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 Cure Costs Motion
Returnable May 26, 2016)

Dated: May 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

C. Haddon Murray LSUC#: 61640P
Tel: (416) 869-5239
Email: hmurray@stikeman.com

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

Lawyers for the Applicants

TO: THE SERVICE LIST

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 Cure Costs Motion Returnable May 26, 2016)

PART I - INTRODUCTION

1. This motion is brought by 3297167 Nova Scotia Limited (the "**Purchaser**") seeking directions from the Court on a single issue: whether the Purchaser, a sophisticated commercial party assisted by a number of experienced professional advisors, is entitled to import the concept of its "reasonable expectations" that are based on alleged representations by the Vendor (as defined below) into the interpretation of a heavily negotiated "as is, where is" asset purchase agreement in which the parties expressly agreed that no such representations or warranties have been given.

PART II - THE FACTS

2. The facts with respect to this motion are more fully set out in the affidavit of Joshua Nevsky dated May 25, 2016 (the "**Nevsky Affidavit**") and the affidavit of

Adam Zalev dated May 25, 2016 (the "**Zalev Affidavit**")[1]. The material provisions of the APA are excerpted in Schedule "C" to this Factum.

A. The Asset Purchase Agreement

(i) Overview

3. Under the APA, the Purchaser is to acquire the Purchased Assets on an "as is, where is" basis. Among the assets to be transferred to the Purchaser are certain of the Vendor's existing contracts (collectively, the "**Assumed Contracts**").[2]

Zalev Affidavit at para. 14, Responding Motion Record, Tab 1.

4. The APA is the culmination of extensive and intensive arm's length negotiations between two highly sophisticated commercial counterparties, each of whom was assisted and advised by a cadre of highly qualified and experienced financial and legal advisors.

Zalev Affidavit at paras. 8-11, Responding Motion Record, Tab 1.

(ii) The Purchased Assets are Acquired on an "As is, Where is" Basis

5. An essential term of the APA is that the Purchased Assets (as defined therein) are sold on an "as is, where is" basis, without any representation or warranty as to anything whatsoever, except as expressly provided in the APA:

> The Purchaser acknowledges that the Vendor is selling the Purchased Assets on an "as is, where is" basis as they shall exist at the Closing Time. No representation, warranty or condition is expressed or can be implied as to Encumbrances, description, fitness for purpose, merchantability, condition, quantity or quality or in respect of any other matter or thing whatsoever concerning the Purchased Assets or the right of the Vendor to sell or assign same save and except as expressly represented or warranted herein... [and] [e]xcept as otherwise provided in Section 5.1, no representation, warranty or

---

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

[2] The APA defines the "Assumed Contracts" to mean "all Contracts except Excluded Contracts", and it defines "Contracts" to mean "all of the contracts and other written agreements to which the Vendor is a party in connection with the Purchased Assets and the Business, including, for greater certainty, leases of real or personal property or equipment, and any unfilled purchase orders."

> condition has or will be given by the Vendor concerning completeness or accuracy of such descriptions.

Zalev Affidavit at paras. 14, 27, Responding Motion Record, Tab 1.

6. The Assumed Contracts, which are Purchased Assets under the APA, are similarly acquired subject to the "as is, where is" clause and the Purchaser expressly and unequivocally acknowledged in the APA that the Vendor has made no warranty or representation whatsoever with respect to any "Assumed Contract" unless expressly provided for in the APA.

Zalev Affidavit at paras. 14, 27, Responding Motion Record, Tab 1.

(iii) The Purchaser Has Discretion to Take Assignment of or Exclude Any Contract

7. The Purchaser is free to exclude any of the Consent Required Contracts (or indeed any Assumed Contract whatsoever) from the list of Purchased Assets at any time in advance of the closing of the Sale Transaction (including, notably, any Consent Required Contract that is also an Essential Contract, as the latter term is defined in the APA). Section 2.6 of the APA unequivocally provides:

> Notwithstanding any other provisions to the contrary in this Agreement, the Purchaser shall have the right, at any time prior to the Closing Date to add to the list of assets and/or contracts and other written agreements listed in Appendix 3 [Excluded Contracts] and Appendix 4 [Excluded Assets] to Schedule A (respectively) by notice in writing to the Vendor and the Monitor so that any asset or contract or other written agreement so added shall be an Excluded Asset or an Excluded Contract (as the case may be) and shall not be acquired, transferred or assigned to the Purchaser (as applicable) at Closing, without any adjustment to the Purchase Price.

Zalev Affidavit at paras. 15, Responding Motion Record, Tab 1.

8. The APA grants the Purchaser a measure of discretion in the assets that it will acquire following the Closing Time of the Sale Transaction (as defined in the Zalev Affidavit). The contracts to be assigned to the Purchaser as Assumed Contracts are entirely at the discretion of the Purchaser.

Zalev Affidavit at paras. 14-18, Responding Motion Record, Tab 1.

(iv) The Purchaser is Obligated to Pay Cure Costs

9. Under Section 2.2 of the APA, if the Purchaser wishes to take assignment of any of the Vendor's existing contracts that require counterparty consent to be assigned (the "**Consent Required Contracts**"), then the Purchaser must pay to the counterparties the applicable Cure Costs related to such Consent Required Contract without any inclusion of such costs in Working Capital.

Zalev Affidavit at paras. 14-18, Responding Motion Record, Tab 1.

10. "Cure Costs" are defined in the APA as follows:

> "Cure Costs" means the amounts to be paid to cure any monetary defaults of [FirstOnSite] in relation to the Consent Required Contracts to the extent required to be paid pursuant to Section 11.3 of the CCAA and to otherwise satisfy the requirements of Section 11.3 of the CCAA, which shall in each case have been reasonably incurred by [FirstOnSite] and the quantum of which, having been determined by [FirstOnSite], acting reasonably and in consultation with the Monitor, shall be acceptable to the [Purchaser], acting reasonably.

Affidavit of Jeff Johnson, sworn May 24, 2016 (the "**Johnson Affidavit**"), Purchaser's Motion Record, Tab 2A.

11. Notably, the Purchaser does not dispute the amounts owing under the JPL Contracts. Similarly, it does not assert that FirstOnSite is acting unreasonably in accepting the amounts asserted by JPL as having been reasonably incurred.

Johnson Affidavit at para. 24, Purchaser's Motion Record, Tab 2.

12. There is no provision in the APA for the Vendor to pay the monetary defaults payable under the Consent Required Contracts that the Purchaser does not find acceptable. The Purchaser's option under the APA in such circumstances is to negotiate a lower amount with the relevant counterparty or to exclude any contracts it does not wish to pay Cure Costs for.

(v) The APA Precludes any Reliance by the Purchaser on any Alleged Representations

13. The APA precludes the Purchaser from relying on any alleged representations in respect of quantum of Cure Costs to inform the interpretation of the definition of Cure Costs.

14. Consistent with the intention unequivocally expressed in the "as is, where as" clause set out in section 2.3 of the APA and consistent with the typical procedure in sales processes such as the kind at issue herein, all of the essential SISP documents advised all participants that they rely solely on their own due diligence inquiries with respect to FirstOnSite (and its business) and that FirstOnSite (in its capacity as putative Vendor) disclaims any representation whatsoever unless that representation is incorporated in the contract executed with an actual purchaser.

Zalev Affidavit at paras. 19-25, Responding Motion Record, Tab 1.

15. All parties invited to participate in Phase I received an initial due diligence package after executing a non-disclosure agreement ("**NDA**") that included access to a preliminary data room and confidential information memorandum ("**CIMs**").[3] The form of NDA unequivocally disclaimed any warranty or representation in the preliminary disclosure material provided to the parties in connection with Phase I:

> You understand and acknowledge that neither we nor any of our Representatives or shareholders are making any representation or warranty, express or implied, as to the accuracy or completeness of the Evaluation Materials or have any liability to you or to any of your Representatives relating to or resulting from the use of the Evaluation Materials. Only those representations or warranties, if any, which are made in a final definitive agreement regarding a Transaction, when, as and if executed, and subject to such limitations and restrictions as may be specified therein, will have any legal effect.

Zalev Affidavit at paras. 20-21, Responding Motion Record, Tab 1.

---

[3] The CIM provided an overview of, and significant detail about, among other things, the FirstOnSite business, including historical and forecast financial information, the market, the industry and key customer and vendor relationships.

16. Consistent with the disclaimers in the NDA and the CIM (and the unequivocal and unambiguous language ultimately incorporated in the "as is, where is" clause in the APA), the Phase II Process Letter (the "**Phase II Letter**") unequivocally provided that no representation or warranty whatsoever, whether in any written material furnished or any information orally transmitted, unless such warranty or representation was made in the parties' executed agreement:

> In submitting a Final Bid, <u>a prospective purchaser acknowledges that it is relying solely on its own investigation and evaluation of the Partnership and its business. [FirstOnSite] and A&M expressly disclaim any and all liability for representations, warranties or statements contained in this letter or in any other written material furnished or information orally transmitted to a potential purchaser</u>, except only those particular representations and warranties of the Partnership made to the actual purchaser in the Definitive Agreement when, as and if such Definitive Agreement is ultimately executed by [FirstOnSite] and subject to such limitations and restrictions as may be contained therein. Until a Definitive Agreement is executed by [FirstOnSite], neither the Partnership, nor A&M will have any obligations whatsoever to any potential purchaser.
>
> [Emphasis added]

Zalev Affidavit at para. 25, Responding Motion Record, Tab 1.

17. The APA says nothing about the quantum of monetary defaults with respect to the Assumed Contracts (or Consent Required Contracts). In particular, there is nothing in the APA to support that monetary defaults under $25,0000 will be deemed reasonable and amounts over $25,000 will be deemed unreasonable. The $25,000 figure appears to have been arbitrarily and randomly selected by the Purchaser for the sole purpose of this motion as a kind of threshold amount in determining Cure Costs.

B. <u>The Purchaser is a Sophisticated Commercial Party and Had Ample Opportunity to Conduct its Due Diligence</u>

18. The Purchaser is a highly sophisticated commercial party with a wealth of industry-specific transaction experience, having had the benefit its negotiations being conducted by one of the "most seasoned" management team in the North American disaster restoration industry, who bring "significant experience in acquiring and integrating acquisition targets in that industry." In addition to its own internal

expertise, the Purchaser had the benefit of a highly-qualified cadre of professional advisors including: Canadian counsel at Norton Rose Fulbright Canada LLP ("**Norton Rose**"), U.S. Counsel at Goodwin Procter LLP, and its financial advisors at RSM US LLP (Financial) ("**RSM**").[4]

> Zalev Affidavit at paras. 8-12, Responding Motion Record, Tab 1.
>
> Affidavit of Jeff Johnson, sworn May 12, 2016, at paras. 6-7, Responding Motion Record Tab 1A.

19. The Purchaser had over 3 months to complete its due diligence. By the conclusion of Phase II of the SISP, over 35 individuals from Interstate, Delos and their various professional advisors were ultimately granted access to the electronic data room set up by A&M for the purposes of providing due diligence material in respect of FirstOnSite (and its business).

> Zalev Affidavit at paras. 10-12, Responding Motion Record, Tab 1.

20. In fact, presumably as a result of its due diligence, almost two months after submitting its final bid on or about the Final Bid Deadline and after multiple extensions of the timeline to closing, the Purchaser advised that it was reducing the Base Purchase Price (as defined in the APA) by $15 million. Following discussions and negotiations, the Purchaser agreed to decrease the reduction to $10 million instead of $15 million.

> Zalev Affidavit at paras. 37, Responding Motion Record, Tab 1.

C. <u>The Alleged Representations</u>

21. The Purchaser alleges that A&M provided it with repeated assurances that there would be no Cure Costs or monetary defaults in connection with the contracts to be assumed by the Purchaser.

> Johnson Affidavit at paras. 14-18, Purchaser's Motion Record, Tab 2.

---

[4] I understand that RSM is a leading U.S. provider of audit, tax and consulting services focused on the middle market.

22. The Purchaser references two specific instances of an alleged representation: (i) a single e-mail dated February 9, 2016 (i.e., more than two months before the signing of the APA); and (ii) two alleged and undocumented conversations at an "elevator bank" in the offices of A&M wherein Josh Nevsky allegedly repeatedly assured Delos and Interstate representatives there were would be no material Cure Costs.

Johnson Affidavit at paras. 14-18, Purchaser's Motion Record, Tab 2.

23. Contrary to the assertions made by the Purchaser:

(i) There were no oral representations made by A&M at any time during the pendency of the SISP in connection with the quantum of Cure Costs or the existence or extent of any monetary defaults with respect to any contracts to be assumed by the Purchaser;

Zalev Affidavit at paras. 30-31, 33-34, 39, Responding Motion Record, Tab 1.
Nevsky Affidavit at paras. 8-12, Responding Motion Record, Tab 2.

(ii) The invoices in respect of the Cure Costs about which the Purchaser complains were all issued subsequent to February 9, 2016; and

Zalev Affidavit at para. 35, Responding Motion Record, Tab 1.

(iii) The Purchaser did not prepare a list of contracts it wished to assume until weeks after the February 9, 2016 correspondence and only finalized the list of Consent Required Contracts (in respect of which Cure Costs could be incurred) on May 17, 2016 - over three months from the only alleged written representation. Indeed, the February 9, 2016 correspondence informs the Purchaser that the Vendor has not actually prepared a list of Cure Costs, so if any significance should be placed on this email it is that the Purchaser, if the quantum of Cure Costs was important to it, should have asked for such a list to be prepared or requested a list of outstanding accounts payable so it could have

reviewed the list against its own expectations of which contracts it would require to be assigned to it.

Zalev Affidavit at para. 33, Responding Motion Record, Tab 1.

24. A&M representatives with primary carriage for the FirstOnSite engagement (and alleged to have made the representations alleged by the Purchaser) reviewed their records and do not recall or have any records of any inquiries with respect to the amount of Cure Costs or the status of payment or non-payment by FirstOnSite under its numerous leases and contracts other than the February 9, 2016 email exchange.

Zalev Affidavit at paras. 31 39, Responding Motion Record, Tab 1.
Nevsky Affidavit at paras. 4, 11-12, Responding Motion Record, Tab 2.

25. The lead partner at the Vendor's counsel also has no recollection of the Purchaser ever raising the issue of Cure Costs on any of the calls or emails to discuss the open items of the draft APA, other than occasionally inserting a note to draft in a draft form of the APA and not ever following up on it.

Affidavit of Brian Pukier ("**Pukier Affidavit**") at paras. 4-5.

D. There Is No Moral Hazard that Arises on the Present Facts and Dates

26. The Purchaser's motion is a blatant attempt to shift the liability from its failure to conduct proper due diligence into the Vendor. The moral hazard argument advanced by the Purchaser is absurd on the facts herein, as illustrated by the following summary of essential facts and dates:

(a) **January 4, 2016**: Phase II of the SISP commences. Representatives from Interstate and Delos receive access to the expanded Phase II data room to perform their due diligence;

(b) **February 9, 2016**: Ms. Gauthier sends the e-mail in which she inquires whether A&M will have prepared or will prepare a Cure Costs schedule. A&M responds that they have not and do not anticipate preparing one;

(c) **February 17, 2016**: The earliest date of any invoices from JPL which are ultimately included in the list of Cure Costs;

(d) **March 14, 2016**: FirstOnSite circulates for the first time a proposed Essential Contracts List that includes the contract with JPL. FirstOnSite does not receive any feedback from the Purchaser on this draft list until much later;

(e) **April 6, 2016**: The Purchaser reduces the proposed Base Purchase Price by $15 million;

(f) **April 7, 2016**: Following negotiations, the Purchaser decreases the proposed reduction by $5 million, making the actual reduction to the original Base Purchase Price $10 million;

(g) **April 20, 2016**: FirstOnSite and the Purchaser execute the APA;

(h) **April 21, 2016**: FirstOnSite files for, *inter alia*, protection from its creditors pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36. Any amounts incurred after this date under the Consent Required Contracts (including the JPL Contracts and Bell Mobility Contract) are paid as post-filing expenses and would not be the liability of the Purchaser under the APA;

(i) **April 27, 2016**: The original deadline contemplated in the APA for when the Consent Required List was to be provided by the Purchaser to FirstOnSite;

(j) **May 5, 2016**: The date to which the deadline for delivery of the Consent Required List was initially extended;

(k) **May 9, 2016**: The Approval and Vesting Order is granted;

(l) **May 11, 2016**: The date to which the deadline for delivery of the Consent Required List was further extended;

(m) **May 12, 2016**: The contract with Bell Mobility is added by the Purchaser to the draft Consent Required Contract List;

(n) **May 17, 2016**: The Purchaser finalizes the Consent Required Contract List;[5] and

(o) **May 18, 2016**: The Assignment Order is granted.

Zalev Affidavit at paras. 2, 29, 32, 37, Responding Motion Record, Tab 1.
Pukier Affidavit at paras. 1-5.

27. As illustrated by the above timeline, had the Purchaser diligently carried out its due diligence with respect to the Cure Costs at issue herein, it would have had more than a two week window to attempt to negotiate an abatement in the purchase price. However, the Purchaser elected not to incur the cost of such further due diligence. It cannot shift the cost of that diligence on the Vendor at such a late date.

PART III - ISSUES

28. The sole issue on this motion is whether the undisputed amounts outstanding under the Consent Required Contract, in particular the Bell Contract[6] and the JPL Contracts, constitute Cure Costs within the meaning of the APA to be paid by the Purchaser.

---

[5] FirstOnSite continues to receive requests to modify the Consent Required Contract List notwithstanding that the Assignment Order has been granted.

[6] The inclusion of the Bell Contract in the Purchaser's motion is surprising since the Purchaser has removed the Bell Contract from the Consent Required Contract List.

PART IV - LAW AND ARGUMENT

29. The Vendor submits that the amounts owing by the Vendor under the Bell Contract and JPL Contracts are "Cure Costs" within the meaning of the APA and are to be paid by the Purchaser should it wish to take assignment of those contracts. The interpretation advanced by the Purchaser is commercially absurd and would nullify clear and unequivocal provisions of the APA (and other documents exchanged by the parties leading up to the execution of the APA) which expressly prohibit exactly the kind of reliance on representations the Purchaser is asking this Court to permit.

> Johnson Affidavit at para. 24, Purchaser's Motion Record, Tab 2.

A. The Relevant Rules of Contractual Interpretation

30. The Ontario Court of Appeal summarized the general principles of contractual interpretation in *Simex Inc. v. Imax Corporation* as follows (citations omitted):

> ...while the court strives to interpret a contract in a manner consistent with the intent of the parties, the parties are presumed to have intended the legal consequences of their words. **The court will consider the context or factual matrix in which the contract was drafted, including commercial reasonableness, to understand what the parties intended. The court will not adopt an interpretation that is "clearly" commercially absurd.** The court must also consider the contract as a whole. **The various provisions "should be read, not as standing alone, but in light of the agreement as a whole and other provisions thereof"**. **Where the contract is unambiguous, extrinsic evidence is inadmissible**. In my view, the contract in this case was unambiguous. Therefore, while evidence as to the background that led to the two agreements, especially concerning the Transfer Agreement, may be helpful in understanding the context, the assertions by the parties as to what they intended is not admissible.
>
> [Emphasis Added.]

> *Simex Inc. v. Imax Corporation*, [2005] O.J. No. 5389 (C.A.) at para. 23, Responding Book of Authorities , Tab 1.

31. It is well-established that "an agreement that is negotiated between sophisticated businesspersons ought to be enforced in accordance with the terms they select in all but the most exceptional circumstances."

> *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270 at para. 45., Responding Book of Authorities , Tab 2.

32. A contract must be interpreted "as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective" and "by determining the intention of the parties in accordance with the language they have used in the written document and based upon the 'cardinal presumption' that they have intended what they have said".

> *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 at para. 24 ["***Ventas***"], Responding Book of Authorities , Tab 3.

33. Courts have also consistently held that entire agreement clauses are intended to "prevent any terms from being added to the [contract] by one party later claiming there were additional terms agreed to but not put to writing" or to "limit that parties' duties to each other to what has been reduced to writing and, as a corollary, to exclude any other duties."

> *Paddon Hughes Development Co. v. Pancontinental Oil Ltd.*, 67 Alta L.R. (3d) 104 (C.A.) at para 46, Responding Book of Authorities, Tab 4.
>
> *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.) at para. 31, Responding Book of Authorities, Tab 5.

34. Courts routinely enforce the "as is, where is" clauses (and other non-reliance provisions). In *Antorisa Investments Ltd. v. 172965 Canada Ltd.*, the plaintiff purchased a service station from a petroleum company on an "as is" basis after being afforded a reasonable opportunity to conduct an environmental assessment and opting not to conduct more expensive and thorough tests. Subsequently, the plaintiff discovered serious remediation issues and brought an action seeking the cost of remediation on the basis that the vendor represented that property was "clean" (pleading reckless or fraudulent misrepresentation). Justice Lax held that:

> The common law has always recognized the primacy of contract law. Under this Agreement, [the plaintiff], a sophisticated commercial party, assumed all liability for the condition of the property... There was opportunity to negotiate the allocation of risk, but [the plaintiff] preferred to purchase the property and accept the risk.
>
> *Antorisa Investments Ltd. v. 172965 Canada Ltd.* (2006), 82 O.R. (3d) 437 (S.C.J.) at para. 81, Responding Book of Authorities, Tab 6.

35. In *Carman Construction Ltd. v. Canadian Pacific Railway*, the plaintiff ("**Carman**") succeeded in a tender process to remove rock for the defendant ("**CPR**"). The contract provided that it was entered into based on the contractor's own knowledge and not on reliance on information offered by CPR. An incorrect representation was made by a CPR employee to Carman about the amount of rock to be removed. Carman sued CPR for breach of collateral contract and negligent misrepresentation. The Court of Appeal held (and was affirmed on this point by the Supreme Court of Canada):

> This is not... a case in which, after making a negligent misrepresentation in order to induce it to enter into a contract, the terms of which at the time of the misrepresentation were unknown, the defendant thereafter inserts an exculpatory clause in order to insulate itself against antecedent tort liability. This is a case in which the plaintiff tendered knowing that in the very contract which it was tendering it had agreed to assume the risk of using any information obtained by it from the defendant's employees. There is no basis in these circumstances for the exercise of the Court's equitable jurisdiction.
>
> *Carman Construction Ltd. v. Canadian Pacific Railway*, 33 O.R. (2d) 472 (C.A.) at para. 2, aff'd [1982] 1 S.C.R. 958 at para. 41, Responding Book of Authorities , Tab 7.

B. The APA Provides a Comprehensive Scheme for Payment of Monetary Defaults under the Consent Required Contracts by the Purchaser

36. The parties intensively negotiated the terms of the APA, including with respect to who would bear the brunt of paying monetary defaults owing under any contracts to be assumed by the Purchaser. Under the APA, the contracts to be sought to be assigned are entirely at the discretion of the Purchaser and any associated Cure Costs in connection with those contracts are entirely the Purchaser's obligation.

Zalev Affidavit at paras. 13-18, Responding Motion Record, Tab 1.

37. If the Purchaser wishes to take assignment of any of the Vendor's existing contracts that require counterparty consent to be assigned (the "**Consent Required Contracts**"), then the Purchaser must pay to the counterparties any monetary defaults owing by the Vendor thereunder specifically stated to be payable in addition to its other monetary obligations under the APA. Section 2.2 of the APA provides, in part, as follows:

> With respect to each Consent Required Contract, subject to Closing and to either (i) the consent of the other parties thereto to the assignment thereof, or (ii) in the absence of such consent, the obtaining of an Assignment Order, in addition to its other obligations under this Agreement, **the applicable Cure Costs related to such Consent Required Contract on Closing shall be paid by the Purchaser, without any inclusion of such costs in Working Capital**.
>
> [Emphasis added]

Zalev Affidavit at paras. 16-17, Responding Motion Record, Tab 1.

38. "Cure Costs" are defined in the APA as follows:

> "Cure Costs" means the amounts to be paid to cure any monetary defaults of [FirstOnSite] in relation to the Consent Required Contracts to the extent required to be paid pursuant to Section 11.3 of the CCAA and to otherwise satisfy the requirements of Section 11.3 of the CCAA, which shall in each case have been reasonably incurred by [FirstOnSite] and the quantum of which, having been determined by [FirstOnSite], acting reasonably and in consultation with the Monitor, shall be acceptable to the [Purchaser], acting reasonably.

Affidavit of Jeff Johnson, sworn May 24, 2016 (the "**Johnson Affidavit**"), Purchaser's Motion Record, Tab 2A.

39. The definition of Cure Costs incorporates by reference the concept of "monetary default" in Section 11.3 of the CCAA. Section 11.3(4) unequivocally provides that "monetary default" (and by extension, the amount of Cure Costs as defined in the APA) means:

> (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.
>
> CCAA, section 11.3(4).

40. Accordingly, if the Purchaser elects to assume a Consent Required Contract then the Purchaser is obligated to pay "all monetary defaults in relation to that agreement". The uncontested amounts owing under, *inter alia*, the JPL Contracts and the Bell Contracts at issue on this motion are clearly "monetary defaults" and represent precisely the amount that, had a court-ordered assignment been sought and granted, must have been paid to give effect to such assignment order.

41. The concept of acceptability to the Purchaser gives some comfort to the Purchaser that FirstOnSite cannot accept whatever amounts are asserted by the counterparties (as evidenced in their books and records), but rather must act reasonably in determining whether the asserted amounts were reasonably incurred by FirstOnSite. Similarly, if any counterparty asserts amounts in excess of what is owing under any particular Consent Required Contract (such as legal or assignment fees that are often asserted by counterparties in the context of CCAA assignments), such amounts must acceptable to the Purchaser, acting reasonably.

42. There is no provision in the APA for the Vendor to pay the monetary defaults payable under the Consent Required Contracts that the Purchaser does not find acceptable. There is nothing in the APA to ever suggest a $25,000 threshold that the Purchaser has invented for the purposes of this motion. In an APA that was heavily negotiated by commercially sophisticated parties with the assistance of professional advisors these omissions can only be interpreted as not requiring the Vendor to ever be responsible for payment of any monetary defaults owing under any contracts the Purchaser wants to assume.

43. The APA does expressly give the Purchaser the option to exclude any contracts it does not wish to pay Cure Costs for. That is the only remedy the parties bargained for and agreed to in the APA.

C. The Purchaser's "Reasonable Expectations" as to the Quantum of Cure Costs Are Irrelevant to the Interpretation of "Cure Costs" under the APA

44. The parties' intention to preclude any reliance by the Purchaser on any representations is unambiguously stated in the APA which, in three separate locations, clearly and unambiguously states that no representations may be relied upon other than those written in the APA itself.[7]

> Zalev Affidavit at paras. 19, 21, 25 and 26, Responding Motion Record, Tab 1.

45. In *Bank of Montreal v. Maple City Ford Sales (1986) Ltd.*, Justice Gillese (as she then was) explains the relationship between the expectation (and intention) of the parties, objectively understood, and the deliberate choice to include a "no representation" clause in their agreement as follows (citations omitted):

> ... After receiving legal advice, they chose to include in the written agreement, terms that are in direct conflict with the alleged oral statements. Having included in their agreement a clause excluding any prior representations, the defendants cannot now rely on pre-contractual representations. They are bound by the terms of the written agreement.
>
> [...]
>
> ...The inclusion of a "no representation" clause in a contract is indicative of an intention by the parties thereto to be bound only by those terms included within the written agreement and to exclude liability for any pre-contractual representations. By entering into a contract with such a clause, the parties acknowledge that they cannot rely on any pre-contractual representations. Paragraph 10 of the Forbearance Agreement is such a clause. In such circumstances, it would be improper for this court to give effect to representations not incorporated into the terms of the contract.

---

[7] Sections 2.3, 5.3, 10.10 of the APA.

Bank of Montreal v. Maple City Ford Sales (1986) Ltd., 2002 CarswellOnt 3039 (S.C.J.) at paras. 120 and 122, Responding Book of Authorities , Tab 8.

46. In addition, the parties exchanged a number of documents prohibiting exactly the kind of reliance that the Purchaser is now asking this Court to permit. In particular (and evidencing a clear intention to be bound by the terms of the entire agreement clause):

(a) at the outset of the SISP the Purchaser executed the NDA which provides:

> You understand and acknowledge that neither we nor any of our Representatives or shareholders are making any representation or warranty, express or implied, as to the accuracy or completeness of the Evaluation Materials or have any liability to you or to any of your Representatives relating to or resulting from the use of the Evaluation Materials. Only those representations or warranties, if any, which are made in a final definitive agreement regarding a Transaction, when, as and if executed, and subject to such limitations and restrictions as may be specified therein, will have any legal effect.

Zalev Affidavit at paras. 19, Responding Motion Record, Tab 1.

(b) during the pendency of Phase I of the SISP, A&M distributed a CIM to all parties executing the NDA, which reaffirmed:

> No representation, warranty or guarantee, expressed or implied, is made by [FirstOnSite] or any of its representatives with respect to the accuracy or completeness of any information provided in this CIM or in any oral or written or electronic or other communications transmitted to the recipient in the course of its evaluation of [FirstOnSite]....The only information concerning [FirstOnSite] that shall have any legal effect will be that which is specifically represented or warranted in a definitive agreement relating to a specific transaction affecting [FirstOnSite]that has been executed on behalf of [FirstOnSite]...

Zalev Affidavit at paras. 21, Responding Motion Record, Tab 1.

(c) the Phase II Process Letter, provided to the Purchaser early in the SISP unequivocally stated:

> In submitting a Final Bid, a prospective purchaser acknowledges that it is relying solely on its own investigation and evaluation of the Partnership and its business. [FirstOnSite] and A&M expressly disclaim any and all liability for representations, warranties or statements contained in this letter or in any other written material furnished or information orally transmitted to a potential purchaser, except only those particular representations and warranties of the Partnership made to the actual purchaser in the Definitive Agreement when, as and if such Definitive Agreement is ultimately executed by [FirstOnSite] and subject to such limitations and restrictions as may be contained therein. Until a Definitive Agreement is executed by [FirstOnSite], neither the Partnership, nor A&M will have any obligations whatsoever to any potential purchaser.
>
> Zalev Affidavit at paras. 25, Responding Motion Record, Tab 1.

47. The Purchaser cannot re-write the parties' agreement merely because it is dissatisfied that a risk that it deliberately assumed in executing the contract has materialized. To import the concept of the Purchaser's "reasonable expectations" as to the quantum of Cure Costs would nullify the express provisions of the APA (which are supported by numerous other documents exchanged by the parties) that preclude reliance on such expectations or any alleged representations that may have given rise to such expectations. To impose an invented monetary threshold of $25,000 would rewrite an agreement the parties spent a lot of time, effort and money to negotiate.

D. In Any Event, the Purchaser's Expectations with Respect to the Quantum of Cure Costs are not Reasonable in the Circumstances

48. Even if some standard of reasonableness or Purchaser's expectations as to what Cure Costs should be quantified as is to be imported despite the express language to the contrary, the basis for the Purchaser's expectation that Cure Costs will be minimal are not reasonable and are a mere attempt to compensate (and shift the responsibility

on to the Vendor) for the Purchaser's poor due diligence in respect of amounts that could be outstanding under any of the Consent Required Contracts.

49. An alleged representation contrary to the clear and express terms of an entire agreement clause cannot be predicated on "uncorroborated bald assertions" that such representations were made. Clear evidence is required. As the Court explains in *Balfour* in connection with a summary judgement motion (dismissing a claim predicated on an alleged collateral contract for want of evidence), it is implausible (indeed, commercially absurd) that a party would execute a contract "with an entire agreement clause and take no steps to obtain some sort of written confirmation of the arrangement or even specifically mention it in email communications". This is particularly true in the present case given that the Purchaser is a sophisticated party benefiting from representation by, *inter alia*, very experienced and qualified counsel.

> *Balfour v. StormCloud Network (Canada) Inc.*, 2015 BCSC 132 at para. 42. , Responding Book of Authorities , Tab 9.

50. Apart from the bare assertion that representations were made at unspecified times and by unspecified means during the pendency of the SISP, the Purchaser references two specific instances of an alleged representation: (i) an e-mail dated February 9, 2016 (which pre-dates the actual Cure Costs with which the Purchaser is now concerned and which on its face makes clear that the Vendor had not even prepared a list of expected Cure Costs); and (ii) two alleged and undocumented conversations at an "elevator bank" in the offices of A&M where Mr. Nevsky allegedly repeatedly assured Delos and Interstate representatives there were would be no material Cure Costs (but in respect of which there was no written correspondence or follow-up whatsoever).

> Johnson Affidavit at paras. 14-18, Purchaser's Motion Record, Tab 2.
>
> Zalev Affidavit at paras. 30-31, 33-34, 39, Responding Motion Record, Tab 1.
>
> Nevsky Affidavit at paras. 8-12, Responding Motion Record, Tab 2.

51. The Purchaser cannot rely on its own lack of diligence to fix responsibility for the amount of Cure Costs owing in respect of, *inter alia*, the JPL Contracts upon the Vendor. The Purchaser and its advisors had every opportunity to satisfy themselves with respect to the Cure Costs owed by FirstOnSite. The Purchaser was provided, and took advantage of, an extended due diligence period in order to satisfy itself about the condition of the assets it was purchasing.

52. Crucially, the Cure Costs complained about by the Purchaser arose after February 9, 2016. There is a distinct lack of evidence to show that the Purchaser carried out any reasonable diligence concerning the existence of monetary defaults with respect to any of FirstOnSite's contracts during the pendency of its due diligence program and, in particular, following February 9, 2016. Indeed, it appears that the Purchaser has made no other written inquiries regarding the preparation of a Cure Cost schedule or what arrears, if any, there might be under any of FirstOnSite's contracts or leases other than a couple of notes to drafts in draft versions of the APA that no one ever expressly raised in subsequent calls or emails. The only inquiry about Cure Costs or FirstOnSite's accounts payable was the February 9, 2016 email exchange between Adam Zalev, Josh Nevsky and Virginie Gauthier of Norton Rose.

> Nevsky Affidavit at para. 6, 8, and 11, Responding Motion Record, Tab 2.
> Zalev Affidavit at paras. 25, Responding Motion Record, Tab 1.
> Pukier Affidavit at paras. 4-5.

53. The NDA, CIM, and Phase II Letter – three unequivocal agreements that the Vendor, *inter alia*, makes no representation whatsoever unless expressly set out in the executed agreement - are relevant to determining the parties' reasonable expectations. In light of these unequivocal agreements, the Purchaser's insistence that it had an expectation as to the quantum of Cure Costs based on, *inter alia*, bald assertions of oral representations is an unreasonable one.

> Zalev Affidavit at paras. 25, Responding Motion Record, Tab 1.

54. At its highest, the Purchaser's assertion is that its "reasonable expectations" with respect to the quantum of Cure Costs to be paid by the Purchaser under the APA would be defined by an email exchange that took place over 2 months before the execution of the APA and a conversation at "an elevator bank". This position taken by the Purchaser in this regard is *prima facie* commercially absurd, thereby contrary to the well-established principles of contractual interpretation, and should be rejected.

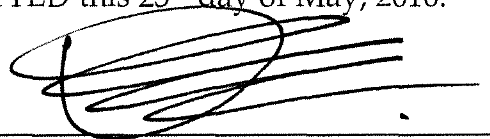
Ventas at para. 24, Responding Book of Authorities, Tab 3.

55. Finally, the Purchaser has arbitrarily selected a figure of $25,000 as the "reasonable" figure – yet offers no rationale or basis in the APA as to why this figure is reasonable in comparison with any other.

PART V - ORDER REQUESTED

56. For all of the foregoing reasons, FirstOnSite submit that the Purchaser's motion should be dismissed, with costs (on a partial indemnity basis) to the Vendor.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of May, 2016.



Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Simex Inc. v. Imax Corporation,* [2005] O.J. No. 5389 (C.A.)
2. *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270
3. *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205
4. *Paddon Hughes Development Co. v. Pancontinental Oil Ltd.*, 67 Alta L.R. (3d) 104 (C.A.)
5. *Shelanu Inc. v. Print Three Franchising Corp.* (2003), O.R. (3d) 533 (C.A.)
6. *Antorisa Investments Ltd. v. 172965 Canada Ltd.* (2006), 82 O.R. (3d) 437 (S.C.J.)
7. *Carman Construction Ltd. v. Canadian Pacific Railway*, 33 O.R. (2d) 472 (C.A.), aff'd [1982] 1 S.C.R. 958
8. *Bank of Montreal v. Maple City Ford Sales (1986) Ltd.*, 2002 CarswellOnt 3039 (S.C.J.)
9. *Balfour v. StormCloud Network (Canada) Inc.*, 2015 BCSC 132

SCHEDULE "B"
RELEVANT STATUTES

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

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.

SCHEDULE "C"
RELEVANT SECTIONS OF APA

Section 1.1 Definitions

...

"**Assumed Contracts**" means all Contracts including Consent Required Contracts but excluding Excluded Contracts.

...

"**Cure Costs**" means the amounts to be paid to cure any monetary defaults of the Vendor in relation to the Consent Required Contracts to the extent required to be paid pursuant to Section 11.3 of the CCAA and to otherwise satisfy the requirements of Section 11.3 of the CCAA, which shall in each case have been reasonably incurred by the Vendor and the quantum of which, having been determined by the Vendor, acting reasonably and in consultation with the Monitor, shall be acceptable to the Purchaser, acting reasonably.

...

Section 2.3 "As is, Where is"

The Purchaser acknowledges that the Vendor is selling the Purchased Assets on an "as is, where is" basis as they shall exist at the Closing Time. No representation, warranty or condition is expressed or can be implied as to Encumbrances, description, fitness for purpose, merchantability, condition, quantity or quality or in respect of any other matter or thing whatsoever concerning the Purchased Assets or the right of the Vendor to sell or assign same save and except as expressly represented or warranted herein. Without limiting the generality of the foregoing, any and all conditions, warranties or representations expressed or implied pursuant to the *Sale of Goods Act* (Ontario), the Civil Code of Québec or similar legislation do not apply hereto and have been waived by the Purchaser. The description of the Purchased Assets contained in the Schedules is for purpose of identification only. Except as otherwise provided in Section 5.1, no representation, warranty or condition has or will be given by the Vendor concerning completeness or accuracy of such descriptions.

...

Section 2.4 Assumed Obligations

The Purchaser agrees to assume and perform, discharge and pay when due the following obligations and liabilities of the Vendor (the "**Assumed Obligations**") after the Closing:

...

(c) the obligation and liability of the Vendor to pay Cure Costs in respect of any Assumed Contract;

...

Section 5.2 Purchaser's Representations

The Purchaser represents and warrants to the Vendor as of the date hereof and as of the Closing Time that and acknowledges that the Vendor is relying on such representations and warranties in connection with entering into this Agreement and performing its obligations hereunder:

...

(c) this Agreement has been duly executed and delivered by the Purchaser and constitutes a legal, valid and binding agreement of it enforceable against it in accordance with its terms, subject to any limitation under applicable laws relating to (i) bankruptcy, winding-up, insolvency, arrangement, fraudulent preference and conveyance, assignment and preference and other laws of general application affecting the enforcement of creditors' rights, and (ii) the discretion that a court may exercise in the granting of equitable remedies such as specific performance and injunction;

...

Section 5.3 Limitations

With the exception of the Vendor's representations and warranties in Section 5.1 and the Purchaser's representations and warranties in Section 5.2, none of the Vendor or the Purchaser, or their respective Representatives, make, have made or shall be deemed to have made any other representation or warranty, express or implied, at law or in equity, in respect of the Vendor, the Purchaser or the Purchased Assets, or the sale and purchase of the Purchased Assets pursuant to this Agreement.

...

Section 10.10 Entire Agreement

This Agreement, the attached Schedules hereto, constitute the entire agreement between the Parties with respect to the subject matter hereof and supersede all prior negotiations, understandings and agreements. This Agreement may not be amended or modified in any respect except by written instrument executed by all of the Parties.

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

FACTUM OF THE APPLICANT (RETURNABLE MAY 9, 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

C. Haddon Murray LSUC#: 61640P
Tel: (416) 869-5239
Email: hmurray@stikeman.com

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

Lawyers for the Applicants