

Court File No. \_\_\_\_\_

**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  
(Returnable April 21, 2016)**

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TO: THE SERVICE LIST

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**PART I - OVERVIEW**

1. 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 seeks protection from its creditors and certain other ancillary relief pursuant to an order (the "**Initial Order**") made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). FirstOnSite GP further seeks to have a stay of proceeding and other benefits of an Initial Order under the CCAA extended to FirstOnSite LP, as the limited partnership carries on operations integral to and inseparable from FirstOnSite GP's enterprise.<sup>1</sup>

2. 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.

3. Since 2010, FirstOnSite has been facing significant financial and liquidity difficulties due to, *inter alia*, insufficient equity, substantial and escalating operating

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<sup>1</sup> Hereinafter, where reference is made to the FirstOnSite enterprise as a whole, the term FirstOnSite will be used.

losses, and correspondingly escalating debt to fund these losses, primarily stemming from a series of debt-financed and market consolidating asset acquisitions. In the fall of 2015, the equity sponsors of FirstOnSite indicated that they were longer prepared to continue to fund its continuing and escalating operating losses. This withdrawal of support, combined with adverse economic conditions in commencing in 2015 and continuing through to 2016, exacerbated an already precarious liquidity situation.

4. FirstOnSite cannot satisfy its liabilities as they become due. As a result of its financial difficulties and its ongoing and severe liquidity crisis, FirstOnSite has been unable to meet its various financial and other covenants. On October 31, 2015, FirstOnSite first defaulted with respect to its senior secured revolving credit facility and thereby triggered a cascade of cross-defaults with respect to its senior and junior subordinated debt, along with acceleration of payment clauses. At present, FirstOnSite does not have sufficient liquidity to satisfy these accelerated payment obligations.

5. Simply, FirstOnSite GP is insolvent. Without CCAA protection, a shut-down of FirstOnSite's operations is inevitable, which outcome would be extremely detrimental to its more than 900 employees and its numerous suppliers, customers, creditors and its other stakeholders. CCAA protection will allow FirstOnSite to maintain operations while providing it with the time necessary to implement its proposed restructuring strategy: the going concern sale of substantially all of its business and assets pursuant to a sale and investor solicitation process ("**SISP**") commenced in November, 2015.

## **PART II - THE FACTS**

6. The facts underlying this Application are more fully set out in the Affidavit of Dave Demos sworn April 20, 2016 (the "**Demos Affidavit**"). All capitalized terms used but not defined herein have the meaning ascribed to them in the Demos Affidavit.

## A. Overview

7. FirstOnSite is one of the largest independently owned, non-franchised restoration services provider in Canada, which is an industry with sales in excess of \$2.0 billion. FirstOnSite was founded by the merger of two regional business from Ontario and British Columbia in 2007. Between 2007 to 2009, FirstOnSite consolidated a large portion of the fragmented, regional industry into a national operation through a series of debt-financed asset acquisitions.<sup>2</sup> At present, FirstOnSite holds significant market share in every province that it operates in. In 2011, FirstOnSite established a limited presence in the United States through an indirect, but wholly owned, subsidiary: FirstOnSite Restoration, Inc. (“FOS US”). FOS US supports Canadian operations by supplying, *inter alia*, specialized project management and other expertise. Due to the way financial results from such contributions are credited between branch offices, FOS US has technically always operated at a loss. To satisfy its liabilities as they become due, FOS US relies on funding from FirstOnSite LP.

Demos Affidavit, Application Record, Tab 2 at paras. 16, 21-25, 27-28, 35-38.

8. FirstOnSite offers customers a diverse range of services, including but not limited to emergency response work in connection with, *inter alia*, fire, flood and other weather-related events, follow-up rebuild and repair work, and other specialty services, such as content restoration and environmental clean-up (collectively, the “Restoration Services”).

Demos Affidavit, Application Record, Tab 2 at paras. 28-30.

9. FirstOnSite has a diverse customer base, consisting of insurance companies and property owners, with two distinct revenue streams. Residential revenue, derived

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<sup>2</sup> FirstOnSite carries on business in nine provinces: Ontario, Quebec, British Columbia, Alberta, Manitoba, Saskatchewan, Nova Scotia, New Brunswick and Prince Edward Island. FirstOnSite does not carry on business in any of the territories.

from restoration work on residential properties, is primarily generated from insurers as part of their property coverage programs. Commercial revenue, derived from restoration work on commercial properties, is generated from insurers as part of their commercial property coverage programs and, *inter alia*, commercial property owners, operators and managers.

Demos Affidavit, Application Record, Tab 2 at paras. 28-31 and 34.

10. As a participant in the construction pyramid, FirstOnSite frequently subcontracts part of its work to, *inter alia*, construction companies, independent contractors and numerous material or service suppliers.<sup>3</sup> FirstOnSite LP has a number of essential supplier relationships, divisible into five types: (i) subcontractors; (ii) equipment suppliers and equipment rental companies; (iii) safety supplies and material vendors; (iv) temporary staffers and labourers; and (v) vehicle and transport suppliers (the “**Suppliers**”).

Demos Affidavit, Application Record, Tab 2 at paras. 32-33.

11. FirstOnSite has 935 employees, almost all of whom are situated in Canada. Their services are supplemented by teams of independent contractors and temporary workers, all of whom are recruited as-needed based on, *inter alia*, project scope and demand.

Demos Affidavit, Application Record, Tab 2 at paras. 39 and 41.

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<sup>3</sup> The construction pyramid is the term commonly used to describe the myriad of contractual relationships for, *inter alia*, services and materials that are essential to the work necessary to complete a given project.

**B. FirstOnSite's Assets and Liabilities<sup>4</sup>**

12. As at February 29, 2016, FirstOnSite had total assets of approximately \$86.90 million and total liabilities of approximately \$161.36 million. FirstOnSite's secured and unsecured debt obligations, summarized below, total approximately \$125.08 million.

Demos Affidavit, Application Record, Tab 2 at para. 40.

13. FirstOnSite LP is indebted to Wells Fargo Capital Finance Corporation Canada ("**Wells Fargo**") in the amount of \$17.38 million pursuant to a credit agreement dated November 25, 2014 (as amended from time to time, the "**ABL Agreement**"). Up to \$60 million (the "**ABL Facility**") is available under the ABL Agreement, subject to a borrowing base calculation based on eligible accounts receivable and unbilled accounts.

Demos Affidavit, Application Record, Tab 2 at para. 56-67.

14. FirstOnSite LP has granted a comprehensive security interest to Wells Fargo over all of its present and after-acquired property pursuant to, *inter alia*, a general security agreement ("**GSA**") and a deed of hypothec. FirstOnSite LP's obligations are separately and independently guaranteed by FirstOnSite GP, FirstOnSite Holdings Limited ("**FOS Holdings**") and FOS US. The guarantees are secured by, *inter alia*, a GSA and deed of hypothec.

Demos Affidavit, Application Record, Tab 2 at paras. 62 and 65.

15. FirstOnSite LP is indebted to the Business Development Bank of Canada ("**BDC**") in the amount of \$2.46 million pursuant to a variable interest rate term loan

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<sup>4</sup> FirstOnSite's secured and unsecured debt obligations are set out in greater detail at paras. 56-106 of the Demos Affidavit.



pursuant to a letter of credit entered into on November 25, 2014 (the “**BDC Credit Agreement**”). The term loan matures on November 30, 2017.

Demos Affidavit, Application Record, Tab 2 at para. 68.

16. FirstOnSite LP is indebted to BDC Capital Inc. (“**Capital**”) in the amount of \$4.9 million pursuant to a fixed interest rate term loan pursuant to a letter of offering of financing entered into on November 25, 2014 (the “**Capital Agreement**”). The term loan matures on November 30, 2019.

Demos Affidavit, Application Record, Tab 2 at para. 74.

17. FirstOnSite LP’s obligations under the BDC Credit Agreement and the Capital Credit Agreement are secured by way of, *inter alia*, a GSA and a deed of hypothec. FirstOnSite LP’s obligations under the BDC Credit Agreement and Capital Credit Agreement are separately and independently guaranteed by FirstOnSite GP, FOS Holdings and FOS US. The guarantees are secured by way of, *inter alia*, a GSA and deed of hypothec.

Demos Affidavit, Application Record, Tab 2 at paras. 71-72, 77-78.

18. The relative priorities of the security interests with respect to the assets of FirstOnSite LP, FirstOnSite GP, FOS Holdings and FOS US pursuant to each of the ABL Agreement, the BDC Credit Agreement and the Capital Credit Agreement are governed an intercreditor agreement entered into on November 25, 2014 (the “**Intercreditor Agreement**”), which provides as follows:

- (a) BDC has priority on any and all machinery and equipment (the “**BDC Priority Assets**”);

- (b) Wells Fargo has priority with respect to all other personal moveable property, assets and undertakings including, without limitation, inventory and accounts (the “**Wells Fargo Priority Assets**”); and
- (c) Capital ranks subordinate in priority with respect to both the Wells Fargo Priority Assets and the BDC Priority Assets.

Demos Affidavit, Application Record, Tab 2 at paras. 81-83.

19. FirstOnSite LP is presently indebted in the aggregate amount of \$35.06 million to certain of its limited partners on account of six tranches of secured convertible and non-convertible debentures issued between December 10, 2010 and November 25, 2014. The secured debentures are subordinated to Wells Fargo, BDC, and Capital.

Demos Affidavit, Application Record, Tab 2 at paras. 83-102 and 106.

20. FirstOnSite LP is indebted to Torquest (in such capacity, the “**Noteholders**”) in the aggregate amount of \$66.45 million on the basis of a series of unsecured loans provided by way of promissory note – bearing an interest rate of 14% and payable on demand – issued between February 1, 2007 and July 28, 2015 (collectively, the “**Torquest Notes**”).

Demos Affidavit, Application Record, Tab 2 at para. 104.

21. The Torquest Notes (with one exception) are subordinated to each tranche of the Secured Convertible Debentures and Secured Subordinated Debentures.<sup>5</sup>

Demos Affidavit, Application Record, Tab 2 at paras. 86, 89, 92, and 95.

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<sup>5</sup> The TorQuest notes are not expressly subordinated to the Tranche 1 Subordinated Debentures.

**C. Financial Difficulties and Defaults**

22. FirstOnSite has experienced ongoing operational and liquidity challenges since 2010, primarily stemming from its 2007 to 2009 debt-financed, industry consolidating acquisitions. Substantial capital investment is required to maintain a national platform in the Restoration Services industry. Heavily leveraged and undercapitalized, FirstOnSite was not able to leverage synergies from its acquisitions to lower its cost structure and, generally, found itself incapable of sustaining growth beyond general market shifts.

Demos Affidavit, Application Record, Tab 2 at paras. 107-108.

23. In addition to facing an ever-increasing debt burden, FirstOnSite incurred substantial net losses in every year from 2010 to 2013: \$32.4 million in the fiscal-year ended 2010 ("FY2010"); \$6.9 million in the fiscal-year ended 2011 ("FY2011"); \$49.1 million in the fiscal-year ended 2012 ("FY2012"); and \$16.1 million in the fiscal-year ended 2013 ("FY2013"). By December 31, 2013, total liabilities exceed total assets by \$34 million.

Demos Affidavit, Application Record, Tab 2 at para. 108.

24. Since 2012, FirstOnSite has pursued a number of strategies in an endeavour to alleviate its financial difficulties and liquidity problems.

Demos Affidavit, Application Record, Tab 2 at paras. 110-112.

25. Nevertheless, starting in the fall of 2014, continuing adverse economic conditions (caused by unseasonably mild weather conditions which substantially reduced insurance claims) blunted the efficacy of FirstOnSite's response. As a result:

- (a) Revenue continued to steadily (and precipitously) decline: from \$214 million in FY2013, to \$204 million FY2014 and to \$155 million FY2015;

- (b) Debt continued to accrue, with significant net operating losses of: from \$26 million FY2013, to \$10 million FY2014, and to \$24 million in FY2015;
- (c) Notwithstanding a decline in working capital of \$15 million during FY2013 and FY2015, debt over the same period increased by \$6 million; and
- (d) Ultimately, as at February 29, 2016, total liabilities exceeded total assets by approximately \$74 million.

Demos Affidavit, Application Record, Tab 2 at para. 112.

26. Throughout this period, FirstOnSite depended on Torquest to finance its ongoing operations, which it did by way of, *inter alia*, the Torquest Notes. In or about October 2015, Torquest advised that it was no longer prepared to fund FirstOnSite's continuing operating losses. Without continued outside funding, and combined with continued and adverse economic conditions, FirstOnSite's situation became dire.

Demos Affidavit, Application Record, Tab 2 at paras. 113-114.

27. As a result of the foregoing financial difficulties (including falling revenues due to the mild weather and reduction in claims) and an increasingly over-leveraged balance sheet, FirstOnSite LP defaulted under the ABL Agreement.

Demos Affidavit, Application Record, Tab 2 at paras. 116.

28. The ABL Credit Agreement Defaults resulted in cross-defaults under the BDC Credit Agreement ("**BDC Credit Defaults**"), the Capital Credit Agreement ("**Capital Credit Defaults**"), Secured Convertible Debentures ("**Secured Convertible Debenture Defaults**"), and the Tranche 1 Subordinated Debentures (the "**Subordinated Secured Debenture Defaults**"), and collectively with the ABL Credit Defaults, the BDC Credit Defaults, the Capital Credit Defaults and the Secured Convertible Debenture Defaults, the "**Credit Defaults**"). The Credit Defaults have

triggered acceleration of payment clauses. As a result of the Credit Defaults, the vast majority of FirstOnSite's total liabilities have become immediately due and payable.

Demos Affidavit, Application Record, Tab 2 at para. 118.

**D. FirstOnSite is Insolvent**

29. As indicated by the financial information described above, FirstOnSite is cash-flow and balance-sheet insolvent. The Credit Defaults allow the ABL Agent, BDC, Capital, and the holders of the Secured Convertible Debentures and the Subordinated Secured Debentures to exercise certain remedies, including acceleration of payment of all amounts due under their respective agreements. FirstOnSite does not have sufficient liquidity to satisfy the accelerated payment obligations resulting from the Credit Defaults.

Demos Affidavit, Application Record, Tab 2 at paras. 119-120.

**E. Sales and Investor Solicitation Process ("SISP")**

30. Following the cessation of funding by Torquest, the Board of FirstOnSite GP (the "**Board**") carefully considered its available options, and after consulting with its legal and financial advisors and concluded that the course of action that would most likely maximize returns for the stakeholders of FirstOnSite would be to pursue a transaction that would result in either a full sale of, or a substantial equity investment in, FirstOnSite LP.

Demos Affidavit, Application Record, Tab 2 at para. 122.

31. FirstOnSite elected to pursue and complete the SISP outside of formal insolvency proceedings out of concern that, *inter alia*, the period of CCAA protection necessary to implement and execute any post-filing sales process, including the

associated publicity, would have serious and detrimental effects on FirstOnSite's business and customers.

Demos Affidavit, Application Record, Tab 2 at paras. 123-124.

32. With the assistance of Alvarez & Marsal Canada Securities ULC ("A&M"), who was retained to act as financial advisor, FirstOnSite conducted a competitive pre-filing SISP and chose a successful bid. Following a period of intensive and extensive arm's length negotiation, as well as extensive consultation with its professional advisors, the Board concluded, on the basis of its commercial and business judgement, that the bid by 3297167 Nova Scotia Limited (in such capacity, the "**Purchaser**") was the best offer in the circumstances and that proceeding with such transaction (the "**Sale Transaction**") was in the best interest of all stakeholders.

Demos Affidavit, Application Record, Tab 2 at paras. 125-127.

33. The Asset Purchase Agreement ("**APA**") between FirstOnSite LP, by its general partner FirstOnSite GP, and the Purchaser, requires FirstOnSite to make an expeditious application to this Court for the Initial Order sought herein. The Board of FirstOnSite GP thereby authorized the expeditious application to this Court for the relief sought herein.

Demos Affidavit, Application Record, Tab 2 at paras. 13 and 128-129

34. Ultimately, and without the CCAA protections sought herein, FirstOnSite will be forced to shut down its operations, which would be an extremely detrimental outcome for their employees, secured creditors and other stakeholders.

Demos Affidavit, Application Record, Tab 2 at para. 121.

### **PART III - ISSUES AND THE LAW**

35. The issues on this application are as follows (each capitalized term defined below):

- (a) Whether to grant CCAA protection to FirstOnSite GP;
- (b) Whether to extend CCAA Protection to FirstOnSite LP;
- (c) Whether to grant the Administration Charge;
- (d) Whether to approve the DIP Facility and grant the DIP Lender's Charge;
- (e) Whether to approve the Engagement Letter and grant the Financial Advisor's Charge;
- (f) Whether to approve the KEPRs and the KERF Charge;
- (g) Whether to approve the Lien Claims Mechanism and the Lien Charge;
- (h) Whether to authorize FirstOnSite to pay certain pre-filing obligations with respect to the Critical Suppliers; and
- (i) Whether to seal the Confidential Supplement to the Pre-Filing Report.

### **PART IV - ORDER REQUESTED**

#### **A. FirstOnSite GP Should be Granted Protection Under the CCAA**

##### **i. FirstOnSite GP is a "Debtor Company"**

36. The CCAA applies to, among others, a "debtor company" whose liabilities exceed \$5 million. A "debtor company" is defined in the CCAA as, *inter alia*, a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as amended, the "BIA"). The CCAA defines "company" as, among other things,

Any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province...

CCAA s. 2(1) "debtor company", "company" and CCAA s. 3(1)

37. FirstOnSite GP, a private company incorporated pursuant to the laws of Ontario in 2007, is a "company" by definition. Although the CCAA does not define the term "insolvent," the definition of "insolvent person" under section 2(1) of the BIA is well-established to be the governing definition in applications under the CCAA. The definition of "insolvent person" in the BIA is as follows:

... "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

BIA, s. 2, "insolvent person".

38. Insolvency is a factual situation where a debtor is unable to pay its creditors in the ordinary course. In *Stelco*, Justice Farley applied an expanded definition of insolvent in the CCAA context to reflect the "rescue" emphasis of the CCAA, modifying part (a) of the BIA's definition of "insolvent person" to include a financially troubled company that is "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

*Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60 ["*Century Services*"] at para. 12, Applicants' BOA, Tab 1.

*Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.) [Comm. List] ["*Stelco*"], paras 21-22, Applicants' BOA, Tab 2.



39. FirstOnSite GP's precarious financial situation has rendered it insolvent within the definition contemplated in the BIA and pursuant to the expanded definition set out in *Stelco*. FirstOnSite GP is incapable of satisfying the substantial and accelerated payment obligations triggered by the Credit Defaults. As illustrated by the consolidated financial statements, its total liabilities substantially outstrip total assets. If any secured creditors attempt to realize on their security, FirstOnSite GP will be forced into liquidation, wherein its realizable liquidation value will not suffice to satisfy its aggregate debt.

Demos Affidavit, Application Record, Tab 2 at para. 107-115.

40. Finally, FirstOnSite GP has total liabilities far in excess of \$5 million: as at February 29, 2016, FirstOnSite GP had total liabilities of \$161.36 million.

Demos Affidavit, Application Record, Tab 2 at para. 54.

41. For all of the foregoing reasons, and given that FirstOnSite GP is both balance sheet and cash flow insolvent, FirstOnSite GP is a "debtor company" to which the CCAA applies and is eligible to apply for CCAA protection.

**ii. An Order Granting a Stay of Proceedings is Appropriate**

42. Section 11.02(1) provides the Court, on the initial application of a debtor company, with the general power to, among other things, stay, restrain or prohibit the commencement of any action, suit or proceeding. Section 11.02(3) requires that the debtor company satisfy the Court that circumstances exist that make the order appropriate.

CCAA ss. 11.02(1) and 11.02(3)

43. The CCAA is "remedial legislation entitled to a liberal interpretation". In *Lehndorff*, Justice Farley recognized that a central purpose of the CCAA is to facilitate "ongoing operations of a business where its assets have a greater value as part of an

integrated system than individually” (avoiding a piecemeal liquidation that would erode value for stakeholders by squandering the integrated value in the debtor business):

...Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA.

[...]

One of the purposes of the CCAA is to facilitate the ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors...[T]he purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally.

*Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div. [Comm. List]) [*“Lehndorff”*] at para. 7, Applicants’ BOA, Tab 3.

44. A stay of proceeding is appropriate relief in circumstances where a debtor will seek approval of a going concern sale of all or substantially all of its assets, the ultimate result of which will be to preserve its business for the benefit of its stakeholders. As Justice Morawetz (as he then was) explains in *Re Nortel Networks Corp*:

...The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

*Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List]) [*“Nortel Networks”*], para. 47, Applicants’ BOA, Tab 4.

45. The power to grant a stay of proceedings should be construed broadly in order to facilitate the CCAA's legislative purpose and to enable continuance of the company

seeking CCAA protection. The exercise of that power is appropriate in the present case.

*Lehndorff*, at para. 10, Applicants' BOA, Tab 3.

46. In *First Leaside*, Justice Brown (as he then was) stressed that, although a liquidation CCAA is uncommon, "the reality is that reorganizations of different complexity require different legal mechanics" and, as such, the "CCAA may be used to sell substantially all of the assets of a debtor company to preserve it as a going concern under new ownership".

*First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 [*"First Leaside"*], at para. 32, Applicants' BOA, Tab 5.

47. FirstOnSite GP requires CCAA protection to allow it to maintain operations while giving it the necessary time to seek court approval of the Sale Transaction and to maximize recovery for all stakeholders, including its over 900 employees and numerous Suppliers. Without CCAA protection, a shut-down of operations is inevitable.

Demos Affidavit, Application Record, Tab 2 at para. 7-12

48. Ultimately, FirstOnSite GP satisfies the definition of a "debtor company" and circumstances otherwise such that an order granting a stay of proceeding and other protections of the CCAA appropriate within the meaning contemplated in section 11. For all the foregoing reasons, the stay of proceeding sought herein should be granted.

## **B. This Court Should Extend CCAA Protection to FirstOnSite LP**

### **i. Overview**

49. FirstOnSite GP seeks to extend the stay of proceeding and other ancillary relief requested in the draft Initial Order to FirstOnSite LP.

Demos Affidavit, Application Record, Tab 2 at para. 4

**ii. The Jurisdiction to Extend CCAA Protection to FirstOnSite LP**

50. The Courts consistently exercise their inherent and statutory jurisdiction to stay proceedings with respect to limited partnerships if it is just and convenient, despite that the CCAA definition of a “debtor company” does not expressly include limited partnerships. The Courts have repeatedly held, generally, that extending CCAA protection is appropriate if the operations of the applicant are so intertwined with those of the partnerships or limited partnerships in question that not extending CCAA protection would undermine the effectiveness of such relief in respect of the applicant.

*Priszm Income Fund (Re)*, 2011 ONSC 2061 [*Priszm Income Fund*] at paras. 26-28, Applicants BOA, Tab 6.

*Re Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184 (S.C.J.) [*Canwest Global*], at para. 29, Applicants’ BOA, Tab 7.

*Lelmdorff*, at paras. 16-20, Applicants’ BOA, Tab 3.

*Calpine Canada Energy Ltd. (Re)* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.), [*Calpine*] at paras. 30-34, Applicants’ BOA, Tab 8.

*Courts of Justice Act*, RSO 1990, c C.43 s. 106.

**iii. It is Just and Convenient to Extend CCAA Protection to FirstOnSite LP**

51. FirstOnSite LP is inseparably intertwined with FirstOnSite GP. FirstOnSite LP is the entity that owns the vast majority of the operating assets and carries on the business of FirstOnSite. It is also the counterparty to the majority of the FirstOnSite’s critical contracts, leases and each credit instrument detailed herein. FirstOnSite GP has no source of income independent from FirstOnSite LP and is entirely dependent on the business, assets and performance of FirstOnSite LP for its continued operation.

Demos Affidavit, Application Record, Tab 2 at 16-23.

52. Failure to extend CCAA protection to FirstOnSite LP would have a significant, detrimental impact on the value of FirstOnSite and meaningfully impair FirstOnSite

GP's ability of to avail itself of the CCAA protection to which is justifiably entitled. Exposing the assets of FirstOnSite LP to the demands of its creditors would make it impossible for FirstOnSite to achieve a going concern sale, to the substantial detriment of all stakeholders, and contrary to the well-established jurisprudence.

*First Leaside*, at para. 30, Applicants' BOA, Tab 5.

*Calpine*, at paras. 32 and 34, Applicants' BOA, Tab 8.

*Lehndorff*, at para. 21, Applicants' BOA, Tab 3.

53. Without the benefit of CCAA protection in favour of FirstOnSite LP, piecemeal liquidation is inevitable. In *Century Services*, the Supreme Court of Canada held that a principal purpose of the CCAA is to avoid the "social and economic cost" of a piecemeal liquidation. In *First Leaside*, Justice Brown unequivocally held that a going concern sale through the CCAA is preferable to such an outcome. Extending CCAA protection to FirstOnSite LP is necessary to avoid the "inefficiency and chaos" that would attend this insolvency if creditors were able to pursue their individual remedies against it's the assets.

*Century Services*, at paras. 15-18, 22, 24 and 70, Applicants' BOA, Tab 1.

*First Leaside*, at paras. 30-33, Applicants' BOA, Tab 5.

*Lehndorff*, para 10, Applicants' BOA, Tab 6.

54. For all of the foregoing reasons, FirstOnSite GP respectfully submits that this Court should extend the CCAA protection to FirstOnSite LP.

## **C. The Administration Charge Should be Granted**

### **i. Overview of the Administration Charge**

55. FirstOnSite seeks a charge on the assets, property and undertakings of the FirstOnSite (the "Property") in the maximum amount of \$1 million to secure the fees and disbursements incurred in connection with services rendered to FirstOnSite both before and after the commencement of the CCAA proceedings by: (i) Stikeman Elliott

LLP; (ii) the Monitor and its counsel Goodmans LLP; and (iii) A&M for “work fees” incurred in its capacity as Financial Advisor (the “**Administration Charge**”).

Demos Affidavit, Application Record, Tab 2 at para. 141.

56. The Administration Charge is proposed to rank ahead in priority to the existing security interests of the ABL Lenders BDC, Capital and Torquest, but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, the “**Encumbrances**”) in favour of any persons that have not been served with notice of this application.

Demos Affidavit, Application Record, Tab 2 at para. 143.

**ii. The Court has the Jurisdiction to Grant the Administration Charge**

57. Section 11.52 of the CCAA expressly provides for the jurisdiction to grant the Administration Charge:

**11.52(1) Court may order security or charge to cover certain costs –** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor’s duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

**11.52(2) Priority –** This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

CCAA, s. 11.52.

**iii. The *Canwest* Factors Support Granting the Administration Charge**

58. In *Re Canwest Publishing Inc.*, Justice Pepall considered the following factors in addition to the considerations enumerated in section 11.52:

- (a) the size and complexity of the business being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the monitor.

*Canwest Publishing Inc. (Re)* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Comm. List]) [*“Canwest Publishing”*] at para 54, Applicants’ BOA, Tab 9.

59. The appropriate quantum of an administration charge is a question of fact to be assessed in the totality of the circumstances of a case. The following factors support the granting of the Administration Charge in the quantum requested:

- (a) FirstOnSite is one of the largest entities in an industry with annual sales in excess of \$2.0 billion, employing over 900 people across North America, and operates a complex, multi-jurisdictional business that requires, *inter alia*, dealing with a hundreds of Suppliers in the ordinary course;
- (b) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout the CCAA proceedings, without which FirstOnSite will not be able to successfully navigate the CCAA proceeding;

- (c) the beneficiaries of the Administration Charge each provide unique services, and there is no anticipated unwarranted duplication of their roles;
- (d) the Administration Charge does not purport to prime any secured party who has not received notice of this Application;
- (e) the quantum of the administration charge was determined following careful consultation with the proposed Monitor and discussions with other key financial stakeholders of FirstOnSite, including Wells Fargo in its capacity as the ABL Agent and the DIP Lender and BDC and Capital; and
- (f) the proposed Monitor supports the Administration Charge on the terms sought herein.

Demos Affidavit, Application Record, Tab 2 at paras. 141-144.

The pre-filing report of FTI Consulting Canada Inc. ("FTI") in its capacity as proposed Monitor (the "Pre-Filing Report") at paras. 60 and 63, to be filed separately.

60. For all of the foregoing reasons, FirstOnSite submits it is appropriate in this case to grant the Administration Charge sought herein. Each of the proposed beneficiaries will play a critical role in FirstOnSite's restructuring and it is unlikely that the above-noted advisors will participate in the CCAA unless the Administration Charge is granted to secure their fees and disbursements.

#### **D. Approval of the DIP Facility and Granting of the DIP Lender's Charge**

##### **i. Overview of the DIP Facility and DIP Lender's Charge**

61. FirstOnSite GP seeks approval of the DIP Facility in the amount of up to \$40 million to be secured by the DIP Lender's Charge in the amount of \$15 million over the Property, ranking ahead of all other charges except the Administration Charge, and the security interest of any person who is a "secured creditor", as defined in the



CCAA, with notice of the application for CCAA protection as of the date of the Order sought herein.

Demos Affidavit, Application Record, Tab 2 at paras. 134, 137-140.

**ii. The Jurisdiction to Approve a DIP Facility and grant a DIP Charge**

62. Section 11.2 of the CCAA provides express jurisdiction to this Court to approve the DIP Facility and to grant the DIP Charge:

**11.2(1) Interim Financing** – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

**11.2(2) Priority – Secured Creditors** – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

CCAA, s. 11.2.

63. Sub-section 11.2(4) sets out the factors to be considered by the Court in deciding whether to grant a DIP charge pursuant to section 11.2(2):

**11.2(4) Factors to be considered** – In deciding whether to make an order, the court is to consider, among other things:

(a) the period during which the company is expected to be subject to proceedings under the CCAA;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report.

CCAA, s. 11.2(4).

**iii. The Criteria Set out in Section 11.2(1) of the CCAA are Satisfied**

64. In *Canwest Global*, Justice Pepall stressed the importance of meeting the criteria set out in s. 11.2(1), namely:

- (a) whether notice has been given to secured creditors likely to be affected by the security or charge;
- (b) whether the amount to be granted under the DIP Facility is appropriate and required having regard to the debtors' cash-flow statement; and
- (c) whether the DIP Lender's Charge secures an obligation that existed before the Order was made.

*Canwest Global*, at paras. 32-34, Applicants' BOA, Tab 7.

65. In the present matter, the following factors support approving the DIP and granting the DIP Lender's Charge:

- (a) The DIP Lender's Charge does not purport to prime any secured party who has not received notice of this Application;
- (b) FirstOnSite expects to continue daily operations throughout the CCAA;
- (c) The management of FirstOnSite's business throughout the CCAA process will be overseen by the Monitor, who will supervise spending under the DIP Facility;

- (d) FirstOnSite LP urgently requires the interim financing under the DIP Facility to continue to operate as a going concern. Without the interim financing available under the DIP Facility, FirstOnSite would be forced to immediately cease operations, which would be extremely detrimental to closing the Sale Transaction and maximizing stakeholder returns;
- (e) Based on the FirstOnSite's cash-flow forecast, the DIP Facility is sufficient to allow continued operations during the pendency of the CCAA;
- (f) The DIP Facility is based on the existing ABL Facility and thereby does not require any changes to the cash managements system (in fact, a condition precedent is the preservation of such system). Wells Fargo, as the existing ABL Lender, is familiar with FirstOnSite's business and operations, thereby reducing the administrative costs related to the DIP Facility;
- (g) The ability to borrow funds under the DIP Facility is crucial to retaining the confidence of FirstOnSite's creditors, employees and the Suppliers;
- (h) The proposed Monitor is supportive of the DIP Facility and the DIP Lender's Charge; and
- (i) The DIP Lender's Charge does not secure an obligation that existed before the granting of the Initial Order.

Demos Affidavit, Application Record, Tab 2 at paras. 136-140, 145-147.

Pre-Filing Report at paras. 31-35.

66. For all of the foregoing reasons, FirstOnSite GP submits that this Court should approve the DIP Facility and grant the DIP Lender's Charge on the terms sought herein.

**E. The KERPs should be Approved and the KERP Charge should be Granted**

**i. Overview of the KERPs and KERP Charge**

67. FirstOnSite GP seeks an Order approving two key executive employee retention plans (the “**First KERP**” and the “**Second KERP**”, respectively, and, collectively, the “**KERPs**”):

- (a) With respect to the First KERP, and for three employees who were identified as essential to ensuring the success of the SISP and maximizing the realizable value for the benefit of all stakeholders, payment, on the closing of the Sale Transaction, of:
  - (i) a guaranteed amount, but subject to,
  - (ii) certain increases depending on the enterprise value of any resulting restructuring transaction (if any);
- (b) With respect to the Second KERP, and for six employees who occupy essential managerial and operation roles and who are considered essential to FirstOnSite continuing to operate as a going concern through the CCAA process, a guaranteed amount equal to 90% of the annual base salary of each Second KERP Participant payable on closing the Sale Transaction.

Demos Affidavit, Application Record, Tab 2 at paras. 149-152.

68. The KERP Charge is proposed to rank subsequent to the Administration Charge and the DIP Lender’s Charge (the “**KERP Charge**”).

Demos Affidavit, Application Record, Tab 2 at paras. 158

ii. **The Jurisdiction to Approve the KERPs and Order the KERP Charge**

69. It is well-established that the general power in section 11 of the CCAA grants the jurisdiction to approve a KERP and order a charge to secure the debtor's obligations pursuant the same. In *Cinram*, Justice Morawetz (as he then was) summarized the factors to be considered in determining whether to approve a KERP and grant a KERP charge:

91.... The Court in *Re Grant Forest Products Inc.* considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

- a. whether the Monitor supports the KERP agreement and charge;
- b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
- c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
- d. the employees' history with and knowledge of the debtor;
- e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
- f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
- g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and
- h. whether the payments under the KERP are payable upon the completion of the restructuring process.

*Cinram International Inc. (Re)*, 2012 ONSC 3767 (Comm. List.) [*"Cinram"*] at para. 91, Applicants BOA, Tab 11

*Grant Forest Products Inc. (Re)*, 2009 CarswellOnt 4699 (S.C.J. [Comm. List]) [*"Grant Forest"*] at paras. 8-24, Applicant's BOA, Tab 12

*Essar Steel Algoma Inc. (Re)*, 2015 ONSC 7656 (Comm. List), at para. 10, Applicants BOA, Tab 10.

*Canwest Global* at para. 49, Applicant's BOA, Tab 7.

**iii. The *Grant Forest Products* Factors Support Granting the KERP Charge**

70. The following factors support approving the KERPs and granting the KERP Charge:

- (a) The proposed Monitor supports the KERP and the quantum of the KERP Charge sought herein;
- (b) Absent the approval of the KERP and the security provided by the KERP Charge, the KERP Participants are likely to consider other employment options;
- (c) The KERP Participants are critical to a successful restructuring, and their continued employment is essential for the stability of FirstOnSite during the pendency of the CCAA;
- (d) Each KERP Participant has an extensive history with and knowledge of FirstOnSite's business and operations, including long-standing relationships with key customers and Suppliers all of which would be very difficult to replace during the pendency of the CCAA;
- (e) At minimum, it will be highly disruptive to the restructuring effort and, given FirstOnSite's precarious financial position, expensive to find adequate and qualified replacements;
- (f) The KERP was approved by the Board, who determined that, in their business judgement, the KERP is necessary to ensure that the KERP Participants do not seek employment elsewhere;
- (g) the KERP Charge does not purport to prime any secured party who has not received notice of this Application; and
- (h) the payments under the KERP are payable only on the closing of the Sale Transaction.

Demos Affidavit, Application Record, Tab 2 at paras. 148-155.  
[Pre filing Report]

71. In *Grant Forest*, Justice Newbould stressed that the business judgement of the board of directors of the debtor company and the monitor should rarely be ignored when it comes to approving a KERP charge:

The business acumen of the board of directors of [the debtor company], including the independent directors, is one that the court should not ignore unless there is good reason of the record to ignore it. This is particularly so in light of the support of the Monitor and [the Chief Restructuring Advisor] for the KERP provisions. Their business judgement cannot be ignored.

*Grant Forest Products* at para. 18, Applicant's Book of Authorities, Tab 12.

72. In this case, the Board has determined that the approval of the KERPs are necessary to ensure the continued participant of employees essential to the restructuring process. For all of the foregoing reasons, FirstOnSite GP submits the KERPs should be approved and the KERP granted on the terms sought herein.

**F. The Engagement Letter should be Approved and Financial Advisor Charge Should be Granted**

**i. Overview of the Engagement Letter and Financial Advisor Charge**

73. FirstOnSite seeks an order approving the fees and expenses in the Engagement Letter entered into *nunc pro tunc*. The loss of A&M's services would be detrimental to FirstOnSite and its stakeholders and would delay and hinder the advancement of these CCAA proceedings. The Financial Advisor's charge is proposed to rank subordinate to all charges but for the Lien Charge.

Demos Affidavit, Application Record, Tab 2 at paras. 171-173.

**ii. The Jurisdiction to Approve Fees and Expenses of Financial Advisors**

74. Section 11.52(1)(b) of the CCA grants the jurisdiction to approve the fees and expenses of financial advisors and, in so doing, order a super-priority charge to secure them. The relevant language in section 11.52 reads as follows:

11.52 (1) ... [T]he court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of

[...]

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act...

CCAA, s. 11.52(1)(b)

75. Courts routinely grant super-priority charges securing the payment of fees and expenses of financial advisors for services rendered (or to be rendered) during the pendency of CCAA proceedings in order to ensure their participation if such fees are fair and reasonable, applying the factors set out by Justice Pepall (as she then was) in *Canwest Publishing* and referenced above.

*U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 at para. 22, Applicant's BOA, Tab 13.

*Canwest Publishing* at paras. 54-55, Applicants BOA, Tab 11.

*Target Canada Co. (Re)*, 2015 ONSC 303 at paras. 73-75, BOA, Tab 14.

76. It is within the jurisdiction of this court to order a super-priority charge to secure the payment of a success fee contingent on the closing of a sale transaction in a liquidation CCAA.

*Essar Algoma Steel Inc. (Re)*, (29 January 2016), Toronto, Court File No. CV-15-000011169-00CL (S.C.J.), Applicant's BOA, Tab 15.



**iii. The *Canwest Publishing* Factors Support Granting the Financial Advisor's Charge**

77. The following factors, set out in *Canwest Publishing* factors and reproduced further above, support approving the fee structure contained in the Engagement Letter and the Financial Advisor's Charge:

- (a) As set out with respect to the Administration Charge, the business of FirstOnSite is complex;
- (b) A&M is a well-known firm that provides investment banking and corporate advisory services to middle-market companies in troubled situations in potentially complex restructurings or reorganizations;
- (c) A&M was selected because of its familiarity with the FirstOnSite business, having already acted as a financial advisor and having already become proficient with the nature of its business and operations, thereby reducing the cost of such a retainer;
- (d) A&M provided essential services in developing and conduct the SISP that resulted in the Sale Transaction;
- (e) A&M's knowledge of and experience with FirstOnSite would be wasted if FirstOnSite were deprived of the benefit of A&M's advice and assistance and were required to retain a new financial advisor;
- (f) The fee structure contained in the Engagement Letter was the subject of significant negotiations and was approved by the Board prior to the commencement of the CCAA proceedings;
- (g) A&M fulfills a vital role in the CCAA Proceedings which could not be replicated by the other advisors to the Applicants;
- (h) The Proposed Monitor is of the view that the terms of the Financial Advisor Engagement Letter are reasonable and commensurate with market rates for such transactions; and

- (i) The continued involvement of A&M during the CCAA is essential to the completion of the CCAA process in as expeditious and inexpensive a manner as possible.

Demos Affidavit, Application Record, Tab 2 at paras. 125, 172-173.

The "Pre-Filing Report" at paras. 31-35.

78. The Financial Advisor's Charge is reasonable considering the *Canwest Publishing* factors set out above and should thereby be approved.

#### **G. The Lien Charge and Liens Claim Mechanism Should be Approved**

##### **i. Overview of the Lien Claims Mechanism and the Lien Charge**

79. FirstOnSite, in the usual course of its business as a Restoration Services provider, is party to a myriad of contractual relationships for, *inter alia*, services and materials that are essential to the work necessary to complete their projects (the "FOS Projects").<sup>6</sup> Consequently, FOS Projects are potentially subject to potential builders', mechanics' or construction liens under applicable provincial builders', mechanics' or construction lien legislation (collectively, the "Provincial Lien Legislation").

Demos Affidavit, Application Record, Tab 2 at para. 163.

80. In order to preserve the position of potential lienholders while, at the same time, ensuring that FirstOnSite is able to reorganize in an orderly fashion, the draft Initial Order contemplates a procedure whereby the rights of potential claimants ("Lien Claimants") to register any claim for lien ("Lien Claim") are stayed and substituted for a charge over the Property equal in the value to that which could have been secured by way of a lien under Provincial Lien Legislation (the "Lien Charge").

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<sup>6</sup> Funds flow through these projects from the owner/insurer to FirstOnSite, as general contractor and then from FirstOnSite to the various sub-contractors. This structure is commonly referred to as the construction pyramid.

Demos Affidavit, Application Record, Tab 2 at para. 165-166 and 168.

**ii. The Jurisdiction to Order the Lien Claims Mechanism and Grant the Lien Charge**

81. The CCAA is remedial legislation, the purpose of which “is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets”. Accordingly, it is a well-established and bedrock principle that the “the key objective” of the CCAA is “to facilitate the restructuring of corporations through flexibility and creativity” (emphasis added).

*Century Services* at paras 15, 19 and 59, Applicant's BOA, Tab 1.

*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CarswellOnt 2652 at para. 43, aff'd 2008 ONCA 587, Applicant's BOA, Tab 16.

*Nortel Networks Corporation (Re)*, 2015 ONCA 681 at para. 41, Applicant's BOA, Tab 17.

82. Section 11 of the CCAA codifies the principle articulated by Justice Blair in *Canadian Red Cross Society* – that the “efficacy” of the CCAA is its “flexibility”, even if an order is made for “the first time in Canadian jurisprudence” – by providing that the Court may “make any order that it considers appropriate in the circumstances” (emphasis added). Debtors turn to the CCAA specifically for its type of flexibility.

CCAA, s. 11

*Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, (Re)* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 45, Applicant's BOA, Tab 18.

*Century Services* at para 19, Applicant's BOA, Tab 1.

*Lehndorff* at para 5, Applicant's BOA, Tab 3.

*Chef Ready Foods Ltd (Re)* (1990), 4 CBR (3d) 311, at paras 10 and 22- 23 (B.C.C.A.), Applicant's BOA, Tab 18.

83. The broad jurisdiction set out in section 11 has been exercised by this Court to grant similar relief in a CCAA involving Comstock Canada Ltd. (“Comstock”), a

national multi-discipline construction contractor. Despite the imposition of a stay of proceeding prohibiting lien claimants from exercising any rights against Comstock, Comstock experienced significant disruptions to the flow of funds on its projects due to a cascade of post-filing construction lien registrations, as well as motions to lift the stay to permit Lien Claimants to preserve their Lien Claims. In response, Comstock sought, and the Justice Morawetz (as he then was) approved, a procedure similar to the Lien Claims Mechanism as a means of permitting an orderly restructuring.

*Comstock Canada Ltd. (Re)*, (7 August 2013), Toronto, Court File No. CV-13-10181-00CL (S.C.J.).

**iii. The Court Should Exercise Its Discretion to Approve the Lien Claims Mechanism and Grant the Lien Charge**

84. To permit the continued registration of post-filing Lien Claims and to allow any Lien Claimants to take steps under Provincial Lien Legislation to enforce the Lien Claims will imperil the restructuring of FirstOnSite and frustrate the overriding purpose of the CCAA.

85. Post-filing lien registrations against FirstOnSite's clients' properties have the potential to substantially compromise the ability of FirstOnSite to operate as a going concern. FirstOnSite relies on its professional reputation with insurers, who are its primary clients, as well as subcontractors and other Suppliers, to obtain and complete construction mandates. 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.

Demos Affidavit, Application Record, Tab 2 at para. 164

86. The Lien Claims Mechanism and Lien Charge appropriately balances between the rights and interests of the Lien Claimants while permitting FirstOnSite to restructure in an orderly fashion, all of which advances the key objectives of the

CCAA. Accordingly, FirstOnSite GP submits that the exercise of section 11 discretion to incorporate the Lien Charge and Lien Claims Mechanism is appropriate.

Demos Affidavit, Application Record, Tab 2 at para. 168

## **H. FirstOnSite Should Be Authorized to Pay Pre-Filing Amounts**

### **i. Overview**

87. FirstOnSite has identified a number of Suppliers (the “**Critical Suppliers**”) with whom a continued relationship is essential to its future success but to whom significant pre-filing obligations are owed. To ensure its continued operation, FirstOnSite seeks an order authorizing it to pay certain pre-filing amounts to the Critical Suppliers on terms set out in the draft Initial Order.

Demos Affidavit, Application Record, Tab 2 at paras. 157-159.

### **ii. The Jurisdiction to Authorize Payment of Pre-Filing Amounts**

88. The general jurisdiction to permit payment of pre-filing obligations to persons whose services are deemed to be critical to the ongoing operations of a debtor is well-settled. It is trite law that “the preservation of the *status quo*” is not synonymous with “the preservation of the relative pre-stay debt status of each creditor”. The “inherent jurisdiction” to permit the payment of pre-filing amounts is not ousted by the enactment of section 11.4 and, in any event, “[t]he general language of the CCAA should not be read as being restricted by the availability of more specific orders”.

*Canwest Global*, at paras. 41 and 43; Applicants BOA, Tab 7.

*Alberta-Pacific Terminals Ltd. (Re)*, [1991] B.C.J. No. 1065 (B.C.S.C.) at para. 23, Applicants BOA, Tab 21.

*Century Services*, at para. 12, Applicants’ BOA, Tab 1.

**iii. An Order Authorizing Payment of Pre-Filing Amounts is Appropriate**

89. Courts have frequently exercised the jurisdiction to authorize a debtor to satisfy pre-filing obligations in circumstances where the debtor did not seek a charge with respect to its critical suppliers. In *Cinram International*, Justice Morawetz (as he then was) effectively summarized the principal factors the Courts have considered as follows:

- (a) whether the goods and services are integral to the debtor's business;
- (b) whether the debtor depends on the uninterrupted supply of such goods or services;
- (c) whether such payment could be made without the Monitor's consent;
- (d) the Monitor's support and willingness to work with the debtor to minimize the payments to suppliers for pre-filing obligations;
- (e) whether the debtor had sufficient inventory of the goods on hand to meet its needs; and
- (f) the effect on the debtor's ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

*Cinram*, at para. 68, Applicants BOA, Tab 11

*Cantwest Global*, at paras. 41 and 43, Applicants BOA, Tab 7.

*Brainhunter Inc. (Re)*, [2009] O.J. No. 5207 (Sup. Ct. J. [Commercial List]) at para. 21; Applicants BOA, Tab 22.

*Priszm Income Fund*, at paras. 29-34; Applicants BOA, Tab 6.

90. In the present matter, the following factors support this Court's exercise of discretion to authorize FirstOnSite to pay certain pre-filing amounts on the terms set out in the draft Initial Order:

- (a) FirstOnSite operates in a highly competitive and time-sensitive business (particularly with respect to the emergency branch of its

- services) where timely and uninterrupted provision of supplies to a project is necessary to ensure the continued operation of the business;
- (b) FirstOnSite procures suppliers, and particularly labour, on a per project basis, and labour-related services cannot be procured in advance, thereby making the continued relationship with individual Critical Suppliers essential to continuing to operate the business;
  - (c) Any interruption of supply or service by the Critical Suppliers could have an immediate materially adverse impact on FirstOnSite's business, operations and cash flow, and could thereby seriously jeopardize its ability to restructure and continue as a going concern;
  - (d) The proposed Monitor is supportive of the relief sought herein, including the threshold for Monitor approval of a given transaction;
  - (e) Consent of the Monitor is required for any proposed pre-filing payment in excess of \$10,000, which threshold is a necessary function of the nature of FirstOnSite's business (the volume of transactions for which consent would be required at a lower threshold would result in a prohibitively expensive if not an outright unworkable requirement);
  - (f) The bids submitted in the SISP reflected that these proposed payments to Critical Suppliers would be made in the ordinary course throughout these CCAA proceedings or assumed by the bidder, with the purchase price reduced accordingly.

Demos Affidavit, Application Record, Tab 2 at paras. 32-33, 160-162.

Pre-filing Report at paras. [39-42].

91. For all of the foregoing reasons, FirstOnSite GP submits that it should be authorized to pay the pre-filing amounts on the terms sought herein.

## I. The Confidential Supplement to the Pre-Filing Report Should be Sealed

92. Pursuant to the Ontario *Courts of Justice Act*, this Court has the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

*Courts of Justice Act*, RSO 1990, c C.43 s. 137(2).

93. In *Sierra Club of Canada v. Canada (Minister of Finance)*, Justice Iacobucci adopted the following test to determine when a sealing order should be made

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 53, Applicant's BOA Tab 23.

94. Orders sealing confidential supplements relating to KERPs containing sensitive personal and compensation information have been granted by this Court on a number of occasions.

*Canwest Global*, at para. 52, Applicants' BOA, Tab 7.

*Canwest Publishing*, at para. 65, Applicants' BOA, Tab 9.

95. The Confidential Supplement contains sensitive personal and compensation information about the KERP Participants. Protecting the disclosure of such sensitive



personal and compensation information (the disclosure of which will cause harm to both the Applicants and the KERP Participants) is an important commercial interest that should be protected. Moreover, the KERP Participants have a reasonable expectation that their names and salary information will be kept confidential.

96. The salutary effects of sealing the Confidential Supplement - namely the protection of commercially sensitive and personal information that could negatively affect the Applicants and the KERP Participants if disclosed - outweigh any deleterious effect of restricting the accessibility of court proceedings.

97. The Monitor supports the sealing of the Confidential Supplement for substantially the reasons discussed above.

Pre-filing Report at para. [61].

#### **PART V - ORDER SOUGHT**

98. For all of the foregoing reasons, FirstOnSite GP request an Order substantially in the form of the draft Initial Order attached as Tab 3 to the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of April, 2016.

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Stikeman Elliott LLP  
Lawyers for the Plaintiff

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60.
2. *Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.) [Comm. List].
3. *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div. [Comm. List]).
4. *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List]).
5. *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299.
6. *Priszm Income Fund (Re)*, 2011 ONSC 2061.
7. *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184 (S.C.J.).
8. *Calpine Canada Energy Ltd. (Re)* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.).
9. *Canwest Publishing Inc. (Re)* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Comm. List]).
10. *Essar Steel Algoma Inc. (Re)*, 2015 ONSC 7656 (Comm. List).
11. *Cinram International Inc. (Re)*, 2012 ONSC 3767 (Comm. List.).
12. *Grant Forest Products Inc. (Re)*, 2009 CarswellOnt 4699 (S.C.J. [Comm. List]).
13. *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145.
14. *Target Canada Co. (Re)*, 2015 ONSC 303.
15. *Essar Algoma Steel Inc. (Re)*, (29 January 2016), Toronto, Court File No. CV-15-000011169-00CL (S.C.J.).
16. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CarswellOnt 2652, *aff'd* 2008 ONCA 587.
17. *Nortel Networks Corporation (Re)*, 2015 ONCA 681.
18. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, (Re)* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Comm. List]).
19. *Chef Ready Foods Ltd (Re)* (1990), 4 CBR (3d) 311, (B.C.C.A.).

20. *Comstock Canada Ltd. (Re)*, (7 August 2013), Toronto, Court File No. CV-13-10181-00CL (S.C.J.).
21. *Alberta-Pacific Terminals Ltd. (Re)*, [1991] B.C.J. No. 1065 (B.C.S.C.).
22. *Brainhunter Inc. (Re)*, [2009] O.J. No. 5207 (S.C.J. [Commercial List]).
23. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41.

**SCHEDULE "B"**  
**RELEVANT STATUTES**

*Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3*

**2. Definitions**

In this Act,

...

**"insolvent person"** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

*Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36*

**2. Definitions**

In this Act,

[...]

**"company"** means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;

[...]

**"debtor company"** means any company that

- (a) is bankrupt or insolvent,
- (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and*

*Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

[...]

### **3(1). Application**

(1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

[...]

## **11. General power of court**

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.

[...]

### **11.02. Stays, etc. – initial application**

(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(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.

### **Stays, etc. – other than initial application**

(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**

(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**

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

## **11.2 Interim financing**

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

### **Priority — secured creditors**

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

### **Priority — other orders**

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

### **Factors to be considered**

(4) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

#### **11.52 Court may order security or charge to cover certain costs**

(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

#### **Priority**

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[...]

*Courts of Justice Act, R.S.O. 1990, c. C-43*

**106 Stay of proceedings**

A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

**137 Documents public**

(1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

**Sealing documents**

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.



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

Court File No. \_\_\_\_\_

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

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(RETURNABLE APRIL 21, 2016)**

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