

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF PT HOLDCO, INC., PRIMUS TELECOMMUNICATIONS CANADA, INC., PTUS,
INC., PRIMUS TELECOMMUNICATIONS, INC., AND LINGO, INC.

Applicants

**FACTUM OF THE APPLICANTS
(Re Approval of the Birch Transaction, Stay Extension and Distribution
Returnable February 25, 2016)**

Dated: February 23, 2016

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Email: mkonyukhova@stikeman.com

Vlad Calina LSUC#: 69072W
Tel: (416) 869-5202
Email: vcalina@stikeman.com
Fax: (416) 947-0866

Lawyers for the Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF PT HOLDCO, INC., PRIMUS TELECOMMUNICATIONS CANADA, INC., PTUS,
INC., PRIMUS TELECOMMUNICATIONS, INC., AND LINGO, INC.**

Applicants

**FACTUM OF THE APPLICANTS
(Re Approval of the Birch Transaction, Stay Extension and Distribution
Returnable February 25, 2016)**

PART I - INTRODUCTION

1. This motion is brought by the Applicants, PT Holdco, Inc. ("**Holdco**"), Primus Telecommunications Canada Inc. ("**Primus Canada**" and together with Holdco, the "**Canadian Primus Entities**"), PTUS, Inc. ("**PTUS**"), Primus Telecommunications, Inc. ("**PTI**") and Lingo, Inc. ("**Lingo**", and together with PTUS and PTI, the "**U.S. Primus Entities**" and collectively with the Canadian Primus Entities, the "**Primus Entities**").
2. The Primus Entities were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to the Initial Order of the Honourable Justice Penny of the Ontario Superior Court of Justice dated January 19, 2016 (the "**Initial Order**"). FTI Consulting Canada Inc. ("**FTI**") was appointed as monitor of the Primus Entities (in such capacity, the "**Monitor**") in these CCAA proceedings.

3. The Initial Order was recognized in the United States pursuant to Chapter 15 of the United States Bankruptcy Code on January 21, 2016 in the United States Bankruptcy Court for Delaware (the "Chapter 15 Proceedings").

4. The Primus Entities now seek, among other relief, court approval of the sale of substantially all of their business and property. In particular, the Primus Entities bring this motion seeking the following:

- (a) An Order, substantially in the form of the draft order located at Tab 2 of the Supplementary Motion Record ("Approval and Vesting Order"):
 - (i) Approving the Agreement of Purchase and Sale made and entered into as of January 19, 2016 (the "Birch APA") between the Primus Entities and Birch Communications, Inc. (the "Purchaser") for the sale of the Purchased Assets (as defined below) and the transactions contemplated thereby (the "Birch Transaction");
 - (ii) Approving the SISP (as defined below) and the actions of the Primus Entities and their advisors, including Origin Merchant Partners ("Origin") and FTI, in developing and implementing the SISP and entering into the Birch APA and any ancillary agreements *nunc pro tunc*;
 - (iii) Approving the pre-filing report of FTI in its capacity as proposed monitor (the "Pre-Filing Report"), the first report of the Monitor dated February 10, 2016 (the "First Monitor's Report"), the second report of the Monitor dated February 19, 2016 (the "Second Monitor's Report") and the activities described therein; and
 - (iv) Vesting all of the Purchased Assets in the Purchaser free and clear of any Encumbrances other than Permitted Encumbrances (as such terms are defined in the Birch APA).

- (b) An order substantially in the form of the draft order located at Tab 3 of the Supplementary Motion Record ("**Stay Extension and Distribution Order**"):
 - (i) Extending the Stay Period (as defined in paragraph 14 of the Initial Order) to September 19, 2016;
 - (ii) Authorizing and directing the Monitor to disburse certain amounts as set out in the draft order.
- (c) Such other and further relief as this Court deems just.

5. The Birch Transaction represents the best possible transaction in the circumstances for the benefit of the Primus Entities and their stakeholders. The SISP was conducted fairly and properly, with due regard to the interests of the Primus Entities' stakeholders. The Purchase Price to be paid pursuant to the Birch APA represents the highest realizable price obtained through the sales process. The Syndicate and Monitor support the relief sought herein and the Primus Entities' second lien secured lenders have withdrawn their objections to the sale.

PART II - THE FACTS

6. The facts with respect to this application are more fully set out in the first affidavit of Michael Nowlan, sworn January 18, 2016, in support of the Initial Order (the "**Initial Order Affidavit**"), the second affidavit of Michael Nowlan, sworn February 2, 2016 in support of the orders sought herein (the "**AVO Affidavit**") and the first affidavit of Robert Nice, sworn February 20, 2016 ("**Nice Affidavit**").¹

¹ All capitalized terms used but not defined herein have the meaning ascribed to them in the AVO Affidavit.

A. The Development of the SISP

7. The Primus Entities' principal business is the re-selling of residential and commercial telecommunications services within Canada and the United States.² Since early 2012, and as a result of economic conditions described in greater detail in the Initial Order Affidavit, the Primus Entities experienced ongoing and severe liquidity issues due to, among other things, over-leverage, declining revenues, and high capital costs. By late 2014, the Primus Entities were unable to satisfy certain financial covenants in their credit facilities (the "Credit Defaults").³

AVO Affidavit at paras 4, 8-9, Motion Record, Tab 2.

Initial Order Affidavit at paras. 18, 23-27 92-112, 119-128, 152-156, Motion Record, Tab 2B.

8. As a result of these financial difficulties, by late 2014 the Primus Entities had defaulted with respect to: (i) their senior secured credit facilities owing to the Syndicate (the "Senior Secured Debt"); and (ii) their subordinated secured credit facilities owing to the Manufacturer's Life Insurance Company ("Manulife") and BMO Capital Partners (collectively with Manulife, the "Subordinate Lenders").⁴ The Primus Entities operated under forbearance arrangements with the Syndicate from February 2015 onwards.

AVO Affidavit at paras 4, 8-9, Motion Record, Tab 2.

Initial Order Affidavit at paras. 92-112, 119-128, Motion Record, Tab 2B.

9. The Primus Entities explored a wide variety of potential restructuring options, all of which were evaluated using financial model forecasts. Without additional support

² Re-sellers are telecommunications service providers who acquire services wholesale from major telecommunications service industry carriers to offer services to their own customers.

³ As described in greater detail in the Initial Order Affidavit, the Primus Entities were required to maintain certain earnings before interest, taxes, and amortization ("EBITA") to debt ratios. Due to their high debt load and decreasing EBITA, the Primus Entities were unable to maintain these ratios.

⁴ The Syndicate has a first-ranking security interest over all of the Primus Entities assets. The Subordinate Lenders are fully subordinated to the prior repayment in full of all obligations owing to the Syndicate and the security of the Syndicate under the Credit Agreement.

from the Syndicate or the Subordinate Lenders, however, none of the options proved viable. Thus, the Primus Entities began to consider a sale of their business.

AVO Affidavit at paras 10-11, Motion Record, Tab 2.

Initial Order Affidavit at paras. 113-118, Motion Record, Tab 2B.

10. To maximize returns for their stakeholders, the Primus Entities decided to pursue a restructuring transaction by way of a privately planned and supervised sales and investor solicitation process (“SISP”). Four considerations underpinned this decision:

- (a) First, a going concern sale was necessary to maximize value, as the assets of the Primus Entities were expected to have a nominal value in a liquidation;
- (b) Second, a going concern sale would preserve jobs and future business opportunities for suppliers and minimize disruptions for customers;
- (c) Third, the development and execution of the pre-filing SISP was one of the conditions of the Syndicate’s continued forbearance. Without the Syndicate’s forbearance, the Primus Entities would have been required to shut down operations or immediately file for CCAA protection; and
- (d) Fourth, conducting the pre-filing SISP was preferable to restructuring under formal insolvency proceedings because the period of CCAA protection necessary to implement and execute any post-filing sales process, including the publicity associated with such a filing, was expected to have serious and detrimental effects on Primus Entities’ business and customers.

AVO Affidavit at paras 10-13 and 101, Motion Record, Tab 2.

11. Following arms-length negotiations commencing in July 2015, the Primus Entities entered into a support agreement with the Syndicate dated August 31, 2015 (the “Support Agreement”). The Support Agreement allowed the Primus Entities to implement the SISP pre-filing, while preserving the position of the Syndicate lenders and the Primus Entities’ other stakeholders if the SISP did not result in a restructuring transaction.

AVO Affidavit at paras 14 and 16, Motion Record, Tab 2.

Initial Order Affidavit at paras. 129-132, Motion Record, Tab 2B.

12. In the Support Agreement, the Syndicate covenanted, among other things: (i) to forbear from exercising their rights and remedies as creditors notwithstanding the Credit Defaults; (ii) not to take any action to frustrate the consummation of any potential restructuring transaction; and (iii) to support the Court approval of any resulting restructuring transaction as promptly as practically possible. In return, the Primus Entities would: (i) adhere to certain monitoring and reporting obligations; (ii) follow a predetermined business plan; and (iii) adhere to a timeline for implementing the SISP.

AVO Affidavit at para 17, Motion Record, Tab 2.

Initial Order Affidavit at paras. 131-132, Motion Record, Tab 2B.

13. All material decisions with respect to the SISP - including whether to enter into a transaction and, if so, what transaction to enter into - remained within the Primus Entities' sole discretion and were to be made with a view to securing the best available outcome for stakeholders. All milestones and procedures in the SISP could be amended at any time by mutual agreement between the Primus Entities and the Syndicate.

AVO Affidavit at paras 18-19, Motion Record, Tab 2.

14. The Support Agreement provided the Primus Entities with the time necessary to conduct a thorough market canvass and to avoid a distressed-asset sale scenario while preserving their relationships with suppliers and customers at a critical and sensitive time, all without affecting or altering their secured creditors' rights and remedies.

B. The SISP

15. The SISP was developed to govern the process by which the Primus Entities would select a purchaser for or investor in their business and/or assets. In particular:

- (a) The SISP was designed to parallel and correspond to sales and investor solicitation processes used and approved in other CCAA proceedings;
- (b) The SISP was designed to broadly solicit potential strategic restructuring transactions to ensure that the Primus Entities would be able to select the transaction that would most benefit their stakeholders; and
- (c) The Primus Entities expressly reserved their right to modify or amend the SISP procedure at any time.

AVO Affidavit at paras 20-21 and 22, Motion Record, Tab 2.

16. The SISP was structured as a two phase process. Phase I of the SISP involved: (i) a thorough market canvass to attract strategic and financial buyers and ascertain their interest in a transaction; (ii) initial due diligence by the potential interested parties following execution of a non-disclosure agreement ("NDA"); and (iii) receipt by the Primus Entities of non-binding letters of intent for the purchase of the whole or part of their business and assets or an investment in the same. Phase II of the SISP involved additional due diligence, data room access and management presentations aimed at completion of binding documentation for a superior offer.

AVO Affidavit at paras 30-46, Motion Record, Tab 2.

17. As contemplated in the SISP, and following a competitive selection process, the Primus Entities engaged Origin to act as their financial advisor on August 7, 2015. Origin and the Primus Entities, in consultation with FTI, developed a list of qualified, potentially interested parties comprised of strategic and financial buyers, including private equity firms and hedge funds.

AVO Affidavit at paras 31-32, Motion Record, Tab 2

Second Monitor's Report at para. 27

18. The Primus Entities, with the assistance of their professional advisors, thoroughly canvassed the market for potential interested parties. By September 23, 2015, Origin had

distributed 75 teaser documents and made phone calls to 79 potential bidders (comprised of 34 strategic parties and 45 financial sponsors). In total, 25 of the 75 parties that received teaser documents executed NDAs and received confidential information memoranda. The Primus Entities offered in-depth management presentations as to, among other things, their business and assets. In total, 27 potential parties participated in active discussions with respect to the SISP, which culminated in 10 in-depth management meetings.

AVO Affidavit at paras 32-33, Motion Record, Tab 2.

19. The Primus Entities and Origin formally advised potentially interested parties of the SISP selection procedure by way of a process letter (the "Phase I Letter") dated September 22, 2015. The Phase I Letter notified all parties that the Primus Entities and Origin would evaluate their proposals with the objectives of realizing the highest value, ensuring certainty of execution and proper treatment of stakeholders, and consummating a sale transaction on an expedited timeline. The Phase I Letter advised that, using these criteria, certain qualifying parties would be invited to participate in Phase II of the SISP.

AVO Affidavit at paras 34-35, Motion Record, Tab 2.

20. As a result of the foregoing marketing efforts, between September 29 and October 7, 2015, six parties submitted non-binding letters of intent ("Phase I LOIs"). The Primus Entities reviewed the Phase I LOIs with the assistance of their professional advisors using the SISP criteria. All bidders were given preliminary feedback on their Phase I LOIs to encourage them to improve their proposals in terms of value and certainty of closure. All but one of the bidders submitting Phase I LOIs were invited to participate in Phase II.

AVO Affidavit at paras 36-39, Motion Record, Tab 2.

21. Phase II of the SISP involved additional due diligence, data room access and management presentations aimed at completing binding documentation for a superior offer. The Primus Entities and Origin held numerous discussions with bidders selected for Phase II participation to respond to their due diligence enquiries and encourage them to improve their bids, all to maximize value for the Primus Entities' stakeholders.

AVO Affidavit at paras 45-46, Motion Record, Tab 2.

22. On October 8, 2016, the Primus Entities and Origin formally advised all parties that advanced to Phase II of the timeline and expectations for final proposals by way of a process letter (the "Phase II letter").⁵

AVO Affidavit at paras 40-41, Motion Record, Tab 2.

23. The evaluation of proposed restructuring transactions was designed to identify the value maximizing transaction using predetermined and objective criteria. Bids were evaluated on various grounds, including: purchase price or imputed value of the transaction; treatment of creditors; ease of closing; and any other risk associated with a bid. Following the thorough evaluation of all of the bids, the Primus Entities could:

- (a) Accept one or more of the bids;
- (b) Continue negotiation with select bidders with the aim of having them improve their offers; or
- (c) Conduct an auction in accordance with the procedure set out in Appendix "B" to the SISP with some or all of the bidders.

AVO Affidavit at paras 25-26, Motion Record, Tab 2.

24. At the conclusion of Phase II, on November 16, 2015, five parties submitted proposals to purchase all or substantially all of the assets of the Primus Entities: (i) Comwave Networks Inc. ("Comwave") submitted a proposal to purchase substantially all of the Primus Entities' assets; (ii) three parties (one of which was the Purchaser) submitted offers to acquire the Primus Entities' Canadian assets only; and (iii) one party (the "U.S. Proposed Purchaser") submitted a proposal to acquire the Primus Entities' U.S. assets.⁶

⁵ On October 22, 2015, Origin distributed a Phase II process letter to the party that submitted a Phase I LOI on October 20, 2015.

⁶ On November 18, 2015, an additional party submitted a proposal to acquire all or substantially all of the Primus Entities Canadian assets. However, this bidder refused to provide any evidence of financing and refused to proceed with due diligence in absence of an exclusivity arrangement.

Affidavit of Jim Osler sworn February 2, 2016 (the "Osler Affidavit") at paras. 6-7, Motion Record, Tab 6.

AVO Affidavit at paras 47-48, Motion Record, Tab 2.

25. The Primus Entities reviewed the proposals received from the foregoing parties in consultation with their professional advisors and FTI. None of the proposals were capable of acceptance in the forms submitted by the bidders. As contemplated under the SISP and as was conveyed to all potential bidders, over the next several weeks the Primus Entities engaged in intensive discussions simultaneously with five of the interested parties in order to clarify and/or improve the terms of their proposals.

Osler Affidavit at paras. 8-30, Motion Record, Tab 6.

AVO Affidavit at paras 49-103, Motion Record, Tab 2.

26. Following the receipt of Phase II bids, it became apparent that the proposed sales transaction values were less than the Primus Entities' indebtedness to the Syndicate and that, as a result, it was unlikely that funds would remain for the Subordinate Lenders. In parallel with the negotiations with the Phase II bidders, the Primus Entities explored the possibility of alternative refinancing for the indebtedness. No refinancing transaction was available despite a careful market canvass.

AVO Affidavit at para 118-119 and 122, Motion Record, Tab 2.

27. A proposed combination of Comwave and the U.S. Proposed Purchaser emerged as having the highest potential realizable value, but involved substantial closing complexity and risks.⁷ The proposed combined transaction with Comwave and the U.S. Proposed Purchaser did not include certain of the U.S. Primus Entities' assets (the "U.S. Regulated Assets"). A third party acquiror (the "U.S. Regulated Asset Purchaser")

⁷ Comwave did not ascribe material value to the assets of the U.S. Primus Entities and its proposal reflect this valuation. Origin advised Comwave that it could improve its value proposition if it amended its proposal to include only the Primus Entities Canadian assets, which it did on November 20, 2015. The revision to the Comwave proposal provided the Primus Entities with the opportunity to find another party to purchase the U.S. Primus Entities assets, who ascribed them non-negligence value. The U.S. Proposed Purchaser emerged as such as a party.

emerged on December 4, 2015, provided a non-binding LOI on December 14, 2015, and conducted due diligence between December 15 and 17, 2015.

Osler Affidavit at paras. 11-22, Motion Record, Tab 6.

AVO Affidavit at paras 52-58, 61, 68, 72-73, Motion Record, Tab 2.

28. At a meeting with Comwave on December 3, 2015, the Primus Entities proposed an auction be conducted in accordance with the SISP. Comwave did not agree to participate in the auction and advised it would withdraw if any auction were held. By December 4, 2015, the Primus Entities were involved in active discussions with four bidders: Comwave, the U.S. Proposed Purchaser, the U.S. Regulated Asset Purchaser and the Purchaser.

AVO Affidavit at paras 60, 62-63, Motion Record, Tab 2.

29. On December 16, 2015, the Purchaser submitted a revised and comprehensive proposal to acquire substantially all of the Primus Entities' business and operations, including the entirety of the Primus Entities' U.S. assets. This proposal was at a higher purchase price than the Comwave proposal. Over the next several days, the Primus Entities engaged in intensive negotiations with the Purchaser.

AVO Affidavit at paras 71-72, Motion Record, Tab 2.

30. On December 18, 2015, Comwave advised Primus Canada that it would withdraw its proposal by 6:00 PM on December 19, 2015 unless the Primus Entities agreed to exclusivity. Following extensive consultations with their professional advisors and FTI, the board of directors of Primus Canada, on behalf of the Primus Entities, determined that it was not in the best interest of the Primus Entities or their stakeholders to enter into an exclusivity agreement with Comwave. Comwave advised that it was prepared to extend its deadline to December 31, 2015 if the Primus Entities agreed to a break-fee of \$300,000. The Primus Entities determined that there would be no advantage to the sales process or to their stakeholders to agree to the break-fee.

AVO Affidavit at paras 74-79, Motion Record, Tab 2.

31. On December 22, 2015, after extensive deliberations and consultations with their professional advisors, FTI and the Syndicate, the Primus Entities concluded, further to and on the basis of their commercial and business judgement, that it was in the best interest of the Primus Entities' and their stakeholders to enter into the transaction with the Purchaser. Accordingly, the parties entered into an exclusivity agreement. On January 18, 2016, the boards of directors of the Primus Entities selected the Purchaser as the Successful Bidder (as defined) and approved the execution of the Birch APA.

AVO Affidavit at paras 80-83, Motion Record, Tab 2.

C. The Birch Transaction

32. On January 19, 2016, the Primus Entities and the Purchaser executed and delivered a definitive version of the Birch APA, conditional on Court approval. An essential precondition to the Birch APA was the expeditious application to this Court for the Initial Order, which the Primus Entities sought and obtained on January 19, 2016.

AVO Affidavit at para 82, Motion Record, Tab 2.

Initial Order Affidavit at para 144, Motion Record, Tab 2B.

33. The Purchaser will acquire substantially all of the business, assets and operations of the operating companies of the Primus Entities, including all of their patents, patent applications, trademarks and domains ("**Purchased Assets**" and "**Purchased Intellectual Property**" as set out in Schedules "A" and "H" to the Birch APA) on an "as is, where as" basis free and clear of all Encumbrances (as defined in the Birch APA).

AVO Affidavit at para 84, Motion Record, Tab 2.

34. As set out in section 1.1 and Schedule "D" to the Birch APA, the Purchased Assets will not include: the Excluded Contracts, all Benefit Plans and Employee Plans (as defined in the Birch APA), all cash and cash equivalents of the Primus Entities, any shares or other

securities owned by the Primus Entities, any deposits paid or other security posted by the Primus Entities or any amounts set off or held back from the Primus Entities in respect of goods or services to be supplied after the CCAA proceedings have commenced.

AVO Affidavit at para 85, Motion Record, Tab 2.

35. The aggregate purchase price (“Purchase Price”) payable to the Primus Entities is calculated on the basis of the Purchase Price formula set out in section 3.7 of the Birch APA, consisting of the following: (i) the Base Purchase Price of \$44 million (as adjusted according to the formula set out therein); less Cure Costs (as defined in the Birch APA); and (iii) less all amounts payable that do not constitute Cure Costs in respect of Essential Contracts (as defined) provided in the period prior to or until the closing.

AVO Affidavit at paras 85-87, Motion Record, Tab 2.

Second Monitor’s Report at paras. 32-35.

36. The Purchaser may terminate the Birch APA, in its sole and absolute discretion, if this Court orders a post-filing sales process or it may elect not to terminate the APA and may serve as a stalking horse offer in such post-filing sales process with customary stalking horse protections, in accordance with the terms of the exclusivity letter arrangement (which are to include, without limitation, a 3% break-free to be paid from the proceeds of any overbid in favour of the Purchaser), subject to court approval.

AVO Affidavit at paras 88, Motion Record, Tab 2.

37. The Primus Entities employ approximately 540 people as of February 2, 2016. The Purchaser may, in its sole discretion, offer employment to any or all active and inactive employees of the Primus Entities (conditional on closing the Birch Transaction and effective as of the time of closing). The Purchaser has advised that it intends to offer employment to all or substantially all of the employees of the Primus Entities.

AVO Affidavit at paras 89-90, Motion Record, Tab 2.

38. The Purchaser will assume, perform, discharge and pay the obligations and certain liabilities of the Primus Entities set out in section 2.6 of the Birch APA. The Purchaser will not assume, perform, discharge and pay the Primus Entities' obligations as per section 2.7.

AVO Affidavit at paras 91-92, Motion Record, Tab 2.

39. The Birch APA contemplates that the Primus Entities will assign to the Purchaser certain contracts identified as the "Essential Contracts" (as defined in the Birch APA). It is a condition precedent to closing that the Essential Contracts be assigned, either by consent or court order (the "Assignment Order"). The hearing for the approval of the Assignment Order has been adjourned to March 2, 2016.

AVO Affidavit at para 135, Motion Record, Tab 2.

Nice Affidavit at paras. 12-14 , Supplementary Motion Record, Tab 1.

40. The Birch APA provides that the Birch Transaction will close (i) five Business Days after the date upon which the Approval and Vesting Order is granted and is final, not stayed or varied in a manner prejudicial to the Purchaser, or vacated or appealed, (unless the Purchaser provides written consent that closing occur despite such appeal); or (ii) on such other earlier or later date as may be agreed by the parties. Due to regulatory requirements in the U.S., it is anticipated that a further three months from closing will elapse until all required regulatory approvals are received. In the interim, the U.S. Primus Entities' operations will be governed by a management services agreement.

AVO Affidavit at paras 95-96, Motion Record, Tab 2

Second Monitor's Report at paras. 36-38 and 40-44

PART III - ISSUES

41. The issues on this motion are as follows:

- (a) The request that this Court approve the Birch APA and the Birch Transaction contemplated therein and vest all of the Purchased Assets in the Purchaser;
- (b) The extension of the Stay of Proceedings to September 19, 2016;
- (c) The requested approval of the Pre-Filing Report and Monitor's First Report, including the activities described therein;
- (d) The requested approval of the actions of the Primus Entities and their advisors, including Origin and FTI, in developing and implementing the pre-filing SISP *nunc pro tunc*; and
- (e) The granting of the Distribution Order.

PART IV - LAW AND ARGUMENT

A. The Birch APA and the Birch Transaction Should be Approved

(i) *The Test to Approve a Pre-Filing Sales Transaction is the Same as the Test to Approve a Post-Filing Sale Transaction*

42. In *Nelson Education Limited (Re)*, Justice Newbould held that the same principles that apply to the approval of a sale transaction resulting from a post-filing sales process apply to the approval of a sale transaction resulting from a pre-filing sales process.

Nelson Education Limited (Re), 2015 ONSC 5557, Applicants BOA, Tab 1 at paras. 32-33, 35-38 [*Nelson*]

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), Applicants' BOA, Tab 2 at para. 16 [*Soundair*]

43. *Nelson* recognized, *inter alia*, the following nine factors as salient to the determination that a pre-filing sales process can meet the *Soundair* principles and the requirements of s. 36(3) of the CCAA. The Primus Entities submit that each of the following factors are satisfied:

- 1) The design of the SISP was typical of such marketing processes and was consistent with processes that have been approved by the courts in many CCAA proceedings;
- 2) The SISP allowed interested parties adequate opportunity to conduct due diligence; both management and their financial advisors were responsive to all requests from potentially interested parties; and the timelines were reasonable in the circumstances;
- 3) The activities undertaken by Origin were consistent with the activities that any investment banker or sale advisor engaged to assist in the sale of a business would be expected to undertake;
- 4) Both senior management of the Primus Entities and Origin were incentivised to achieve the best value available in the circumstances and there was no impediment to doing so;
- 5) The SISP was undertaken in a thorough and professional manner;
- 6) The results of the SISP clearly demonstrate that none of the interested parties would, or would be likely to, offer a price for the business of the debtor that would be sufficient to repay more than the amounts owing to the Syndicate;
- 7) There are no significant operational improvements available that would materially improve profitability in the short-term such that the value of the business would increase to the extent necessary to repay the Syndicate in full and, accordingly, there is no benefit to delaying the sale of the business;
- 8) A new source of financing to repay the Syndicate in full or an alternative debt restructuring that might create value for the Subordinate Lenders is not available at this time; and

- 9) The SISP was a thorough market test and can be relied on to establish that there is no value beyond the Birch APA and the Purchase Price contemplated therein.

Nelson, Applicants' BOA, Tab 2 at paras. 35-36

AVO Affidavit at paras 20-83 and 128, Motion Record, Tab 2

Second Monitor's Report at paras. 48-81

(ii) *The Court has the Jurisdiction to Approve the Birch Transaction and Vest the Purchased Assets in the Purchaser*

44. The power of this Court to approve a sale of assets prior to the formulation of a plan of compromise or arrangement is contained in section 36 of the CCAA. Courts have recognized that, as "reorganizations of differing complexity require different legal mechanisms," the sale of "substantially all of the assets of a debtor company to preserve it as a going concern under new ownership" is a valid objective under the CCAA.

PCAS Patient Care Automation Services Inc. (Re), 2012 ONSC 3367, Applicants' BOA, Tab 3 at paras. 35

First Leaside Wealth Management Inc. (Re), 2012 ONSC 1299 at para 32, Applicants' BOA, Tab 4

Nortel Networks Corp. (Re) (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), Applicants' BOA, Tab 5 at paras. 27, 32-34, 36, 38 and 40 [*Nortel Networks*]

45. The Court has to look at the transaction as a whole and decide whether the sale is appropriate, fair and reasonable. Section 36(3) of the CCAA sets out the following list of non-exhaustive factors for the Court to consider in determining whether to approve a debtor's sale of assets outside the ordinary course of business:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;

- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

CCAA section 36(3)

Re White Birch Paper Holding Company, 2010 QCCS 4915 at paras. 48-49, leave to appeal ref'd 2010 QCCA 1950 at para. 13, Applicants' BOA, Tab 6

46. In *Re Canwest Publishing Inc.*, Justice Pepall held that the section 36(3) criteria largely overlapped with the traditional common law criteria established in *Royal Bank v. Soundair Corp.* for approval of a sale of assets in an insolvency scenario:

- a. Whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- b. The interests of all parties;
- c. The efficacy and integrity of the process by which offers have been obtained; and
- d. Whether there has been unfairness in the working out of the process.

CCAA, s. 36(3)

Re Canwest Publishing Inc. (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J.), Applicants' BOA, Tab 7 at para. 13

Soundair, Applicants' BOA, Tab 2 at para. 24

47. Section 36 of the CCAA grants the necessary jurisdiction to approve a sale transaction where certain creditors will not recover at all if the transaction is otherwise in the best interest of the stakeholders of the debtor. In *Nelson*, Justice Newbould approved a credit bid, the effect of which was that second-lien lenders and the unsecured creditors

would not recover anything. Similarly, in *Re Grant Forest Products Inc*, Justice Campbell approved a sale transaction where “there will be a shortfall” for the first-lien lenders, “likely no recovery” for second-lien lenders and no recovery for the unsecured creditors.

Nelson, Applicants’ BOA, Tab 3 at para. 1

Re Grant Forest Products Inc., 2010 ONSC 1846, Applicants’ BOA, Tab 8 at paras. 10-11, 37 and 49

(iii) *The Birch APA and Birch Transaction Satisfy the Section 36 Requirements and the Soundair Criteria*

48. The Birch APA and the Birch Transaction satisfy section 36 of the CCAA requirements and the *Soundair* criteria for approval of disposition of assets in CCAA proceedings for, *inter alia*, the following reasons:

- (a) **Section 36(3)(a): The process leading to the Birch Transaction was reasonable in the circumstances.** The sales process that culminated in the Birch APA was reasonable in the circumstances in accordance with the requirements of section 36(3)(a):
 - (i) The SISP was designed to maximize the purchase price that could be obtained for the assets of the Primus Entities;
 - (ii) The SISP was developed and structured in a manner consistent with and analogous to post-filing sales processes commonly approved by this Court; and
 - (iii) The SISP was conducted in a fair and transparent and reasonable manner under the supervision of and in consultation with FTL, who was consulted throughout the development of the SISP and its implementation.

AVO Affidavit at paras 20-25, 100 and 142, Motion Record, Tab 2

Second Monitor’s Report at paras. 53-54

(b) **Section 36(3)(b): The Monitor would have recommended approval of the SISP had the SISP been presented for approval as a post-filing sales process. The Monitor is of the view that:**

- (i) The design of the SISP was typical of and consistent with marketing processes typically approved by the courts in CCAA proceedings;
- (ii) The timelines provided for in the SISP were reasonable in the circumstances;
- (iii) The marketing process was carried out in accordance with the SISP and the opportunity to acquire the business and assets of the Primus Entities was widely known;
- (iv) The SISP allowed interested parties adequate opportunity to conduct due diligence and Origin and the Primus Entities' management were responsive to requests from potentially interested parties;
- (v) The degree of creditor consultation was appropriate in the circumstances and no material change in the outcome of the SISP would have resulted from additional creditor consultation;
- (vi) Further canvassing of the market is unnecessary in the circumstances as there has been no material improvement in the business or market conditions that would suggest that a different result could be achieved if the sales process was reopened at this time.

Second Monitor's Report at paras, 11, 49-50, 52, 61-68 and 74-79

(c) **Section 36(3)(c): The Monitor has filed a report attesting to the benefit of the Transaction. In particular, the Monitor is of the view that:**

- (i) The Birch Transaction would be more beneficial to the Primus Entities' creditors than a sale or disposition in a bankruptcy; and

- (ii) **The Birch Transaction represents the best available outcome for all stakeholders.**

Second Monitor's Report at paras, 11, and 55-60.

- (a) **Section 36(3)(d): Creditors were adequately consulted.** The Syndicate, the first-ranking secured creditor of the Primus Entities, was consulted at all key stages of the SISP. The Syndicate supports the Birch APA and the Birch Transaction. The Subordinate Lenders were kept apprised of the progress of the SISP by way of regulate update calls. While the Subordinate Lenders were not consulted on the Birch Transaction, they were aware of the process, procedures and conduct of the SISP and knew in December 2015 that the Primus Entities were finalizing a sale transaction. Throughout the SISP, the Primus Entities worked with the Subordinate Lenders to explore alternative refinancing transactions, without success. The Monitor is of the view creditors were adequately consulted.

AVO Affidavit at paras. 104 and 116-127, Motion Record, Tab 2

Second Monitor's Report at paras, 11, and 61-68

- (b) **Section 36(3)(e): The effects of the Birch Transaction are positive.** The Birch Transaction provides for the continued operation of the Primus Entities' business, which will mean ongoing employment for its employees and business for suppliers, service providers and customers that would not be available in the event that the Primus Entities were to be liquidated.

AVO Affidavit at paras. 12, 104 and 116-127, Motion Record, Tab 2

Second Monitor's Report at paras. 69-73

- (c) **Section 36(3)(f): The consideration to be received for the Primus Entities' business and property is adequate.** The Birch APA, which was thoroughly market derived and tested, represents the highest price realizable for the Purchased Assets that could be obtained pursuant to the SISP.

AVO Affidavit at paras 35-40 and 141, Motion Record, Tab 2

Second Monitor's Report at para, 11

49. In exercising any authority under the CCAA, a court should always bear in mind the requirements of appropriateness, good faith and due diligence stressed by the Supreme Court of Canada in *Re Century Services Ltd.*:

Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA – avoiding the social and economic losses resulting from liquidation of an insolvent company.

Re Century Services Ltd., 2010 SCC 60, Applicants BOA, Tab 9 at para. 70 [*Century Services*]

50. Courts will not lightly interfere with the exercise of commercial and business judgment properly exercised where the marketing and sale process was fair, reasonable, transparent and efficient. The Primus Entities' uncontested evidence is that the Birch Transaction is the product of a fair and transparent procedure and that it constitutes the best value realizable in the circumstances for all of the Primus Entities' stakeholders.

Re AbitibiBowater Inc., 2010 QCCS 1742, Applicants BOA, Tab 10, at paras. 70-71

51. For all of the foregoing reasons, the circumstances set out in section 36(3) in the CCAA are satisfied.

(iv) The Additional Factors for Sale Approval are Also Satisfied

52. In addition to the factors set out in section 36(3), section 36(7) of the CCAA sets out the following restrictions on disposition of assets within CCAA proceedings:

36 (7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

CCAA, s. 36(7) references paragraphs 6(4)(a) and (5)(a), which appears to be a drafting error. It is submitted that this section should read 6(5)(a) and (6)(a).

53. The Primus Entities intend to continue making payments required under sections 6(5)(a) and 6(6)(a) of the CCAA in the ordinary course, to the extent applicable.

AVO Affidavit at paras 108, Motion Record, Tab 2

54. The restrictions in sections 36(4) and (5) of the CCAA are not applicable as the Purchaser and the Primus Entities are not related persons as defined therein.

AVO Affidavit at paras 107, Motion Record, Tab 2

B. The Stay of Proceeding Should be Extended to September 19, 2016

(i) The Court has the Jurisdiction to Extend the Stay of Proceeding

55. Pursuant to section 11.02 of the CCAA, the Court may extend a stay of proceedings with respect to a debtor where (a) circumstances exist that make the order appropriate; and (b) the applicant has acted and is acting in good faith and with due diligence.

CCAA s. 11.02(2), 11.02(3).

(ii) Extending the Stay of Proceeding is Necessary in the Circumstances

56. The stay of proceeding expires on February 26, 2016. An extension of the stay up to and including September 19, 2016 is necessary to give the Primus Entities time to obtain the Assignment Order and appropriate recognition orders, close the Birch Transaction, complete the transfer of all U.S. assets (given the time required to obtain regulatory approval from the Federal Communications Commissions and the relevant State regulator for each Regulated Customer Relationship) and to complete the CCAA proceedings.

AVO Affidavit at paras 97-98, Motion Record, Tab 2

Nice Affidavit, Supplementary Motion Record, Tab 1 at paras. 26-27

57. In *Re Canwest Global Communications Corp.*, Justice Pepall granted an extension of the stay of proceedings for a group of debtors that were continuing to work with their stakeholders. She found that the extension would provide the necessary stability to allow the debtors to continue working towards a resolution that would result in the

continuation of their businesses as a going concern. The factors which supported her decision were: (a) the cash flow forecast indicated that the debtors had sufficient cash resources to operate throughout the extension of the stay period; (b) the monitor supported the extension; (c) there was no opposition to the motion; and (d) the debtors had acted and were continuing to act in good faith and with due diligence.

Re Canwest Global Communications Corp., [2009] O.J. No. 4788 (S.C.J.), Applicants' BOA, Tab 11 at para. 43 [*Canwest Global*]

58. The Primus Entities have been working diligently and in good faith since the commencement of the CCAA proceedings. Among other things, the Primus Entities have been:

- (a) Communicating with their stakeholders, including their customers and employees;
- (b) Addressing supply issues raised by their suppliers, including providing for payment in advance where necessary and the payment of pre-filing amounts where hardship would otherwise occur; and
- (c) Working towards the closing of the Birch Transaction.

Nice Affidavit, Supplementary Motion Record, Tab 1 at para. 26.

59. The cash flow forecast included in the Second Monitor's Report demonstrate that, subject to the underlying assumptions, the Primus Entities will have sufficient funds to continue operating to the anticipated date of the closing of the Birch Transaction. Funds will be available from the sale proceeds to complete the CCAA proceedings thereafter.

Nice Affidavit, Supplementary Motion Record, Tab 1 at para. 26.

Second Monitor's Report at paras. 12-13 and 45.

60. The Monitor supports the motion to extend the stay of proceeding and the Primus Entities are unaware of any creditor who opposes this motion. It is not believed that any creditor will suffer any material prejudice if the stay of proceeding is extended as requested.

Second Monitor's Report at paras. 44-48.

61. For the foregoing reasons, it is respectfully submitted that the stay of proceeding should be extended to September 19, 2016.

C. The Pre-Filing Report, the First Monitor's Report and the Second Monitor's Report Should be Approved

62. The decision of Justice Morawetz in *Re Target Canada Co.* identified that the doctrinal and jurisdictional bases for the approval of monitors' reports (and the activities described therein) derive from the doctrine of *res judicata*.

Re Target Canada Co., 2015 ONSC 7574 at paras 13-14, Applicants' BOA, Tab 12 [Target].

63. An important factor in the approval of a monitor's report is the evidentiary record before the court (i.e., whether the court is asked to "squarely" decide the issue in respect of which approval is sought). With respect to the approval of a sales transaction in particular, Justice Morawetz provides the following guidance (citations omitted):

...[I]f the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that *res judicata* and related doctrines apply to approval of a Monitor's report in these circumstances.

Target, Applicants' BOA, Tab 12 at paras 18-19

64. The issues canvassed by the Second Monitor's Report with respect to the Approval and Vesting Order and the Stay Extension and Distribution Order are "squarely" before the Court on the present motion, are supported by substantial affidavit evidence and commentary from the Monitor, address essential issues in respect of which findings of fact

must be made to determine whether to grant the relief sought herein, and will result in a decision that will substantively affect the rights of all stakeholders of the Primus Entities. In the present circumstances, and provided that the Court otherwise grants the Approval and Vesting Order and Stay Extension and Distribution Order, approval of the Monitor's Second Report and its activities described therein is appropriate relief.

First Monitor's Report at para. 3

65. For the foregoing reasons, the Monitor's Second Report and the activities described therein ought to be approved. The Pre-Filing Report and the First Report similarly canvassed issues before this Court in prior motions and ought to be approved.

Pre-Filing Report at para. 2

First Monitor's Report at para. 2

D. The Actions of Primus Canada, FTI and Origin in Developing and Implementing the SISP Should be Approved

66. The Primus Entities seek *nunc pro tunc* approval of the SISP, and approval of the actions of the Primus Entities and their professional advisors, including FTI and Origin, in developing and implementing the pre-filing SISP.

67. This Court has the jurisdiction to approve a pre-filing sales process *nunc pro tunc* pursuant to section 11 of the CCAA, as supplemented by the courts' inherent jurisdiction, on the basis that such approval is necessary and appropriate in the circumstances to further the reorganization process.

CCAA s. 11.

Re Stelco Inc. (2005), 75 O.R. (3d) 5, Applicants' BOA at Tab 13 at para. 31-38.

Century Services, Applicants BOA, Tab 9 at paras. 67-70.

68. There are three principal considerations when determining whether to approve a post-filing sales process: (i) the fairness, transparency and integrity of the proposed process; (ii) the commercial efficacy of the proposed process in light of the specific

circumstances; and (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

CCM Master Qualified Fund v. blutip Power Technologies, 2012 ONSC 1750, Applicants' BOA, Tab 14 at para. 6

PCAS Patient Care Automation Services Inc. (Re), 2012 ONSC 2840, Applicants' BOA, Tab 15 at paras 17-20

69. The Applicants submit that approval of a pre-filing sales process and the actions of the applicants and their professional advisors on a *nunc pro tunc* basis is appropriate where a resulting a sale transaction is found to satisfy the requirements of section 36(3) and the record supports finding that: (i) a sales process was the most viable method for maximizing value for shareholders; and (ii) the adopted sales methodology was the best process for achieving that end.

70. By approving the SISP *nunc pro tunc*, litigation in connection with the design and conduct of the SISP is foreclosed in the same manner that it would be foreclosed in cases where the court grants prior approval to a post-filing sales process. It is submitted that such relief should be available to provide the parties that conduct a pre-filing sales process commensurate protection in circumstances where a pre-filing sales process is determined to have been appropriate to maximize creditor recoveries.

E. The Monitor Should be Authorized to Make the Distributions Contemplated in the Distribution Order

(i) *The Court Has the Jurisdiction to Order the Distribution*

71. Distribution orders are routinely granted in CCAA proceedings under section 11. In *Re AbitibiBowater Inc.*, Justice Gascon (as he then was) approved a distribution order, noting that nothing in the CCAA prevents such relief and that "it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization."

Re AbitibiBowater Inc., 2009 QCCS 6461, Applicants' BOA, Tab 16 at paras 70-75 [Abitibi]

Re Windsor Machine & Stamping Ltd., 2009 CarswellOnt 4505 (Ont. S.C.J.), Applicants' BOA, Tab 17 at paras 7-8 and 13 [Windsor]

Re Northstar Aerospace, Inc., 2012 ONSC 4423, Applicants' BOA, Tab 18 at paras. 82-83

72. Justice Gascon considered a number of factors, including: (a) that the payee's security was valid and enforceable; (b) that the amounts owed to the payee exceeded the distribution; and (c) that the distribution would result in significant interest savings.

(ii) *The Disbursements are Appropriate in the Circumstances*

(a) *Disbursements to the Agent are Appropriate and Should be Authorized*

73. The courts have authorized distributions where the distribution would not prejudice other creditors. Distributions to first-ranking secured creditors have been approved on the basis that the subordinated creditors are "out of the money", and have no realistic prospect of recovery. The sale of assets and the distribution of proceeds may be authorized "even if there will be insufficient assets to retire the creditor claims in full."

Re Crystallex International Corp., 2012 ONSC 2125 at para. 55, aff'd 2012 ONCA 404, Applicants' BOA, Tab 19

Abitibi at paras. 73-74, citing *Windsor* at para. 13, Applicants' BOA, Tab 16

74. A subordinated creditor with no economic interest in the assets of a company cannot be prejudiced by the distribution of the company's assets to creditors who are "out of the money." The Syndicate are entitled to have their claims paid in priority to those of the Subordinate Lenders. As to unsecured creditors, the Ontario Court of Appeal affirmed that unsecured creditors, who have no remaining economic interest in the assets that would be the subject of the distribution, suffer no prejudice if such a distribution is made.

Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd., 2007 ONCA 600 at paras. 44-47, aff'g 22 C.B.R. (5th) 298 (Ont. Sup. Ct. J.) at paras. 46-60, Applicants' BOA, Tab 20

Re Anvil Range Mining Corp., 2002 CarswellOnt 2254 (C.A.) at paras. 31 and 36, Applicants' BOA, Tab 21

75. The Monitor conducted a review of the Syndicate's security and determined that the security is: (i) valid and legally enforceable against the Primus Entities; (ii) properly perfected in all applicable jurisdictions and is sufficient to secure payment; and (iii) sufficient to performance of the obligation described therein as being secured.

First Monitor's Report at paras. 27-29.

76. No creditors will be prejudiced by the proposed distributions. The distributions will be limited to the amount owing under the Credit Agreement, subject to the Holdback. In turn, the Holdback will: (i) protect creditors ranking in priority to the Syndicate; and (ii) ensure the retention of sufficient funds for the payment of the Origin Payment, Professional Expenses and Post-Filing Expenses; and (iii) to secure the obligations under the Administration Charge, the D&O Charge (as defined in the Initial Order) and the Priority Claims (as defined in the Stay Extension and Distribution Order). The distribution is reasonable and appropriate in the circumstances.

Nice Affidavit, Supplementary Motion Record, Tab 1 at para. 17-19.

Second Monitor's Report at paras. 15-16, 114-115 and 118-119.

(b) *Disbursements to Origin are Appropriate and Should be Authorized*

77. Pursuant to the general power granted in Section 11 of the CCAA, Courts will grant orders approving the fees and expenses of financial advisors (and thus by necessary implication authorize contemplated disbursements to those financial advisors on account of their fees and disbursements) where such fees are appropriate and reasonable in the circumstances and the services to be rendered are necessary to facilitate the restructuring.

Re Target Canada Co., 2015 ONSC 303, Applicants BOA at Tab 22 at paras. 72-73

Canwest Publishing Inc., 2010 ONSC 222, Applicants BOA at Tab 23 at paras. 54-55

78. Origin provided critical assistance to the Primus Entities in the course of preparing the SISP. Origin solicited potentially interested parties, assisted with negotiations and was instrumental in evaluating the bids received. Origin's efforts have been of critical importance throughout the conduct of the SISP and were integral achieving the Birch

APA and Birch Transaction. The Monitor has reviewed Origin's fees in comparison to publicly available information for CCAA filings where an investment banker has been appointed. The Monitor determined that they are within the market rate for the services Origin provided to the Primus Entities. Accordingly, Origin's fees are appropriate in the circumstances and commensurate to the efforts and assistance provided to the Primus Entities in securing the best value realizable for their business and assets.

Nice Affidavit, Supplementary Motion Record, Tab 1 at paras. 20-22

AVO Affidavit at paras 14-83, Motion Record, Tab 2

Osler Affidavit, at paras. 6-36, Motion Record, Tab 6

Second Monitor's Report at paras. 110-113

79. The Subordinate Lenders had clear notice of that the Primus Entities would seek authorization for a disbursement to Origin and, critically, Manulife had notice of such relief when it served notice that it would withdraw its objection. No prejudice will and can accrue to them in such circumstances. Accordingly, Origin's fees are appropriate in the circumstances and commensurate to the efforts and assistance provided to the Primus Entities in securing the best value realizable for their business and assets.

PART V - ORDER REQUESTED

80. For all of the foregoing reasons, the Primus Entities submit that it is appropriate for this Court to grant the orders sought substantially in the forms at Tabs 2-3 of the Supplementary Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of February, 2016.



Stikeman Elliott LLP

Lawyers for the Applicants

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Nelson Education Limited (Re)*, 2015 ONSC 5557
2. *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.)
3. *PCAS Patient Care Automation Services Inc. (Re)*, 2012 ONSC 3367
4. *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299
5. *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.)
6. *Re White Birch Paper Holding Company*, 2010 QCCS 4915, leave to appeal ref'd 2010 QCCA 1950
7. *Re Canwest Publishing Inc.* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J.)
8. *Re Grant Forest Products Inc.*, 2010 ONSC 1846
9. *Re Century Services Ltd.*, 2010 SCC 60
10. *Re AbitibiBowater Inc.*, 2010 QCCS 1742
11. *Re Canwest Global Communications Corp.*, [2009] O.J. No. 4788 (S.C.J.)
12. *Target Canada Co. (Re)*, 2015 ONSC 7574
13. *Re Stelco Inc.* (2005), 75 O.R. (3d) 5
14. *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750
15. *PCAS Patient Care Automation Services Inc. (Re)*, 2012 ONSC 2840
16. *Re AbitibiBowater Inc.*, 2009 QCCS 6461
17. *Re Windsor Machine & Stamping Ltd.* (2009), 55 C.B.R. (5th) 241 (Ont. S.C.J.)
18. *Re Northstar Aerospace, Inc.*, 2012 ONSC 4423
19. *Re SemCanada Crude Company*, 2009 ABQB 90
20. *Re Crystallex International Corp.*, 2012 ONSC 2125, aff'd 2012 ONCA 404
21. *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*, 2007 ONCA 600, aff'g 22 C.B.R. (5th) 298 (Ont. Sup. Ct. J.)
22. *Re Anvil Range Mining Corp.*, 2002 CarswellOnt 2254 (C.A.)
23. *Re Target Canada Co.*, 2015 ONSC 303
24. *Canwest Publishing Inc.*, 2010 ONSC 222

SCHEDULE "B"
RELEVANT STATUTES

Companies' Creditors Arrangement Act, RSC 1985, c C-36

Compromises to be sanctioned by court

Restriction – employees, etc.

6(5) The court may sanction a compromise or an arrangement only if

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

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

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

[..]

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

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

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

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

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

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

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

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

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

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

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

[...]

General power of the court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, 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.

[...]

Stays, etc. — other than initial application

11.02(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

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

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

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

Burden of proof on application

11.02(3) The court shall not make the order unless

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

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

[...]

Restriction on disposition of business assets

36(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

36(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

36(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors – related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction – employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PT HOLDCO, INC., PRIMUS TELECOMMUNICATIONS CANADA, INC., PTUS, INC., PRIMUS TELECOMMUNICATIONS, INC., AND LINGO, INC..

Court File No: CV-16-11257-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT
(RETURNABLE FEBRUARY 25, 2016)**

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Email: mkonyukhova@stikeman.com

Vlad Calina LSUC#: 69072W
Tel: (416) 869-5202
Email: vcalina@stikeman.com
Fax: (416) 947-0866

Lawyers for the Applicants

