsel and from the disagreements even as to the question which is to be determined by the Court

on a mini-trial, that Allen-Vanguard's rights will be significantly prejudiced if its claims are parsed off into silos and adjudicated in this way.

78. There will be far more interlocutory disputes leading up to the mini-trial, than there would be on a trial of the liability issues. There will be a disagreement about the admissibility of evidence from the parties, from their counsel and from experts on the issues to be determined, and especially when there is no agreement on the actual question to be adjudicated at a mini-trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of April, 2014.

Ronald G. Slaght, Q.C.

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Ian MacLeod

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Lawyers for Allen-Vanguard Corporation

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re Canwest Global Communications Corp.*, [2009] O.J. No. 5379 (S.C.J.)
2. *Re 3S Printers Inc.*, [2011] B.C.J. No. 895 (S.C.)
3. *Salah v. Timothy's Coffees of the World Inc.*, [2010] O.J. No. 4336 (C.A.)
4. *Hill v. Nova Scotia (Attorney General)*, [1997] 1 S.C.R. 69
5. *White, Fluhman and Eddy v. Central Trust Co. and Smith Estate*, [1984] N.B.J. No. 147 (C.A.)
6. *Consolidated-Bathurst Export Limited v. Mutual Boiler & Machinery Insurance Company*, [1980] 1 S.C.R. 888
7. *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 S.C.R. 69
8. *Landreville v. Town of Boucherville*, [1978] 2 S.C.R. 801

SCHEDULE 1 – PROCEDURAL OPTIONS FOR TRIAL

	Option 1: "Mini-Trial" + Subsequent Trial of All Remaining Issues	**Option 2: Trial of Liability Issues + Subsequent Trial of Damages Issues**	**Option 3: Full Trial (Liability and Damages Issues)**
Further oral discovery required at this time based upon the pleadings	None	None	Only on damages issues
Further documentary discovery required at this time based upon the pleadings	None	None	Only on damages issues
Hearing time required	3 weeks	6-7 weeks	10 weeks
Total number of witnesses required	10 (approx.)	10-15	12-17
Likely hearing date(s)	July 2014	September-October 2014	2015
Likelihood of pre-hearing motions and interlocutory appeals	High (evidentiary and pleading issues)	None	Moderate
Likelihood of appeal(s)	High	Moderate	Moderate
Costs for Growthworks (excluding pre-hearing motions and appeals)	$60,000-$80,000	$100,000-$125,000	$125,000-$150,000
Costs for Allen-Vanguard (excluding pre-hearing motions	$300,000-$350,000	$450,000-$600,000	$600,000-$700,000

	Option 1: "Mini-Trial" + Subsequent Trial of All Remaining Issues	**Option 2: Trial of Liability Issues + Subsequent Trial of Damages Issues**	**Option 3: Full Trial (Liability and Damages Issues)**
and appeals)			
Prejudicial Effect of Procedure to Allen-Vanguard	High	None	None
Prejudicial Effect of Procedure to Growthworks	None	None	None
Prejudicial Effect of Procedure to Paul Timmis	High	None	None
Costs for Growthworks to prepare damages issues for trial	$40,000-$60,000	$40,000-$60,000	$40,000-$60,000
Costs for Allen-Vanguard to prepare damages issues for trial	$100,000-$125,000	$100,000-$125,000	$100,000-$125,000
Hearing date for remaining issues	2016 (remaining issues related to liability and damages)	2015 (remaining issues related to damages)	N/A
Costs for Growthworks to complete trial of remaining issues	$80,000-$100,000 (remaining issues related to liability and damages)	$40,000-$60,000 (remaining issues related to damages)	N/A
Costs for Allen-Vanguard to complete trial of remaining issues	$300,000-$400,000 (remaining issues related to liability and damages)	$150,000-$200,000 (remaining issues related to damages)	N/A

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED, AND IN THE MATTER OF GROWTHWORKS CANADIAN FUND LTD.

Court File No. CV-13-10279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

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