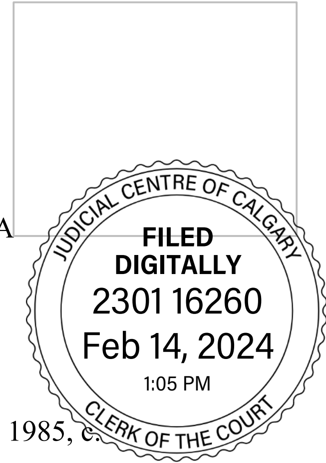
Clerk's Stamp



COURT FILE NUMBER	2301-16260
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PROCEEDING	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 FREE REIN RESOURCES LTD.
APPLICANT	INVICO DIVERSIFIED INCOME LIMITED PARTNERSHIP, by its general partner, INVICO DIVERSIFIED INCOME MANAGING GP INC.
RESPONDENT	FREE REIN RESOURCES LTD.
DOCUMENT	**BRIEF OF LAW OF INVICO DIVERSIFIED INCOME LIMITED PARTNERSHIP**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Fasken Martineau DuMoulin LLP** Barristers and Solicitors Suite 3400, 350 7 Avenue SW Calgary Alberta T2P 4K9 **Solicitor: Robyn Gurofsky / Anthony Mersich** Telephone: (403) 261 9469 / (587) 233 4124 Email: rgurofsky@fasken.com / amersich@fasken.com File Number 324505.00011

BRIEF OF LAW OF INVICO DIVERSIFIED INCOME LIMITED PARTNERSHIP
APPLICATION TO BE HEARD BY
THE HONOURABLE JUSTICE M. HOLLINS

February 23, 2024 at 2:00 p.m.

TABLE OF CONTENTS

INTRODUCTION **1**

FACTS **2**

Free Rein prior to creditor protection 3

The NOI Proceeding 3

The Tidewater Gas Plant shut down and CCAA Continuation 4

Progress since the commencement of the CCAA Proceedings 5

The proposed Transaction 6

ISSUES **8**

LAW AND ARGUMENT **9**

A. The Transaction should be approved **9**

(a) The Transaction satisfies the factors provided at CCAA s. 36(3) and the Soundair principles 9

(b) The Transaction satisfies the Harte Gold principles 12

The RVO Structure is necessary 14

The RVO Structure provides the most favourable result 15

No stakeholder is worse off due to the RVO Structure 15

The consideration reflects the value of the Licenses 16

B. The GORRs should be vested out and transferred to the Residual Trust **16**

(a) The Newgrange GORR 17

The Newgrange GORR is intended to preserve a risk-free business opportunity 18

Newgrange's prior conduct confirms mere contractual interest 21

The Newgrange GORR is not carved from an interest in land 22

The Newgrange GORR should be vested out 24

(b) The Shareholder GORR 26

Invico did not consent to the Newgrange GORR 26

The Shareholder GORR arises from an equity interest 27

The Shareholder GORR does not grant an interest in land 28

Every factor of the Dianor Test supports vesting out the Shareholder GORR 29

c) The Legacy Agreement 30

The balance of equities favours vesting off of the ROFR provision within the Legacy Agreement 32

CONCLUSION **35**

LIST OF AUTHORITIES **37**

INTRODUCTION

1. This Brief of Law is submitted by Invico Diversified Income Limited Partnership, by its general partner, Invico Diversified Income Managing GP Inc. ("**Invico**" or the "**Applicant**") in support of its Application, returnable February 23, 2024 (the "**Application**"), for an Order:

   (a) approving the term sheet and subscription agreement (the "**RVO Transaction Documents**") and the transaction contemplated thereby (the "**Transaction**") for the sale of Free Rein to Invico or its nominee;

   (b) authorizing and directing the Monitor to execute the necessary RVO Transaction Documents to consummate the Transaction on the terms set out in the RVO Transaction Documents, which will result in Invico or its nominee being the sole shareholder of Free Rein Resources Ltd. ("**Free Rein**")

   (c) vesting the Transferred Assets and Transferred Liabilities (each defined in the RVO Transaction Documents) in a residual trust (the "**Residual Trust**") for the benefit of certain of Free Rein's creditors;

   (d) declaring that all claims and encumbrances in respect of Free Rein and its Property, other than the Retained Liabilities (as defined in the RVO Transaction Documents), shall continue to attach to the Transferred Assets with the same nature and priority as they had immediately prior to the Effective Time (as defined in the RVO Transaction Documents);

   (e) declaring that all claims and encumbrances other than the Retained Liabilities shall be irrevocably and forever expunged and discharged as against Invico or its nominee, Free Rein and the Retained Assets;

   (f) declaring that a Joint Venture agreement between Free Rein and Legacy Disposal Facility Ltd. ("**Legacy**" and such agreement being the "**Legacy Agreement**") relating to a disposal well having unique well identifying number 02/13-23-051-27W4 (the "**Disposal Well**"), is null and void; and

   (g) removing Free Rein from this CCAA proceeding and replacing it with the Residual Trust and terminating this CCAA proceeding upon filing of a termination certificate from the Monitor.

2. Free Rein commenced its court-supervised restructuring on June 12, 2023 by filing a Notice of

Intention to File a Proposal ("**NOI**" and such proceedings being the "**NOI Proceedings**") under Part III of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("**BIA**"). In the NOI Proceedings, Free Rein conducted a sale and investment solicitation process ("**SISP**") that generated no final and binding offers because of a material adverse event in late November, 2023, shortly after the SISP's bid deadline had closed, resulting in the shut-in of all of Free Rein's producing assets, significantly adversely affecting the value of Free Rein's business and property. As a result of the adverse event, two third-party bids that had been submitted could not be advanced, leaving Invico's stalking horse bid as the only remaining available transaction.

3. On December 7, 2023, the NOI Proceedings were continued under these *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**") in order to provide Invico with sufficient time to conduct appropriate diligence on certain contracts and prepare the necessary definitive documents to consummate a share transaction (i.e. the Transaction) by way of reverse vesting order ("**RVO**"). Invico, being Free Rein's senior secured creditor and fulcrum creditor, is the only remaining party that is willing to transact with Invico, and is doing so to preserve the value of its security.

4. The Transaction follows the SISP, which thoroughly marketed Free Rein's property and business and was conducted fairly and with integrity. The Transaction is in the best interests of Free Rein's stakeholders because, among other things, it preserves Free Rein's business as a going concern and avoids a liquidation of Free Rein's assets through a bankruptcy, which would likely result in numerous oil and gas assets being transferred to the Orphan Well Association.

5. The RVO structure is necessary in the circumstances, since it allows for the beneficial transfer of Free Rein's oil and gas licenses without having to proceed through the Alberta Energy Regulator's ("**AER**") license transfer process, which would be costly, create uncertainty, and regardless of the outcome, cause delays. Further, the RVO structure may preserve certain of Free Rein's tax attributes. No stakeholder is worse off as a result of consummating the Transaction by way of the RVO, and the opposite would be true if the Transaction was not consummated. Accordingly, Invico respectfully requests that the Transaction be approved in the submitted form, and that the RVO be granted.

FACTS

6. A more detailed review of the facts are set out in the Affidavit of Chris Wutzke, sworn on December 4, 2023 (the "**Wutzke #1 Affidavit**"), the Affidavit of Chris Wutzke sworn on January 15, 2024 (the "**Wutzke #2 Affidavit**") and the Affidavit of Chris Wutzke sworn on February 2,

2024 (the "**Wutzke #3 Affidavit**"). A summary of the key facts are set out below.

7. Capitalized terms not defined in this Brief have the meanings given to them in the Wutzke #1 Affidavit, the Wutzke #2 Affidavit and the Wutzke #3 Affidavit, unless otherwise defined.

Free Rein prior to creditor protection

8. Free Rein is an oil and gas exploration and production company with assets in the Goldenspike region, southwest of Edmonton, Alberta.[1] At all material times, Terry McCallum ("**Mr. McCallum**") was the Chairman, CEO and directing mind of Free Rein.[2]

9. Invico is Free Rein's lender, holding a fixed and floating charge security interest registered in first position over all of Free Rein's assets.[3] Free Rein currently owes approximately $6.3 million in secured indebtedness to Invico pursuant to a loan agreement that was initially entered into on September 21, 2022,[4] and was amended and restated on April 18, 2023.[5]

10. Shortly after Invico advanced the initial tranche of funds to Free Rein under the loan agreement, Free Rein encountered operating challenges while conducting its drilling and completion program, which resulted in significantly lower production levels than projected.[6]

The NOI Proceeding

11. During early 2023, Free Rein experienced higher costs and generated lower hydrocarbon production than had been forecast, which caused significant financial difficulties for Free Rein. As a result, approximately nine days after receiving a demand letter from Invico accompanied by a notice of intention to enforce security pursuant to section 244 of the BIA, Free Rein filed the NOI and commenced the NOI Proceedings on June 12, 2023.[7]

12. During the NOI Proceedings, Free Rein conducted a sale and investment solicitation process ("**SISP**") for the sale of its business and assets, commencing in late August of 2023. The SISP was pre-approved by the Court and supervised and administered by FTI Canada Consulting Inc., in its then capacity as proposal trustee (the "**Proposal Trustee**").[8]

[1] Wutzke #1 Affidavit at para 9.
[2] Wutzke #1 Affidavit at para 10.
[3] Wutzke #1 Affidavit at para 8.
[4] Wutzke #1 Affidavit at para 13.
[5] Wutzke #1 Affidavit at para 30.
[6] Wutzke #1 Affidavit at para 20.
[7] Wutzke #1 Affidavit at para 35.
[8] Wutzke #1 Affidavit at para 39.

13. Under the SISP, Invico provided a stalking horse term sheet (the "**Stalking Horse Term Sheet**") that contemplated a credit bid in the amount of all of the secured indebtedness owing by Free Rein to Invico. The Stalking Horse Term Sheet provided that Invico could advance its bid either in the form of an asset purchase, or in the form of a share transaction.[9]

14. Further, as part of the SISP, after September of 2023, Free Rein suspended payments on all of its gross overriding royalties with the intention that payment arrears would be addressed as a "cure cost" in a successful transaction resulting from the SISP.[10] However, despite Free Rein suspending its royalty payments during the SISP, Mr. McCallum caused Free Rein to issue royalty payments to a company that he owns and controls, called Newgrange Energy Inc ("**Newgrange**") on September 7, November 5 and November 22, 2023, in the amounts of $23,292, $21,730, and $25,390, for the production months of July, August and September 2023, respectively. Newgrange was the only recipient of a royalty payment on account of September 2023 production.[11]

15. The Phase 2 Bid Deadline under the SISP occurred on November 6, 2023. At that time, two formal offers were received for the purchase of Free Rein's business and assets, excluding the Stalking Horse Term Sheet.[12]

The Tidewater Gas Plant shut down and CCAA Continuation

16. On November 15, 2023, just over a week after the Phase 2 Bid Deadline, Tidewater Midstream and Infrastructure Ltd. ("**Tidewater**"), who owns the gas plant (the "**Tidewater Gas Plant**") through which all of Free Rein's gas production flows and is processed, advised Free Rein that it anticipated that the inlet gas volumes at the Tidewater Gas Plant would not be sufficient for the Tidewater Gas Plant to be safely run. Tidewater indicated that, as a result, it would be shutting down the Tidewater Gas Plant as of November 30, 2023 and would be unable to accept Free Rein's production at the Tidewater Gas Plant after November 30, 2023. Tidewater advised that it anticipated issuing "force majeure" notices to Free Rein under the Gas Handling Agreement and the Emulsion Handling Agreement (the "**Force Majeure Notice**").[13]

17. As a result of the Tidewater Gas Plant's shut down, Free Rein was forced to shut in all of its producing wells for an unknown period of time. Consequently, the parties that had submitted offers prior to the Phase 2 Bid Deadline did not advance their proposals any further, and no

[9] Wutzke #1 Affidavit at para 41.
[10] Wutzke #3 Affidavit at para 52.
[11] Wutzke #3 Affidavit at para 53.
[12] Wutzke #1 Affidavit at para 44.
[13] Wutzke #1 Affidavit at para 45.

qualified bids were thereafter received.[14]

18. In light of the fact that there were no offers for Free Rein's business or assets at the conclusion of the SISP, Invico advised the Proposal Trustee and Free Rein that it wished to advance the share transaction contemplated by the Stalking Horse Term Sheet, in order to protect the value of its security;[15] however, Invico required additional time to conduct due diligence and prepare the definitive documents to consummate the share transaction.[16] At that time, the NOI Proceedings had been underway for approximately five and a half months, and were nearing the ultimate six month deadline provided by BIA s. 50.4(9).

19. As a result, pursuant to Invico's application as Free Rein's secured creditor, the NOI Proceedings were continued under the CCAA pursuant to an Initial Order and an Amended and Restated Initial Order ("**ARIO**") granted concurrently by the Honourable Justice J.T. Nielson on December 7, 2023.[17]

Progress since the commencement of the CCAA Proceedings

20. All of Free Rein's producing oil and gas assets (the "**O&G Assets**") were shut-in on or around November 30, 2023 as a result of the Force Majeure Notice from Tidewater.[18]

21. On December 13, 2023, Free Rein, with the assistance of representatives from Invico, submitted a letter to the Alberta Energy Regulator (the "**AER**") seeking emergency permission to flare gas volumes produced from three wells capable of producing both oil and natural gas (the "**Emergency Flaring Application**"). If granted, such permission would allow Free Rein to produce oil from those three wells to be trucked to a refinery, and to flare (i.e. combust) the produced gas at the well-head (i.e. "associated gas") obviating the need for the gas to be processed at a gas plant.[19]

22. December 18, 2023 the AER granted Free Rein emergency permission to flare the natural gas produced from three wells on a temporary basis (the "**Temporary Flaring Permission**"), on the express understanding that Free Rein would seek formal authorization to flare or incinerate produced gas and investigate and perform analysis of alternative solutions to conserve the

[14] Wutzke #1 Affidavit at paras 46-48.
[15] Wutzke #2 Affidavit at para 12.
[16] Wutzke #2 Affidavit at para 13.
[17] Wutzke #2 Affidavit at paras 13 – 14.
[18] Wutzke #2 Affidavit at para 16.
[19] Wutzke #2 Affidavit at para 18.

associated gas.[20]

23. Free Rein commenced production from the three wells on or around December 20, 2023. Average production from these wells is approximately 82 barrels of oil per day.[21] The proceeds from the sale of this production assists in mitigating the costs of operating and running these proceedings, however, it does not cover the entirety of such costs.[22]

24. Since the continuation of these proceedings under the CCAA, Invico has also spent considerable time and effort conducting due diligence of Free Rein's books and records with a view of completing the proposed Transaction. This process was complicated by the significant information gaps and missing documents in Free Rein's records.[23]

The proposed Transaction

25. Invico has negotiated the Subscription Agreement with the Monitor for the Transaction and in respect of the shares of Free Rein, and seeks the Court's approval thereof by way of reverse vesting order. The Subscription Agreement provides that the Share Purchaser (being Invico or its nominee) will be issued one million shares common shares in Free Rein, and will ultimately hold all of the issued and outstanding common shares of Free Rein at closing.[24]

26. The Transaction also contemplates that certain of Free Rein's assets and liabilities will be retained by Free Rein (the "**Retained Assets**" and "**Retained Liabilities**", respectively) and that certain assets and liabilities would be transferred (the "**Transferred Assets**" and "**Transferred Liabilities**", respectively) to the Residual Trust for the benefit of Free Rein's creditors. A complete list of the Retained Assets, Retained Liabilities, Transferred Assets and Transferred Liabilities is provided at paragraphs 19-22 of the Wutzke #3 Affidavit.

27. In particular, Invico seeks to have two gross-overriding royalties ("**GORRs**" and each, a "**GORR**") granted in favour of Newgrange (the "**Newgrange GORR**") and in favour of certain of Free Rein's shareholders (the "**Shareholder GORR**") vested out and transferred to the Residual Trust as Transferred Liabilities. Invico seeks this relief as the GORRs further impair the already impaired value of the assets, making them uneconomic. Further, and as set out below, these particular GORRs may be vested off as these GORRs are in form and substance, grants of

[20] Wutzke #2 Affidavit at para 19.
[21] Wutzke #2 Affidavit at para 20.
[22] See for example the First Report of the Monitor dated January 17, 2024 at Appendix "A".
[23] Wutzke #2 Affidavit at paras 22-24.
[24] Wutzke #3 Affidavit at Exhibit "B".

longer term economic interests, as opposed to transfers of specific mineral interests, to related parties. In other words, the circumstances in which they were granted and the characteristic they bear do not represent a traditional royalty in the oil and gas context.

28. The Newgrange GORR:

(a) was granted as part of a sale transaction of oil and gas assets from Newgrange to Free Rein that also contemplated a purchase price of $750,000.[25] Newgrange had purchased those same assets five months earlier from the receivership of Questfire Energy Corp. for $250,000,[26] and performed no work or improvements on those assets during that period.[27]

(b) was purportedly granted by Free Rein at a time when Free Rein had no interest in the subject royalty lands;[28]

(c) purports to apply to additional "mutual interest lands" in which neither Free Rein nor Newgrange have ever held an interest;[29] and

(d) appears to be subject to a condition agreed to by Mr. McCallum, that it is only payable "when it is commercially reasonable to do so." [30]

29. The Shareholder GORR:

(a) was purportedly granted at a time when Free Rein was experiencing significant operating challenges, and was in default of its debt service coverage ratio covenant under the Loan Agreement with Invico;[31]

(b) was purportedly granted without Invico's prior consent;[32]

(c) was purportedly granted to incentivize Free Rein's existing equity holders to advance funds for capital costs associated with the completion of a potentially productive "up hole" geologic formation in an existing well (the "**Completion**");[33]

---

[25] Wutzke #3 Affidavit at para 45.
[26] Wutzke #3 Affidavit at par 38.
[27] Wutzke #3 Affidavit at para 49.
[28] Wutzke #3 Affidavit at para 47(a).
[29] Wutzke #3 Affidavit at paras 47(d), 48.
[30] Wutzke #3 Affidavit at para 50(b).
[31] Wutzke #3 Affidavit at para 55.
[32] Wutzke #3 Affidavit at para 59.
[33] Wutzke #3 Affidavit at paras 56, 58.

(d) despite repeated requests, has never been provided to Invico in a properly compiled Shareholder GORR Agreement that sets out the purported participants as "Royalty Owner" under the agreement;[34] and

(e) relates to the Completion, which was initially successful, and produced hydrocarbons; however, shortly after production commenced, excess water influx attributed to a mechanical failure required further expenditures to restore production, which funds came from working capital provided by Invico.[35]

30. Invico also seeks to have the Legacy Agreement relating to the Disposal Well and the related facility (the "**Disposal Facility**") declared null and void, or in the alternative, permit Free Rein's liabilities and obligations under the Legacy Agreement to be transferred to the Residual Trust under the proposed Transaction.

31. The Legacy Agreement was executed on or around June 27 or June 28, 2023, which is more than two weeks after Free Rein commenced the NOI Proceedings. The Proposal Trustee was not aware of the Legacy Agreement at the time it was executed, and the Legacy Agreement was never approved by the court.[36]

32. Among other things, the Legacy Agreement appoints Legacy as the Service Provider and requires Free Rein to transfer its Waste Management Facility license and all related infrastructure relating to the Disposal Facility, to Legacy. Further, the Legacy Agreement purports to grant Legacy a security interest in that license and those assets until such time as the transfer is completed.[37]

33. The Legacy Agreement appears to have been an attempt by Free Rein and Legacy to transfer certain of Free Rein assets to Legacy outside of the normal course of business in the midst of Free Rein's NOI Proceeding, without approval of the Proposal Trustee or the court, which contravenes BIA s. 65.13(1).

ISSUES

34. The following issues arise in this Application:

(a) *Should the Transaction be approved?*

[34] Wutzke #3 Affidavit at para 63.
[35] Wutzke #3 Affidavit at para 65.
[36] Wutzke #3 Affidavit at para 76.
[37] Wuztke #3 Affidavit at para 78.

(b) *Should the Newgrange GORR and Shareholder GORR be vested out as part of the Transaction?*

(c) *Should the Legacy Agreement be declared null and void, or, in the alternative, vested out as part of the Transaction?*

LAW AND ARGUMENT

A. The Transaction should be approved

(a) The Transaction satisfies the factors provided at CCAA s. 36(3) and the Soundair principles

35. Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. These include:

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

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

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

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

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

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

36. These factors largely correspond to the principles articulated in Royal Bank v. Soundair Corp, for the approval of the sale of assets in an insolvency scenario,[38] which are as follows:[39]

(a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;

---

[38] *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para 21 [***Harte Gold***].
[39] *Royal Bank v. Soundair Corp*,.1991 CarswellOnt 205, [1991] O.J. No. 1137 at para 16 [***Soundair***].

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers have been obtained; and

(d) whether there has been unfairness in the working out of the process.

37. Invico submits that the above noted factors and principles are satisfied in the circumstances.

38. The Transaction is being advanced at the conclusion of the court approved SISP that thoroughly marketed Free Rein's business and property. During the SISP:[40]

(a) The proposal trustee distributed a teaser letter to potential known bidders, and advertised the SISP in industry publications;

(b) 23 parties executed confidentiality agreements;

(c) 9 parties submitted non-binding letters of intent;

(d) 6 parties were asked to conduct further due diligence with a view of submitting a Phase 2 bid; and

(e) 2 parties made offers prior to the Phase 2 bid deadline.

39. Unfortunately, as a result of the intervening Force Majeure Notice, no bidders remain, and no party, other than Invico, is willing to transact with Free Rein. Invico is not prepared to fund a further sales process given that it is highly unlikely that any further sales process would generate additional offers, particularly given the robust nature of the process initially conducted while all of Free Rein's assets were producing.[41]

40. The Monitor, in its then capacity as proposal trustee, administered and supervised the SISP with integrity, and the SISP was approved by the Court pursuant to the Second Extension and SISP Order granted by Justice Hollins on August 25, 2023. Invico supported Free Rein's application for the SISP, and there was no allegation of unfairness in the process.[42] All available information with respect to the sale or investment in Free Rein, including its financial and tax information, was made available to any potential bidder who signed a confidentiality agreement. Thus, all bidders

---

[40] Wutzke #2 Affidavit at para 7; Wutzke #3 Affidavit at para 7.
[41] *Romspen Investment Corporation v. Tung Kee Investment Canada Ltd. et al.*, 2023 ONSC 5911 at para 86.
[42] Wutzke #3 Affidavit at para 10(e).

had the opportunity to view the same information.

41. The Force Majeure Notice has forced Free Rein to shut in most of its oil and gas production for an unknown period of time. Free Rein currently only produces approximately 82 barrels of oil per day from three wells, and flares the associated gas produced with that oil.[43] This production is only possible as a result of the Temporary Flaring Permission issued by the AER, which may be rescinded at any time.[44]

42. As a result, Invico submits that the consideration being paid, which exceeds $7.5 million and is comprised of the assumption of the Invico Secured Debt, which currently exceeds $6.7 million, together with the payment and assumption of priority payables and cure costs, is more than reasonable and fair. This value is further supported based on the fact that after the Force Majeure Notice was issued, the only offers made in the SISP were withdrawn.[45]

43. Invico submits that the Transaction provides the best possible outcome and is in the best interests of Free Rein's stakeholders because the Transaction will:[46]

(a) preserve Free Rein's business as a going concern;

(b) result in the retention of certain of Free Rein's contracts;

(c) result in payment to certain lien-holders;

(d) result in payment to other priority creditors, such as surface lessors and the municipalities; and

(e) ensure that environmental liabilities associated with Free Rein's oil and gas assets are not transferred to the Orphan Well Association.

44. Without this Transaction, Free Rein will simply be wound up and its unsold assets, comprising mostly of oil and gas assets in Alberta, would likely be transferred to the purview of the Orphan Well Association. Thus, the Transaction provides value and benefit, not only to Invico, but to other creditors and stakeholders with an interest in Free Rein, as well as the public given Invico's assumption of environmental liabilities as contemplated by the Transaction.

---

[43] Wutzke #2 Affidavit at paras 20 - 21.
[44] Wutzke #2 Affidavit at para 19.
[45] *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. Al,* 2022 ONSC 6354 at para 59 [***Just Energy***].
[46] Wutzke #3 Affidavit at paras 25, 29.

45. Invico understands that the Monitor supports the Transaction.[47]

(b) The Transaction satisfies the Harte Gold principles

46. The Ontario Superior Court of Justice in *Harte Gold* provided additional guidance regarding RVOs in an insolvency context. In that case, Justice Penny stated that, while the jurisdiction to grant a RVO under the CCAA may originate from CCAA s. 11, rather than CCAA s. 36(1) since an RVO doesn't result in the sale of a debtor's *assets*, the factors provided in CCAA s. 36(3) provide a useful analytical framework for evaluating an RVO transaction.[48]

47. In that regard, Justice Penny provided additional factors that a court ought to consider, beyond the factors identified in CCAA s. 36(3), when evaluating a proposed RVO transaction. These factors are as follows:[49]

   (a) Why is the RVO necessary;

   (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative;

   (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative; and

   (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licenses and permits (or other intangible assets) being preserved under the RVO structure;

   (collectively, the "***Harte Gold* Factors**").

48. The *Harte Gold* Factors have since been considered in several other decisions which provide additional guidance regarding RVOs in insolvency proceedings.

49. In *Re Acerus Pharmaceuticals Corporation,* the Ontario Superior Court of Justice granted an RVO noting that the debtor company operated in a heavily regulated industry where the debtor's licenses were essential to the viability of the business.[50] The Court noted that challenges in transferring the debtor's licenses to a purchaser, preservation of the debtor's tax attributes, and assumption of

---

[47] Wutzke #3 Affidavit at para 16.
[48] *Harte Gold* at para 37.
[49] *Harte Gold* at para 38.
[50] 2023 ONSC 3314 at para 13 [***Acerus***].

unsecured liabilities associated with retained contracts, were all important factors in granting the RVO.[51]

50. In *Just Energy*, the Ontario Superior Court of Justice similarly considered the preservation of the debtor's tax attributes and the debtor's heavily regulated industry as factors favouring granting an RVO.[52]

51. In *Rambler Metals and Mining Limited, Re CCAA*, the Newfoundland and Labrador Supreme Court stated that an RVO may be necessary if approving the transfer of licenses (through a traditional asset transaction) would result in significant delays and costs and create risk or uncertainty.[53] The Court also noted that where the debtor's tax attributes are important to the purchaser to support its valuation of the debtor, an RVO may be appropriate since it is the only way to preserve those tax attributes.[54]

52. Further, in each of *Acerus*, *Just Energy, Rambler Metals* as well as *CannaPiece Group Inc v. Marzilli*[55] the court noted, in granting the respective RVOs, that the RVO structure provided greater benefits to the debtor's stakeholders than the only likely alternative structure, which would have been a sale or disposition of the debtor's assets under a bankruptcy.[56]

53. Several decisions, such as *Acerus*[57], *Just Energy*[58] and *Arrangement relatif à Blackrock Metals Inc.*[59] have also acknowledged that RVO transactions often result in the claims of unsecured creditors and shareholders being transferred to a residual trust or company, which is an empty shell that holds all unassumed liabilities of the debtor resulting in no recovery for those stakeholders. In those decisions, the courts noted that this perceived unfairness is not a result of the RVO process, but rather, it is a reflection of the value of the debtor's assets and business. In this regard, unsecured creditors and shareholders are treated no differently than if the transaction was effected by way of an asset purchase. As stated in *Acerus*:

> Under the proposed transactions, the applicants, some of the unsecured creditors and all of the existing shareholders will have no recovery. However, the evidence makes it clear that these stakeholders would not realize any recovery in any other

[51] *Ibid* at para 16, 21.
[52] *Just Energy* at paras 33- 34, 39, 45.
[53] 2023 NLSC 134 at para 64, 76-78 [***Rambler Metals***].
[54] *Ibid.*
[55] 2023 ONSC 3291 [***CannaPiece***].
[56] *Acerus* at para 26; *Just Energy* at para 52; *Rambler Metals* at para 67-68; *CannaPiece* at para 19.
[57] *Acerus* at para 32.
[58] *Just Energy* at para 57.
[59] 2022 QCCS 2828 at para 109, leave for appeal dismissed 2022 QCCA 1073 [***Blackrock***].

available restructuring alternative either (i.e., under either of the unsuccessful bids or in a bankruptcy/liquidation).[60]

54. For the reasons provided below, Invico submits that each of the *Harte Gold* Factors favours approving the Transaction and granting the RVO.

The RVO Structure is necessary

55. The RVO is necessary because Free Rein's assets are primarily comprised of oil and gas wells, facilities and pipelines. The oil and gas sector is a highly regulated industry, and any transaction by way of an asset sale would require the purchaser to proceed through the AER's license transfer approval process. This process can be costly, takes months to complete, and creates risk and uncertainty.[61] While Free Rein will remain responsible for any regulatory obligations or directions if the Transaction is approved, the RVO structure avoids the uncertain license transfer process. In this regard, Free Rein's circumstances are similar to those in *Acerus, Just Energy* and *Rambler Metals.*

56. If Invico were required to proceed by way of asset purchase, including waiting out the time associated with the license transfer application, Invico, as the party funding these proceedings, would have to incur additional costs associated with the professional fees of the Monitor, who has enhanced powers to operate Free Rein, and its legal counsel. The Court in *Harte Gold,* determined that similar circumstances in that case favoured granting the RVO.[62]

57. A third factor favouring the RVO structure is that the structure is the only mechanism available to potentially preserve certain of Free Rein's tax attributes.[63] While the tax attributes are not significant, they may be utilized in the future to offset potential tax obligations which would arise in the event Invico or any subsequent purchaser is able to expend sufficient funds on the assets to commence operations at levels high enough to generate taxable revenues. As the tax attributes were included in the data room information, any potential purchaser would have had an opportunity to assess them as part of their offer. Therefore, the fair market value of the tax attributes, contingent on future events occurring and capital spent, is accounted for in the results of the sales process. Several decisions, including *Acerus, Just Energy, Rambler Metals* and *Blackrock*, have held that preserving tax attributes can be a significant factor favouring approval

[60] *Acerus* at para 18.
[61] Wutzke #3 Affidavit at para 25(b).
[62] *Harte Gold* at para 73.
[63] Wutzke Affidavit #3 at para 26.

of a transaction through RVO.

The RVO Structure provides the most favourable result

58. No other proposed transactions have been advanced for the purchase of Free Rein’s business or assets. The only alternative to the Transaction would be a liquidation through bankruptcy, which would likely result in no responsible party assuming the environmental liabilities associated with Free Rein’s assets, and numerous oil and gas assets being transferred to the Orphan Well Association.

59. Under those circumstances, none of Free Rein’s creditors, including Invico, would receive any distribution from Free Rein’s estate. Instead, any value realized from Free Rein’s estate would be applied against the costs associated with performing abandonment and reclamation work associated with Free Rein's oil and gas assets.[64]

60. The Transaction contemplates that Free Rein will retain all of its oil and gas assets, the associated environmental liabilities and obligations, as well as certain contracts. As a result, the Transaction benefits not only Invico, but also the public and certain of Free Rein’s other creditors and stakeholders.

No stakeholder is worse off due to the RVO Structure

61. No stakeholder is worse off by completing the Transaction through an RVO. Although the claims of certain creditors and Free Rein’s shareholders will be transferred to the Residual Trust where only those with priority claims will receive a distribution, the subordinate stakeholders would not have received any distribution from any other form of transaction, whether by a traditional asset purchase or through a bankruptcy liquidation. In this regard, the circumstances are similar to those in *Acerus*, *Just Energy* and *Blackrock.* In other words, it is not because of the RVO transaction that certain creditors will be without distributions; such result is a reflection of the value of Free Rein’s assets and business.

62. As a result, stakeholders are not prejudiced by consummating a transaction through an RVO where those stakeholders would not realize any recovery in any other available restructuring alternative.[65]

---

[64] *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 at para 163.
[65] *Acerus* at para 18.

<u>*The consideration reflects the value of the Licenses*</u>

63. Free Rein's assets and business, including the existence of certain tax attributes, were extensively marketed through the SISP in the NOI Proceedings and no other parties are willing to purchase Free Rein's assets or business. The Transaction is the only remaining path forward. As a result of the Force Majeure Notice, the value of Free Rein's oil and gas production has been severely impaired. With significant capital expenditures required to bring on both oil and gas production, such impairment is likely to continue for a period of time.

64. The consideration to be paid by Invico under the Transaction includes an assumption of Free Rein's secured debt owing to Invico, which exceeds $6.7 million as well as cash consideration for cure costs and priority payables.

65. Courts have favoured approving a proposed RVO transaction where a debtor's assets have been extensively marketed but have yielded no other potential offers.[66] In the matter at hand, the SISP widely marketed Free Rein's assets and business. Information regarding Free Rein's oil and gas assets and its tax attributes was made available to any person that executed a non-disclosure agreement and entered the virtual data room.

66. At the conclusion of the SISP, Invico was the only party willing to transact with Free Rein. Accordingly, Invico submits that the consideration contemplated by the Transaction is fair and reasonable.

67. Evaluating each of the *Harte Gold* factors with the additional guidance provided by the case law that has evolved from it, the Transaction conducted by way of RVO is in the best interests of Free Rein's creditors and stakeholders because the Transaction (i) provides an efficient mechanism for dealing with Free Rein's licenses associated with its O&G Assets, (ii) preserves Free Rein's tax attributes, (iii) provides a more favourable outcome for Free Rein's stakeholders than a bankruptcy liquidation, (iv) does not leave any of Free Rein's stakeholders worse off, and (v) provides fair and reasonable consideration for Free Rein's business and property. As a result, Invico respectfully requests that the Transaction and RVO be approved.

B. The GORRs should be vested out and transferred to the Residual Trust

68. Free Rein granted several GORRs relating to its O&G Assets. However, certain of those GORRs fall outside of the traditional oil and gas royalty grant. As a result, Invico seeks to have these

[66] *Just Energy* at para 59; *Blackrock* at para 101.

GORRs, listed as follows, transferred to the Residual Trust as Transferred Liabilities:

(a) Newgrange (such GORR being the "**Newgrange GORR**"); and

(b) "Shareholders" (such GORR being the "**Shareholder GORR**"),

(collectively, the "**Transferred GORRs**").

69. The underlying circumstances surrounding each of these GORRs, together with the essential terms and substance of the GORRs, as outlined below, justify their transfer to the Residual Trust.

70. Courts have jurisdiction to vest out a GORR, particularly if the GORR is at its core, a contractual obligation.[67] However, Courts also have the jurisdiction to vest out an interest in land in appropriate circumstances.[68]

71. The Supreme Court of Canada in *Bank of Montreal v. Dynex Petroleum Ltd* provided the two part test for determining whether a royalty is an interest in land, or whether it is merely a contractual right. A royalty can be an interest in land if:

(a) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and

(b) the interest, out of which the royalty is carved, is itself an interest in land,[69]

(the "***Dynex*** **Test**").

72. *Dynex* has been considered and applied several times by Alberta Courts in recent years, including in *Accel* and *Re Manitok Energy Inc.*[70] *Dynex* has also been considered by the Ontario Court of Appeal in *Dianor #2.*

(a) The Newgrange GORR

73. Invico submits that the Newgrange GORR fails both parts of the *Dynex* Test.

74. When determining whether the parties intended the royalty to be a grant of an interest in land, one

[67] *Accel Canada Holdings Limited (Re)*, 2020 ABQB 182 at para 93 [***Accel***] citing *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc*., 2019 ONCA 508 [***Dianor #2***].
[68] *Dianor #2* at para 109.
[69] *Bank of Montreal v. Dynex Petroleum Ltd*., 2002 SCC 7 at para 22 [***Dynex***].
[70] 2018 ABQB 488 [***Manitok***].

must "examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words."[71] Accordingly, a royalty-owner cannot simply rely on a provision within a royalty agreement stating that the royalty is intended to be an interest in the lands;[72] rather, one must look to the surrounding circumstances to determine what the parties intended.

75. When evaluating the surrounding circumstances of an agreement, any information that was known to both parties at the time of the agreements that is evidence of an objective intent (as opposed to mere statements about an individual's subjective beliefs) is admissible and can be considered by the Court.[73]

The Newgrange GORR is intended to preserve a risk-free business opportunity

76. The concept of a GORR was developed by the oil and gas industry as a mechanism for investors to meet the high risks of the enterprise.[74] The Ontario Court of Appeal in its first hearing of the *Dianor* matter noted that royalty rights, generally, play a useful role in financing the industry and spreading risk.[75]

77. The Alberta Court of Appeal's decision in *Dynex* examined the underlying purposes and functions of royalty agreements. In that regard, the Court of Appeal stated:

> Oil and gas ventures require huge amounts of capital but only a small fraction are successful. The oil and gas investor is betting that the many losses will be made up by the small fraction of successes. Therefore, the industry needs first, the incentive to induce such high risk investments by offering the hope of a share of production from successful ventures. Second, good investment decisions in the oil and gas industry depend on good geological information. Geological information is information about specific land.
>
> Royalties fit these characteristic needs because they are investments in a particular piece of property, not in a particular operator or company. There are other means for investing in the owner or operator. The investment return on a royalty results from the success of the property regardless of who owns or is working the

[71] *Accel* at para 16.
[72] See, e.g. *Accel.*
[73] *Accel* at para 30.
[74] *Bank of Montreal v. Dynex Petroleum Ltd.,* 1999 ABCA 363 at para 43 [*Dynex ABCA*].
[75] *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc*., 2018 ONCA 253 at para 71 [***Dianor #1***].

property.[76]

78. The surrounding circumstances relating to the Newgrange GORR demonstrate that Newgrange did not intend to reserve for itself an interest in the Goldenspike Lands, but rather, Newgrange intended to collect a share of future revenue generated by the business opportunity being sold to Free Rein. In other words, the Newgrange GORR reflects an investment (for questionable consideration) in the owner or operator as opposed to a specific investment in a piece of property.

79. Newgrange, whose sole director and shareholder was Mr. McCallum[77], "quick flipped" the Goldenspike Assets to Free Rein for triple the price it had paid six months earlier.[78] In addition, it held back a 5% royalty on production from not only the Goldenspike Lands, but also from other adjacent lands identified in the Newgrange GORR Agreement as "mutual interest lands."[79]

80. In particular, Newgrange acquired the Goldenspike Assets through the Questfire receivership, effective April 1, 2018, for a purchase price of $250,000, which was paid by Andy Prefontaine, Shaun Addison and Darwin Little on Newgrange's behalf. That is, Newgrange did not advance any of its own funds to acquire the Goldenspike Assets.[80]

81. Throughout the summer of 2018, Newgrange attempted to sell the Goldenspike Assets to arm's length third parties, subject to a 5% GORR in favour of Newgrange; however, Newgrange was not able to find an interested buyer.[81]

82. As a result, in the fall of 2018, Newgrange arranged to sell the Goldenspike Assets to Free Rein in what was effectively a non-arm's length transaction, for a purchase price of $750,000 and the retention of a 5% GORR in favour of Newgrange over the Royalty Lands (as defined in the Newgrange Royalty Agreement).[82] As part of the sale, Mr. McCallum was issued three million shares in Free Rein, resulting in Mr. McCallum being the majority shareholder of Free Rein.[83] Further, following closing of the sale, Mr. McCallum was appointed as Free Rein's Chairman of the board of directors as well as its Chief Executive Officer.

83. Importantly, the scope of the Newgrange GORR Agreement does not apply solely to the Goldenspike Lands. Rather, the Newgrange GORR Agreement identifies additional lands to which

---

[76] *Dynex ABCA* at paras 35 -36.
[77] Wutzke #3 Affidavit at para 36.
[78] Wutzke #3 Affidavit at para 49.
[79] Wutzke #3 Affidavit at para 47.
[80] Wutzke #3 Affidavit at para 38.
[81] Wutzke #3 Affidavit at para 39.
[82] Wutzke #3 Affidavit at para 43.
[83] Wutzke #3 Affidavit at para 50(a).

a royalty payment may be due if Free Rein was to acquire them within two years of executing the Newgrange GORR Agreement.

84. The Newgrange GORR defines the "Royalty Lands" as:

Crown Agt. #	Lands	P&NG Rights	WI of Royalty Payor	Ownership
22254	22-51-27 W4M	All PNG from Surface to Top Leduc	FRR 100%	100%
22254	23-51-27 W4M	All PNG from Surface to Top Leduc	FRR 100%	100%
22254	26-51-27 W4M	All PNG from Surface to Top Leduc	FRR 100%	100%
22254	27-51-27 W4M	All PNG from Surface to Top Leduc	FRR 100%	100%
39143	NW 35-51-27 W4M	All PNG from Surfe to Base Mannville (excluding PNG in Basal Quartz)	FRR 100%	5%

85. Under the Newgrange GORR Agreement, Free Rein must pay the Overriding Royalty (as defined therein) on the Royalty Lands.

86. However, section 16 of the Newgrange GORR Agreement also identifies "mutual interest lands" that are outlined in a map set out at Schedule "B" thereof. Pursuant to section 16(b) of the Newgrange GORR, if Free Rein was to acquire any of the mutual interest lands within two years of acquiring the Goldenspike Lands, those mutual interest lands would also be subject to the Overriding Royalty, and the Royalty Lands under the Newgrange GORR Agreement would be amended in order to include the mutual interest lands that had been acquired.

87. The map at Schedule "B" of the Newgrange GORR Agreement, which identifies the mutual interest lands, includes lands that neither Newgrange nor Free Rein have never owned or leased; namely, section 33-51-27 W4M as well as the north-east quarter section and southern half of 35-51-27 W4M. Further, and unlike the Goldenspike Lands which permit production only from specific geologic formations, the mutual interest lands are not limited to any geologic strata.

88. In *Prairiesky Royalty Ltd v. Yangarra Resources Ltd*,[84] Justice Borque considered the impact of

[84] 2023 ABKB 11 [*Yangarra*].

an "area of mutual interest" provision in a royalty agreement when determining whether the royalty was a contractual obligation or an interest in land. Contrasting with the present matter, in *Yangarra*, the area of mutual interest was restricted to Royalty Lands that "revert back to the Crown by expiry or surrender but are reacquired by the grantor within two years."[85]

89. Justice Borque determined that the royalty interest at issue in *Yangarra* created an interest in land, noting that the language of the "area of mutual interest" provision in the royalty agreement demonstrated that the royalty was intended to be an investment in the success of "a particular piece of property", citing *Dynex ABCA*.[86]

90. By contrast to the *Yangarra* royalty interest, the Newgrange GORR Agreement purports to reserve for Newgrange a share of revenue generated not only from the Goldenspike Lands, but also from lands which neither Free Rein nor Newgrange have ever held an interest or contemplated holding an interest. This is clear and unequivocal evidence that the Newgrange GORR Agreement was intended to preserve an interest in the business opportunity being sold by Newgrange to Free Rein rather than to create an interest in the Goldenspike Lands to reserve a share of production from the Goldenspike Lands, which is the intent of a royalty that validly runs with the land.

91. The circumstances surrounding the Newgrange GORR also reveal that it does not satisfy the underlying purpose of a royalty as identified in *Dynex ABCA*. First, Newgrange undertook no risk whatsoever in the transactions. Rather, it used other peoples' money to acquire oil and gas assets and flipped those assets to what became a related company as part of the transaction, for a quick and tidy profit.

92. Second, the Newgrange GORR is not an investment in a "particular piece of property." Rather, it purports to apply not only to the Goldenspike Lands, but also to lands and mineral rights in which it has never held an interest. Accordingly, the Newgrange GORR Agreement is not an interest in land, but rather a contractual arrangement between Newgrange and Free Rein to reserve for Newgrange an interest in a business opportunity that may have been pursued by Free Rein in the future.

<u>Newgrange's prior conduct confirms mere contractual interest</u>

93. In June of 2018, Newgrange granted the 159 GORR and the Puravida GORR. The respective agreements creating each of those GORRs follow the same template as the Newgrange GORR.

---

[85] *Yangarra* at para 99.
[86] *Yangarra* at para 99.

94. Free Rein, however, under Mr. McCallum's management, ceased making payments on the 159 GORR and the Puravida GORR on the basis that Free Rein was not a party to the underling GORR agreements.[87] In other words, Free Rein, under Mr. McCallum's management, has treated other identically-worded GORR agreements as being mere contractual obligations as opposed to obligations that run with the lands.

95. Mr. McCallum and Newgrange cannot have it both ways. They cannot assert that on the one hand the Newgrange GORR is an interest in Free Rein's lands, while simultaneously having refused to treat the 159 GORR and the Puravida GORR in the same manner.

The Newgrange GORR is not carved from an interest in land

96. Not only do the surrounding circumstances demonstrate that the parties intended for the Newgrange GORR to be a contractual obligation, but the Newgrange GORR also fails the second element of the *Dynex* Test because it was not carved from an interest in land.

97. In *Manitok,* Justice Horner stated that the second part of the *Dynex T*est "is intended to ensure that the party granting the interest in land is able to do so because it holds an interest in land."[88]

98. The Newgrange GORR Agreement is dated October 30, 2018, and provides that "[Free Rein] does hereby grant to [Newgrange] the Overriding Royalty on the Royalty Lands."[89] Critically, however, at the time the Newgrange GORR Agreement was entered into, Free Rein had no interest in the Royalty Lands whatsoever. The Free Rein/Newgrange APA has an effective date of November 1, 2018, and contemplates transfer of title in the Goldenspike Assets on November 30, 2018. Thus, pursuant to the Free Rein/Newgrange APA, Free Rein did not acquire the interest in the Goldenspike Assets until November 30, 2018, one month after the royalty was purportedly granted. As per the Court in *Manitok*, Free Rein could not convey an interest in land because it did not itself hold that interest at the time of the grant.

99. The circumstances of Free Rein's grant to Newgrange are similar to those in *Vandergrift v. Coseka Resources Ltd.*,[90] which also involved a dispute over a royalty and whether it constituted an interest in land. In that case, Suffolk Oil and Gas Ltd. ("**Suffolk**") had entered into a farm-out agreement with Imperial Oil ("**Imperial**"), who was the lessee of various crown mineral leases. The farm-out agreement provided that Suffolk would earn an undivided 60% of Imperial's interest

[87] Wutzke #3 Affidavit at para 41.
[88] *Manitok* at para 25.
[89] Wutzke #3 Affidavit at Exhibit "M" section 2(a).
[90] [1989] AWLD 528 (ABQB) [*Vandergrift*].

in the mineral leases upon drilling a well.

100. Shortly after entering into the farm-out agreement, Suffolk entered into an agreement with third parties in which it granted a royalty in Suffolk's interest earned under the Imperial farm-out agreement. However, at the time the royalty agreement was entered into, Suffolk had not yet drilled the well contemplated under the farm-out agreement. Even though Suffolk eventually drilled the well, the Court held that the royalty granted by Suffolk was not an interest in land, in part, because it was not "carved out" of an interest in land held at the time of the grant (emphasis in original):[91]

> When the royalty agreement was entered into, the grantor, Suffolk, had an interest in the farmout agreement from Imperial, and it had a natural gas licence from the Crown. At that time, Suffolk, which granted the royalty, did not have a lease, and it would not acquire a lease until it earned it by drilling a well. The farmout agreement stated that "if Suffolk drills the well to the contract depth", as required by the agreement, *then* Imperial would "convey to the Farmee an undivided sixty (60%) per cent of the Farmors' interest in the lands and the leases ... effective as of and from the release date of the rig used to drill the well to contract depth".
>
> …
>
> The result is that when Suffolk granted the royalty it did not own an interest in land and could not, therefore, "carve out" or convey an interest in land to the plaintiffs.

101. Notably, the Supreme Court of Canada in *Dynex* cited *Vandergrift* and adopted the test set out in *Vandergrift* as the *Dynex* Test.[92]

102. The grant of the Newgrange GORR is not an ongoing or continuous grant. It is a one-time grant that entitles the grantee to ongoing revenues.[93] Thus, according to the court's reasoning in *Vandergrift*, if Free Rein did not have a proprietary interest in the lands at the time of the grant, the grant itself is invalid. This follows Horner, J.'s comment in *Manitok* that the second part of the *Dynex T*est "is intended to ensure that the party granting the interest in land is able to do so because it holds an interest in land."[94]

---

[91] *Vandergrift* at paras 45, 49.
[92] *Dynex* at para 22.
[93] See for example *Manitok* and *Vandergrift*.
[94] *Manitok* at para 25.

103. Similar to the circumstances in *Vandergrift,* Free Rein granted the Newgrange GORR before it had acquired an interest in the Goldenspike Lands.

104. The Free Rein/Newgrange APA provides at section 2.2 as follows: "Provided that Closing occurs, and subject to the terms and conditions of this Agreement, possession, risk, beneficial and legal ownership of the Assets shall transfer from the Vendor to the Purchaser on the Closing Date." The Closing Date is defined in section 5.1 of the Free Rein/Newgrange APA as November 30, 2018.[95]

105. Accordingly, Free Rein was unable to grant the Newgrange GORR as an interest in land on October 30, 2018, as it did not itself hold that interest. Instead, the Newgrange GORR Agreement created a contractual obligation on Free Rein to pay the Overriding Royalty to Newgrange on the terms set out therein, if and when Free Rein obtained an interest in the Goldenspike Lands.

106. Since the Newgrange GORR is a mere contractual interest, and not an interest in land, it can be vested out and transferred to the Residual Trust.[96]

The Newgrange GORR should be vested out

107. Even if the Newgrange GORR is found to be an interest in land, which is not supported in the evidence, Invico submits that it is appropriate for the Court to transfer it to the Residual Trust.

108. The Ontario Court of Appeal in *Dianor #2* provides a set of factors to consider when determining whether it is appropriate to vest out an interest in land. These factors are as follows:[97]

(a) the nature of the interest in land;

(b) whether the interest holder has agreed to vest it out; and

(c) if the first two factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case,

(the "***Dianor*** **Test**").

109. The equities the Court may consider include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from

[95] Wutzke #3 Affidavit at Exhibit "L".
[96] *Accel* at para 93.
[97] *Dianor #2* at para 109

the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list.[98]

110. Invico submits that the Newgrange GORR is only a contractual right and can therefore be vested out without having to engage the *Dianor* test. In the alternative, Invico submits that the Newgrange GORR is ambiguous or inconclusive as to whether it is an interest in land for the reasons provided above.

111. Further, Free Rein's resolution of its board of directors dated December 15, 2018 approved the granting of the Newgrange GORR to be "paid as long as it is commercially reasonable to do so."[99] Mr. McCallum, who is the sole shareholder and director of Newgrange, executed this board resolution. As a result, and given (i) Free Rein's insolvency, and (ii) the uncertainty regarding whether Free Rein will return to profitability as a result of the Force Majeure Notice, Invico submits that Newgrange has implicitly agreed that the Newgrange GORR need not be paid in the circumstances.

112. Further, the circumstances merit vesting out the Newgrange GORR, given that:

(a) Newgrange undertook no risk with regard to the Goldenspike Lands;[100]

(b) The Newgrange GORR purports to apply to the "mutual interest lands", which include lands in which Newgrange never held an interest;[101]

(c) Newgrange performed no work and made no improvements to the Goldenspike Lands or Goldenspike Assets during the brief period in which it owned them;[102]

(d) Free Rein, under Mr. McCallum's management, ceased paying the Puravida GORR and the 159 GORR, which arise from the same form of agreement as the Newgrange GORR;[103]

(e) Mr. McCallum caused Free Rein to pay <u>only</u> the Newgrange GORR during part of the SISP, and in particular, caused Free Rein to make a payment to Newgrange on the eve of a court order prohibiting Free Rein from making any payments to any party without the

---

[98] *Dianor #2* at para 110.
[99] Wutzke #3 Affidavit at Exhibit "O".
[100] Wutzke #3 Affidavit at para 38.
[101] Wutzke #3 Affidavit at Exhibit "M".
[102] Wutzke #3 Affidavit at para 49.
[103] Wutzke #3 Affidavit at para 41.

prior written consent of the proposal trustee.[104]

113. As a result, the equities favour vesting out the Newgrange GORR and transferring it to the Residual Trust.

(b) The Shareholder GORR

114. The Shareholder GORR should also be vested out and transferred to the Residual Trust; however, for different reasons than the Newgrange GORR.

Invico did not consent to the Newgrange GORR

115. The Shareholder GORR was issued by Free Rein to a subset of Free Rein's shareholders in March or April of 2023, at a time when Free Rein was experiencing operating challenges and cost overruns, and was already in default of covenants under the Loan Agreement.[105]

116. At that time, Free Rein had identified an "up-hole" (i.e. shallow) geologic formation in one of its existing wells that could potentially be capable of producing oil or gas, and sought to perform the Completion in the up-hole formation to increase Free Rein's production and revenue.[106]

117. At that time, Free Rein did not have sufficient funds to pay for the Completion and Invico was not willing to advance further funds. As a result, Free Rein raised additional investment funds from its existing shareholders to pay for the Completion (the "**Shareholder Funds**"). As an incentive to invest in the Completion, Free Rein offered the Shareholder GORR to those who participated. Shareholders were invited to participate in proportion to their respective stock ownership.[107]

118. Free Rein purported to grant the Shareholder GORR at a time when it was already in financial distress and was in default under the terms of the Loan Agreement. While Invico sought clarification from Free Rein in respect of the Shareholder GORR at the time it was being considered, Invico never received the requisite information and never agreed to allow Free Rein to grant the Shareholder GORR, since the Shareholder GORR would erode the value of Invico's security in Free Rein's assets for no consideration in return.[108]

[104] Wutzke #3 Affidavit at para 54.
[105] Wutzke #3 Affidavit at para 55.
[106] Wutzke #3 Affidavit at para 56.
[107] Wutzke #3 Affidavit at paras 57-58.
[108] Wutzke #3 Affidavit at paras 59 – 61.

The Shareholder GORR arises from an equity interest

119. The Shareholder Funds are akin to a capital injection, and should therefore be considered as an "equity claim" under the CCAA. In *Alberta Energy Regulator v. Lexin Resources Ltd.*,[109] Justice Romaine set out a number of factors to assist in determining how to characterize contributions to a company. Although *Lexin* dealt with the distinction between equity and debt, the factors identified therein nonetheless provide helpful guidance for classifying contributions made by shareholders. Those factors include:[110]

(a) the source of repayments. If the expectation of repayment depends solely on the success of the borrower's business, the cases suggest that the transaction has the appearance of a capital contribution;

(b) the adequacy or inadequacy of capitalization. Thin or inadequate capitalization is strong evidence that the advances are capital contributions rather than loans;

(c) the identity of interest between the creditor and the shareholder. If shareholders make advances in proportion to their respective stock ownership, an equity contribution is indicated;

(d) the corporation's ability to obtain financing from outside lending institutions. When there is no evidence of other outside financing, some cases indicate that the fact no reasonable creditor would have acted in the same manner is strong evidence that the advances were capital contributions rather than loans; and

(e) the extent to which the advances were used to on capital expenditures. The use of the advance to meet the daily operating needs for the corporation, rather than to purchase capital assets, is arguably indicative of bona fide indebtedness;

120. Each of the factors identified above suggests that the Shareholder Funds are a capital contribution rather than an advance in exchange for a royalty. That is, (i) the Shareholder Funds will only be repaid if the Completion is successful and generates production; (ii) Free Rein, at the time the Shareholder GORR was issued, was poorly capitalized;[111] (iii) the shareholders were permitted to participate in proportion to their respective stock ownership;[112] (iv) no other parties, including

---

[109] 2018 ABQB 590 [*Lexin*].
[110] *Ibid* at para 42.
[111] Wutzke #3 Affidavit at para 55.
[112] Wutzke #3 Affidavit at para 58.

Invico, were willing to advance the funds to pay for the Completion;[113] and (v) the Shareholder funds were used for a capital expenditure (namely, the Completion) rather than operating expenses.[114]

121. The CCAA provides that an "equity claim" includes a claim in respect of a dividend or similar payment or a return of capital.[115] Further, CCAA s. 6(8) provides that no compromise or arrangement that provides for the payment of an equity claim may be sanctioned by the court unless all claims that are not equity claims are to be paid in full before the equity claim is to be paid.[116]

122. The restrictions placed on the payment of equity claims in the CCAA accords with the principle that equity claims are paid last. As noted by the Ontario Court of Appeal in *U.S. Steel Canada Inc., Re*, "Equity claims are subordinated in order to keep shareholders away from the table while the claims of other creditors are being sorted out. Even prior to being explicitly subordinated by statute in 2009, they generally ranked lower than general creditors."[117]

123. While the Transaction is not strictly a compromise or arrangement, the principle that equity is subordinated to creditors' claims would nonetheless apply in these circumstances.

The Shareholder GORR does not grant an interest in land

124. A further basis for vesting out the Shareholder GORR and transferring it to the Residual Trust is because the language of the Shareholder GORR does not grant the Shareholders an interest in any mineral rights and does not identify who the royalty owners are.

125. The Shareholder GORR Agreement provided in Free Rein's virtual data room during the SISP does not identify any shareholders as being the royalty owner of the Shareholder GORR.[118] Despite Invico's repeated requests prior to and during the NOI Proceedings and during the SISP, Free Rein never provided Invico with a properly compiled Shareholder GORR Agreement setting out the purported participants as "Royalty Owner" under the agreement.[119]

126. It is also unclear that each of the purported participants in the Shareholder GORR actually advanced funds to earn their respective shares of the Shareholder GORR interest. To the contrary,

---

[113] Wutzke #3 Affidavit at para 57.
[114] Wutzke #3 Affidavit at para 65.
[115] CCAA s. 2(1), definition "equity claim".
[116] CCAA s. 6(8).
[117] 2016 ONCA 662 at para 96.
[118] Wutzke Affidavit at Exhibit "R".
[119] Wutzke Affidavit at para 63.

Invico's due diligence review revealed that at least three of the purported participants did not advance any such funds.[120]

127. In addition, the Shareholder GORR purports to grant an Overriding Royalty in the petroleum substances produced from the Royalty Well, which is defined at Schedule "A" attached thereto as the well having unique well identifying number 100/06-26-051-27W4 (the "**Royalty Well**"). The Shareholder GORR, however, does not grant the Shareholders an interest in the mineral rights from which the Royalty Well is producing, which mineral rights are typically granted in a royalty. Conceivably, Free Rein could shut-in the Royalty Well, drill another well nearby to the Royalty Well and then produce oil and gas from that well, without having to pay the Shareholder GORR. This is because the Shareholder GORR does not relate to Free Rein's mineral rights or the substances produced from those mineral rights, but rather, it is limited to substances produced specifically from the "up hole" geologic formation from the Royalty Well.

128. In other words, the language of the Shareholder GORR does not show that the Shareholders intended to create an interest in land because the Shareholder GORR does not relate to an investment in "a particular piece of property", as described in *Dynex ABCA*. Rather, the Shareholder GORR, if anything, gives its participants a right to a share of the revenue generated from the Completion in the Royalty Well.

Every factor of the Dianor Test supports vesting out the Shareholder GORR

129. When considering the *Dianor* Test factors, it is clear the Shareholder GORR is not an interest in land. For ease of reference, the *Dianor* Test factors are as follows:[121]

(a) the nature of the interest in land;

(b) whether the interest holder has agreed to vest it out; and

(c) if the first two factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case.

130. Invico submits that the Shareholder GORR is not an interest in land, but, in the alternative and in any event, the Shareholder GORR should be vested out because:

[120] Wutzke Affidavit at para 64(b).
[121] *Dianor #2* at para 109.

(a) the specific language of the Shareholder GORR does not provide the Shareholders with an interest in any mineral rights; rather, unknown Royalty Owners are purportedly granted an interest in substances produced from the Completion in the Royalty Well;

(b) the equities weigh in Invico's favour, in that the Shareholder GORR is an equity claim that is subordinate to the Invico security. Furthermore, Invico as secured creditor is funding the proceedings and the only mechanism to potentially recover its significant indebtedness is through the transaction. The Shareholder GORR, together with the Newgrange GORR, erode any potential value from the assets and create a larger hurdle to Invico's recoveries;

(c) while the Completion initially was successful, within two months, excess water influx attributed to a mechanical failure halted gas production from the Completion. Further expenditures from Free Rein's working capital were required to restore production.[122] In other words, without the working capital provided by Invico to restore production from the Completion, the Shareholder GORR would be worthless; and

(d) the Shareholder GORR was granted at a time when Free Rein was in financial difficulty and was in default of its covenants under the Loan Agreement.[123] Invico, in good faith, agreed to renegotiate the terms of the Loan Agreement in order to provide Free Rein with an opportunity to resolve its financial difficulties. Invico should not be penalized in these circumstances by preserving the assignment of a portion of its security in favour of Free Rein's shareholders.

131. In light of the foregoing, Invico respectfully submits that the Shareholder GORR should be vested out and transferred to the Residual Trust.

c) The Legacy Agreement

132. Invico seeks an order declaring the Legacy Agreement to be null and void, or alternatively, transferring the Legacy Agreement to the Residual Trust.

133. Free Rein and Legacy purported to enter into a joint venture agreement with respect to the Disposal Well and the Disposal Facility, made as of March 1, 2023 (i.e. the Legacy Agreement).[124] It is not clear from Free Rein's records; however, the Legacy Agreement appears to replace the Nucor

[122] Wutzke #3 Affidavit at para 65.
[123] Wutzke #3 Affidavit at para 55.
[124] Wutzke #3 Affidavit at para 76.

Agreement relating to the Disposal Well and Disposal Facility between Free Rein and Nucor Environmental Solutions Ltd. ("**Nucor**"), dated June 1, 2020 (the "**Nucor Agreement**"), because Legacy and Nucor are related entities,[125] and both agreements relate to the Disposal Well and Disposal Facility.

134. Although the Legacy Agreement is dated March 1, 2023, the dates provided in the signature blocks indicate that the agreement was executed on or around June 27 or 28, 2023, which is more than two weeks after Free Rein commenced the NOI Proceedings.[126]

135. Among other things, the Legacy Agreement appoints Legacy as the Service Provider on the Disposal Well and Disposal Facility, but unlike the Nucor Agreement, the Legacy Agreement requires Free Rein to transfer its Waste Management Facility license and all related infrastructure relating to the Disposal Facility, to Legacy. Further, the Legacy Agreement purports to grant Legacy a security interest in that license and those assets until such time as the transfer is completed.[127]

136. BIA s. 65.13(1) prohibits debtors in proposal proceedings under Part III of the BIA from selling or otherwise disposing of their assets outside the ordinary court of business, unless authorized to do so by a court.[128]

137. The Legacy Agreement contemplates a transfer of certain of Free Rein's assets out of the ordinary course of business, was executed by both parties while Free Rein was subject to the NOI Proceedings, and was executed without approval of the court or the proposal trustee. As a result, the Legacy Agreement clearly violates the prohibition on the disposition of Free Rein's assets outside the normal course of business provided by BIA s. 65.13(1).

138. The BIA does not expressly provide any specific remedy in respect of transfers that violate BIA s. 65.13(1); however, Invico submits that the Legacy Agreement should be declared null and void, because it is illegal.

139. In *Proposition de CL Métal inc.*, the Superior Court of Quebec nullified a sale transaction of a debtor that had filed, but not completed, its proposal under Part III of the BIA, on the basis of illegality.[129] This is consistent with the general approach of Canadian courts to treat all contracts

[125] Wutzke #3 Affidavit at para 75.
[126] Wutzke #3 Affidavit at para 76.
[127] Wutzke #3 Affidavit at Exhibit "U", s. 7.1.
[128] *BIA* at s. 65.13(1).
[129] 2017 QCCS 2931 at para 103.

that violate an express statutory prohibition as being invalid and unenforceable.[130]

140. Accordingly, Invico seeks to have the court set aside or declare the Legacy Agreement null and void, or in the alternative, permit Free Rein's liabilities and obligations under the Legacy Agreement to be transferred to the Residual Trust under the proposed Transaction.

The balance of equities favours vesting off of the ROFR provision within the Legacy Agreement

141. Invico's primary position is that the Legacy Agreement is invalid as a result of its formation violating the statutory prohibition provided by BIA s. 65.13(1). In the alternative, and if the court determines that the Legacy Agreement is not invalid, Invico submits that Free Rein's liabilities and obligations under the Legacy Agreement ought to be transferred to the Residual Trust due to the fact that the Legacy Agreement is uneconomic and has the effect of hindering any turnaround.

142. The Legacy Agreement contains a right of first refusal ("**ROFR**") in favour of Legacy, pursuant to which Legacy is entitled to a sixty-day period to match any bid for the purchase of the assets and infrastructure associated with the Disposal Facility.[131]

143. If the Legacy Agreement is determined to be invalid, then the ROFR is similarly invalid.

144. In the event that the court determines that the Legacy Agreement is not invalid, the existence of the ROFR does not impair the vesting order being sought on this Application. Courts have vested off ROFR interests on several occasions in insolvency proceedings, particularly where the ROFR related to only a portion of the debtor's assets.

145. In *Quest University Canada (Re)*, Quest University Canada applied for various relief under the *CCAA*, including for an order approving a sale transaction with Primacorp Ventures Inc. for substantially all of Quest's lands and related assets.[132] Capilano University opposed the approval of the sale on the basis it held ROFRs attached to certain lands included in the Primacorp transaction.[133]

146. Justice Fitzpatrick undertook a balancing of the equities present to determine whether to grant the sale approval and vesting order in light of the Capilano University ROFRs. Ultimately, Fitzpatrick, J. concluded that the equities favoured vesting off the ROFRs by considering, *inter alia*, the

---

[130] *Strait Line Contractors Ltd. (Receiver of) v Rainbow Oilfield Maintenance Ltd.*, [1991] 4 WWR 376, [1991] AWLD 301 at para 18 (ABCA).
[131] Wutzke #3 Affidavit at Exhibit "U" section 13.3.
[132] *Quest University Canada (Re)*, 2020 BCSC 1883 at paras 20-22 [*Quest*].
[133] *Quest* at paras 50-51.

following:

(a) Capilano University was aware that Quest had been pursuing a restructuring for several months prior and had the opportunity to participate in such efforts;

(b) a precondition for Primacorp to purchase Quest's assets on an *en bloc* basis was that Quest would obtain title to the individual lands in dispute without any reference to the Capilano University ROFRs, and an assertion of the rights contained in the ROFRs by Capilano University would delay and potentially terminate the proposed sale;

(c) enforcement of Capilano University's rights under the ROFRs would "give rise to a severe 'chilling effect'", which would both prevent the Primacorp transaction and disincentivize future purchasers; and

(d) the Primacorp transaction was the only sale before the Court which could produce a restructuring of Quest that was beneficial for its stakeholders.[134]

147. The Saskatchewan Court of Queen's Bench (as it then was) in *Bear Hills Pork Producers Ltd, Re,* similarly approved a sale of all the assets of the applicant corporations despite the presence of several ROFRs in regard to certain lands owned by the applicants.[135]

148. In *Bear Hills*, the proposed transaction contemplated the sale of all the lands of the applicant corporations on an *en bloc* basis. The withdrawal of any one property would terminate the sale and result in a potential liquidation of the assets.[136] The Court approved the sale, finding the welfare of the business carried on by the applicant corporations as well as the avoidance of the detrimental economic impacts resulting from a liquidation each weighed in favour of such a result.[137]

149. Similarly, Bourque, J. recently granted an approval and vesting order in the bankruptcy proceedings of Goldenkey Oil Inc. pursuant to which the Court vested off certain joint venture agreements containing ROFRs in respect of a certain oil and gas well owned by Goldenkey.[138]

150. In the present case, a consideration of the *Dianor* Test outlined in paragraph 108 above, indicates

---

[134] *Quest* at paras 51, 63-64.
[135] *Bear Hills Pork Producers Ltd, Re*, 2004 SKQB 213 at paras 1-3 [*Bear Hills*].
[136] *Bear Hills* at para 5.
[137] *Bear Hills* at para 9.
[138] See *In the Matter of the Bankruptcy of Goldenkey Oil Inc.*, Alberta Court of King's Bench Court File No. 25-2906009, Bench Brief of PricewaterhouseCoopers Inc. LIT in its capacity as Trustee in Bankruptcy of Goldenkey Oil Inc., filed January 23, 2024, and Sale Approval and Vesting Order granted by Bourque, J. on January 24, 2024.

that the ROFR in the Legacy Agreement should be vested off.

151. The first step of the *Dianor* Test is to determine the nature and strength of the interest proposed to be extinguished. In *Dianor #2*, the Court identified a spectrum of interests in land where, at one end, interests similar to a fee simple, such as ownership interests in ascertainable features of property, are less likely to be extinguishable. In contrast, a fixed monetary interest attached to real or personal property is more likely to be extinguishable.[139]

152. Invico accepts that the ROFR contained in the Legacy Agreement constitutes an interest in land. The rights granted pursuant to a ROFR are initially characterized as mere contractual rights, but such rights crystallize into interests in land once an offer to purchase is made.[140] Notwithstanding this characterization, and following on the results from *Quest* and *Goldenkey,* the nature of the interest in the present circumstances is closer to that of a fixed monetary interest rather than a fee simple interest, indicating the interest may be vested off per *Dianor #2*. The Legacy Agreement is, at its core, a services agreement, and while it purports to transfer assets to Legacy, such transfer is illegal and according to Free Rein's records, never in fact occurred.[141]

153. The second step of the *Dianor* Test is to consider whether the interest holder has consented to the vesting off of their interest, either prior to entering into insolvency proceedings or during.[142] Legacy has not consented to the vesting off of their interest.

154. Where the result of the first two steps of the *Dianor* Test are ambiguous or inconclusive, the courts are to conduct an assessment of the equities present.[143] The present circumstances which favour vesting off the ROFR contained in the Legacy Agreement are as follows:

(a) As per *Quest University* and *Bear Hills*, the Transaction contemplates a share transaction for the entirety of Free Rein's business and is more akin to an *en bloc* sale as opposed to a discrete sale of the Disposal Well and Disposal Facility, subject to the ROFR;

(b) the Legacy Agreement was entered into after the NOI Proceedings had commenced, and without approval of the court or the proposal trustee, in violation of BIA s. 65.13(1);

(c) preserving the Legacy Agreement or the ROFR would adversely affect Invico's ability to sell Free Rein's assets at a later date, which would have the effect of eroding the value of

[139] *Dianor #2* at paras 103-105.
[140] *2123201 Ontario Inc v Israel Estate*, 2016 ONCA 409 at para 23.
[141] Wutzke #3 Affidavit at para 79.
[142] *Dianor #2* at para 106.
[143] *Dianor #2* at para 110.

Invico's security. This is inequitable, since the Legacy Agreement did not exist at the time Invico advanced funds to Free Rein, and in any event, Invico did not consent to the Legacy Agreement; and

(d) The Legacy Agreement appears to replace the Nucor Agreement, which contains no ROFR provision.[144]

155. In light of the foregoing, Invico submits that the *Dianor* Test favours the vesting off of the Legacy Agreement despite the presence of the ROFR therein.

CONCLUSION

156. For all of the foregoing reasons, Invico respectfully requests that the Transaction be approved and that the RVO be granted on the terms provided in Invico's Application materials.

157. The RVO structure is necessary in the circumstances, since it allows for the beneficial transfer of Free Rein's oil and gas licenses without the cost and uncertainty associated with a traditional asset purchase transaction. Further, the RVO structure preserves certain of Free Rein's tax attributes, and importantly, no stakeholder is worse off as a result of consummating the Transaction by way of the RVO,

158. The Transaction follows the SISP, which thoroughly marketed Free Rein's property and business and was conducted fairly and with integrity.

159. In order to effect the Transaction and provide the best opportunity for the survival of the assets and recovery to Invico, Invico requires the Transferred GORRs to be vested out of Free Rein and transferred to the Residual Trust. Similarly, the Legacy Agreement, which should be declared null and void as a result of it being entered into after the NOI Proceedings, erodes the value of the Disposal Well and Disposal Facility, and therefore the Transaction requires in the alternative that the Legacy Agreement be transferred to the Residual Trust.

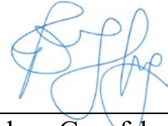
160. Invico is the fulcrum creditor in these proceedings and is advancing the Transaction in an attempt to protect any future prospect of recovering its loans. The Transaction is in the best interests of Free Rein's stakeholders in that it is the only remaining transaction available to Free Rein, and it provides recoveries to stakeholders and addresses environmental liabilities for the benefit of the public that would not otherwise be available.

---

[144] Wutzke #3 Affidavit at Exhibit "T".

161. As a result, Invico submits that it is reasonable and appropriate to approve the Transaction and granted the related relief sought.

162. ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF FEBRUARY, 2024.



Robyn Gurofsky /Anthony Mersich
Counsel to Invico Diversified Limited Partnership by its general partner, Invico Diversified Income Managing GP Inc.

LIST OF AUTHORITIES

1. *Harte Gold Corp.* (Re), 2022 ONSC 653, 2022 CarswellOnt 1698;
2. *Royal Bank v. Soundair Corp*., 1991 CarswellOnt 205;
3. *Romspen Investment Corporation v. Tung Kee Investment...,* 2023 ONSC 5911,...;
4. *Just Energy Group Inc. et. al. v. Morgan Stanley Capital...*, 2022 ONSC 6354,...;
5. *Acerus Pharmaceuticals Corporation* (Re), 2023 ONSC 3314, 2023 CarswellOnt 8791;
6. *Rambler Metals and Mining Limited*, Re CCAA, 2023 NLSC 134, 2023 CarswellNfld 254;
7. *CannaPiece Group Inc v. Marzilli*, 2023 ONSC 3291, 2023 CarswellOnt 9600;
8. *Arrangement relatif à Blackrock Metals Inc*., 2022 QCCS 2828, 2022 CarswellQue 10503;
9. *Orphan Well Association v. Grant Thornton Ltd*., 2019 SCC 5, 2019 CSC 5, 2019...;
10. *Accel Canada Holdings Limited* (Re), 2020 ABQB 182, 2020 CarswellAlta 475;
11. *Third Eye Capital Corporation v. Ressources Dianor*..., 2019 ONCA 508, 2019...;
12. *Bank of Montreal v. Dynex Petroleum Ltd*., 2002 SCC 7 at para 22;
13. *Manitok Energy Inc* (Re), 2018 ABQB 488, 2018 CarswellAlta 1235;
14. *Bank of Montreal v. Dynex Petroleum Ltd.*, 1999 ABCA 363, 1999 CarswellAlta 1271'
15. *Third Eye Capital Corporation v. Ressources Dianor*..., 2018 ONCA 253, 2018...;
16. *Prairiesky Royalty Ltd v. Yangarra Resources Ltd*, 2023 ABKB 11, 2023 CarswellAlta 30;
17. *Vandergrift v. Coseka Resources Ltd*., 1989 CarswellAlta 76;
18. *Alberta Energy Regulator v. Lexin Resources Ltd*., 2018 ABQB 590, 2018 CarswellAlta...;
19. *Companies' Creditors Arrangement Act*, R.S.C. 1985;
20. *U.S. Steel Canada Inc*., Re, 2016 ONCA 662, 2016 CarswellOnt 14104;
21. *Bankruptcy and Insolvency Act*, R.S.C. 1985;
22. *Proposition de CL Métal inc*. 2017 QCCS 2931;
23. *Strait Line Contractors Ltd. (Receiver of) v. Rainbow Oilfield*..., 1991 CarswellAlta 47;
24. *Quest University Canada* (Re), 2020 BCSC 1883, 2020 CarswellBC 3091;
25. *Bear Hills Pork Producers Ltd*., Re, 2004 SKQB 213, 2004 CarswellSask 417;

26. In the Matter of the Bankruptcy of Goldenkey Oil Inc., Alberta Court of King's Bench Court File No. 25-2906009, Bench Brief of PricewaterhouseCoopers Inc. LIT in its capacity as Trustee in Bankruptcy of Goldenkey Oil Inc., filed January 23, 2024, and Sale Approval and Vesting Order granted by Bourque, J. on January 24, 2024;

27. *2123201 Ontario Inc v Israel Estate*, 2016 ONCA 409.