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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD, LTS RESOURCES PARTNERSHIP, 1863360 ALBERTA LTD AND BAKKEN RESOURCES PARTNERSHIP
APPLICANTS	LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD AND 1863360 ALBERTA LTD
PARTIES IN INTEREST	LTS RESOURCES PARTNERSHIP AND BAKKEN RESOURCES PARTNERSHIP
DOCUMENT	**BRIEF OF THE APPLICANTS (COMEBACK HEARING)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BLAKE, CASSELS & GRAYDON LLP** Barristers and Solicitors 3500 Bankers Hall East 855 – 2nd Street SW Calgary, Alberta T2P 4J8 Attention: Kelly Bourassa Telephone No.: 403-260-9697 Email: kelly.bourassa@blakes.com Fax No.: 403-260-9700 File: 89691/8

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I. INTRODUCTION

1. This brief is submitted on behalf of the Lightstream Group in response to the bench brief dated September 26, 2016 (the "**Plaintiffs' Brief**") from two groups of holders of Unsecured Notes, Mudrick Capital Management ("**Mudrick**"), FrontFour Capital Corp. and FrontFour Capital Group LLC (together, "**FrontFour**", and collectively with Mudrick, the "**Plaintiffs**"). The Plaintiffs, among other things, opposed certain relief sought in the initial order (the "**Initial Order**") granted pursuant to the *Companies' Creditor Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**") on September 26, 2016 by the Honourable Justice A.D. Macleod.[1]

2. The Lightstream Group previously provided this Honourable Court with a bench brief in these proceedings in support of the Initial Order (the "**Initial Order Brief**"), which outlines the legislation and jurisprudence that is relevant to the relief granted in the Initial Order. The purpose of this brief is to respond to certain statements made in the Plaintiffs' Brief. This brief should be read in conjunction with the Initial Order Brief. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Initial Order Brief.

II. FACTS

3. A summary of the facts relevant to the application for the Initial Order is set out in the Initial Order Brief. Additional facts pertaining to the issues raised in the Plaintiffs' Brief are set out below.

A. The Transaction

4. As discussed in the Initial Order Bench Brief, the Unsecured Notes were issued pursuant to an indenture dated as of January 30, 2012 (as supplemented by the supplemental indenture dated as of February 25, 2015, collectively, the "**Unsecured Note Indenture**") between LTS, as issuer, 1863359, 1863360, LTS Partnership, Bakken Partnership, U.S. Bank National Association (now Wilmington Trust), as trustee, and Computershare Trust Company of Canada, as Canadian trustee. [2]

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[1] Initial Order (September 26, 2016), Calgary, Court File No 1601-12571. [**TAB 1**]

[2] Affidavit of Peter D. Scott sworn on September 21, 2016 at paras 46 and 69; Exhibit 1 at Exhibit Q (the "**Scott Affidavit**").

5. Section 4.06(b) of the Unsecured Note Indenture provides several options through which LTS was able to incur further indebtedness (the "**Permitted Debt Baskets**").[3] One of the Permitted Debt Baskets under section 4.06(b) is set out in section 4.06(b)(i) (the "**Credit Facility Basket**"). The Credit Facility Basket expressly permits LTS to incur further indebtedness in the form of, among other things, notes, debentures, bonds or similar securities or instruments, up to a specified amount.[4]

6. Section 4.06(d) of the Unsecured Note Indenture confirms that where indebtedness falls within more than one of the Permitted Debt Baskets, it can be incurred in whole or in part under any one or more Permitted Debt Baskets and subsequently re-allocated in whole or in part at any time between or among any one or more Permitted Debt Baskets.[5] Section 4.08 of the Unsecured Note Indenture specifies the circumstances under which indebtedness may be secured by a lien; however, indebtedness incurred under the Credit Facility Basket is specifically permitted to be secured by a lien under the first clause of the definition of "Permitted Liens".[6]

7. In July 2015, LTS announced that it had agreed to: (i) repurchase certain Unsecured Notes from certain holders in exchange for the issuance by LTS of the new Secured Notes; and (ii) to issue additional Secured Notes to those same holders for US$200 million paid to LTS (the "**Transaction**").[7]

8. Lightstream issued the Secured Notes pursuant to the Credit Facility Basket and granted liens for the benefit of the Secured Noteholders, as expressly permitted and contemplated under the terms of the Unsecured Note Indenture.[8] There was no obligation under the Unsecured Note indenture or applicable securities laws on LTS to invite all holders of Unsecured Notes to participate in the Transaction or to notify all holders that the Transaction was being considered.

9. After the Plaintiffs voiced their dissatisfaction in being excluded from the Transaction, LTS advised the Plaintiffs that the Secured Note Indenture provided a basket for additional

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[3] Affidavit of David Kirsch sworn on September 23, 2016 at Exhibit A (the "**Kirsch Affidavit**").

[4] Kirsch Affidavit at Exhibit A.

[5] Kirsch Affidavit at Exhibit A.

[6] Kirsch Affidavit at Exhibit A.

[7] Scott Affidavit at paras 61-63.

[8] Scott Affidavit, Exhibit 1 at paras 82-86; Kirsch Affidavit at Exhibit A.

exchanges, subject to certain limitations on rate and amount. The Plaintiffs chose not to participate in this exchange.[9]

B. The Plaintiffs

10. The Plaintiffs are sophisticated investment advisors or portfolio managers based out of New York, Toronto and Greenwich, Connecticut,[10] who have experience assessing and valuing securities and who hold a substantial number of the Unsecured Notes.[11]

11. Following the announcement of the exchange transaction, the Plaintiffs commenced certain actions against LTS in this Honourable Court in Court File No. 1501-08782 (the "**Mudrick Action**") and Court File No. 1501-07813 (the "**FrontFour Action**", and together with the Mudrick Action, the "**Actions**").[12] LTS has filed statements of defence in the Actions disputing the allegations and claims made by the Plaintiffs in the Actions.[13]

12. FrontFour holds a total of US$31,750,000 of Unsecured Notes[14] and Mudrick holds US$107,465,000 of Unsecured Notes.[15] Since filing its statement of claim in the Mudrick Action, Mudrick has more than tripled its holdings of the Unsecured Notes from US$32,200,000 to US$107,465,000.[16]

C. Necessity of these Proceedings

13. As set out in the Initial Order Brief beginning at paragraph 21, the Lightstream Group was unable to reach a satisfactory settlement with respect to the Actions on or before September 16, 2016 and, as required by the Support Agreement, the Lightstream Group brought an application for the Initial Order, which order was granted on September 26, 2016, subject to a comeback hearing scheduled for October 11, 2016 (the "**Comeback Hearing**").[17]

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[9] Kirsch Affidavit, Exhibit E at paras 31-32, Exhibit F at paras 11-12.
[10] Kirsch Affidavit at para 1, Exhibit F at paras 1-2.
[11] Kirsch Affidavit at para 9, Exhibit F at paras 3, 13.
[12] Kirsch Affidavit at para 5.
[13] Initial Order Brief at TAB 1.
[14] Kirsch Affidavit at para 18.
[15] Kirsch Affidavit at para 17.
[16] Kirsch Affidavit, Exhibit D at paras 5, 11.
[17] Scott Affidavit at para 75.

14. It was necessary and appropriate for the Lightstream Group to seek protection under the CCAA because:

(a) the US$200 million received from the Transaction did not solve the liquidity issues of the Lightstream Group as was expected;

(b) a borrowing base redetermination in 2016 reduced the total amount of the credit facilities under the Credit Agreement from $550 million to $250 million, which resulted in a borrowing base shortfall and, after failure to cure the shortfall within the cure period, an event of default under the Credit Agreement;[18]

(c) the failure to make the interest payments owing to the Secured Noteholders and the Unsecured Noteholders resulted in events of default under the Secured Note Indenture and Unsecured Note Indenture, and cross defaults under the Credit Agreement;[19] and

(d) the revolving facility commitment letter (the "**Commitment Letter**") dated August 26, 2016, which provides for a new revolving credit facility with an aggregate commitment of $400 million (the "**Replacement Credit Facility**"), which is available to the Secured Noteholders should the Secured Noteholder Credit Bid be the successful bid in the Sale Procedures, requires the sale transaction to close on or before December 31, 2016.[20]

III. LAW AND ARGUMENT

A. The Sale Procedures are Appropriate in the Circumstances

(i) There are no Reasonable Alternatives to the Commencement of the Sale Procedures

15. In December 2014, the Lightstream Group announced its 2015 capital program, as well as certain strategic initiatives, including plans to sell all or parts of its Bakken Business Unit.[21]

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[18] Scott Affidavit at para 55.

[19] Scott Affidavit at paras 55, 65, 71.

[20] Scott Affidavit at para 58.

[21] Scott Affidavit at para 80.

16. On May 2, 2016, the Lightstream Group announced a decision to initiate a process to explore a range of strategic alternatives (the "**Strategic Review Process**"), which entailed the Lightstream Group considering among other things: (i) alternative first lien financing to replace the credit facilities under the Credit Agreement; (ii) the sale of certain assets; and (iii) negotiated restructuring and/or recapitalization alternatives.[22]

17. As part of the Arrangement Proceedings, the Lightstream Group commenced the SISP on July 13, 2016. As described in the Initial Order Brief beginning at paragraph 41, the Lightstream Group has continued the SISP in these CCAA proceedings by way of the Sale Procedures.[23] The Sale Procedures contemplate the sale of substantially all of the Lightstream Group's property.

18. The Plaintiffs suggest the Sale Procedures are premature and argue that these CCAA proceedings should be used to pursue all restructuring alternatives, including a potential debt-for-equity exchange of Secured Notes and Unsecured Notes.[24]

19. Through the Strategic Review Process, the Lightstream Group has already considered a wide range of alternatives to the Sale Procedures.[25] The Lightstream Group has also already attempted to restructure its affairs by way of a debt-for-equity exchange pursuant to the Arrangement Proceedings that were commenced on July 13, 2016; however, these attempts were unsuccessful, in no small part due to the actions of the Plaintiffs. As a result, the Lightstream Group was required to seek protection under the CCAA and the concurrent approval of the Sale Procedures.

20. Canadian courts have repeatedly recognized that *en bloc* sales of a debtor company's assets can be consistent with the broad remedial purpose and flexibility of the CCAA.[26] Recently, in *Sanjel*, this Court noted that affecting the *en bloc* sale of a debtor company's assets through the CCAA was particularly well-suited to the current catastrophic downturn of the

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[22] Scott Affidavit, Exhibit 1 at paras 126-128.

[23] Scott Affidavit at para 88.

[24] Plaintiffs' Brief at para 64.

[25] Questioning Transcript of Peter D. Scott dated October 3, 2016 ("**Scott Transcript**") at 33, lines 21-27. **[TAB 2]**

[26] *Sanjel Corp, Re,* 2016 ABQB 257 at para 64, ("***Sanjel***"). **[Initial Order Brief, TAB 7]**

economy in Alberta since it allowed a business to be kept together and sold as a going concern to the extent possible.[27]

21. Further, this Court has broad discretion under the CCAA to approve marketing and solicitation processes, and routinely does so as part of an Initial Order at the outset of a CCAA proceeding in the appropriate circumstances.[28]

22. Given the already exhaustive attempts by the Lightstream Group to pursue other restructuring options (including over two months in the Arrangement Proceedings attempting to settle a consensual debt-for-equity exchange with the Plaintiffs), the only option left was for the Lightstream Group to pursue the Sale Procedures. There is no reason to delay their implementation.[29]

23. Courts should be reluctant to interfere with the good faith exercise of business judgment of the directors and officers of a corporation, who in the case of Lightstream have a substantial amount of experience in the business of exploration and production companies and are working to maximise value to all stakeholders.[30] This reluctance to interfere with the business judgment is even more so in this CCAA proceeding in which the Sale Procedures were reviewed and approved by highly qualified professionals with great experience in restructuring.[31] Additionally, the Sale Procedures are recommended by the Monitor and supported by the First Lien Lenders and the *Ad Hoc* Committee of Secured Noteholders.

24. As set out in the Initial Order Brief beginning at paragraph 40, the Sale Procedures are appropriate in the circumstances.

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[27] *Sanjel* at para 66. **[Initial Order Brief, TAB 7]**

[28] *Poseidon Concepts Corp et al (Re)* (April 9, 2013), Calgary, Court File No 1301-04364 at paras 41-42 **[TAB 3]**; *Skope Energy Partners et al, Re* (November 28, 2012), Calgary, Court File No 1201-14864 at para 10 **[TAB 4]**; *Argent Energy Trust, et al, Re* (February 17, 2016, as amended and restated on March 9, 2016), Calgary, Court File No 1601-01675, ("***Argent Energy***"). **[Plaintiffs' Brief, TAB 13]**

[29] Scott Transcript at 75, lines 14-17. **[TAB 2]**

[30] Scott Transcript at 8, lines 1-5; 56, lines 20-23. **[TAB 2]**

[31] *Essar Steel Algoma Inc, Re,* 2016 ONSC 3205 at para 29. **[TAB 5]**

(ii) The Plaintiffs have No Bona Fide Reason to Object to the Sale Procedures

25. In opposition to the Sale Procedures, the Plaintiffs suggest that the Secured Noteholder Credit Bid "will be contentious and heavily litigated".[32] There is no evidence before the Court that the Actions are in any way impacting the sale process being undertaken pursuant to the Sale Procedures. The Actions, like other litigation against the Lightstream Group, are subject to the broad stay of proceedings in the Initial Order (and, as set out in the Initial Order Brief, there is no basis upon which to exclude the Actions from the stay of proceedings).

26. As set forth in the Initial Order Brief beginning at paragraph 89, the claims advanced by the Plaintiffs are merely unsecured claims against LTS. The Lightstream Group is attempting to advance the threshold issue determination as to whether the specific performance remedy sought by the Plaintiffs is available in the CCAA. If the Court accepts the Lightstream Group's position that, based upon the pleadings in the Actions, the Plaintiffs could only ever have an unsecured claim for the value of their Unsecured Notes plus interest, in accordance with the Unsecured Note Indenture, there is no possible impact on the Sale Procedures or the Secured Noteholder Credit Bid.

27. The Plaintiffs argue, in the alternative that, should the Sale Procedures continue following the Comeback Hearing: (i) the length of time for the Phase I bid deadline is too short; (ii) the Sale Procedures pre-suppose amounts owing to the Secured Noteholders; and (iii) the Secured Noteholders should not have consultation rights in the Sale Procedures.[33]

28. With regard to the timing for the Phase I bid deadline, the Sale Procedures contemplate that non-binding indications of interest are to be submitted on or before October 21, 2016, which is approximately four weeks after the Sale Procedures were approved pursuant to the Initial Order.[34]

29. In constructing the timeline for the Sale Procedures, including the Phase I bid deadline, TD Securities Inc. (the "**Sale Advisor**") took a range of factors into consideration, including: (i)

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[32] Plaintiffs' Brief at para 63.

[33] Plaintiffs' Brief at para 67.

[34] Scott Affidavit at para 94.

typical timelines for processes conducted by the Sale Advisor for similar exploration and production companies; (ii) the bid submission requirements that each potential bidder would need to satisfy, which in the case of the Phase I bid deadline is limited to a non-binding indication of interest; (iii) the activity level to date, including the fact that the Sale Advisor contacted more than 600 parties and 37 non-disclosure agreements had been executed at that time; and (iv) consultations with the Lightstream Group and the Monitor.[35]

30. With regard to the Plaintiffs' objection to the illustrative valuation of the Secured Noteholders Credit Bid prepared by the Monitor, which included a "make-whole" amount, the Secured Note Indenture at section 3.01 contemplates that a make-whole price is owed to the Secured Noteholders where the Secured Notes are redeemed prior to the maturity date.[36] Section 6.02(c) of the Secured Note Indenture states expressly that the make-whole amount is also payable in the event of a bankruptcy filing. As at July 12, 2016, the make-whole amount was approximately US$48.2 million,[37] which is only approximately 5% of the total illustrative price. Whether or not the make-whole payment is ultimately owed to the Secured Noteholders will only need to be determined in the event a bid is received that is greater than the Secured Noteholder Credit Bid. Given the nominal difference to the illustrative valuation of the Secured Noteholder Credit Bid as a result of the inclusion of a make-whole payment, and the fact the Plaintiffs provide no grounds for excluding the make-whole payment, the Lightstream Group submits this inclusion in the illustrative valuation does not impact the Sale Procedures or the fairness thereof.

31. Finally, the Plaintiffs take issue with the *Ad Hoc* Committee of Secured Noteholders having access to information and certain consultation rights pursuant to the Sale Procedures.[38] The Second Forbearance Agreement and the Support Agreement require approval of a sale process acceptable to the First Lien Lenders and the *Ad Hoc* Committee of Secured Noteholders, respectively, and each contain disclosure covenants which provide that these parties are entitled to such additional information and disclosures regarding the Sale Procedures as they may request.[39] As a result, the First Lien Lenders and the *Ad Hoc* Committee of Secured Noteholders

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[35] The First Report of the Monitor at Confidential Appendix A (the "**Monitor's First Report**").

[36] Scott Affidavit, Exhibit 1 at Exhibit M.

[37] C$62.66 million using a foreign exchange rate of 1.3CAD/1USD.

[38] Plaintiffs' Brief at para 67.

[39] Scott Affidavit at Exhibits 8, 10.

have been provided with very limited consultation rights in the Sale Procedures and access to information and disclosures upon request.

32. It is common for secured creditors to have consultation rights in sale processes.[40] While the Sale Procedures contemplate the Secured Noteholder Credit Bid, the *Ad Hoc* Committee of Secured Noteholders is explicitly not entitled to increase the consideration provided in the Secured Noteholder Credit Bid.[41] The Secured Noteholder Credit Bid is a backstop. The *Ad Hoc* Committee of Secured Noteholders is not participating in the Sale Procedures as a bidder, but is merely exerting its rights as a secured creditor to realize on its collateral in satisfaction of its debt where the Sale Procedures do not garner a successful bid in excess of the Lightstream Group's secured debt. Further, the consultation rights provided to the *Ad Hoc* Committee of Secured Noteholders under the Sale Procedures is limited only to situations where the Lightstream Group may contemplate extending the Phase I and Phase II bid deadlines. [42]

33. The Plaintiffs provide no basis or authority to support their allegations that these very narrow consultation rights may discourage parties from participating in the process or suggest why the Sale Procedures may be seen as favouring the Secured Noteholders.

34. The Sale Procedures were developed with considerable input from the Sale Advisor and were reviewed by the Monitor, each of whom agree that the Sale Procedures encourage and facilitate bidding by interested parties.[43]

B. The Sale Advisor is Appropriate

35. Since July, the Lightstream Group, with the assistance of the Sale Advisor, has been canvasing the market to solicit, explore, assess and negotiate possible transactions for the sale of the Lightstream Group or a combination of one or more of its three business units, with a view to the best interests of the Lightstream Group and its stakeholders.[44] It was not until the Lightstream

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[40] See for example Procedures for the Sale Solicitation Process in *Argent Energy*. **[TAB 5]**.

[41] Initial Order, Appendix A at para 29. **[TAB 1]**

[42] Initial Order, Appendix A. **[TAB 1]**

[43] Pre-Filing Report of FTI Consulting Canada Inc. in its Capacity as Proposed Monitor at paras 79-80 (the **"Proposed Monitor's Report"**).

[44] Scott Affidavit at paras 85, 89.

Group sought approval of the Sale Procedures in this Court that the Plaintiffs raised an issue of perceived conflict on the part of the Sale Advisor.[45]

36. The Sale Advisor is one of Canada's largest investment banking firms and has acted as financial advisor on more than $100 billion worth of transactions involving public and private energy companies. The Sale Advisor's investment banking office in Calgary is focused almost exclusively on assisting and advising energy companies and the Sale Advisor ranks as the second most active merger and acquisition advisor by deal volume in Canada.[46] Given the Sale Advisor's expertise, previous experience with, and knowledge of, the Lightstream Group and its assets, they are the most qualified party to run the sale process and act as Sale Advisor pursuant to the Sale Procedures.

37. The Lightstream Group are Canadian entities with oil and gas assets in Canada.[47] If being an affiliate to a lender under the Credit Agreement or the Commitment Letter created a conflict of interest, affiliates of each major Canadian bank would be conflicted from acting as Sale Advisor. The only major Canadian bank that is not a lender under the Credit Agreement is the Bank of Montreal, who is a lender under the Replacement Credit Facility pursuant to the Commitment Letter and BMO Nesbitt Burns Inc. ("**BMO**") currently acts as financial advisor to the *Ad Hoc* Committee of Secured Noteholders.[48] Therefore, to the extent that lenders and their affiliates can be conflicted from acting as Sale Advisor, as suggested by the Plaintiffs, the Lightstream Group's options of available parties in the Canadian market place (where all of the assets are located) are foreclosed, which is a nonsensical result in the circumstances and inconsistent with ordinary practice in complex commercial restructurings.

38. The Monitor is a court officer and is responsible for ensuring that the sales process pursuant to the Sale Procedures is fair and transparent.[49] The Monitor has not raised any concern with the Sale Advisor and, in fact, acknowledges at paragraph 79 of its Proposed Monitor's Report that the Sale Advisor has significant experience in marketing Canadian oil and gas assets

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[45] Plaintiffs' Brief at paras 68-73.

[46] Monitor's First Report at Confidential Appendix A.

[47] Scott Affidavit at paras 8-12 and 18-19.

[48] Scott Affidavit at paras 58,133.

[49] *Winalta Inc, Re*, 2011 ABQB 399 at paras 67-68. **[Plaintiffs' Brief, TAB 18]**

and, in particular, asset packages of the size, quality and nature of the Lightstream Group's assets.

39. Finally, there has been no criticism with respect to the adequacy of the Sale Advisor's efforts in respect of the SISP and Sale Procedures to date. Since being retained to carry out the SISP, the Sale Advisor has contacted over 600 parties seeking expressions of interest in acquiring or investing in some or all of the property of the Lightstream Group. Out of the approximately 600 parties contacted, 37 non-disclosure agreements had been executed at the date of the Initial Order.[50] Since the granting of the Initial Order, TD Securities has notified these same 600 parties of the Sale Procedures and has made made outbound calls to parties that it had identified as "key parties" based on various factors including access to capital, interest in the assets and a history of acquiring similar assets.[51]

40. To replace the Sale Advisor under the Sale Procedures at this stage would result in an unnecessary and costly duplication of efforts. The Monitor has advised it is of the view the Sale Procedures provide for a broad, open, fair and transparent process for seeking interested buyers of the property, assets and operations of the Lightstream Group.[52] Based on the foregoing, it is the view of the Lightstream Group that there is no conflict, perceived or actual, with TD Securities Inc. continuing to act as Sale Advisor.

C. The Priority Charges sought by the Applicants are Necessary and Appropriate

41. As set out in the Initial Order Brief beginning at paragraph 46, the Lightstream Group seeks approval of six priority charges (the "**Priority Charges**") granted under the Initial Order, each securing payment or performance of the Lightstream Group's obligations to various advisors, creditors and stakeholders. Each of the requested charges is essential to the Lightstream Group's prospects of being able to successfully conduct these CCAA proceedings and the Sale Procedures for the benefit of all stakeholders.

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[50] Scott Affidavit at para 87.

[51] Affidavit of Peter D. Scott sworn October 5, 2016 at paras 8-9 ("**Extension Affidavit**").

[52] Proposed Monitor's Report at para 80.

42. The Plaintiffs have either challenged the validity, beneficiaries or quantum of all of the Priority Charges, except the Credit Card Charge.

(i) Administration Charge

43. The Lightstream Group seeks an Administration Charge in an amount not to exceed $2,000,000 to secure the professional fees and disbursements of the Monitor, counsel to the Monitor, counsel to the Lightstream Group, independent counsel to the Applicants' directors and officers, counsel to the First Lien Lenders, PricewaterhouseCoopers Inc. in its capacity as financial advisor to the First Lien Lenders, counsel to the *Ad Hoc* Committee and BMO in respect of BMO's monthly work fee.[53] The First Lien Lenders' and *Ad Hoc* Committee of Secured Noteholders' advisors have been included in the Administration Charge because, among other things: (i) the Lightstream Group has a contractual obligation under the Second Forbearance Agreement and the Support Agreement to pay their fees; and (ii) they are secured creditors and are entitled to be paid before unsecured creditors.

44. The Plaintiffs do not take issue with the Administration Charge or its quantum but instead object to its legal counsel not being included in the proposed Administration Charge.[54]

45. The Lightstream Group submits it is wholly unreasonable and inappropriate to extend the Administration Charge to cover the fees of the Plaintiffs' legal counsel for the following reasons:

(a) the Plaintiffs are only two of the Unsecured Noteholders and are not an *ad hoc* committee representing the interests of all Unsecured Noteholders, as was the case in the *Argent Energy* proceedings referenced at paragraph 42 of the Plaintiffs' Brief;[55]

(b) the Plaintiffs are simply plaintiffs in the Actions and are seeking to advance their litigation as opposed to participating in the advancement of these CCAA proceedings;

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[53] Scott Affidavit at para 115.

[54] Plaintiff' Brief at para 38.

[55] *Argent Energy*. **[Plaintiffs' Brief, TAB 13]**

(c) the Actions seek a remedy only for the Plaintiffs and not the entire Unsecured Noteholder class;[56]

(d) the Plaintiffs have indicated that they may submit a bid in the Sale Procedures and it is inappropriate for the Administration Charge to cover a prospective bidder's legal costs when costs of other bidders are not being paid;[57] and

(e) other *pari passu* creditors legal fees are not being paid (including other holders of Unsecured Notes).

46. At one point during the Arrangement Proceedings, the Lightstream Group paid the legal fees of the Plaintiffs to a maximum of $100,000.[58] This amount was paid during negotiations to advance the Arrangement Proceedings, which if successful, would have avoided the necessity of these CCAA proceedings. This payment is not an indication of the appropriateness of the Plaintiffs fee request in these proceedings.

47. Section 11.52(c) of the CCAA provides this Court with the power to grant a charge, on notice to affected secured creditors, in respect of fees and disbursements of "any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act."[59] There is no evidence that a charge in favour of the Plaintiffs' legal advisors fees and disbursements is appropriate or necessary for their effective participation in these proceedings.

(ii) Directors' Charge

48. The Applicants seek the Directors' Charge up to the maximum amount of $2,500,000 to secure the indemnity of the Applicants' directors and officers. The reasonableness of the Directors' Charge is discussed in the Initial Order Brief beginning at paragraph 58.

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[56] Kirsch Affidavit at paras 5, 28.

[57] Plaintiffs' Brief at para 67.

[58] Scott Transcript at 66, lines 12-15. [**TAB 2**]

[59] CCAA, ss 11.52(1), (2). [**Plaintiffs' Brief, TAB 11**]

49. The Monitor has responded to various requests from the Plaintiffs since the date of the Initial Order, including in respect of the calculation of the Directors' Charge.[60]

50. The Initial Order is consistent with the Alberta Template CCAA Initial Order and contemplates a Directors' Charge that does not duplicate coverage already in place pursuant to the D&O Insurance Policies. The Directors' Charge only extends to post-filing liabilities and expressly excludes indemnification of claims arising from wilful misconduct and gross negligence.[61]

51. While the Applicants' directors and officers do have the benefit of D&O Insurance, the deductibles and exclusions from the policies mean that the insurance may not fully cover the potential statutory liabilities of the directors and officers of the Lightstream Group and, therefore, the Directors' Charge is reasonable in the circumstances.[62] The directors and officers are only entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under the D&O Insurance Policy, the Directors' Charge is fair and reasonable in the circumstances and the quantum is support by the Monitor.[63]

(iii) KERP Charge and KEIP Charge

52. The Applicants seek the Court's approval of the KERP Charge and the KEIP Charge, which have both been designed in consultation with the Monitor to incentivize employees and executives to remain in their employment during this restructuring.[64] The KERP Charge and KEIP Charge are discussed in detail in the Initial Order Brief beginning at paragraph 66.

107. The Plaintiffs claim that the KERP Charge and KEIP Charge are not justified and reasonable because: (i) 193 employees cannot be considered key; and (ii) given the employment market, it is unlikely that a significant number of employees will consider other employment options.[65]

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[60] Confidential Exhibit 8 to the Questioning of Peter D. Scott on October 3, 2016.
[61] Initial Order at para 22. [**TAB 1**]
[62] Proposed Monitor's Report at para 39.
[63] Initial Order at para 24. [**TAB 1**]
[64] Scott Affidavit at para 124.
[65] Plaintiffs' Brief at para 52.

108. Since December 31, 2014, LTS has reduced its staff from 433 employees to less than 300 employees. The KERP applies to 193 of the remaining 300 employees of LTS, which is about 64% of the remaining employees, but is only 44% of the total Lightstream Group staff prior to the reductions that began in 2014.[66] The 193 employees were determined by the Lightstream Group as important in order to preserve asset value in these CCAA Proceedings.[67]

109. The KERP is only payable to beneficiaries thereof if the successful bid pursuant to the Sale Procedures is other than the Secured Noteholder Credit Bid, or in the case that the Secured Noteholder Credit Bid is the successful bid, where employment is not offered to such employees on terms, including recognition of seniority, consistent with current terms of employment.[68]

110. The KEIP applies to only nine employees, or approximately 3% of the total number of employees of LTS. Compensation pursuant to the KEIP is only payable to these nine senior executives if the successful bidder pursuant to the Sale Procedures is a party other than the Secured Noteholders, or in the case that the Secured Noteholder Credit Bid is the successful bid, where employment is not offered to such senior executives on terms, including recognition of seniority, consistent with current terms of employment, and if certain sale proceeds thresholds are achieved.[69]

111. Any amounts received by beneficiaries of the KERP or KEIP are to be applied towards any statutory or contractual severance entitlements of those employees and will mitigate any potential claims that may otherwise by brought by those employees.[70]

112. The Monitor has reviewed the KERP and KEIP and has advised that they are reasonable in the circumstances and that their implementation will be beneficial to the Lightstream Group and its stakeholders.[71]

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[66] Scott Affidavit at para 125.

[67] Scott Transcript at 71, lines 3-9. [**TAB 2**]

[68] Scott Affidavit at para 125.

[69] Scott Affidavit at paras 126-127.

[70] Scott Affidavit at para128.

[71] Proposed Monitor's Report at para 51.

113. As Courts have recognized, where business issues have been carefully considered, it is not appropriate or necessary for the Court to substitute its own judgment for the business acumen of the debtors' advisors.[72] This deference is even more appropriate where the relief sought is supported by the court-appointed Monitor and was developed through a consultative process.[73]

114. As stated by Justice Newbould of the Ontario Superior Court of Justice [Commercial List] in *Grant Forest*:

> 18 A three year severance payment is not so large on the face of it to be unreasonable, or in this case, unfair to the other stakeholders. The business acumen of the board of directors of Grant Forest, including the independent directors, is one that a court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and Mr. Stephens for the KERP provisions. Their business judgment cannot be ignored.
>
> 19 The Monitor is, of course, an officer of the court. The Chief Restructuring Advisor is not but has been appointed in the Initial Order. Their views deserve great weight and I would be reluctant to second guess them. The following statement of Gallagan J.A., in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.), while made in the context of the approval by a court appointed receiver of the sale of a business, is instructive in my view in considering the views of a Monitor, including the Monitor in this case and the views of the Chief Restructuring Advisor:
>
> > When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.
>
> [Emphasis added]

115. Finally, the KERP and KEIP are consistent with current practice for retention plans in the context of a CCAA proceeding and the quantum of the payments under the KERP and KEIP are consistent with the relative size of the charges granted in other complex CCAA restructurings.[74]

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[72] *Grant Forest Product s Inc, Re*, [2009] OJ No 3344, ("***Grant Forest***") at para 18. **[Initial Order Brief, TAB 15]**

[73] *Grant Forest* at para 18. **[Initial Order Brief, TAB 15]**; *US Steel Canada Inc, Re*, 2016 ONSC 5215 at paras 22-23. **[TAB 6]**

[74] Proposed Monitor's Report at para 46.

(iv) Financial Advisors' Charge

116. As set out in the Initial Order Brief beginning at paragraph 76, the Financial Advisors have been engaged by LTS and its board of directors to assist the Lightstream Group with its strategic review process, the SISP, the Sale Procedures, the Actions and to advise the directors and officers of LTS in these restructuring proceedings (and the Arrangement Proceedings which preceded them).[75] Specifically, Evercore Capital L.L.C. was retained as restructuring advisor and was involved in settlement discussions with interested parties to the Actions, the Sale Advisor was retained to carry out the SISP and now acts as Sale Advisor in the Sale Procedures and RBC Dominion Securities Inc. was retained as an independent financial advisor to LTS' board of directors.[76] Each advisor has been engaged for distinct purposes without any significant duplication of roles in an effort to minimize costs.

117. In addition, the *Ad Hoc* Committee has engaged BMO as its financial advisor. The requirement to pay BMO is an obligation of the Lightstream Group under the Support Agreement and is expressly permitted in the Second Forbearance Agreement.[77]

118. The appointment of multiple advisors has been recognized as appropriate where there is a coordinated effort that will assist restructuring parties in achieving their goals and where the joint enterprise is expected to produce a better result overall.[78] As previously noted, the Monitor has responded to various information requests from the Plaintiffs since the date of the Initial Order, including the provision of information that sets out the various roles of the Financial Advisors in both the Arrangement Proceedings and these CCAA proceedings. The Lightstream Group submits that coordinated efforts of the Financial Advisors do not create any significant overlap of roles.[79]

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[75] Scott Affidavit at para 132.

[76] Scott Affidavit at Exhibit 1.

[77] Scott Affidavit at para 133 and Exhibit 8.

[78] *Walter Energy*, 2016 BCSC 107 at para 44. **[Plaintiffs' Brief at TAB 17]**

[79] Confidential Exhibit 8 to the Questioning of Peter D. Scott on October 3, 2016.

119. The Financial Advisors' Charge equates to approximately 1.5% of the total transaction value of the Secured Noteholder Credit Bid, which is in the mid-point of fees typically payable to financial advisors in restructuring proceedings.[80]

120. Furthermore, the Lightstream Group's operations are large and complex, and the Monitor has found the Financial Advisors' Charge is reasonable and appropriate in the circumstances.[81] Given the foregoing, the priority and quantum of the Financial Advisors' Charge is justified and appropriate in the circumstances.

IV. EXTENSION OF THE STAY OF PROCEEDINGS

A. CCAA Authority for an Extension of the Stay

121. The current stay of proceedings expires on October 26, 2016. The Applicants are seeking an extension of the stay period up to and including December 16, 2016.

122. Section 11.02(2) of the CCAA gives the Court discretion to grant or extend a stay of proceedings:

> (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.

123. Pursuant to section 11.02(3) of the CCAA, to exercise its discretion to extend the stay of proceedings, the Court must be satisfied that: (i) circumstances exist that make the order

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[80] Proposed Monitor's Report at paras 55, 58.

[81] Proposed Monitor's Report at para 58.

appropriate; and (ii) the Applicant has acted, and is acting, in good faith and with due diligence during the CCAA proceedings.[82]

B. Actions in Good Faith and with Due Diligence since the granting of the Initial Order

124. Since the date of the Initial Order, the Lightstream Group has acted, and continues to act, in good faith and with due diligence in pursuing the Sale Procedures and in dealing with all of its stakeholders, including creditors, employees and suppliers and in cooperating with the Monitor.

125. Since the date of the Initial Order, the Applicants have, among other things:

(a) met regularly with the Monitor and provided the Monitor with full co-operation and complete access to the Lightstream Group's property, premises and books and records;

(b) implemented procedures for the monitoring of the Lightstream Group's operations and financial circumstances, including receipts and disbursements;

(c) communicated with their stakeholders, including their creditors (including responding to specific inquiries of and providing requested information to the Plaintiffs), customers and employees;

(d) at the request of the Plaintiffs, allowed for the Plaintiffs to question a representative of the Lightstream Group under oath;

(e) continued to perform their duties and obligations under the Sale Procedures; and

(f) as contemplated by the Sale Procedures, continued to negotiate the terms of a definitive form of asset purchase agreement in respect of the Secured Noteholder Credit Bid (the "**Credit Bid APA**").[83]

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[82] Extension Affidavit at para 12.

[83] Extension Affidavit at para 10.

C. The Purpose of the Extension

126. The requested extension will allow the Lightstream Group to, among other things:

(a) advance the determination of the threshold issue in respect of the Actions, as directed by the Court at the hearing of the Initial Order application, and to the extent necessary, seek this Court's assistance in that regard;

(b) continue to negotiate and finalize the Credit Bid APA; and

(c) continue to implement the sale process in accordance with the Sale Procedures, including seeking this Court's approval of any successful bid(s) resulting from the implementation of the Sale Procedures. [84]

D. A Stay Extension is Appropriate in the Circumstances

127. The requested extension to the stay of proceedings is required to allow the Lightstream Group, with the assistance of TD Securities and the Monitor, to continue and carry out the Sale Procedures.

128. The stability of a stay of proceedings is necessary in order not to disrupt the sales process pursuant to the Sale Procedures and will instill confidence in the parties that are interested in participating in the process.

129. It is anticipated the Monitor will file the Monitor's First Report in advance of the Comeback Hearing, which will include, among other things, the Monitor's recommendation in respect of the requested extension of the stay of proceedings.[85]

130. The First Report is also anticipated to include the Lightstream Group's revised cash flow forecast demonstrating that, subject to the underlying assumptions contained therein, the Lightstream Group will have sufficient funds to continue their operations and fund these CCAA proceedings until December 16, 2016.[86]

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[84] Extension Affidavit at para 11.

[85] Extension Affidavit at para 13.

[86] Extension Affidavit at para 14.

131. The stay extension is supported by the First Lien Lenders, the *Ad Hoc* Committee of Secured Noteholders and the Monitor.[87]

V. NATURE OF THE ORDER SOUGHT

132. The Lightstream Group seeks the continuation of the Initial Order in the form granted on September 26, 2016 by the Honourable Justice A.D. MacLeod and an extension of the stay of proceedings to December 16, 2016.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5th DAY OF OCTOBER, 2016

BLAKE, CASSELS & GRAYDON LLP

Kelly Bourassa
Counsel to the Lightstream Group

[87] Extension Affidavit at para 15.

TABLE OF AUTHORITIES