

Court File No. CV-16-11358-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF FIRSTONSITE G.P. INC.

Applicant

FACTUM OF THE APPLICANT

(Re Assignment of Agreements et al, Returnable May 18, 2016)

Dated: May 17, 2016

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TO: THE SERVICE LIST

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PART I - INTRODUCTION

1. This motion is brought by the Applicant, FirstOnSite G.P. Inc. ("**FirstOnSite GP**"), the general partner of FirstOnSite Restoration L.P. ("**FirstOnSite LP**"), a limited partnership formed under the laws of Ontario. Hereinafter, where reference is made to the FirstOnSite enterprise as a whole, the term FirstOnSite will be used.
2. On April 21, 2016, FirstOnSite received protection from its 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 Newbould of the Ontario Superior Court of Justice (as amended, the "**Initial Order**"). FTI Consulting Canada Inc. ("**FTI**") was appointed as monitor of FirstOnSite (in such capacity, the "**Monitor**").
3. On May 2, 2016, Justice Newbould granted an order (the "**Approval and Vesting Order**"), *inter alia*, approving the transaction contemplated by the Agreement of Purchase and Sale executed April 20, 2016 (the "**Sale Agreement**") between FirstOnSite LP, by its general partner, FirstOnSite GP (in such capacity, the "**Vendor**") and 3297167 Nova Scotia Limited (in such capacity, the "**Purchaser**") and, on closing, vesting all of the Purchased Assets in the Purchaser free and clear of all but the Permitted

Encumbrances (as defined in the Sale Agreement). At the same time, Justice Newbould extended the stay of proceeding to May 31, 2016.

4. FirstOnSite now seeks, among other relief, the court-ordered assignment of certain of its contractual rights and obligations to the Purchaser on the closing of the Sale Transaction that the Purchaser considers critical to the continued operations of FirstOnSite's business. In particular, FirstOnSite brings this motion seeking:

- (a) an order (the "**Assignment Order**") substantially in the form of the draft order located at Tab 2 of the Second Supplemental Motion Record, assigning their rights and obligations to certain agreements thereto (the "**Outstanding CR Contracts**") to the Purchaser and vesting in the Purchaser all rights, title, and interests in such contracts at closing time;
- (b) an order (the "**Distribution Order**") substantially in the form of the draft order located at Tab 3 of the Second Supplemental Motion Record, authorizing and directing the Monitor to make distributions from the proceeds of the Sale Transaction (the "**Sale Proceeds**") and certain other funds received by the Monitor; and
- (c) an order (the "**Stay Extension Order**"), substantially in the form of the draft order located at Tab 4 of the Second Supplemental Motion Record extending the stay period granted in the Initial Order to June 24, 2016.

5. The foregoing orders are each necessary for FirstOnSite to complete its present restructuring strategy, the substance of which has already been approved by this Court by way of the Initial Order (as amended) and the Approval and Vesting Order.

6. First, the Assignment Order is necessary to close the Sale Transaction on the terms contemplated in the Approval and Vesting Order. The Sale Agreement requires FirstOnSite to use all commercially reasonable efforts to assign the Outstanding CR Contracts to the Purchaser including, if necessary, by way of Court order. Further, it is a

condition present to closing that the Outstanding CR Contracts that are deemed essential by the Purchaser are assigned to the Purchaser (the “**Essential Contracts**”).

7. Second, the Distribution Order is necessary to allow FirstOnSite and the Monitor to distribute the Sale Proceeds and any additional funds that the Monitor may receive in an orderly and transparent manner to ensure the orderly transition of its business and operations to the Purchaser as contemplated in the Sale Agreement.

8. Accordingly, for all of the following reasons, the orders sought herein are necessary to complete the CCAA proceeding and are in the best interests of FirstOnSite’s stakeholders. No party has objected to the relief sought herein.

PART II - THE FACTS

9. The facts with respect to this application are more fully set out in the affidavit of Dave Demos, sworn April 20, 2016 in support of the Initial Order (the “**Initial Order Affidavit**”), the affidavit of Kevin McElcheran, sworn April 26, 2016 (the “**Special Committee Affidavit**”), and the affidavit of Adam Zalev, sworn April 26, 2016 (the “**Financial Advisor Affidavit**” and, collectively with the Special Committee Affidavit, the “**Sale Approval Affidavits**”), in support of the Approval and Vesting Order, and the affidavit of Kevin McElcheran sworn May 12, 2016 (the “**Assignment Order Affidavit**”).¹

A. Background to the CCAA Proceedings

10. FirstOnSite carries on business in Canada and, to a lesser degree, the United States, by providing remediation, restoration and reconstruction services in the commercial, industrial and residential sectors. Since 2010, FirstOnSite has experienced significant financial and liquidity difficulties due to, *inter alia*, insufficient equity, escalating operating losses, and correspondingly escalating debt to fund these losses.

¹ Capitalized terms not otherwise defined herein have the meaning assigned to the in the Assignment Order Affidavit.

Special Committee Affidavit at paras. 6, 14-16, Motion Record, Tab 2.

Initial Order Affidavit at paras. 16, 21-25, 27-28, 35-38, 107-115 Motion Record, Tab 2A.

11. Since 2012, FirstOnSite has pursued a number of strategies in an endeavour to alleviate its financial difficulties and liquidity problems (including cost-cutting and revenue-growth related strategies). Unfortunately, continuing and adverse economic conditions blunted the efficacy of FirstOnSite's responses; its losses continued unabated.

Special Committee Affidavit at paras. 8, 14-16, Motion Record, Tab 2.

Initial Order Affidavit at paras. 113-118, Motion Record, Tab 3.

12. As described in greater detail in the Sale Approval Affidavits, and for the reasons set out therein, FirstOnSite conducted a pre-filing sales and investor solicitation process.

Special Committee Affidavit at paras. 16-31, Motion Record, Tab 2.

Financial Advisor's Affidavit at paras. 11-43, Motion Record, Tab 3.

13. After extensive deliberation and consultation with its professional advisors, FTI (in its capacity as proposed monitor), A&M (as defined below) and their legal counsel, FirstOnSite determined, further to and on the basis of its commercial and business judgment, that it was in its stakeholders' best interest to enter into the Sale Transaction. Accordingly, on April 20, 2016, the board of directors of FirstOnSite GP selected the Purchaser as the successful bidder and approved the execution of the Sale Agreement.

Special Committee Affidavit at paras. 29-31, Motion Record, Tab 2.

B. The Sale Transaction

14. On April 20, 2016, the Vendor and Purchaser executed the final and definitive version of the Sale Agreement. On May 2, 2016, this Court approved the Sale Transaction.

Special Committee Affidavit at paras. 29-31, Motion Record, Tab 2.

15. The Sale Agreement contemplates the assignment of certain contracts to the Purchaser, approximately 80 of which require the consent of the applicable counterparty to assign ("**Consent Required Contracts**"). FirstOnSite is obligated to use commercially reasonable efforts to secure consent to assign all rights and obligations under such contracts to the Purchaser or, failing such consent, to seek a Court Order for the same.

Assignment Order Affidavit at paras. 8-11, Second Supplemental Motion Record, Tab 1.

16. The Sale Agreement contemplates the payment of Cure Costs (as defined therein and in the quantum set out in Schedule "A" to the draft Assignment Order) provided that a consent to such assignment is executed by the applicable counterparty or the Assignment Order is granted by this Court.² The draft Assignment Order contemplates that the Purchaser shall pay the amounts set out in Schedule "A" in full and final satisfaction of the amount of outstanding Cure Costs no later than five (5) business days after receiving wire remittance or other payment instructions from such counterparty.

Assignment Order Affidavit at para. 20, Second Supplemental Motion Record, Tab 1.

Draft Assignment Order at paragraph 8, Second Supplemental Motion Record, Tab2.

Supplemental Report to the Second Report of the Monitor ("**Second Supplemental Report**") at para. 30.

17. The Sale Agreement permits the Purchaser to amend the list of contracts to be assigned at any point prior to the closing of the Sale Transaction and deem one of the Outstanding CR Contracts as an Excluded Contract (as defined in the Sale Agreement). Accordingly, the draft Assignment Order provides that FirstOnSite is to notify any counterparty that is listed in Schedule "A" and is subsequently added as an Excluded Contract and removed from Schedule "A" prior to closing of the Sale Transaction.

Draft Assignment Order at paragraph 9, Second Supplemental Motion Record, Tab2.

²The amounts of Cure Costs have been determined based on the books and records of FirstOnSite in consultation with the Monitor.

C. The Vendor's Efforts in Securing Consents to Assignment

18. Between April 27, 2016 and May 13, 2016, FirstOnSite distributed letters to the counterparties of all of the Consent Required Contracts as required pursuant to the terms of the Sale Agreement. FirstOnSite, the Purchaser and the Monitor, with the assistance of their respective counsel, have been engaged in dialogue with many of the counterparties to the Consent Required Contracts, including where necessary their legal groups, in an attempt to procure executed consent agreements in advance of the return of this motion.

Assignment Order Affidavit at paras. 11-16, Second Supplemental Motion Record, Tab 1.

Supplemental Second Report at paras. 26-28.

19. FirstOnSite has endeavoured to resolve the assignment of the Outstanding CR Contracts on a consensual basis. However, as at May [17], 2016 the consent of 27 counterparties to 30 of the Consent Required Contracts has been secured, with the consent of 32 counterparties of 50 of the Consent Required Contracts yet outstanding.

Assignment Order Affidavit at paras. 11-16, Second Supplemental Motion Record, Tab 1.

Supplemental Second Report at paras. 26-28.

D. The Purchaser's Ability and Willingness to Perform its Assigned Obligation

20. The Purchaser, while newly constituted for the purpose of executing the present transaction, is intended to wholly succeed the business and operations of FirstOnSite with the operational resources and management oversight of Bellwether International Group LLC (doing business as Interstate Restoration, "Interstate") and the financial resources and capital market expertise of Delos Capital Management L.P. ("Delos").

Affidavit of Jeff Johnson, sworn May 12, 2016 (the "Purchaser's Affidavit") at paras. 5 and 7, Motion Record of the Purchaser, Tab 1.

21. Interstate is a highly experienced participant in the North American Restoration Services industry, with significant experience in acquiring and integrating acquisition

targets in that industry. The Purchaser will enter into a management services agreement with Interstate contemporaneous with the Sale Transaction's closing. In addition, Delos has executed a commitment letter to make a significant capital investment of \$30 million in cash in the Purchaser (the "Delos Equity Investment"). As a substantial and long-term investor in Interstate, Delos has extensive experience as a capital partner in the Restoration Services industry.

The Purchaser's Affidavit at para. 5, Motion Record of the Purchaser, Tab 1.

22. In addition to the foregoing arrangements, the Purchaser has secured a \$45 asset-backed lending facility (the "New ABL Facility") to finance, *inter alia*, its operations as a going concern business.

The Purchaser's Affidavit at para. 8, Motion Record of the Purchaser, Tab 1.

ISSUES

23. There are three issues on this motion:
- (a) Whether the rights and obligations of the Vendor under the Outstanding CR Contracts should be assigned to the Purchaser;
 - (b) Whether the Distribution Order should be granted as sought herein; and
 - (c) Whether to extend the stay of proceeding to June 24, 2016.

PART III - LAW AND ARGUMENT

A. The Assignment Order Should be Granted

(i) *The Court Has Jurisdiction to Assign the Outstanding CR Contracts*

24. Section 11.3(1) of the CCAA authorizes the Court to make an order assigning the rights and obligations of a debtor company under an agreement to any person specified

by the Court and agreeable to the assignment, provided that none of the exclusions in Section 11.3(2) apply. The authority granted by Section 11.3(1) is otherwise discretionary.

CCAA, s. 11.3(1)-(2)

25. Accordingly, courts have exercised their discretion pursuant to section 11.3(1) to order the assignment of a debtor company's contractual rights and obligations notwithstanding a restriction or prohibition on assignment in the contract. In addition, courts have ordered that all contractual counterparties are deemed to have waived all existing or previously committed non-monetary defaults under the contracts.

Re TBS Acquireco Inc., 2013 ONSC 4663, Applicants Book of Authorities ("Applicants BOA"), Tab 1 at para. 25

Re White AcquireCo Paper Holding Company (2010), 72 C.B.R. (5th) 63 (Que. S.C.), Applicant's BOA, Tab 2 at para. 16

Re Sterling Shoes Inc. (30 April 2012), Vancouver No. S117081 (B.C.S.C.), Applicant's BOA, Tab 3 at para. 6

Re PT Holdco, Inc. et al (2 March 2016), Toronto Court File No. CV-16-11257-00CL (Ont. S.C.J. [Commercial List]), Applicant's BOA, Tab 4 at paras. 6-9

(ii) The CCAA Criteria for Assigning the Essential Contracts are Satisfied

26. Section 11.3(3) of the CCAA sets out the following non-exhaustive list of factors to consider in determining whether to order the assignment of a debtor company's rights and obligations under an agreement:

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

CCAA, s. 11.3(3)

(a) *The Monitor Approves of the Assignment*

27. The Monitor filed a report stating that, subject to the Monitor completing its final review of the Outstanding CR Contracts, it supports the Vendor's request that this Court order the assignment of the Outstanding CR Contracts in accordance with section 11.3 and on the terms of the Assignment Order sought herein.

Supplemental Second Report at para. 65.

(b) *The Purchaser is Willing and Able to Perform the Agreements*

28. As set out in greater detail in the Purchaser's Assignment Affidavit, the Purchaser is solvent and adequately capitalized and is able and willing to perform the obligations it will assume under the agreements to be assigned herein. Combined, the \$30 million in financing from Delos and the \$45 million ABL credit facility will suffice

Purchaser's Assignment Affidavit at paras. 4-12, Tab 1 of the Motion Record of the Purchaser.

Supplemental Second Report, at paras. 33-34.

(c) *It is Appropriate to Order the Assignment of Agreements*

29. Prior to the enactment of section 11.3, the courts situated their jurisdiction to assign agreements over the objections of counterparties and to permanently stay the termination of the agreement by reason of the assignment or any insolvency defaults that arise in the CCAA proceedings under their general power in section 11. In *Re Veris Gold Corp.*, Justice Fitzpatrick held that the effect of the enactment of section 11.3 was "to codify what had been the general approach to assignment issues".

Re Playdium Entertainment Corp. (2001), 31 C.B.R. (4th) 302, as supplemented at 31 C.B.R. (4th) 309 (Ont. S.C.J.), Applicant's BOA, Tab 4 at paras. 38 and 42

Re Nexient Learning Inc. (2009) 62 C.B.R. (5th) 248 (Ont. S.C.J.), Applicant's BOA, Tab 5 ["Nexient"] at paras. 53, 54

Re Hayes Forest Services Ltd., 2009 BCSC 1169, Applicant's BOA, Tab 6 at paras. 32 and 51

Re Veris Gold Corp., 2015 BCSC 1204, Applicant's BOA, Tab 8 at paras 53-56

30. In *Nexient*, Justice Wilton-Siegel found it appropriate to approve the assignment of contracts to a purchaser in a CCAA proceeding where it was “important to the reorganization process”, furthering the purpose and spirit of the CCAA proceedings. The assignment of the Outstanding CR Contracts (including but not limited to the subset of such contracts that are Essential Contracts) is such an instance.

Nexient, Applicant’s BOA, Tab 9 at paras. 56 and 59

31. First, the assignment of the Essential Contracts is a condition precedent to the closing of the Sale Transaction. Without such an assignment, the Vendor would be at risk of being unable to close the Sale Transaction, to the detriment of the stakeholders of the Vendor and related FirstOnSite entities.

AVO Affidavit at paras. 8-10, Motion Record, Tab 2

32. Second, the assignment of the Outstanding CR Contracts is to the benefit of the counterparties to the same given that: (i) otherwise the obligations with respect to the same will be stranded with FirstOnSite as unsecured liabilities, and the Sales Proceeds are insufficient to satisfy even the junior secured obligations; and (ii) the assignment of such contracts will be effectively only following satisfaction of outstanding Cure Costs.

33. Furthermore, the assignment of the Outstanding CR Contracts will allow the Purchaser to carry on the business of the Vendor in the same manner in which it has been carried out thus far, thereby ensuring an orderly transition from FirstOnSite to the Purchaser for the benefit of counterparties, employees and other stakeholders. It is in the best interest of all of the Vendor’s stakeholders that the Assignment Order be granted, thereby ensuring that the Sale Transaction contemplated pursuant to Sale Agreement will be closed.

34. The discretion of the court is appropriately exercised where the terms of the assignment are fair to the affected counterparties and interfere with their rights only as necessary to assist the reorganization. The terms of the draft Assignment Order

will ensure that the Purchaser will step into the shoes of the Vendor and will cover all outstanding Cure Costs (to the clear benefit of counterparties to such contracts).

Assignment Order Affidavit at para. 20, Second Supplemental Motion Record, Tab 1.

Draft Assignment Order at paragraph 8, Second Supplemental Motion Record, Tab2.

35. For the foregoing reasons, it is respectfully requested that this Court make an order assigning the agreements set out in Schedule "A" to the Assignment Order.

B. The Distribution Order Should be Granted

(i) Overview of the Proposed Distributions

36. The Sale Agreement contemplated that the Monitor will hold the Sale Proceeds subject to further Court order. FirstOnSite seeks an order authorizing and directing the Monitor to make the following disbursements (subject to maintaining the Reserve) from the Sale Proceeds and any other funds provided to the Monitor following closing of the Sale Transaction (as each capitalized term is defined in the Assignment Order Affidavit):

- (a) to Wells Fargo Capital Finance Corporation Canada ("Wells Fargo") as agent and lender (in such capacity, the "DIP Lender") under the DIP Facility Agreement dated April 20, 2016 (the "DIP Agreement"), an amount not exceeding the maximum amount of the "DIP Obligations);
- (b) to Wells Fargo as administrative agent (in such capacity, the "ABL Agent") for an amount not exceeding the ABL Secured Obligations;
- (c) to Business Development Bank of Canada ("BDC"), an amount not exceeding the maximum amount of the BDC Secured Obligations;
- (d) to BDC Capital Inc. ("BDC Capital"), an amount not exceeding the maximum amount of the BDC Capital Secured Obligations;

- (e) from time to time, amounts owing by FirstOnSite in respect of fees the Professional Expenses;
- (f) from time to time, on instruction from FirstOnSite, any amounts owing by FirstOnSite in respect of the Post-Filing Expenses;
- (g) in consultation with FirstOnSite, the amounts as confirmed by FirstOnSite owing for the KERP Disbursements; and
- (h) from time to time, in consultation with FirstOnSite, the amounts owing by FirstOnSite to A&M under the Engagement Letter up to the maximum amount for the Financial Advisor Disbursements.

Assignment Order Affidavit at para. 28, Second Supplemental Motion Record, Tab 1.

37. The Monitor has completed a security review and approves of the form of the Distribution Order and the distributions for which authorization is sought herein.

Supplemental Second Report at paras. 35-56, 66.

(ii) The Court Has the Jurisdiction to Grant the Distribution Order

38. 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, Applicant’s BOA, Tab 9 at paras 70-75 [“*Abitibi*”]

Re Windsor Machine & Stamping Ltd., 2009 CarswellOnt 4505 (Ont. S.C.J), Applicant’s BOA, Tab 10 at paras 7-8 and 13 [“*Windsor*”]

Re Northstar Aerospace, Inc., 2012 ONSC 4423, Applicant’s BOA, Tab 11 at paras. 82-83

39. 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.

(iii) The Distributions Set out Herein Should be Authorized

40. 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 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, Applicant's BOA, Tab 12

Abitibi at paras. 73-74, citing *Windsor* at para. 13, Applicant's BOA, Tab 9

41. 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 DIP Lender, ABL Agent, BDC and BDC Capital are entitled to have their claims paid in order of their priority (collectively, the "Senior Secured Creditors") to the extent Sales Proceeds remain. The satisfaction of the DIP Obligations is required pursuant to section 3.17(a) to the DIP Agreement, which was approved by this Court on April 21, 2016. The ABL Secured Obligations the BDC Secured Obligations and BDC Capital Secured Obligations rank in priority to all remaining creditors of FirstOnSite.³ 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, Applicant's BOA, Tab 13

³ The relative priorities are set out in greater detail in the Supplemental Second Report and the materials referenced therein

Re Anvil Range Mining Corp., 2002 CarswellOnt 2254 (C.A.) at paras. 31 and 36, Applicant's BOA, Tab 14

Assignment Order Affidavit at paras. 30-32, Second Supplemental Motion Record, Tab 1.

42. The Monitor conducted a security review of the security granted by FirstOnSite in its personal property to secure the Pre-Filing ABL Facility, the Pre-Filing BDC Loan and the Pre-Filing BDC Capital Loan (as defined in the Supplemental Second Report). The Monitor provided the following opinion (subject to the assumptions set out therein):

- (a) The personal property security granted in favour of the ABL Agent, BDC and BDC Capital is valid and enforceable and creates a valid security interest pursuant to the *Personal Property Security Act*, RSO 1990, c P.10;
- (b) The relative priority between the ABL Agent, BDC and BDC Capital is as follows (subject to the assumptions and caveats set out therein):
 - (i) The ABL Agent has a first ranking security interest in all of the personal property other than machinery and equipment;
 - (ii) BDC has a first ranking security in machinery and equipment and a second ranking security interest in the personal property; and
 - (iii) BDC Capital has a third ranking security interest in all personal property.

Supplemental Second Report at paras. 44-47

43. No creditors will be prejudiced by the proposed distributions. The distributions will be limited to the amounts owing under the respective credit agreements, subject to the Reserve. In turn, the Reserve will, *inter alia*: (i) protect trust claimants potentially ranking in priority to the Senior Secured Creditors; (ii) ensure retention of sufficient funds for the payment of the Professional Expenses and Post-Filing Expenses; and (iii) to secure the obligations under the Administration Charge, the KERP Charge and the Financial Advisor's Charge (as each is defined in the Initial Order) and the Priority Claims (as defined in the Distribution Order and Supplemental Second Report).

Assignment Order Affidavit at para. 29, Second Supplemental Motion Record,
Tab 1.

44. For all of the foregoing reasons, the distributions sought herein are reasonable and appropriate in the circumstances. FirstOnSite respectfully submits the Distribution Order ought to be granted on the term sought herein.

C. The Stay of Proceeding Should be Extended to June 24, 2016

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

45. Pursuant to section 11.02 of the CCAA, the Court may extend a stay of proceedings for a debtor where circumstances exist that make the order appropriate and the debtor 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

46. The stay of proceeding expires on May 31, 2016. An extension of the stay of proceedings to June 24, 2016 is necessary, *inter alia*, to permit the Vendor and Purchaser to close the Sale Transaction and then to ensure an orderly transition of the business and operations to the Purchaser, ensure the completion of all applicable post-Closing matters and make the necessary distributions from the Sale Proceeds.

Assignment Order Affidavit at para. 36, Second Supplemental Motion Record,
Tab 1.

47. The extension of the stay of proceedings would further stay any Lien Claims (as defined in the Initial Order Affidavit) against FirstOnSite projects until June 24, 2016. A continued stay of such Lien Claims is necessary to ensure an orderly transition of the business to the Purchaser. Any widespread registration of liens during the restructuring period could jeopardize FirstOnSite's long-standing relationship with commercial and residential insurers who form an essential element of the FirstOnSite enterprise.

Initial Order Affidavit at paras. 161-166, Motion Record, Tab 2A.

48. 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.), Applicant's BOA, Tab 15 at para. 43 [*"Canwest Global"*]

49. FirstOnSite has been diligently working towards a successful completion of its CCAA proceeding. Among other things, FirstOnSite has been:

- (a) Communicating with its key financial and other stakeholders, including its customers, employees, and regulators;
- (b) Addressing issues raised by its suppliers in the ordinary course, and paying pre-filing amounts if required as authorized in the Initial Order;
- (c) Addressing issues raised by contractual counterparties with respect to the terms of the Sale Agreement and the Approval and Vesting Order;
- (d) Addressing issues raised by litigants in respect of ongoing litigation against FirstOnSite LP; and
- (e) Working to satisfy the Vendor's conditions to closing the Sale Transaction in accordance with the timeline in the Sale Agreement.

Assignment Order Affidavit at para. 35, Second Supplemental Motion Record, Tab 1.

Supplemental Second Report at paras. 58-64.

50. The cash flow forecast included in the Supplemental Second Report demonstrate that, subject to the underlying assumptions, FirstOnSite will have sufficient funds to continue operating to the anticipated date of the closing of the Sale Transaction.

Assignment Order Affidavit at para. 37, Second Supplemental Motion Record, Tab 1.

Supplemental Second Report at paras. 15-22 and 60.

51. The Monitor supports extending the stay of proceeding and FirstOnSite is unaware of any creditor who opposes this motion. The DIP Lender, the ABL Agent, BDC and BDC Capital support the extension. It is not believed that any creditor will suffer any material prejudice if the stay of proceeding is extended as requested.

Assignment Order Affidavit at paras. 38-39, Second Supplemental Motion Record, Tab 1.

Supplemental Second Report at para. 66.

PART IV - ORDER REQUESTED

52. For all of the foregoing reasons, FirstOnSite submits that it is appropriate for this Court to grant the orders sought herein sought substantially in the form at Tab 2-4 of the Second Supplemental Motion Record, respectively.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of May, 2016.



Stikeman Elliott LLP

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re TBS Acquireco Inc.*, 2013 ONSC 4663
2. *Re White AcquireCo Paper Holding Company* (2010), 72 C.B.R. (5th) 63 (Que. S.C.)
3. *Re Sterling Shoes Inc.* (30 April 2012), Vancouver No. S117081 (B.C.S.C.)
4. *Re PT Holdco, Inc. et al* (2 March 2016), Toronto Court File No. CV-16-11257-00CL (Ont. S.C.J. [Commercial List])
5. *Re Nexient Learning Inc.* (2009), 62 C.B.R. (5th) 248 (Ont. S.C.J.)
6. *Re Playdium Entertainment Corp.* (2001), 31 C.B.R. (4th) 302, as supplemented at 31 C.B.R. (4th) 309 (Ont. S.C.J.)
7. *Re Hayes Forest Services Ltd.*, 2009 BCSC 1169
8. *Re Veris Gold Corp.*, 2015 BCSC 1204
9. *Re AbitibiBowater Inc.*, 2009 QCCS 6461
10. *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. S.C.J.)
11. *Re Northstar Aerospace, Inc.*, 2012 ONSC 4423
12. *Re Crystallex International Corp.*, 2012 ONSC 2125
13. *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
14. *Re Anvil Range Mining Corp.*, 2002 CarswellOnt 2254 (C.A.)
15. *Re Canwest Global Communications Corp.*, [2009] O.J. No. 4788 (S.C.J.)

SCHEDULE "B"

RELEVANT STATUTES

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

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.

[...]

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- (a) an agreement entered into on or after the day on which proceedings commence under this Act;

- (b) an eligible financial contract; or
- (c) a collective agreement.

Factors to be considered

- (3) In deciding whether to make the order, the court is to consider, among other things,
- (a) whether the monitor approved the proposed assignment;
 - (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
 - (c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement – other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation – will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

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 FIRSTONSITE G.P.
INC.

Court File No: CV-16-11358-00CL

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

Proceeding commenced at Toronto

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(RETURNABLE MAY 18, 2016)**

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