COURT FILE NUMBER	1601 - 12571
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
DOCUMENT	**BRIEF OF ARGUMENT OF LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD AND 1863360 ALBERTA LTD – THRESHOLD ISSUE**
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: Michael Barrack/Richard D. Bell/Peter Smiley Telephone No.: 416-863-5280/403-260-9656/416-863-4226 Email: michael.barrack@blakes.com/richard.bell@blakes.com/ peter.smiley@blakes.com Fax No.: 416-863-2653/403-260-9700 File: 89691/8

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I. INTRODUCTION

1. Lightstream Resources Ltd., 1863359 Alberta Ltd., and 1863360 Alberta Ltd. ("**Lightstream**") seek an order determining certain threshold issues raised by the claims of two groups of holders of its unsecured notes (the "**Unsecured Notes**"), Mudrick Capital Management ("**Mudrick**") and FrontFour Capital Corp. and FrontFour Capital Group LLC (together, "**FrontFour**", and with Mudrick, the "**Plaintiffs**") in the context of proceedings commenced by Lightstream pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985 c C-36 (the "**Act**" or the "***CCAA***").

2. Based upon discussions with this Honourable Court, the threshold issues are;

   a. *Is there jurisdiction in the Court to recognize the Plaintiffs' claims as secured claims after the granting of the Initial Order and to make an order varying the Secured Notes Transaction and requiring Lightstream to issue additional Secured Notes to remedy alleged oppressive conduct?*

   b. *If there is jurisdiction to make an Order recognizing the Plaintiffs' claims as secured claims and varying the Secured Notes Transaction, would the Court exercise its discretion to do so based upon the facts as pleaded and supplemented to represent the highest and best factual case of the Plaintiffs?*

3. Lightstream submits that based upon the facts of this case there is no jurisdiction in this Honourable Court to recognize the Plaintiffs' claims in the manner sought, and that even if there is jurisdiction to make such an order this Court would not, and should not, exercise its discretion to do so.

4. When the highest and best case of the Plaintiffs is examined, based upon the record they have placed before the Court, their claims are misrepresentation or breach of contract claims which would in the normal course give rise to damages. These damages would be an unsecured claim. The amount of these damages has become subsumed within the Plaintiff's unsecured claim in this *CCAA* proceeding for the full amount of their Unsecured Notes plus accrued pre-filing interest.

5. The Plaintiffs' claims are based upon the allegation that, contrary to statements made by Lightstream officers prior to an issuance of secured notes (the "**Secured Notes Transaction**"),

that transaction was not offered to all holders of Unsecured Notes (the "**Unsecured Noteholders**"). The complete record that the Plaintiffs have filed makes it clear that at its highest and best, the allegation is that but for the alleged assurances that Lightstream would not enter into the Secured Notes Transaction without offering it to all Unsecured Noteholders, the Plaintiffs either would not have purchased their notes, or would have sold them prior to that transaction occurring.

6. The essential legality of the Secured Notes Transaction is underscored by the fact that the Plaintiffs have consistently demanded that they be allowed to participate in the transaction on the same selective basis as those that participated, and continue to do so.

7. In addition to claiming that Lightstream is liable for both breach of contract and misrepresentation, the Plaintiffs claim that the alleged misrepresentations were oppressive under section 242 of the *Alberta Business Corporation Act*, RSA 2000, c B-9 (the "***ABCA***").

8. The Plaintiffs originally sought an order that the Secured Notes Transaction be restrained or set aside; a declaration that they were entitled to participate in the Secured Notes Transaction on the same basis as those parties who did participate (the "**Secured Noteholders**"); an order under s. 242(3)(e) of the *ABCA* requiring Lightstream to issue them secured notes in order to remedy the allegedly oppressive conduct; and damages

9. Given the *CCAA* filing, the Plaintiffs acknowledge that this matter must be determined within the *CCAA* proceeding. Within the single proceeding model of the *CCAA* the remedy now sought by the Plaintiffs must be treated as an attempt to convert the Plaintiffs' claims from unsecured to secured claims. Such a conversion would presumably be calculated by determining the amount of secured debt the Plaintiffs would have obtained if they had been granted the specific performance relief they were seeking prior to the *CCAA*. There is no jurisdiction within the *CCAA* to grant such relief, which would work to the detriment of both existing secured creditors and other unsecured creditors, none of whom are accused of any actionable conduct.

10. Even if such jurisdiction did exist, it would not be exercised to grant such an equitable remedy outside of the *CCAA* context, and certainly would not be exercised within the *CCAA* context.

II. FACTS

11. The parties have agreed that this motion is to proceed on the basis of the highest and best case that the Plaintiffs assert. In furtherance of this, the Plaintiffs filed an extensive evidentiary record containing materials which have not been previously produced in this proceeding, including affidavit evidence.

12. Lightstream is proceeding on this motion on the basis of the Plaintiffs' evidence filed, and some supplementary portions of the record which contain undisputed facts. If this matter proceeds to a full hearing, many of the facts alleged will be disputed. The facts stated below are the allegations of the Plaintiffs, and should not be taken as being admitted for any purpose in this proceeding.

13. While the facts are taken from the Plaintiffs' record, the legal conclusions to be drawn from those facts are very much open to challenge. In addition, the legal conclusions are not to be based on a selective reading of those facts, but a complete reading of the facts. A complete reading of the facts undercuts many of the legal assertions made by the Plaintiffs.

The Parties

14. Mudrick Capital Management L.P. is an SEC-registered investment advisor, with its head office in New York. Mudrick "manages capital for a diverse group of institutions and individuals".[1]

15. FrontFour Capital Group is the Investment Advisor to the FrontFour Master Fund Ltd. and separately managed accounts. It is headquartered in Greenwich, Connecticut. FrontFour Capital Corp. is the Investment Fund Manager and Portfolio Manager of the FrontFour Opportunity Fund. FrontFour Capital Corp. is based in Toronto.[2] FrontFour makes investments on behalf of a collection of high-net-worth individuals, family offices, and institutional accounts.[3]

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[1] Affidavit of David Kirsch sworn September 23, 2016 ["Kirsch September Affidavit"] at para 1, Plaintiffs' Record Tab 3.
[2] Affidavit of Stephen Loukas sworn June 28, 2016 ["Loukas Affidavit"] at para 2, Plaintiffs' Record Tab 7.
[3] Transcript of Examination for Discovery of Stephen Loukas, March 15, 2016, ["Loukas Transcript"], P. 8.2 – p.9.7, Lightstream Record Tab 1.

16. Lightstream is a light oil-focused exploration and production company operating in Western Canada. Prior to the initiation of the *CCAA* proceedings, Lightstream was publicly traded on the Toronto Stock Exchange ("**TSX**") and its corporate headquarters are located in Calgary.[4]

The Unsecured Notes

17. On January 30, 2012, Lightstream completed a private placement offering of the Unsecured Notes. The Unsecured Notes bear interest at a rate of 8.625% per annum and mature February 1, 2020. Neither of the Plaintiffs participated in this primary offering, but rather purchased their notes in the secondary market.

18. The Unsecured Notes are governed by an indenture dated January 30, 2012, as amended by a supplemental indenture (collectively, the "**Indenture**"). The Indenture expressly permits Lightstream to incur further indebtedness, and to prepay some or all of the Unsecured Notes at its discretion:

a. Section 4.06(a) of the Indenture specifies that Lightstream may properly incur further indebtedness if a fixed charge coverage ratio test is satisfied.[5]

b. Section 4.06(b) of the Indenture provides that, notwithstanding s. 4.06(a), there are also several other options through which Lightstream may properly incur further indebtedness (the "**Permitted Debt Baskets**"). These Permitted Debt Baskets are enumerated in the subsections of 4.06(b).[6]

c. One of the permitted Debt Baskets under s. 4.06(b) is set out in 4.06(b)(i) (the "**Credit Facility Basket**"). The Credit Facility Basket expressly permits Lightstream to incur further indebtedness in the form of, *inter alia,* notes, debentures, bonds, or other securities or instruments, up to a specified amount.[7]

d. A separate Permitted Debt Basket is set out in s. 4.06(b)(v) (the "**Permitted Refinancing Basket**"). While indebtedness incurred under the Permitted Refinancing Basket may not mature earlier than the Unsecured Notes, there is no such restriction on indebtedness incurred under the Credit Facility Basket.[8]

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[4] Loukas Affidavit at para 6, Plaintiffs' Record Tab 7.
[5] Indenture dated January 30, 2012, Plaintiffs' Record Tab 3(A), p. 86
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.* p. 87.

e. Section 4.06(d) of the 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.[9]

f. Section 4.06(c) of the Indenture deals further with indebtedness. While section 4.06(c) provides that Lightstream may not incur any further indebtedness that is contractually subordinated in right of payment to other debt unless it is also subordinate to the Unsecured Notes, the provision also provides that indebtedness will not be deemed contractually subordinated in right of payment to further debt incurred by Lightstream, *inter alia*, solely by virtue of being unsecured.[10]

g. Section 4.08 of the Indenture specifies the circumstances under which indebtedness may be secured by a lien (the "**Permitted Liens**"). 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".[11]

h. Section 6.06 of the Indenture prevents holders of Unsecured Notes from commencing proceedings with respect to the 2012 Indenture, or regarding the Unsecured Notes, unless specific preconditions are met. These preconditions include that the Trustee or Canadian Trustee must first be requested to take action itself by holders of at least 25% in aggregate principal amount of the outstanding Unsecured Notes, and that the Trustee or Canadian Trustee must have failed to comply with that request after 60 days.[12]

i. Section 9.02 of the Indenture states that there are only certain enumerated types of changes to the Indenture or the Unsecured Notes that require Lightstream to obtain the consent of each affected holder before making the changes in question. The Secured Notes Transaction did not involve such changes to the Indenture or the Unsecured Notes.[13]

19. In 2014, Lightstream repurchased US $100,000,000.00 of the principal amount of the Unsecured Notes and retired them, leaving a total of US $800,000,000.00 of the principal amount of the Unsecured Notes outstanding.[14]

Mudrick Purchases the Unsecured Notes

20. Mudrick reviewed the Indenture, and made the decision to purchase the Unsecured Notes. Mudrick pleads that its decision to do so was based on the following factors:

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[9] *Ibid.* p. 88.
[10] *Ibid.*
[11] *Ibid.* p. 93.
[12] *Ibid.* p. 113.
[13] *Ibid.* p. 126.
[14] FrontFour Statement of Claim at para 7, Plaintiffs' Record Tab 2.

a. Lightstream appeared to have sufficient liquidity and continuing oil production to withstand any short to medium-term declines in oil prices without the need for additional capital or debt restructuring;

b. Lightstream had a limited amount of debt ahead of the Unsecured Notes; and

c. Mudrick viewed the value of Lightstream as being in excess of the market valuation of US $1.1 billion.[15]

21. Mudrick has not pleaded that it made its initial purchase of the Unsecured Notes in reliance on any alleged misrepresentations by Lightstream.

22. Prior to the Secured Notes Transaction, Mudrick acquired Unsecured Notes for its clients on the secondary market, at below par value in several installments, as follows:

a. US $10,000,000.00 on January 22, 2015, at 56% of par;

b. US $4,500,000.00 on January 22, 2015, at 55.25% of par;

c. US $5,000,000.00 on January 29, 2015, at 57% of par;

d. US $10,000,000.00 on January 29, 2015, at 57% of par;

e. US $500,000.00 on April 1, 2015, at 72.5% of par;

f. US $1,000,000.00 on April 7, 2015 at 75.5% of par; and

g. US $1,200,000.00 on May 28, 2015 at 72% of par.[16]

23. Lightstream received no capital as a result of Mudrick's purchases of Unsecured Notes.

FrontFour Purchases the Unsecured Notes

24. From February 3, 2015 to March 21, 2015, FrontFour purchased US $31,750,000 of the Unsecured Notes.[17]

25. Like Mudrick, FrontFour purchased all of its Unsecured Notes on the secondary market, at below par value. Lightstream received no capital as a result of FrontFour's purchases of Unsecured Notes.

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[15] Mudrick Statement of Claim at para 10, Plaintiffs' Record Tab 1.
[16] List of Undertakings, Under Advisements, and Refusals from the Oral Questioning of David Kirsch, held March 16, 2016 ["Kirsch Undertakings"], no. 6, Lightstream Record Tab 2.
[17] Loukas Affidavit at para 13, Plaintiffs' Record Tab 7.

The Negotiation of the Secured Notes Transaction

26. The Secured Notes Transaction was necessitated by persistently declining oil prices. At the time it was carried out, the price of oil was approximately half what it had been in the previous year. As a result, Lightstream anticipated that it could have problems servicing its debt.[18] Lightstream had drawn down $640 million on a $750 million credit facility, and had US $800 million in Unsecured Notes outstanding.[19]

27. Before entering into the Secured Notes Transaction, Lightstream carefully considered its options and consulted with a number of financial and legal advisors, as set out below. Lightstream ultimately concluded that the Secured Notes Transaction was in the best interests of the corporation.

28. On February 3, 2015, Peter Scott, the CFO of Lightstream, prepared a document entitled "LTS Debt Considerations".[20] This document contemplated repurchasing Unsecured Notes from Unsecured Noteholders, and issuing them with Secured Notes at a discount.

29. At some point in early March, two holders of the Unsecured Notes, Apollo Capital Management ("**Apollo**") and GSO Capital ("**GSO**") first approached Lightstream about a possible issuance of secured notes.[21]

30. In early May, Lightstream made the decision to retain a financial advisor.[22]

31. On May 9, 2015, Apollo submitted a Term Sheet Proposal to Lightstream. It contemplated the repurchase of US $465 million in Unsecured Notes, and the issuance to those same noteholders of US $395.25 million in Secured Notes.[23]

32. On May 14, 2015, Lightstream held their Annual General Meeting. As part of the meeting, Lightstream gave a slide presentation which was also posted on its website, setting out

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[18] "Apollo Appears Positioned as Winner Under Lightstream Debt Swap", Press Release dated July 8, 2015, Plaintiffs' Record Tab 6G.
[19] Lightstream AGM presentation, May 14, 2015, Plaintiffs' Record Tab 6M, p. 308.
[20] "LTS Debt Considerations – February 3, 2015", L000681, Plaintiffs' Record Tab 11.
[21] Transcript of examination for Discover of Peter Scott ["Scott Transcript"], P. 31.5 – p. 31.19, Lightstream Record Tab 3.
[22] Scott Transcript, P. 40.26 – p. 41.2, Lightstream Record Tab 4.
[23] Email from M. Tu (Apollo) to P. Scott (Lightstream) dated May 9, 2015, Plaintiffs' Record Tab 12 p. 462.

Lightstream's strategies for retaining long-term value and preserving financial flexibility in the low commodity price environment Lightstream was then facing. These strategies, which had previously been disclosed in Lightstream's continuous disclosure filings and corporate presentations, involved the suspension of monthly dividend payments; a reduced second-half drilling program; and the proposed sale of Lightstream's Bakken assets, with the proceeds to be used to transform Lightstream's balance sheet.[24]

33. On May 26, 2015, Mr. Scott met with representatives of RBC to discuss Apollo and GSO's proposal. RBC gave a presentation entitled "Liquidity and Apollo Response Review", which suggested that Lightstream would need to seek incremental liquidity in 2016, and that Lightstream should weigh the importance of the proposed transaction against the importance of maintaining senior secured financing flexibility.[25]

34. On June 4, 2015, RBC gave an updated version of the same presentation to Lightstream. This version noted that Lightstream's remaining liquidity could be expected to erode entirely by 2017;[26] and that Apollo and GSO were "motivated to lock up the capital structure on an exclusive basis".[27] It advised that, given Lightstream's liquidity position, Lightstream would need to execute a liquidity trade sometime in late 2016 or early 2017.[28] RBC suggested that this would have the effect of providing sufficient liquidity to take Lightstream into 2017; would provide an additional $300 million in capacity; and could potentially replace Lightstream's credit facility.[29]

35. On June 11, 2015, Mr. Scott gave a presentation to the Lightstream board which included the presentation of a deck prepared by RBC and entitled "Review of Proposed Debt Exchange Transaction". This presentation stated "anticipate neutral to negative reaction for remaining unsecured bond pricing" and "market observed downward bias to remaining unsecured bond trading values of a similar nature."[30]

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[24] 2015 Annual General Meeting Presentation, May 14, 2015, Plaintiffs' Record Tab 6(M), p. 304.
[25] "Liquidity and Apollo Response Review" dated May 26, 2015, Plaintiffs' Record Tab 13, p. 470.
[26] "Liquidity and Apollo Response Review", June 4, 2015, Plaintiffs' Record Tab 15 p. 489.
[27] *Ibid* p. 490.
[28] *Ibid.* p. 500.
[29] *Ibid.* p. 489.
[30] "Review of Proposed Debt Exchange Transaction" dated June 11, 2015, p. 502, Plaintiffs' Record Tab 15

36. Mudrick takes the position that Lightstream was aware throughout the negotiation of the Secured Notes Transaction that such a transaction would adversely affect the value of the remaining Unsecured Notes.[31] However, Mr. Scott stated on discovery that Lightstream's feeling on this point was that the market's reaction to the Secured Notes Transaction could be positive or negative, depending on how it viewed the increased liquidity that the Secured Notes Transaction would provide.[32] The Board authorized the Secured Notes Transaction.[33] There is absolutely no evidence that the Board considered the Secured Notes Transaction not to be in the best interests of Lightstream in the exercise of their business judgment, or in contravention of applicable contractual obligations or securities law requirements.

37. Mr. Scott stated on discovery that Apollo and GSO both advised Lightstream that they did not want other unsecured noteholders to participate in the Secured Notes Transaction beyond certain follow-on exchanges of unsecured notes for secured notes that took place in August, 2015. As these two noteholders together held $465 million in Unsecured Notes, a transaction without their participation would not have been feasible or provided any significant benefit to Lightstream.[34]

38. In May 2016 Lightstream announced that its borrowing base under its credit facility had fallen from $550 million to $250 million.[35]

The Alleged Misrepresentations

39. Even prior to making their first purchase of Unsecured Notes, FrontFour was aware that Lightstream might issue further secured debt ahead of the Unsecured Notes. On December 20, 2014, Zachary George, a partner at FrontFour, wrote to Badal Pandhi, an analyst at FrontFour, and Stephen Loukas, Managing Member, Partner and Portfolio Manager at FrontFour, asking with respect to the Unsecured Notes: "what is our risk of being primed?" Mr. Pandhi responded that he believed that the risk was minimal.[36]

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[31] Kirsch September Affidavit at para 16(f), Plaintiffs' Record Tab 3.
[32] Scott Transcript, P. 77.13- p.77.17, Lightstream Record Tab 5.
[33] Minutes of a Meeting of the Board of Directors held June 11, 2015, L573, Lightstream Record Tab 6.
[34] Scott Transcript, P. 70.21 – p. 71.22. Plaintiffs' Record Tab 21.
[35] Loukas Affidavit at para. 17, Plaintiff's Record Tab 7.
[36] Email from B. Pandhi to Z. George and others dated December 21, 2014, FR20, Lightstream Record Tab 7.

40. On February 11, 2015, Mr. Loukas held a call with Mr. Pandhi, Mr. Scott and Mr. Wright. They discussed Lightstream's forward-looking strategy generally, and Mr. Loukas raised concerns with respect to Lightstream's working relationship with Apollo. Mr. Loukas allegedly advised Mr. Wright that FrontFour was concerned that Apollo would try to convince Lightstream to exchange their Unsecured Notes into bonds that were structurally senior to the Unsecured Notes. FrontFour alleges that Mr. Scott assured Mr. Loukas that no transaction was contemplated at that time and that Lightstream had ample liquidity.[37] Mr. Pandhi further alleges that Mr. Scott stated that Lightstream (a) had the ability to issue additional debt securities, and (b) would inform FrontFour prior to taking any such action.[38]

41. On February 22, 2015, Mr. Pandhi wrote to Mr. George, Mr. Loukas and David Lorber, a Co-Founder, Managing Member, Partner, Principal, and Portfolio Manager at FrontFour, that he had spoken to Mr. Scott and had been advised that nothing in the bond documents prevented Lightstream from issuing additional senior unsecured notes.[39]

42. On March 8, 2015, Mr. Pandhi distributed a document within FrontFour entitled "LTS Investment Write-up – February 2015" to Mr. Loukas, Mr. George, and Mr. Lorber. The memo stated "per our conversations with company management and our review of its bond indenture, the company's ability to issue debt securities that are senior to our 8.265% senior unsecured notes is limited" and that the trading price of the notes presented an opportunity to "realize equity-like returns".[40]

43. In an affidavit sworn on September 23, 2016, David Kirsch, a Managing Director at Mudrick, states that on March 13, 2015, Mr. Pandhi and Mr. Lorber of FrontFour met with John Wright, the CEO of Lightstream, and Mr. Scott, with Mr. Loukas attending by telephone. Mr. Wright and Mr. Scott were asked about Lightstream's relationship with Apollo, and FrontFour requested that if Lightstream were going to pursue some type of debt exchange they should do so by offering it to all holders of Unsecured Notes. Mr. Loukas alleges that in response, Mr. Wright

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[37] Loukas Affidavit at para 11(b), Plaintiffs' Record Tab 7.
[38] Affidavit of Badal Pandhi sworn October 21, 2016 ["Pandhi Affidavit"] at para 8, Plaintiffs' Record Tab 8.
[39] Email from B. Pandhi to Z. George, S. Loukas and D. Lorber dated February 22, 2015, FR305, Lightstream Record Tab 8.
[40] Email from B. Pandhi to S. Loukas, Z. George and D. Lorber dated March 8, 2015, FR390, Lightstream Record Tab 9; Email from B. Pandhi to B. Pandhi dated March 8, 2015, FR382, FR383, Lightstream Record Tab 10.

advised them at that time that Lightstream had ample liquidity, that there was no contemplated debt exchange, and that if Lightstream was to enter into an exchange they would offer it to all of the Unsecured Noteholders.[41]

44. In a recent affidavit sworn on October 21, 2016, Mr. Pandhi further alleges that, following this meeting, he and Mr. Lorber walked Mr. Wright and Mr. Scott out of their offices, and Mr. Lorber again asked whether Lightstream had plans to issue debt senior to the Unsecured Notes. Mr. Lorber emphasized that FrontFour would like to be part of any contemplated debt exchange related to the Unsecured Notes, and asked that Lightstream include FrontFour in any debt exchange discussions. Mr. Lorber further stated that if Lightstream pursued a debt exchange, he expected that it would be offered to all Unsecured Noteholders.[42]

45. In response, Mr. Pandhi alleges, Mr. Wright again stated that Lightstream was not contemplating a debt exchange, and further agreed that he would inform FrontFour of any contemplated debt exchange, and that if Lightstream decided to pursue one it would be offered to all bondholders.[43] Mr. Pandhi's affidavit sworn for the purposes of this motion is the first time this allegation has been raised by FrontFour in the litigation and does not appear in FrontFour's Statement of Claim or the Affidavit of Stephen Loukas sworn in support.

46. On May 14, 2015, principals of Lightstream participated in a "Year End Results Webcast and Conference Call" on March 5, 2015. A variety of stakeholders participated and asked questions. During this call, Lightstream's representatives were asked whether Lightstream was working with both secured and unsecured notes, and was meeting its covenants. Mr. Scott responded "we are, at this point, primarily working on the secured credit facility. There is no issue under the notes. And that is in my view, a good piece of capital that sits there for us with maturity out to 2020 and provides some flexibility to do some things. So, with that, you know, our primary focus right now is on the credit facility itself."[44]

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[41] Kirsch September Affidavit at para 16(g), Plaintiffs' Record Tab 3.
[42] Pandhi Affidavit at para 11, Plaintiffs' Record Tab 8.
[43] *Ibid.*
[44] Affidavit of David Kirsch sworn July 29, 2015 ["Kirsch July Affidavit"] at para 49(a), Plaintiffs' Record Tab 6.

47. Mr. Kirsch alleges that Mudrick relied on these representations in its decision to purchase additional Unsecured Notes in April and May of 2015.[45]

48. In or about the end of May 2015, rumours began circulating in the industry that Lightstream was now receiving many proposals to restructure its debt and enter into private transactions which could involve the exchange of Unsecured Notes for Secured Notes. At this time, Mudrick considered selling off its position in the Unsecured Notes so as not to be left holding Unsecured Notes in the event of an exchange or other transaction which might negatively impact them.[46] Similarly, FrontFour states that it did not consider selling its position in Lightstream "because of the repeated assurances by Lightstream that it would not participate in the transaction that ultimately occurred."[47]

49. FrontFour was aware at this time that Lightstream was in talks with its creditors. On May 19, 2015, Mr. Lorber wrote to Mr. Pandhi, copying Mr. Loukas and Mr. George as follows: "anything new in the [Lightstream] deck that just came across [Bloomberg]?" Mr. Pandhi responded: "nothing yet – guidance same and pres still says they are in "advanced" talks with creditors." Mr. Lorber responded "Steve, Zach, shouldn't we work to insert ourselves into creditor talks?"[48]

50. FrontFour was also aware at this time that Lightstream's liquidity situation was deteriorating. On May 22, Mr. George emailed Mr. Loukas and stated "LTS – getting tighter" in reference to Lightstream's liquidity.[49]

51. At or about this time, Mudrick also suspected that a second-lien deal could be imminent. On May 27, 2015, Mr. Kirsch called Mr. Scott. Mr. Kirsch alleges that Mr. Scott assured him that he felt "very comfortable" with Lightstream's liquidity. Mr. Kirsch further inquired whether Lightstream was contemplating a transaction such as the Secured Notes Transaction, and alleges

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[45] *Ibid.*
[46] Mudrick Statement of Claim, paras 12 and 18, Plaintiffs' Record Tab 1; Affidavit of David Kirsch sworn July 29, 2015 at para 23, Plaintiffs' Record Tab 6; Transcript of Examination for Discovery of David Kirsch P. 77.21 – p. 78.23, Plaintiffs' Record Tab 23.
[47] Answers to Undertakings given at the Examination for Discovery of Stephen Loukas, no. 29, Plaintiffs' Record Tab 25.
[48] Email from D. Lorber to B. Pandhi, S. Loukas and Z. George re. "Re: LTS" dated May 19, 2015, FR456, Lightstream Record Tab 11.
[49] Loukas Transcript, P. 82.23 – p. 83.5, Lightstream Record Tab 12.

that Mr. Scott advised him that such a transaction was "unlikely".[50] Mr. Kirsch subsequently emailed Mr. Mudrick and two other colleagues with a summary of this conversation, writing "I asked about the potential for a 2nd lien deal, and though he certainly didn't say he thought it was likely, he did seem slightly more inclined to it than before, so maybe they are kicking that round as an idea, and that is what is weighing on the bonds."[51]

52. FrontFour likewise continued to be concerned by the prospect of Lightstream carrying out a transaction such as the Secured Notes Transaction. By May 29, 2015, the issue for FrontFour appeared to be not whether, but the extent to which Lightstream could issue additional secured debt. On that day, Mr. Lorber forwarded to Mr. Pandhi a list of secured issuances carried out in the energy sector in recent months, and asked: "How much debt can be put ahead of us in LTS?"[52]

53. On June 2, 2015, Mr. Loukas and Mr. Pandhi of FrontFour attended a meeting in New York with Mr. Wright. Mr. Loukas alleges that he reiterated his view that if Lightstream were to pursue some type of debt exchange it should do so by making an offer to all of the Unsecured Noteholders. Mr. Loukas alleges that Mr. Wright advised him and Mr. Pandhi that the financing offers the company had received were becoming more reasonable, but that there was no contemplated debt transaction, and that if Lightstream were to enter into such a transaction it would offer it to all of the Unsecured Noteholders.[53]

54. On June 3, 2015, Mr. Kirsch alleges that he had a conversation with Mr. Wright, in which he asked him about rumours that Lightstream was contemplating a transaction involving the issuance of secured or "second lien" notes in exchange for the existing Unsecured Notes. Mr. Kirsch alleges that Mr. Wright explained that although Lightstream was receiving many proposals to restructure its debt, it was not interested in such proposals because their terms were not favourable for Lightstream and its stakeholders. Mr. Kirsch further alleges that Mr. Wright assured Mr. Kirsch that if Lightstream decided to restructure its debt, an offer would be made to

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[50] Kirsch July Affidavit at para 20, Plaintiffs' Record Tab 6.
[51] Email from D. Kirsch to K Sahl and J. Mudrick (Mudrick) re. "RE: LTSCN" dated May 27, 2015, Plaintiffs' Record Tab 6(C).
[52] Email from D. Lorber to B. Pandhi (FrontFour) re. "FWL !!! Secured Energy Deals—Just a Starting Point of Info—Relative Value to Follow" dated May 29, 2015, FR507, Lightstream Record Tab 13.
[53] Kirsch September Affidavit at para 16(h), Plaintiffs' Record Tab 3.

all of the holders of Unsecured Notes, as to do otherwise would be both unattractive to Lightstream, and an "un-Canadian" way of doing business.[54]

55. Despite these alleged misrepresentations, Mudrick continued to be concerned that Lightstream was planning to enter into a transaction like the Secured Notes Transaction. On June 10, 2015, Mr. Kirsch wrote to his colleagues that "after meeting with CEO last week, feel more confident than ever that value is there, only concern is if they did some 2nd lien deal which disadvantaged us."[55]

56. On June 11, 2015, Mr. Loukas alleges that Mr. Pandhi held a call with Mr. Scott during which he asked Mr. Scott about the likelihood of the company placing debt in front of the Unsecured Notes, and Mr. Scott declined to comment.[56]

57. Mr. Scott subsequently stated on discovery that he would not have made any statements to any bondholder or investor concerning Lightstream's plans to carry out a transaction such as the Secured Notes Transaction beyond saying "we would have the option to do a second lien transaction full stop."[57]

The Secured Notes Transaction

58. On July 2, 2015, Lightstream announced that it had entered into the Secured Notes Transaction.[58]

59. The Secured Notes Transaction was governed by a Note Purchase and Exchange Agreement dated July 2, 2015 (the "**NPEA**"). Under the terms of the NPEA, Lightstream agreed to sell to Apollo and GSO Secured Notes with an aggregate principal value of $595,250,000. The consideration for the purchase of the Secured Notes was to be a combination of cash, and the principal amount of the Purchaser's existing Unsecured Notes.[59]

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[54] Kirsch September Affidavit at para 16(i), Plaintiffs' Record Tab 3.
[55] Loukas Transcript, P. 111.8 – p.112.5, Lightstream Record Tab14.
[56] Loukas Affidavit at para 11(e), Plaintiffs' Record Tab 7.
[57] Loukas Affidavit at para 12(b), Plaintiffs' Record Tab 7.
[58] News Release dated July 2, 2015, Plaintiffs' Record Tab 6(F).
[59] Note Purchase and Exchange Agreement dated July 2, 2015, Plaintiffs' Record Tab 18, pp. 529 – 530.

60. The Secured Notes Transaction closed on July 14, 2015.[60]

61. Prior to entering into the Secured Notes Transaction, Lightstream had drawn down US $640 million on a US $750 million credit facility, and had US $800 million in Unsecured Notes outstanding.[61] The Secured Notes Transaction reduced Lightstream's debt by approximately US $90 million and increased its credit availability by approximately US $250 million.[62] Lightstream anticipated that the Secured Notes Transaction would provide it with the ability to reduce its outstanding borrowing under its credit facility, financial flexibility in the face of a low-price commodity environment, and the ability potentially to accelerate its drilling program in the event that commodity prices improved.[63]

62. On discovery, Mr. Loukas stated that the Secured Notes Transaction "provided the company incremental near-term flexibility" and "enhanced their liquidity".[64]

63. Subsequent events demonstrate that the Secured Notes Transaction was both necessary from Lightstream's financial standpoint and in the best interests of the corporation. On May 4, 2016, Lightstream announced its results for the first quarter of 2016. By that time, benchmark oil prices had reached their lowest point since the commodity cycle downturn began in 2014, resulting in a 40% decrease in Lightstream's operating netback from the previous quarter. Lightstream's semi-annual borrowing base re-determination was also completed, resulting in a reduction of Lightstream's borrowing base from $550 million to $250 million.[65]

The Plaintiffs are Offered the Opportunity to Participate in the Secured Notes Transaction

64. On July 3, 2015, Mr. Pandhi and Mr. Loukas participated in a call with Mr. Wright and Mr. Scott. Mr. Loukas alleges that he reminded Mr. Wright that Mr. Wright had previously assured him that Lightstream would not enter into a transaction such as the Secured Notes Transaction without offering it to all Unsecured Noteholders. He further alleges that Mr. Wright

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[60] News Release dated July 14, 2015, Plaintiffs' Record Tab 6(K); Note Purchase and Exchange Agreement, August 4, 2015, Plaintiffs' Record Tab 20, p. 746.
[61] Lightstream AGM presentation, May 14, 2015, L1833.
[62] News Release dated July 2, 2015, Plaintiffs' Record Tab 6(F).
[63] "Lightstream Announces Closing of Previously Announced US $200 Million Secured Note Transaction and Production Update," press release dated July 14, 2015, L1830, Plaintiffs' Record Tab 6(K).
[64] Loukas Transcript, P.91.21 – p.92.8, Lightstream Record Tab 15.
[65] "Lightstream Announces First Quarter 2016 Results", press release dated May 4, 2016, Plaintiffs' Record Tab 7(E), p. 417.

and Mr. Scott advised them that they believed the Secured Notes Transaction was in the best interests of Lightstream, and that they had pursued it because they wanted a quick close. Mr. Loukas states that he asked about FrontFour's ability to participate on the same terms as the Secured Noteholders, but was advised that they could not participate on the same terms.[66]

65. Mr. Pandhi alleges that on this call Mr. Loukas emphasized his disappointment in Lightstream's decision to carry out the Secured Notes Transaction without offering it to all holders of Unsecured Notes, particularly given Lightstream's prior assurances that they would not do so, and Mr. Wright acknowledged that these assurances had been made.[67] This is inconsistent with the evidence of Mr. Loukas in his affidavit sworn on June 28, 2015, in which Mr. Loukas states that Mr. Wright merely advised Mr. Loukas and Mr. Pandhi that the Secured Notes Transaction was in the best interests of the company and was pursued due to the company's need for a quick close.[68]

66. The announcement of the transaction did not come as a surprise to Mudrick. On July 6, 2015, Mr. Sahl wrote to Mr. Kirsch and Mr. Mudrick, advising them that "[Lightstream] just did the exchange we thought might be coming [...] My guess is that the deal is locked up, but I will call the CFO today (we had a call with him this Wednesday) and see if we could join if we wanted. Depending on who is doing the exchange we might try to make enough noise to see if we could get in."[69] In another email later that same day, Mr. Kirsch wrote to Mr. Mudrick "clearly transaction a negative given the extra debt ahead of you so we should participate if we can, and/or try to stop the transaction if we can."[70]

67. On July 6, 2016, Mr. Kirsch called Salim Mawani, Lightstream's financial advisor at RBC, to advise him that Mudrick wished to participate in the Secured Notes Transaction. Mr. Mawani advised him that the Secured Notes Transaction would not be offered to the remaining holders of Unsecured Notes, but that Lightstream was considering an additional transaction on terms different to those that had been offered to, and accepted by, the Secured Noteholders.

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[66] Loukas Affidavit at para 11(g), Plaintiffs' Record Tab 7.
[67] Pandhi Affidavit at para 13, Plaintiffs' Record Tab 8.
[68] Loukas Affidavit at para 11(E), Plaintiffs' Record Tab 7.
[69] Email from K. Sahl to D. Kirsch, J. Mudrick and others re. "RE: Lightstream" dated July 6, 2015, MCM01919, Lightstream Record Tab 16.
[70] Email from D. Kirsch to J. Mudrick re. "Lightstream" dated July 6, 2015, MCM1922, Lightstream Record Tab 17.

Mudrick was told to provide the lowest price it would be willing to accept for an exchange, and Lightstream would consider the offer.[71] Mudrick explained that it would not accept terms less favourable than those offered to the Secured Noteholders.[72]

68. On July 8, 2015, Mr. Mudrick and Mr. Kirsch participated in a call with Mr. Scott. They expressed Mudrick's view that the transaction was oppressive and unfair and unsupported by the Indenture. They further advised that it should be made available to all holders of Unsecured Notes, and that Mudrick would participate in the transaction if such an offer were made. Finally, they indicated that Mudrick would pursue its available rights and remedies if it were excluded from the Secured Notes Transaction.[73]

69. On July 22, 2015, Mr. Loukas held a call with Mr. Wright, in which he explained that FrontFour wished to participate in the Secured Notes Transaction. Mr. Wright subsequently advised Mr. Loukas to speak to Mr. Mawani about FrontFour's participation in the Secured Notes Transaction. Mr. Loukas called Mr. Mawani and discussed pricing generally, but ultimately FrontFour decided not to participate in the transaction.[74]

70. Lightstream subsequently entered into additional exchanges with three other holders of Unsecured Notes in early August of 2015. These holders were asked to submit their interest to RBC, and advised that they would be selected based on the volume and price at which they were willing to exchange.[75]

The Plaintiffs Oppose the Secured Notes Transaction

71. In a letter dated July 9, 2015, David A. Fliman, of Kasowitz, Benson, Torres & Friedman LLP, acting as counsel to Mudrick, advised Lightstream that it was Mudrick's position that the Secured Notes Transaction was oppressive and contrary to section 242 of the *ABCA*, that it constituted a breach of the Indenture, and that that it constituted a breach of Alberta's *Fraudulent Preferences Act*, and of the *Trust Indenture Act*.[76]

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[71] Kirsch July Affidavit at paras 30-31, Plaintiffs' Record Tab 6.
[72] *Ibid* at para 32.
[73] Kirsch July Affidavit at para 42, Plaintiffs' Record Tab 6.
[74] Loukas Affidavit at para 11(h), Plaintiffs' Record Tab 7.
[75] Scott Transcript, P. 8 l. 21 – p. 9 l.25, Plaintiffs' Record Tab 20.
[76] Letter from D. Fliman (Kasowitz) to J. Wright and others dated July 9, 2015, Plaintiffs' Record Tab 6(J).

72. Lightstream's US counsel, Dorsey & Whitney LLP, replied in a letter dated July 17, 2015. The letter asserted that the Secured Notes Transaction fully complied with the terms of the Indenture, and was expressly permitted under sections 4.06 and 4.08 of that document. The letter further stated that the transaction was not oppressive or contrary to section 242 of the *ABCA*, given that the primary source of a party's reasonable expectations in such a context is the indenture in question, under which the Transaction was fully authorized and permitted.[77]

73. Mudrick continued to purchase Unsecured Notes Subsequent to the Secured Notes Transaction, making the following purchases:

a. US $2,641,000.00 on October 23, 2015, at 26.25% of par;

b. US $2,824,000.00 on November 2, 2015, at 27% of par;

c. US $200,000.00 on November 4, 2015, at 28% of par;

d. US $2,500,000.00 on November 12, 2015, at 26.5% of par;

e. US $9,070,000.00 on April 14, 2016, at 4.12% of par;

f. US $5,000,000.00 on April 22, 2016, at 4.5% of par; and

g. US $14,188,000.00 on May 5, 2016, at 5% of par.[78]

74. Both Mudrick and FrontFour have repeatedly indicated their continued willingness to participate in the Secured Notes Transaction on the same terms as the Secured Noteholders, and to the exclusion of other Unsecured Noteholders.[79]

The Actions

75. Following the announcement of the Secured Notes Transaction, the Plaintiffs commenced the Actions against Lightstream as Court of Queen's Bench of Alberta Action No. 1501-08782 (the "**Mudrick Action**") and Action No. 1501-07813 (the "**FrontFour Action**").[80]

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[77] Letter from K. Schmidt (Dorsey) to D. Fliman dated July 17, 2015, Plaintiffs' Record Tab 6(L).
[78] Kirsch Undertakings, no. 6, Lightstream Record Tab 2.
[79] Will-say statement of David Kirsch dated October 21, 2016, Plaintiffs' Record Tab 4; Will-say statement of Stephen Loukas dated October 21, 2016, Plaintiffs' Record Tab 5
[80] Kirsch September Affidavit at para 5, Plaintiffs' Record Tab 3.

76. Section 6.06 of the Indenture sets out certain preconditions to be satisfied before an action may be brought for its breach. Neither Mudrick nor FrontFour have satisfied or attempted to satisfy those preconditions.[81]

77. Lightstream has filed statements of defence in the Actions disputing the allegations and claims made by the Plaintiffs in the Actions.

Relief Originally Sought in the Actions

78. FrontFour's Statement of Claim seeks the following relief:

a. a declaration pursuant to sections 239 and 242 of the ABCA that the business affairs of Lightstream and the powers of the Board have been carried on, conducted or exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of FrontFour;

b. an Injunction Order restraining the Company from proceeding with the Proposed Refinancing Transaction on its current terms or at all (since abandoned);

c. alternatively, an Order directing that Lightstream provide FrontFour an opportunity to participate in the Proposed Refinancing Transaction on the same basis as the undisclosed parties who are to be issued Secured Notes in the Transaction, and varying the Transaction to effect same; and

d. damages in the amount of $4,524, 375 "to compensate the Plaintiff for the loss in value of its security interest in the Company resulting from the announcement of the Proposed Refinancing Transaction".[82]

79. Mudrick's Statement of Claim seeks an order declaring that the Secured Notes Transaction was oppressive and the following remedial orders under Section 242 of the *ABCA*:

a. that the Secured Notes Transaction be set aside;

b. alternatively, that Lightstream be required to offer the Secured Notes Transaction to Mudrick and its clients on the same terms and conditions as offered to the Secured Noteholders;

c. alternatively, that Lightstream be required to redeem the Unsecured Notes of Mudrick's clients for the "make-whole" price specified in the Indenture; and

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[81] Answers to Undertakings given at Examination for Discovery of Stephen Loukas, No. 53, Lightstream Record Tab 18; Kirsch Undertakings, No. 72, Lightstream Record Tab 2.
[82] FrontFour Statement of Claim at paras 44 and 50, Plaintiffs' Record Tab 2.

d. that Lightstream compensate Mudrick and its clients for its losses as a consequence of the Secured Notes Transaction.[83]

The* CCAA *Proceedings

80. On September 26, 2016, Lightstream brought an application seeking *CCAA* protection, including a stay of all proceedings against it. In advance of this hearing, the Plaintiffs brought an application seeking an order (a) excluding their claims against Lightstream from the stay; and (b) directing a trial of the issues raised in the Actions prior to hearing any further orders or proceedings under the *CCAA*.

81. Lightstream opposed this application on the grounds that the claims of the Plaintiffs, like all other claims against Lightstream, were subsumed within the single proceeding model of the *CCAA*. Lightstream further noted that a threshold issue arose on the facts as pleaded and the relief requested by the Plaintiffs in the Actions as to whether the court-ordered issuance of secured notes and the proposed transformation of the Plaintiffs' status as unsecured creditors to secured creditors as a remedy for the allegedly oppressive conduct is available within the *CCAA*. Lightstream submitted that the availability of this claim within the *CCAA* should be the subject of judicial determination on an expedited basis in order to make the most efficient use of this Honourable Court's resources.

82. This Honourable Court granted Lightstream's application, and stayed all proceedings against it, including the Actions, in an Initial Order granted September 26, 2016.

83. On October 11, 2016, this Honourable Court ordered that the threshold issues be determined at this hearing.

84. Originally, Lightstream suggested that an additional threshold issue be submitted: "Have the claims of the Plaintiffs asserted in the Actions become potential claims within the *CCAA* proceeding?" At the October 11, 2016 hearing counsel for the Plaintiffs conceded that that their claims had become potential claims to be adjudicated within the *CCAA* proceeding. Therefore it is unnecessary for this additional threshold issue to be determined.

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[83] Mudrick Statement of Claim, para 23, Plaintiffs' Record Tab 1.

III. LAW AND ARGUMENT

85. The claims of the Plaintiffs are at present unsecured claims for the principal value of their Unsecured Notes, plus any accrued pre-filing interest.

86. To the extent that the Plaintiffs had a separate claim for damages arising out of their secondary market losses, this claim became subsumed within their *CCAA* claim for the principal value of the notes plus accrued interest as of the date of the Initial Order.

87. However, the Plaintiffs now seek an order i) declaring that they are entitled to participate in the Secured Notes Transaction on the same terms as the Secured Noteholders; and ii) requiring Lightstream to issue to them secured notes on the same basis as the Secured Noteholders. In effect, they seek to have this Honourable Court reclassify their unsecured claims as secured claims.

88. This remedy falls outside the court's *CCAA* jurisdiction. In the alternative, if it is within the court's jurisdiction, the court would not grant it, as doing so would be contrary to the purposes of the Act.

A. Is there Jurisdiction in the Court to Recognize the Plaintiffs' Claims as Secured Claims after the Granting of the Initial Order and to Make an Order Varying the Secured Notes Transaction and Requiring Lightstream to Issue Additional Secured Notes to Remedy Alleged Oppressive Conduct?

89. There is no jurisdiction in this Honourable Court to recognize the Plaintiffs' claims as secured claims after the granting of the Initial Order, or to make an order varying the Secured Notes Transaction and requiring Lightstream to issue additional Secured Notes to remedy alleged oppressive conduct.

90. The guiding principle of the *CCAA* is to permit the insolvent company to continue operations while it restructures, to the benefit of its creditors. During this process, the *status quo* between creditors is to be maintained to the extent possible.[84] This objective is intended to allow

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[84] *Agro Pacific Industries Ltd., Re,* 2000 BCSC 879 at para 17, 2000 CarswellBC 1180. Lightstream's Book of Authorities ["LBOA"] Tab 1.

the insolvent company an opportunity to reorganize itself without any creditor having an advantage over the company or any other creditor.[85]

91. This objective is accomplished via the "single proceeding" model, which requires all claims against a debtor (with certain limited exceptions) to be adjudicated in a single forum.[86] Upon commencement of the *CCAA* proceedings, whatever claims the Plaintiffs had against Lightstream were subsumed into the single proceeding model and became claims within the *CCAA*. The Plaintiffs accepted this model when they agreed that it was not necessary to determine the first threshold issue which had been proposed.

92. The *CCAA* recognizes three types of claims: secured claims, unsecured claims and equity claims.[87] The fundamental principle of the *CCAA*, and of insolvency law in general, is that all claims of the same type are to be treated on a *pari passu* basis, and all unsecured creditors are to receive equal treatment.[88]

93. The only powers which could be relied upon to grant the Plaintiffs the relief that they seek – either to have secured notes issued to them, or to have their unsecured claims converted into secured claims – are sections 42 and 11 of the *CCAA*. Neither provision, however, grants this Honourable Court the jurisdiction to grant the remedy sought by the Plaintiffs in these circumstances.

94. Section 42 of the *CCAA* permits the court to apply the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them. It could be argued that this section may authorize resort to the oppression provisions of the *ABCA* in appropriate circumstances (although in Lightstream's submission section 42 does not warrant such a broad reading).[89]

95. However, even if this Honourable Court were to conclude that section 42 of the *CCAA* permits it to apply the oppression provisions of the ABCA in appropriate circumstances, it has no

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[85] *Woodward's Ltd., Re*, 1993 CarswellBC 75 at para 17, [1993] B.C.W.L.D. 769, LBOA Tab 2
[86] *AbitibiBowater Inc., Re*, 2012 SCC 67 at para 21, LBOA Tab 3.
[87] *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 ["*CCAA*"], ss. 2, 19, 20, LBOA Tab 4.
[88] *Nortel Networks Corporation (Re)*, 2016 ONCA 332 at para 27, LBOA Tab 5.
[89] *CCAA*, s. 42, LBOA Tab 6.

jurisdiction to grant the remedy sought by the Plaintiffs in these circumstances, because i) such an order would not be granted outside the *CCAA* on the facts of the case; and ii) to grant such an order would be inconsistent with the purposes of the *CCAA*.

96. Section 11 of the *CCAA* grants the court a plenary jurisdiction to "make any order that it considers appropriate in the circumstances", subject to the restrictions set out in the *CCAA*.[90]

97. This Honourable Court has no jurisdiction to grant the remedy sought by the Plaintiffs under section 11 of the *CCAA* because section 11 does not grant the broad, equitable jurisdiction required to do so, and to do so would, in fact, hinder the purposes of the Act.

The Court has no Jurisdiction under the *CCAA* to Grant the Remedy Sought

98. Section 42 of the *CCAA* provides as follows:

> The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

99. In *Re Stelco Inc.* the Ontario court concluded that this provision was not limited to those provisions in the relevant corporate statute that deal specifically with the sanctioning of compromises and arrangements between the company and its shareholders, and included the oppression remedy.[91]

100. Section 242 of the *ABCA* provides that a court, on finding that a corporate defendant or its principals have engaged in conduct that is "oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer," may make an order to rectify the matters complained of, including, *inter alia*, an order directing an issue or exchange of securities.[92]

101. It is submitted that section 242 of the *ABCA* is not concerned with the sanctioning of compromises and arrangements between a company and its shareholders, and that the conclusion reached by the court in *Re Stelco* is not justified by the wording of section 42. In

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[90] *CCAA*, s. 11, LBOA Tab 7.
[91] *Stelco Inc., Re*, 2005 CarswellOnt 1188 at paras 52-53, [2005] O.J. No. 1171, LBOA Tab 8.
[92] *Business Corporations Act*, RSA 2000, c B-9, s. 242(3)(e), LBOA Tab 9.

Lightstream's submission, section 42 of the *CCAA* does not provide authority for a judge exercising powers under the *CCAA* to apply the oppression remedy provisions in section 242 of the *ABCA*.

102. However, even if this Court were to adopt the approach of the Ontario court in *Re Stelco*, the potential authority to apply the oppression remedy provision of the *ABCA* under section 42 of the *CCAA* must be understood in the context of the entire Act and be exercised in harmony with its other provisions. Lightstream submits that this requires a two-step analysis. First, the Court should determine whether the proposed power under the companion legislation would be exercised outside of the *CCAA* context on the facts of the case. Second, the Court should determine whether the exercise of the proposed power is consistent with the *CCAA*, or is restricted by the *CCAA*.

103. With respect to the first branch of this exercise, a court would not, on the facts of this case, exercise its discretion outside the context of the *CCAA* to grant the relief sought. The Plaintiffs' oppression claims are essentially breach of contract and misrepresentation claims, and the damages suffered are monetary. As discussed further below, this is not an appropriate case to award the type of equitable relief sought by the Plaintiffs.

104. With respect to the second branch of this exercise, the court must consider whether the *CCAA* restricts its ability to employ the oppression provisions of the *ABCA* to grant the equitable relief sought by the Plaintiffs. In undertaking this analysis the court should have reference to explicit restrictions within the *CCAA*. The court should also take into account restrictions imposed by the structure of the *CCAA* in the same manner it is required to consider these restrictions in the context of exercising its powers under section 11 of the *CCAA*.

i. <u>The Remedy would not be Granted outside the Context of the *CCAA*</u>

105. Even assuming all the facts relied on by the Plaintiffs to be true, a court would not exercise its discretion, in a pre-*CCAA* context, to grant the remedial orders sought by the Plaintiffs requiring Lightstream to offer the Secured Notes Transaction to them on the same terms and conditions as offered to the Secured Noteholders or to issue them additional Secured Notes. This is because the claims of the Plaintiffs are at their core simply claims for misrepresentation and breach of contract, which are adequately compensated by an award of

damages. These particular claims do not warrant the exercise of the extra-ordinary specific performance type remedies sought by the Plaintiffs. Lightstream adopts the submissions of Apollo Management, L.P. and GSO Capital Partners (the "**Second Lien Claimants**") in this regard.

106. The oppression remedy is not intended to provide the court with unfettered powers to modify corporate structures, and not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression.[93] Oppression remedies are not intended as a substitute for an action in contract, tort or misrepresentation.[94] If the real complaint is a breach of contract, it should be pursued as such, and not in the guise of an oppression claim.[95]

107. Both Plaintiffs have pleaded that the allegedly oppressive Secured Notes Transaction breached the terms of the Indenture.[96] Simultaneously, they seek to participate in the Secured Notes Transaction on the same basis as the Secured Noteholders. The Plaintiffs cannot succeed in obtaining the relief they seek based upon an alleged breach of contract. If the Secured Notes Transaction constituted a breach of the Indenture, then the court would not exercise its jurisdiction to include the Plaintiffs in a transaction which was similarly in breach. If the Secured Notes Transaction is not in breach of the Indenture, then there is no basis to grant any relief to the Plaintiffs based upon this cause of action.

108. The factual record that the Plaintiffs have put before the Court demonstrates that they do not seriously contend that there was a contractual breach of the Indenture. The Plaintiffs anticipated that the Secured Note Transaction could and would occur but allege that they either purchased or held off selling the Unsecured Notes because of representations that the feared transaction would not occur.

109. The default remedy for breach of contract or misrepresentation is an award of damages sufficient to restore the plaintiff to the position it would have been in had the breach not taken

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[93] *Stahlke v. Stanfield*, 2010 BCSC 142 at para 22-23, aff'd 2010 BCCA 603, LBOA Tab 10.
[94] *Ibid*, LBOA Tab 10.
[95] *Shefsky v. California Gold Mining Inc.* 2016 ABCA 103 at para 124, LBOA Tab 11.
[96] Mudrick Statement of Claim at para 21(c), Plaintiffs' Record Tab 1; FrontFour Statement of Claim at para 29, Plaintiffs' Record Tab 2.

place or the misrepresentation not been made.[97] Here, the Plaintiffs have, as a result of the *CCAA* filing, abandoned their claim for damages, and instead seek an equitable remedy more akin to specific performance.

110. The remedy of specific performance is generally only available where damages would be an inadequate remedy, typically where the subject of the contract is unique, such as real estate.[98] The Plaintiffs have not pleaded any of the underlying elements which would justify the imposition of such an equitable remedy.

111. Furthermore, the remedy sought by the Plaintiffs would, if granted, leave them in a better position than they would have been in but for the alleged breaches of contract or the alleged misrepresentations.

112. In the event that the Secured Notes Transaction was a breach of the Indenture, then the appropriate remedy would be an award of damages which would put the Plaintiffs in the position that they would have been in had there been no breach – i.e. a monetary award which returned the Plaintiffs to their position prior to the Secured Notes Transaction, in the amount of the difference in value of the Unsecured Notes before and after the announcement of the Secured Notes Transaction, to the extent that such difference could be directly attributed to such announcement. Such a monetary award would necessarily be less than the principal value of the Unsecured Notes plus any accrued pre-filing interest.

113. Similarly, in a claim for misrepresentation, the appropriate remedy would put the Plaintiffs in the position they would have been in had no misrepresentation been made and had Lightstream instead advised the Plaintiffs that it did intend to or might enter into the Secured Notes Transaction with a limited number of Unsecured Noteholders. The Plaintiffs both claim that they retained their Unsecured Notes in reliance on the alleged misrepresentation by Mr. Wright, and that if they had had accurate information they would have sold these notes.[99] In a

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[97] *Chan v. Chadha Construction & Investments Ltd.*, 2000 BCCA 198 at para 10, 2000 CarswellBC 672 citing Waddams, *The Law of Contracts*, 3rd ed. (Toronto: Canada Law Book Inc. 1993) at para. 661, LBOA Tab 12.; *Haig v. Bamford*, 1976 CarswellSask 116 at para 32, [1977] 1 SCR 466, LBOA Tab 13.

[98] *Semelhago v. Paramadevan*, 1996 CarswellOnt 2737, 1996 CarswellOnt 2738 at para 14, [1996] 2 S.C.R. 415, LBOA Tab 14.

[99] Mudrick Statement of Claim, paras 12 and 18, Plaintiffs' Record Tab 1; Affidavit of David Kirsch sworn July 29, 2015 at para 23, Plaintiffs' Record Tab 6; Transcript of Examination for Discovery of David Kirsch p. 77 l. 21 – p.

misrepresentation claim, therefore, the remedy to which the Plaintiffs would be entitled would be monetary damages equal to the difference between the value of the notes before the Secured Notes Transaction was announced and their value after such transaction.

ii. Granting the Proposed Remedy Would Be Inconsistent with the Purposes of the *CCAA*

114. Even in the event that that this Honourable Court were to find that the Plaintiffs' misrepresentation claims were properly the basis of an oppression claim outside the CCAA context, it does not necessarily mean that the court has jurisdiction to grant the relief sought within the CCAA context.

115. The jurisdiction of a *CCAA* court to make discretionary orders in the face of broad statutory discretion was recently considered by the Ontario Court of Appeal in *U.S Steel Canada Inc.*[100] This case arose in the context of the Court being called upon to exercise its broad discretionary powers under s. 11 of the *CCAA,* the alternative basis on which this Honourable Court could potentially grant the relief sought by the Plaintiffs.

116. Section 11 of the *CCAA* provides that the court may, on application, "subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances."

117. However, the court's jurisdiction under section 11 must be exercised in accordance with the purposes of the *CCAA*; to avoid the devastating social and economic effects of commercial bankruptcies; to permit the debtor to continue to carry on business; and to allow the court to preserve the status quo while "attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all."[101]

118. The preservation of priorities as they existed between the parties pre-filing is critical to preserving the status quo. The remedy now sought by the Plaintiffs would seriously disrupt that status quo, by altering priorities as between the various stakeholder groups. This is *prima facie*

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78 l. 23, Plaintiffs' Record Tab 23; Answers to Undertakings given at the Examination for Discovery of Stephen Loukas, no. 29, Plaintiffs' Record Tab 25.

[100] *US Steel Canada Inc., Re.* 2016 ONCA 662, LBOA Tab 15.

[101] *US Steel Canada Inc., supra,* at para 47, citing *Ted Leroy Trucking Ltd. Re.,* 2010 SCC 60 at para 77, LBOA Tab 15.

at odds with the purposes of the *CCAA*. Accordingly, the onus is on the Plaintiffs to show that the order they seek advances the purposes of the *CCAA* in other respects.

119. The Plaintiffs seek an equitable remedy, analogous to specific performance or to the doctrine of equitable subordination. Although *CCAA* jurisdiction is conferred on superior courts vested with inherent and equitable jurisdiction, the present jurisprudential trend is for courts to employ their inherent and equitable jurisdiction only as a tool of last resort when the language of the *CCAA* cannot be interpreted to anchor an intended measure to be taken in the *CCAA* proceedings.[102] The *CCAA* itself simply does not grant an at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors, and while the court may fashion "creative solutions" under section 11, it must not do so where the effect of such an order would be to undermine the remedial purposes of the *CCAA*.[103]

120. In *US Steel*, the Ontario Court of Appeal was asked to consider whether section 11 of the *CCAA* grants jurisdiction to apply the American doctrine of "equitable subordination". There, certain beneficiaries of a pension plan established by the insolvent entity submitted that, due to US Steel's conduct prior to the insolvency, its claims within the *CAA* ought to be equitably subordinated to their own.[104] The trial court declined to grant the requested relief, finding that it lacked the jurisdiction to do so.

121. On appeal, the Court of Appeal upheld the judgment of the lower court, finding, first, that the *CCAA* does not explicitly or impliedly grant the authority to equitably subordinate claims; and second, that the appellant had failed to identify how equitable subordination would advance the purposes of the Act.[105] The Court of Appeal noted that, unlike section 183 of the *Bankruptcy and Insolvency Act*, which invests the bankruptcy court with "jurisdiction in law and equity", the

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[102] *Kerr Interior Systems Ltd., Re*, 2011 ABQB 214 at para 26, 2011 CarswellAlta 508, citing G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in J. P. Sarra, ed., Annual Review of Insolvency Law 2007 (Toronto: Thomson Carswell, 2008) , LBOA Tab 16.
[103] *US Steel Canada Inc., supra* at para 102, LBOA Tab 15.
[104] *Ibid.* at para 13, LBOA Tab 15.
[105] *Ibid.* at para 103, LBOA Tab 15.

CCAA contains no such explicit grant of jurisdiction as a court of equity to ground such a remedy, nor to reorder priorities as between creditors.[106]

122. As was the case in *US Steel*, the remedy sought by the Plaintiffs in this case is an equitable reordering of priorities for which there is no authority under the *CCAA*. Such jurisdiction would be as inconsistent with the scheme of the *CCAA* as the prohibited jurisdiction to equitably subordinate.[107] To grant the remedy sought by the Plaintiffs would be to permit the reclassification of claims instead to become a locus for inter-creditor disputes. This Honourable Court should be highly reluctant to do so.[108] Lightstream adopts the submissions of the Second Lien Claimants with respect to the lack of inter-creditor fairness which would be inherent in the order sought by the Plaintiffs.

B. If there is Jurisdiction to Make an Order Recognizing the Plaintiffs' Claims as Secured Claims and Varying the Secured Notes Transaction, would the Court Exercise its Discretion to Do so Based upon the Facts as Pleaded and Supplemented to Represent the Highest and Best Factual Case of the Plaintiffs?

123. Even in the event that this Honourable Court were to find that it had the jurisdiction to exercise its discretion to grant the remedy sought by the Plaintiffs, Lightstream submits with respect, that it would not and should not do so, as this would effectively frustrate the purposes of the *CCAA* on the facts of this case.

124. As discussed above, the primary goal of the *CCAA* is to maintain the status quo while an insolvent company attempts to bring its creditors on side in terms of a plan of arrangement which will allow the company to remain in business to the mutual benefit of the company and its creditors.[109]

125. Here, the Plaintiffs seek to disrupt the status quo by having their unsecured claims converted to or recognised as secured claims, and thereby move up the capital structure. In doing so, they seek both to put their own debt ahead of that of the other Unsecured Noteholders, as well as creditors, and to dilute the interests of the Secured Noteholders, who have to date injected significant additional cash into the company. The Plaintiffs have not pleaded any actionable

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[106] *Ibid.* at para 82, LBOA Tab 15.
[107] *Ibid.* at paras 101-103, LBOA Tab 15.
[108] *Ibid.* at paras 17 and 69, LBOA Tab 15.
[109] *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 546 at para 15, 2001 CarswellAlta 964, LBOA Tab 17.

conduct on the part of these parties which might justify such a remedy and resulting harm to these parties. Again, Lightstream adopts the submissions of the Second Lien Claimants in this regard.

126. The allegedly oppressive transaction was carried out at a time when the price of oil was approximately half what it had been in the previous year. As a result, Lightstream anticipated that it could have problems servicing its debt load.[110] Lightstream had drawn down $640 million on a $750 million credit facility and had US $800 million in Unsecured Notes outstanding.[111]

127. The Secured Notes Transaction reduced Lightstream's debt by approximately $90 million and increased its credit availability by approximately $250 million.[112] Lightstream anticipated that the Secured Notes Transaction would provide it with the ability to reduce its outstanding borrowing under its credit facility, financial flexibility in the face of a low-price commodity environment, and the ability potentially to accelerate its drilling program in the event that commodity prices improved.[113]

128. The Plaintiffs, while disappointed not to be included in the Secured Notes Transaction, nonetheless agreed that it was of benefit to Lightstream. On the call of July 3, 2015 between Mr. Loukas and the Lightstream principals, Mr. Loukas told Lightstream that the Secured Notes Transaction was a "great deal".[114] Mr. Loukas subsequently agreed on discovery that the Secured Notes Transaction "enhanced Lightstream's liquidity".[115]

129. In applying the provisions of other corporate statutes under section 42 or exercising its broad powers under section 11 of the *CCAA*, the court must remain mindful of its imperative to advance the purposes of the *CCAA*. As this Honourable Court found in *Re. Canadian Airlines Corp,* negotiations with certain key creditors in advance of the CCAA filing, rather than being

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[110] "Apollo Appears Positioned as Winner Under Lightstream Debt Swap", Press Release dated July 8, 2015, Plaintiffs' Record Tab 6G.
[111] Lightstream AGM presentation, May 14, 2015, Plaintiffs' Record Tab 6M, p. 308.
[112] News Release dated July 2, 2015, Plaintiffs' Record Tab 6F.
[113] "Lightstream Announces Closing of Previously Announced US $200 Million Secured Note Transaction and Production Update," press release dated July 14, 2015, Plaintiffs' Record Tab 6K.
[114] Email from P. Scott to K. Cockrell (RBC) and others re. "Important", July 3, 2015 L1802 Lightstream Record Tab 19.
[115] Loukas Transcript, P. 92.7-p.92.8, Lightstream Record Tab 20.

oppressive or conspiratorial, "are to be encouraged as a matter of principle if their impact is to provide a firm foundation for a restructuring."[116]

130. Facing a growing debt load and an uncertain commodity pricing environment, Lightstream was receptive to solutions for improving its balance sheet and, to that end, entered into negotiations with certain of its key creditors. It entered into a transaction which, the Plaintiffs agree, was to its benefit, and which provided a firm foundation for its eventual restructuring. To grant the requested remedy for oppression on these facts and effectively to undo this transaction would be contrary to the purposes of the *CCAA*. Accordingly, it would be inconsistent with the court's jurisdiction under the *CCAA* to order an issuance of further secured notes, or to re-categorize the plaintiff's unsecured claims as secured claims, as a remedy for oppression.

131. To grant the remedy sought by the Plaintiffs would dilute the holdings of the Secured Noteholders, disrupt the capital structure, and fundamentally alter the landscape against which the current sales process is occurring. Given that the overriding purpose of the *CCAA* is to encourage reorganization and avoid liquidation, Lightstream submits that no *CCAA* court would or should grant the remedy sought by the plaintiffs in these circumstances.

IV. CONCLUSION

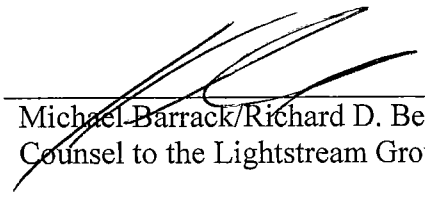
For the reasons set out above, there is no jurisdiction in this Honourable Court to award the remedy sought by the Plaintiffs, and in the event that there is such jurisdiction, it would not be appropriate to award such a remedy in this case. It follows that the appropriate remedy for the claims being advanced by the Plaintiffs, in the event that they are able to prove such claims, is an

[116] 2000 ABQB 442 at para 152, 2000 CarswellAlta 662, LBOA Tab 18.

award of monetary damages. Consequently, the claims advanced by the Plaintiffs should be treated as unsecured monetary claims within the context of the *CCAA*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28th DAY OF OCTOBER, 2016

BLAKE, CASSELS & GRAYDON LLP



Michael Barrack/Richard D. Bell/Peter Smiley
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