

COURT FILE NUMBER

B201-996918
 B201-997457
 B201-997541

COURT

COURT OF KING'S BENCH OF ALBERTA
 IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE

CALGARY



IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY*
ACT, R.S.C. 1985, c. B-3, AS AMENDED

C61353
 Jun 27, 2024
 COM

AND IN THE MATTER OF THE BANKRUPTCY OF NOMODIC
 MODULAR STRUCTURES INC., AITHRA PROJECTS INC., AND
 NOMODIC MODULAR STRUCTURES (ONTARIO) LTD.

DOCUMENT

BENCH BRIEF OF ATB FINANCIAL

ADDRESS FOR SERVICE
 AND CONTACT
 INFORMATION OF PARTY
 FILING THIS DOCUMENT

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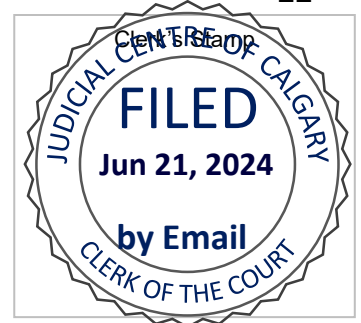
**BENCH BRIEF OF ATB FINANCIAL
 WITH RESPECT TO THE APPLICATION
 TO BE HEARD BY
 THE HONOURABLE JUSTICE B.E. ROMAINE**

June 27, 2024 at 2:00 p.m.

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I. INTRODUCTION

1. This bench brief is submitted by ATB Financial (“**ATB**”) in connection with the applications (the “**Applications**”) of FTI Consulting Canada Inc. (“**FTI**”), in its capacity as the trustee in bankruptcy (when referred to in such capacity, the “**Trustee**”) of Nomodic Modular Structures Inc. (“**NMSI**”), Aithra Projects Inc. (“**Aithra**”), and Nomodic Modular Structures (Ontario) Ltd. (“**Nomodic Ontario**”, NMSI, Aithra, and Nomodic Ontario are collectively referred to as, the “**Bankrupts**”), and Northern Vision Development Limited Partnership (“**NVD**”), concerning, NVD’s express trust claims (the “**Trust Claims**”) against two (2) distinct assets, being: (i) \$1,216,153.98 (the “**RBC Funds**”) currently held in a deposit RBC account number ending in 1348432 (the “**RBC Account**”); and, (ii) a cheque (the “**Additional Cheque**”) in the face amount of \$1,639,000.00 (the “**Cheque Funds**”, the Cheque Funds and the RBC Funds are collectively referred to as, the “**Disputed Funds**”).
2. Despite the multitude of arguments raised by NVD, the underlying dispute is simple. NVD seeks to obtain a preference, by way of elevating its unsecured claim to that of a proprietary trust, despite entering into written and executed commercial agreements (containing entire agreement clauses) which in no way contemplate the creation of any trust. No recognized exceptions permitting the inclusion of parol evidence are present or argued by NVD. More so, there is no written agreement, document, or correspondence, prior to the Date of Bankruptcy, which would, in any way, refer to, contemplate, or imply any form of trust between NMSI and NVD, or Champion Canada International ULC (“**Champion**”); the payor of the Additional Cheque. In short, NVD’s Trust Claim is based solely on inadmissible parol evidence which directly contradicts and is inconsistent with, the terms of the commercial agreements between the parties and their correspondence. On that basis alone, the Trust Claims should fail.
3. Even if NVD’s parol evidence is taken at face value, which ATB refutes, the facts do not disclose the existence of any trust in favour of NVD. The commercial transactions between NVD, NMSI, and Champion, were at all times consistent with a failed construction project and the resulting debtor-creditor relationship; nothing more. There are no extra ordinary circumstances present which would justify the judicial imposition of a constructive trust in NMSI’s bankruptcy proceedings; given the effect that such imposition would have on the interests of NMSI’s creditors and ATB. Even if NVD established that a trust existed over any of the Disputed Funds: (i) any such trust would be subject to the PPSA and

subordinate to ATB's Security Interests; and, (ii) ATB took reasonable steps and made appropriate inquiries in its dealings with NMSI, and is neither a trustee *de son tort* nor in knowing receipt of trust funds.

4. Capitalized terms used herein and not otherwise defined have the same meaning as ascribed to such terms in the Affidavit of Truth of Muhammad Ashraf, sworn on October 6, 2023 (the "**Ashraf Affidavit**").

II. FACTS

5. NMSI built custom-designed modular structures and carried on business in the Province of Alberta.

Affidavit of Muhammad Ashraf, sworn on October 6, 2024 ["Ashraf Affidavit"] at para. 4 and Exhibit "A" (Bates No. 2 - 3).

A. Facilities

6. ATB advanced credit, to NMSI, pursuant to the Commitment Letter, wherein ATB made available, to NMSI: (i) a Line of Credit Facility, in the maximum amount of \$7,000,000; (ii) letters of credit, in the maximum amount of \$1,000,000; and, (iii) a corporate MasterCard, in the maximum amount of \$150,000 (collectively, the "**Facilities**").

Ashraf Affidavit at paras. 7 – 8 and Exhibits "D" and "E" (Bates Nos. 14 - 76).

7. The Line of Credit Facility was margined. Accordingly, NMSI was required to provide regular financial reporting, to ATB, which included:

"(iv) detailed aged payable listing, up to the end of the previous month, which shall include, among others, a detailed list of Priority Payables along with all outstanding, unremitted or uncashed cheques, or amounts that are or may be subject to potential liens and related claims and actions, due to any inability to pay such payables."

Ashraf Affidavit at Exhibit "E", s. 2.7, amending s. 9(c)(i)(iv) (Bates No. 60).

8. ATB relied upon the financial reporting provided to it, by NMSI, in assessing amounts or claims which might have priority over the security granted to ATB by NMSI.

Responses to Undertakings given by Muhammad Ashraf at Questioning Held on April 16, 2024, at Bates No. 000003 (Undertaking No. 2) [Ashraf Undertaking Responses].

9. As of October 6, 2023, the Bankrupts were indebted to ATB in the amount of \$3,073,408.50, plus interest, costs, fees, and expenses, including, without limitation, solicitor and own client costs on a full indemnity basis (collectively, the “**Indebtedness**”).

Ashraf Affidavit at para. 16.

B. Security

10. As continuing security for the Indebtedness and all other debts, liabilities, and obligations owed to ATB, NMSI executed, among other agreements, certain GSAs.

Ashraf Affidavit at para. 12 and Exhibits “H”, “I”, and “K” (Bates Nos. 88 - 118, 134 - 146).

11. Pursuant to the NMSI GSAs, NMSI, among other security interests, assigned, transferred and set over to ATB and granted ATB a security interest in, all of its present and after-acquired personal property, and charged, in favour of ATB, as and by way of a floating charge, its undertaking and all present and after-acquired property and assets, real and personal moveable or immovable, of whatever nature and kind, all as general and continuing security for the payment and performance of all indebtedness, liabilities, and obligations owed to ATB (collectively, the “**Security Interests**”).

Ashraf Affidavit at para. 13 and Exhibits “H”, “I”, and “K” (Bates Nos. 89 - 90, 100; 103 - 104, 116; 135, 144).

12. ATB perfected its Security Interests by registering financing statements, against NMSI, with the applicable Personal Property Registries.

Ashraf Affidavit at para. 14 and Exhibit “M” (among others, Bates Nos. 162, 169, 197, 206, 212).

13. The Trustee has obtained an opinion, from its counsel, concluding that, subject to the usual and standard assumptions and qualifications, ATB has valid and enforceable security against all present and after-acquired property of the Bankrupts; including NMSI.

First Report of the Trustee, dated March 26, 2024, at para. 14 [“First Report”].

C. NMSI & NVD Relationship and Project

14. NVD retained NMSI to develop a hotel project located in Whitehorse (the “**Project**”).

Affidavit of Michael Hale, sworn on December 1, 2023, at para. 6, Exhibit “A” [“Hale Affidavit”].

15. In connection with the development of the Project, NVD and NMSI entered into a Limited Notice to Proceed (the "NVD LNTP"), undated, executed as of December 2 and 7, 2022.

Hale Affidavit, at para. 7 and Exhibit "A".

16. The NVD LNTP "was designed to allow work to begin in the absence of a full agreement that would be negotiated (called a Definitive Agreement)."

Hale Affidavit at para. 8.

17. No "Definitive Agreement" was ever entered into.

Hale Affidavit at para. 10.

18. The key terms of the NVD LNTP are as follows:

"This Limited Notice to Proceed (the "LNTP") shall serve as confirmation of Northern Vision Development LP (the "Limited Partnership") intent to enter into a Definitive Agreement and to place a Purchase Order with Nomodic Modular Structures Inc. (the "Contractor") for the purchase, fabrication, delivery and installation of 117 hotel modular rooms (the "Project") per the details as defined in the Class C Estimate. The purchase price will change as the design develops and is submitted for a building permit until approval

1. **Preliminary Work:** In order to allow Contractor to commence the Work prior to entry into a Definitive Agreement (as hereafter defined) and placement of the Purchase Order so that Contractor will have the full opportunity and ability to meet the anticipated work schedule, the Limited Partnership hereby confirms that Contractor may proceed with the Scope of Services as described in Schedule "A" hereto (collectively, the "Preliminary Work").

[...]

3. **Preliminary Work Price:** Limited Partnership agrees to pay Contractor for the Preliminary Work the sum of \$3,572,149.52 ("Preliminary Work Price"). The Preliminary Work Price is exclusive of any duties, taxes or similar fees. The parties further agree that the Preliminary Work Price shall be part of the contract price due to the Contractor under the Definitive Agreement (as defined below), if one is reached, and that all payments made pursuant hereto shall be credited towards the contract price of any resulting Definitive Agreement.

4. **Prepayment Bonus:** The Contractor acknowledges NVD LP's commitment to this project by entering into this LNTP which includes a significant pre-payment and as a result will offer a 1.5% of this initial payment (\$52,500) reduction in total project costs pertaining to this scope of work once the Class A estimate is complete. [...]

5. **Entire Agreement:** The parties to this LNTP acknowledge that this LNTP (a) is an agreement between them for the Preliminary Work Limited Partnership desires for Contractor to do with regard to the Project, (b) **except with regard to any separate Non-Disclosure Agreement to which the parties may be party with regard to the Project, constitutes the entire agreement between them with respect to the Preliminary Work therefore unless and until a Definitive Agreement on terms mutually agreed is signed by both parties, and (c) supersedes all previous oral or written agreements, representations or negotiations concerning the Preliminary Work or the Project.**

7. **Termination:**

(a) If Limited Partnership and Contractor are unable to reach agreement as to any term of the Definitive Agreement by the Target Date [January 31, 2023], or the Definitive Agreement is not executed by both parties by the Target Date, in either case as such date may be extended by mutual written agreement of the parties, either party shall be entitled to terminate this LNTP by providing seven (7) days' written notice to the other. **In the event of termination of this LNTP, Contractor shall cease all further work on the Preliminary Work, including terminating all Subcontractor work, Contractor shall be entitled to retain all payments received prior to termination, and Contractor shall submit an invoice to Limited Partnership for any additional time, labor, materials, costs, expenses, transportation to deliver any goods purchased prior to termination and other charges incurred through the date of termination not covered by such payments however approved by the Limited Partnership (collectively, "Termination Charges").** The Limited Partnership and Contractor will mutually agree to the Termination Charges in writing and upon agreement the Limited Partnership shall pay such Termination Charges within thirty (30) days of the agreed to date. **The mutually agreeable Termination Charges will be subtracted from the total amount remaining and the remaining amount will be refunded to the Limited Partnership within 30 days of the Termination Charge agreed to date.**

[...]

8. **No obligation:** **Neither party shall have any obligation to the other party with respect to the full Work or otherwise other than as specifically set forth in this LNTP related to the Preliminary Work** (Exhibit A – Manufacturing Limited Notice to Proceed). This LNTP does not create any contract between Contractor, Champion Canada International ULC and Limited Partnership for the full Work, and no such contract will exist unless and until a Definitive Agreement is fully executed in writing by authorized representatives of both parties. **A valid and binding Definitive Agreement for the Project may not be formed through exchange of forms or written or verbal communications, but must be evidenced by a signed Definitive Agreement containing all mutually agreed-upon terms and contract documents.**

[...]

14. Modification: This LNTP may not be changed or modified except by a writing signed by both parties.

Hale Affidavit at Exhibit "A", ss. 1, 3, 5 - 7, 14 [emphasis added].

19. The NVD LNTP incorporates the following Schedule A – Scope of Services:
1. **Deposit to hold fabrication space**, at a value of 20% of the total fabrication estimate
 2. Fabrication of the Show Suite
 3. Purchase on critical long lead materials, including all deposits
 4. **Nomodic general expenses and fees as applicable to this defines [sic] scope of services**
 5. Other tasks to avoid project delays, approved in advance in writing by NVD LP and agreed by Nomodic."

Hale Affidavit at Exhibit "A", Schedule "A" [emphasis added].

20. In accordance with the NVD LNTP, NVD advanced \$3,750,774.00 to Nomodic (the "**Pre-Payment**"), on or around December 7, 2022.

Hale Affidavit at para. 9 and Exhibit "B".

21. The Pre-Payment was deposited into the RBC Account.

First Report at paras. 18, 34(a).

D. The Champion LNTP

22. NMSI sub-contracted a portion of the work, under the NVD LNTP, to Champion. Specifically, NMSI and Champion entered into a Limited Notice to Proceed (the "**Champion LNTP**", the NVD LNTP and the Champion LNTP are collectively referred to as, the "**LNTPs**"), dated as of December 6, 2022.

Affidavit of Ken Volk, sworn on December 4, 2023, at para. 4 and Exhibit "A" ["Volk Affidavit"].

23. The key terms of the Champion LNTP are as follows:

Northern Vision Development LP ("Owner") requires to spend a portion of the allocated budget for the Project in 2022 and therefore, Nomodic Modular Structures Inc ("Nomodic") has entered into a Limited Notice to Proceed with Owner for the purchase, fabrication, delivery and installation of a 117-room modular Hyatt Place Hotel in Whitehorse, VT (the "**Project**") based on a Class C Estimate. The purchase

price will change as the design develops and is submitted for a building permit.

Nomodic is pleased to formally notify Champion Canada International ULC ("**Champion**"), of this Limited Notice to Proceed ("**LNTP**") with the intent to enter into a definitive agreement for the fabrication services in support of the Project by end of February 2023. This LNTP will form part of the definitive manufacturing Agreement. By executing the LNTP, Champion is agreeing to:

[...]

Changes in Services: This LNTP is based on the proposal described above. No changes or modifications to the proposal shall be effective unless made in writing and signed by Nomodic ("Changes"). All costs attributable to Changes may result in the estimate to increase the final cost to said requested change;

[...]

If Owner terminates Agreement, Champion will be entitled for all reasonable costs to time of termination.

[...]

This LNTP does not constitute a complete statement of, or a legally binding or enforceable agreement or commitment on the part of either Party with respect to the matters described herein. **The Parties agree to proceed at their own risk and expense regarding the possible transaction until completion of a formal definitive agreement or abandonment of negotiations.** If Owner abandons the Project prior to Nomodic and Champion executing a manufacturing agreement by February 28th, 2022;¹ **Champion shall refund all pre-payments to Nomodic** for return to Owner, less any reasonable expenses and monies spent on procurement of long leads within seven (7) days Notice. Any purchased goods will be turned over to Owner within fifteen (15) business days.

Volk Affidavit at Exhibit "A" (no section numbering) [emphasis added].

24. Pursuant to the Champion LNTP, NMSI provided a pre-payment, to Champion, of approximately \$2,110,500.00 (the "**Champion Pre-Payment**").

Hale Affidavit at paras. 22 - 23; Volk Affidavit at Exhibit "C".

¹ It appears that the reference to "February 28, 2022" is a typographical error, as the Champion LNTP was dated December 6, 2022. The corresponding provision in the NVD LNTP, section 6, refers to a January 31, 2023 target date for the execution of a Definitive Agreement.

E. Initial Correspondence Regarding RBC Account

25. On February 28, 2023, in the context of correspondence relating to determining NMSI's liquidity requirements and borrowing base, Dawn Walby-Parchoma, a representative of ATB, sent an email to Chumah Metuh, the then Vice President, Finance, of NMSI, requesting additional information regarding NMSI's financial condition and a recent presentation given by FTI, in its capacity as NMSI's financial advisor. Among other things, Ms. Walby-Parchoma's email requested that NMSI, "Please provide current RBC statements from August 2022 to February 2023 along with trust agreements requiring GIC for the NVD Hyatt Place deposit."

Ashraf Undertaking Responses at Bates No. 000004 (Undertaking No. 3) and 000012 (Undertaking No. 9), and Schedule "3" (Bates Nos. 000103 – 000105).

26. In response to Ms. Walby-Parchoma's question, Mr. Metuh advised that:

"Per discussion with Kevin Read, CEO, **for tax purposes pertaining to the 2021 sale of a hotel property, Nomodic's customer accelerated the issuance of deposit funds for its Hyatt project in Whitehorse, YK with instruction that Nomodic hold the funds in a manner that protects and returns deposit interest to the customer similar to that of the customer's own savings account, the proceeds of which (accumulated interest) be returned to the customer by way of a predetermined flat fee.** The deposit funds ultimately earmarked for payment to Nomodic's modular fabricator for the production of a 'prototype unit', in two tranches, through a transparent predetermined supply agreement."

Ashraf Undertaking Responses at Bates Nos. 000004 - 000005 (Undertaking No. 3) and Schedule "3" (Bates No. 000104).

27. This explanation aligns with the recitals and terms of the Champion LNTP, above.
28. Mr. Metuh's response did not enclose any documents relating to or referring to a trust, nor indicate any verbal trust arrangement existed between NMSI and NVD. ATB did not receive any other information from NMSI in relation to Ms. Walby-Parchoma's question.

Ashraf Undertaking Responses at Bates No. 000005 (Undertaking No. 3).

F. Nomodic's Use of the Funds in the RBC Account

29. As described in the First Report of the Trustee in Bankruptcy, dated March 26, 2024 (the "**First Report**"), on January 23, 2023, NMSI redeemed a GIC in the amount of \$492,943,

from the RBC Account, and transferred \$497,000 to its ATB account. On January 30, 2023, \$497,000 was transferred from Nomodic's ATB account to the RBC Account.

30. On March 6, 2023, Ms. Walby-Parchoma sent a further email to Mr. Metuh asking, among other things, "\$497,000 was sent to ATB account on January 23rd and then returned on January 30th. Why was this transaction done?"

Ashraf Undertaking Responses at Bates No. 000007 (Undertaking No. 6) and Schedule "6" (Bates Nos. 000248 - 000249).

31. In response, Mr. Metuh advised that:

"Utilized funds in the RBC account to make critical payment through the ATB account to vendors as we had a BC Housing receivable get pushed into the following week. Once the BC Housing funds were received, the funds were returned to RBC. As you can guess, I got in shit for proceeding in this direction."

Ashraf Undertaking Responses at Bates No. 000008 (Undertaking No. 6) and Schedule "6" (Bates Nos. 000248 - 000249).

32. The reply from Mr. Metuh did not refer to any replenishment of trust funds or similar rationale for moving funds back into the RBC Account. ATB had no reason to suspect that any transfer back to the RBC Account related to any trust arrangement.

Ashraf Undertaking Responses at Bates No. 000008 (Undertaking No. 6).

G. Termination of LNTPs and Settlement Agreement

33. NVD issued a notice terminating the NVD LNTP (the "**NVD Termination Notice**"), on July 17, 2023.²

Hale Affidavit at para. 16 and Exhibit "F".

34. Following the delivery of the NVD Termination Notice, NVD, Champion, and NMSI, engaged in discussions "to resolve issues around the termination of the LNTPs."

Hale Affidavit at para. 18; Volk Affidavit at para. 6.

35. On September 27, 2023, following the delivery of ATB's Demand Letter (as defined below), Champion and NMSI agreed to an "accounting" of the Champion Pre-Payment,

² The record does not disclose any correspondence in which a copy of the NVD Termination Notice was provided to ATB. NMSI's representative referred to "...the NVD Hyatt project which has been cancelled" in an email to Mr. Ashraf of ATB dated October 3, 2023: Ashraf Undertaking Responses at Schedule "4" (Bates No. 000242).

which indicated that the total amount charged, by Champion, for materials and labour, was \$471,341.46.

Volk Affidavit at paras. 8, 10, and Exhibit "C".

36. On or around September 27 - 28, 2023, NVD, NMSI, and Champion, signed a written Mutual Release and Settlement Agreement (the "**Settlement Agreement**").

Hale Affidavit at para. 24 and Exhibit "I"; Volk Affidavit at para. 11 and Exhibit "D".

37. The key terms of the Settlement Agreement include the following:

"C. NVD paid \$3,750,774.00 to Nomodic [NMSI] on December 14, 2022.

D. NVD terminated the Nomodic LNTP on July 17, 2023.

E. NVD, Nomodic [NMSI] and Champion have reached a settlement of all issues outstanding between them, **including relating to the reasonable costs, expenses, and termination charges under the Champion LNTP and under the Nomodic LNTP, pursuant to the terms of this Mutual Release and Settlement Agreement (the "Agreement").**

[...] 1. Nomodic [NMSI] shall refund \$2,405,490.71 to NVD on or before October 6th, 2023 by way of certified cheque, bank draft or wire.

[...] 14. IN SIGNING THIS AGREEMENT, the parties acknowledge they have been given sufficient time to consider their actions and to seek legal advice as they deem appropriate with respect to this matter and the terms of this document. The parties voluntarily accept the terms of this document for the purpose of making full and final compromise, adjustment and settlement of all Claims as set out above. The parties further acknowledge that, other than the consideration promised herein, no representation of fact or opinion, threat or inducement has been made or given by any party to induce the signing of this Release.

Hale Affidavit, Exhibit "I" and Volk Affidavit, Exhibit "D"; each at ss. 1 - 6, 14 [emphasis added].

H. Defaults, Requests for Information, and Bankruptcy Order

38. The Bankrupts committed numerous defaults under the Commitment Letter, the Guarantees, and the Security, as described in the Ashraf Affidavit.

Ashraf Affidavit at paras. 21 - 27.

39. As a result of the Bankrupts' defaults, ATB delivered, to each of the Bankrupts:

- (a) on September 22, 2023, a notice (the “**ATB Termination Notice**”), which, among other things, advised the Bankrupts that all availability under the Commitment Letter and the Facilities was terminated and ATB was exercising its rights under the First Amending Agreement to apply all funds currently on deposit, with ATB, as an indefeasible and irrevocable repayment of the Indebtedness; and,
- (b) on September 25, 2023, a demand letter (the “**Demand Letter**”), through ATB’s counsel, and corresponding Notices of Intention to Enforce Security (the “**244 Notices**”), in accordance with section 244 of the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”).

Ashraf Affidavit at para. 27, Exhibits “P” and “Q” (Bates Nos. 223 - 235).

- 40. NMSI’s financial circumstances deteriorated between late September 2023 and October 6, 2023.

Supplemental Affidavit at para. 15.

- 41. On October 1, 2023, NMSI advised ATB, through their respective counsel, that “Nomodic does not see a path forward and will be advising all employees (with the exception of a few) not to come to work tomorrow as the company will cease to carry on business”. In the same email, NMSI requested a further \$150,000 in availability under the Facilities to “cover wages and hard costs to secure sites”.

Ashraf Affidavit at para. 30 and Exhibit “R” (Bates Nos. 237 - 238).

- 42. ATB was subsequently advised that all employees of the Bankrupts, with the exception of one, had been terminated or resigned.

Ashraf Affidavit at paras. 30 - 31 and Exhibit “R” (Bates Nos. 237 - 238).

- 43. On October 2, 2023, ATB became aware that NMSI: (i) had available RBC Funds; and, (ii) had utilized those RBC Funds to pay various subordinate claims, on or around September 29, 2023, including, among others, payroll and employee expenses in the amount of \$289,194.57.

Ashraf Affidavit at para. 32; Supplemental Affidavit at paras. 19 - 20, Exhibit “F” (Bates No. 23).

- 44. On October 2, 2023, the Bankrupts’ counsel advised, by email (the “**October 2 Payment Request Email**”), that the Bankrupts had used certain funds held in accounts outside of

ATB (collectively, the “**Outside Accounts**”), and intended to use further funds from such Outside Accounts, to make payments of: (i) employee wages, to wind down operations; and, (ii) certain legal costs and expenses (the “**October 2 Payment Request**”).

Supplemental Affidavit at para. 20 and Exhibit “F” (Bates Nos. 23 - 24).

45. The October 2 Payment Request Email also stated that: “... **Nomodic has a small amount of accessible cash in another bank account and could use the funds in that account to pay the above amounts.** We look forward to hearing from you as to ATB’s position regarding the above.”

Supplemental Affidavit at Exhibit “ F” (Bates No. 23).

46. In response to the October 2 Payment Request Email, ATB, through counsel, requested further clarity on the proposed source(s) of the funds to be used for the October 2 Payment Request and details concerning such payments (the “**ATB October 2 Response**”). The October 2 Response stated, in part:

“It appears that Nomodic has had sufficient funds all long with accounts outside of ATB. In connection with the below request, are you able to provide some additional details. Specifically: [...]

2) How much is currently located in the accounts not with ATB and what payments have been made from same?

3) How much is the CRA Payment, what does it relate to, and how does Nomodic plan on funding same?

4) As the below does not appear to be a funding request, **is Nomodic proposing to transfer all funds from the accounts not currently held by ATB into ATB accounts or is the request that ATB agree to allow these payments to be made using its collateral?**”

Supplemental Affidavit at para. 21, Exhibit “ G” (Bates Nos. 26 - 27) [emphasis added].

47. On the same date, the Bankrupts’ counsel advised, by email (the “**October 2 Bankrupts’ Response**”):

“Question #2

There is \$2,300,000.00 between the two RBC accounts. **Nomodic has access to one of the accounts which contains approximately \$1,200,000.00. Nomodic and another party are joint signatories on the other account (containing approximately \$1,100,000.00) which pertains to a particular project (Sudbury).**

A resolution regarding the joint account will require some negotiation over the course of the month of October.

Question #3

There is approximately \$180,000 owing to CRA for source deductions. As discussed, GST is current.

Nomodic proposed to pay CRA from the accessible RBC account tomorrow. It also proposes to pay the employees referenced in my email of 11:57 am from that account. It also proposes to pay BLG from that account. [...]

Question #4

Once the payments contemplated above have been made, Nomodic will arrange for the balance of the cash in the RBC account that it controls to be paid to ATB. Again, the joint account will require some negotiation before that issue is resolved. [...]"

Supplemental Affidavit at para. 22, Exhibit " H" (Bates Nos. 30 - 31) [emphasis added].

48. The only RBC account controlled by NMSI is the RBC Account subject to NVD's Trust Claims.
49. NMSI's then-Chief Financial Officer, Byron Lambert, sent a follow-up email in response to the ATB October 2 Response, on October 2, 2023 (the "**October 2 Lambert Email**"), which contained further details regarding payments made from the RBC Account, indicating a total of \$289,194.57, consisting of "Proposed CRA payments for tomorrow" in the amount of \$183,807.77 and "Additional payments proposed for tomorrow" of (i) \$17,000 for a "Key Employee Retainer", (ii) \$25,000 for a "BLG retainer", and (iii) "Employee Expenses submitted late: < \$5,000 in aggregate."

Supplemental Affidavit at para. 24 and Exhibit "I" (Bates No. 36).

50. Based on the October 2 Bankrupts' Response, the Bankrupts' intent was to utilize: (i) part of the funds held in the RBC Account, to fund the payments described in the October 2 Payment Request, if ATB consented; and, (ii) the balance of the funds held in the RBC Account, to repay the Indebtedness due and owing to ATB.

Supplemental Affidavit at para. 23.

51. As a result, ATB understood that the funds in the RBC Account: (i) were property of the Bankrupts; (ii) had been utilized by the Bankrupts to make various unsecured or

subordinate payments; and, (iii) were available for repayment of the Indebtedness, and in fact, the Bankrupts intended to utilize the RBC Account funds for that specific purpose.

Supplemental Affidavit at para. 25.

52. On October 3, 2023, Mr. Lambert advised ATB directly that he would transfer the RBC Funds to ATB that afternoon, after certain payments were made, but he was unable to process source deduction payments. Mr. Lambert requested that ATB allow the Bankrupts to make source deduction payments from the RBC Funds following their transfer to ATB.

Ashraf Affidavit at para. 33.

53. ATB agreed that it would facilitate the transfer of source deductions. NMSI failed to transfer the RBC Funds to its ATB account.

Ashraf Affidavit at para. 33.

54. During this period, in order to allow ATB to better understand the Bankrupts' financial position and as part of the Bankrupts' ongoing financial reporting requirements under their agreements with ATB, the Bankrupts provided ATB with: (i) payables listings, dated August 31, 2023 and September 21, 2023 – October 20, 2023 (collectively, the "**Payables Listings**"); and, (ii) receivables listings, the most recent being the AR Aging Report, as at October 3, 2023, attached to an October 3, 2023 email (the "**Receivables Listing Email**") from Mr. Lambert.

Supplemental Affidavit at para. 16, Exhibits "C", "D", and "E" (Bates Nos. 7 – 21).

55. The Payables Listings did not disclose any amounts due and owing, by NMSI, to NVD, and included a cash flow forecast which referred to \$0.01 owing, by NMSI, to Champion.

Supplemental Affidavit at para. 17 and Exhibit "D" (Bates No. 17); Ashraf Undertaking Responses at Bates No. 000003 (Undertaking No. 2).

56. The Receivables Listing Email was provided to ATB in the context of: (i) discussions between Mr. Lambert and ATB, concerning the potential engagement of Mr. Lambert to assist ATB (during or following the wind-down of NMSI's and Nomadic Ontario's operations) in collecting eligible receivables, subject to ATB's Security Interests, in exchange for payment of a percentage of the face value thereof; and, (ii) Mr. Lambert identifying eligible receivables for potential collection. The Receivables Listing Email stated, in part:

Attached is the current AR listing with notes on which amounts can be targeted for collections or that will require negotiations with various parties for the full release (joint signatory account).

There was also an agreement reached last week with a manufacturer to provide a refund to Nomodic for approximately \$1.6M, there was supposed to be a cheque sent but it will require follow up – these relate to the NVD Hyatt project that has been cancelled. This would have been tied to the GIC held at RBC, Total funds were due back to NVD of \$2.4M, this would have consisted of the manufacturer refund as well as funds from the GIC. I do not know the status of the manufacturer cheque at this time and will require some leg work.

Supplemental Affidavit at paras. 17, 38 and Exhibit “E” (Bates No. 20).

57. At the time, ATB understood that the “funds [that] were due back to NVD” would at most constitute an unsecured claim, as: (i) details concerning any claims or potential claims by NVD or Champion had not been disclosed to ATB; (ii) NVD was not listed as a creditor in the Payables Listings, which the Bankrupts were aware that ATB was relying upon for the purpose of assessing its position and the Security; (iii) the Receivables Listing Email indicated that the “manufacturer cheque”, *i.e.* the Additional Cheque, would “require follow up” and “will require some leg work”; and, (iv) the funds derived from the Additional Cheque were included, by Mr. Lambert, as part of the eligible receivables to be collected, for and on behalf of ATB.

Supplemental Affidavit at para. 18.

58. On October 4, 2023, NMSI advised ATB that it was in receipt of the Additional Cheque.

Ashraf Affidavit at para. 36; Supplemental Affidavit at para. 27.

59. On October 4, 2023, ATB’s counsel sent an email to NMSI’s counsel (the “**October 4 ATB Email**”), requesting additional information including:

“We understand that there are now concerns that certain of the funds **in the RBC accounts are impressed with a trust under the *Construction Act* (Ontario)**. Can you please provide the following details concerning same:

- the basis of the potential trust claim and any supporting documents and details underpinning same; and,
- the potential quantum of the funds currently on deposit with RBC, which are ultimately subject to any potential trust / priority claim.”

Ashraf Undertaking Responses at Bates No. 000010 (Undertaking No. 9) and Schedule “9” (Bates No. 000270) [emphasis added].

60. NMSI's counsel responded to the October 4 ATB Email by way of return email (the "**October 4 Counsel Response**") and stated in response:

"UNFORTUNATELY, IT APPEARS THAT THERE HAS BEEN A MISCOMMUNICATION ON THIS POINT. **WE HAVE DETERMINED THAT THE DIRECTORS AND OFFICERS MAY BE LIABLE FOR VACATION PAY (IN ONTARIO) UP TO THE DATE OF TERMINATION.** CHUMA IS IN THE PROCESS OF CALCULATING WHAT THAT AMOUNT MIGHT BE.

IN TERMS OF THE RBC ACCOUNT THAT IS FULLY CONTROLLABLE BY NOMODIC, WE BELIEVE THAT THERE SHOULD BE A REVIEW AS TO THE SOURCE OF THE FUNDS BEFORE THEY ARE SIMPLY MOVED OVER TO THE ATB ACCOUNT TO ENSURE THAT THEY ARE ACTUALLY CAUGHT BY THE SECURITY AND ARE NOT CAUGHT BY APPLICABLE ONTARIO LEGISLATION."

Ashraf Undertaking Responses at Bates No. 000010 (Undertaking No. 9) and Schedule "9" (Bates No. 000277) [emphasis added].

61. "...THE RBC ACCOUNT THAT IS FULLY CONTROLLABLE BY NOMODIC..." referred to the RBC Account.

Ashraf Undertaking Responses at Bates No. 000011 (Undertaking No. 9).

62. The October 4 ATB Email also asked: "What further payment(s), if any, does Nomodic intend to make from any of the RBC accounts and, if so, what are the details of such payments and from which accounts will they be made?" In response to that question, the October 4 Counsel Response advised that:

NOMODIC IS PROPOSING TO PAY CRA FOR SOURCE DEDUCTIONS (ROUGHLY \$180,000.00), BLG (\$25,000.00), GST (\$12,278.00), REIMBURSABLE EMPLOYEE EXPENSES (\$12,118.04) - WE HAVE AN ITEMIZED LIST, IT SUPPLIER (\$25,000.00) – WE ARE ATTEMPTING TO LOCATE THE INVOICE (UNFORTUNATELY, DUE TO UNPAID AMOUNTS, THE SUPPLIER HAS SHUT OFF ACCESS TO THE SERVER).

Ashraf Undertaking Responses at Bates No. 000011 (Undertaking No. 9) and Schedule "9" (Bates Nos. 000270, 000276).

63. Later on October 4, 2023, ATB's counsel requested that "...Can you please provide us with copies of the documents on the source of funds in the RBC Account and those which underlie the corresponding **potential claims** against same."

Ashraf Undertaking Responses at Bates No. 000011 (Undertaking No. 9) and Schedule "9" (Bates No. 000274).

64. No documents were provided.

**Ashraf Undertaking Responses at Bates No. 000011 (Undertaking No. 9) and Schedule "9"
(Bates No. 000274).**

65. On October 5, 2023, ATB requested that the Additional Cheque be deposited into an ATB account or, alternatively, that the Bankrupts make an assignment in bankruptcy and deliver the Additional Cheque to the trustee in bankruptcy.

**Ashraf Affidavit at paras. 37 – 39 and Exhibit "S" (Bates No. 240 – 251);
Supplemental Affidavit at para. 28.**

66. On October 5, 2023, ATB's counsel received an email (the "**October 5 Email**") from the Bankrupts' then-counsel, advising that NMSI was prepared to deposit the Additional Cheque, in the ATB Operating Account, provided that ATB, in return, allow NMSI to utilize the ATB Operating Account to make certain payments from the proceeds of the Additional Cheque (the "**October 5 Payment Request**"). Specifically, the October 5 Email states:

Further to our telephone conversations over the course of the last few days, Nomodic Modular Structures Inc. ("**Nomodic**") has received a cheque in the sum of \$1,639,158.54 from Champion Canada International ULC (the "**Cheque**"). **Nomodic is prepared to deposit the Cheque into its ATB account on the conditions that, once the Cheque has cleared, ATB will:**

1. make the following amounts available (in the form of bank drafts) for payment by Nomodic to the following:
 - Canada Revenue Agency (payment of outstanding source deductions) – **\$197,212.40**;
 - Field Payroll (Pay Period – September 29, 2023) - **\$38,922.74** – Upon reviewing its records, Nomodic has discovered (at 11:30 am today) that it short paid a number of former employees.
 - o See the attached Excel spreadsheet for details.
 - Borden Ladner Gervais LLP (legal fees) - **\$15,000.00**;
 - Paul Solota (Ontario Vacation Pay balance) - **\$4,080.10**;
 - Ben LaBoucane (Reimbursable Employee Expense) - **\$367.65**;
 - Chuma Metah (Reimbursable Employee Expense) - **\$73.95**;
 - Janelle LeBlanc (Reimbursable Employee Expense) - **\$666.78**;
 - Joseph Agyemang-Narh (Reimbursable Employee Expense) - **\$562.78**;
 - Julia Read (Reimbursable Employee Expense) - **\$2,968.57**;
 - Kevin Read (Reimbursable Employee Expense) - **\$3,937.42**;

- Mark MacDonald (Reimbursable Employee Expense) - **\$116.62;**
- Paul Sotola (Reimbursable Employee Expense) - **\$1,429.40;**
- Rick Gallop (Reimbursable Employee Expense) – **\$652.00;**
- Robert Gavin (Reimbursable Employee Expense) - **\$1,070.25;**
- Sadie Holt (Reimbursable Employee Expense) - **\$73.44;**
- Tim Foster (Reimbursable Employee Expense) - **\$199.24.**

...

Supplemental Affidavit at para. 31, Exhibit “J” (Bates No. 42).

67. The October 5 Email also advised that:

In an effort to be fully transparent, Nomodic has asked us to make sure that ATB is aware that:

- a. The Cheque was provided to Nomodic pursuant to an agreement that it would remit those funds to a customer in connection with an agreed upon rebate. On that basis, there may be a competing claim for those funds in the bankruptcy process; [...]

Supplemental Affidavit at para. 32, Exhibit “J” (Bates No. 42).

68. The October 5 Email referred to the Additional Cheque having been issued by Champion; however, it did not include any reference to NVD, any trust arrangements, or to any trust claims being asserted against the Additional Cheque, by Champion or NVD.

69. Furthermore, on or around October 4, 2023 and on October 5, 2023, representatives of ATB and NMSI had calls in which Mr. Kevin Read, the Chief Executive Officer of NMSI, reiterated that NMSI would deposit the Additional Cheque, with ATB, if ATB allowed the initial payments, as proposed on October 2, 2023 and, subsequently, the October 5 Payment Request, respectively, to be processed.

Supplemental Affidavit at paras. 33 - 36.

70. On the morning of October 6, 2023 (the “**Date of Bankruptcy**”), ATB reiterated its previous request that NMSI either deposit the Additional Cheque in NMSI’s general operating account with ATB (the “**ATB Operating Account**”), or make an assignment in bankruptcy and deliver the Additional Cheque to its trustee. The Additional Cheque was subsequently deposited, by Mr. Read, in the ATB Operating Account, in the amount of \$1,639,158.94,

at or shortly before 10:15 a.m. Calgary time on the Date of Bankruptcy; prior to the granting of the Bankruptcy Order (as defined below).

**First Report at paras. 30, 32(a), and Appendix "I";
Supplemental Affidavit at paras. 7, 9, 11(c);
Ashraf Affidavit at paras. 38 - 39 and Exhibit "S" (Bates Nos. 240 – 241).**

71. The balance of the ATB Operating Account immediately prior to the deposit was in an overdraft position of \$(68,506.53).

Supplemental Affidavit at paras. 11(a) – (b).

72. At approximately 11:46 a.m. Calgary time on the Date of Bankruptcy, in accordance with the ATB Termination Notice, the funds in the ATB Operating Account were applied, as a payment against the Indebtedness under the Line of Credit Facility. The resulting balance in the ATB Operating Account was \$0.

First Report at para. 28; Supplemental Affidavit at para. 12 and Exhibit "B".

73. Later, on or after 2:00 p.m., upon ATB's application, the Honourable Justice D.B. Nixon granted a Bankruptcy Order (the "**Bankruptcy Order**"): (i) declaring the Bankrupts to be bankrupt; and, (ii) appointing FTI as the Trustee of the Bankrupts.

**Bankruptcy Order pronounced on October 6, 2023 at paras. 2 - 5;
First Report at para. 1;
Supplemental Affidavit at para. 13.**

I. Summary of Information Provided to ATB Over Time

74. For ease of reference, a summary of the evidence concerning information provided from time to time to ATB, by the Bankrupts, is attached as Schedule "**A**" to this Bench Brief.

III. ISSUES

75. The issues to be determined by this Honourable Court, on the within Application, are:
- (a) whether parol evidence should be admitted to substantiate NVD's Trust Claims;
 - (b) if parol evidence is admitted, whether the RBC Funds and/or the Additional Cheque are subject to a valid and enforceable express or Quistclose trust (if a Quistclose trust, being an equitable constructive trust, is appropriate in the circumstances), in favour of NVD;

- (c) if NVD's Trust Claims are valid and appropriate, do NVD's Trust Claims have priority over ATB's Security Interests; and,
- (d) if NVD's Trust Claims are valid, appropriate, and have priority, did ATB act as a *trustee de son tort* or knowing recipient, with respect to the Additional Cheque.

IV. LAW

A. Trusts Generally – Three Certainties

76. In order to create a valid trust, each of the “three certainties” must be present:

Century Services Inc. v Canada (Attorney General), 2010 SCC 60 at para. 83 [Book of Authorities (“BOA”) TAB 12].

- (a) **Certainty of Intention** - the settlor and trustee must have intended to create a trust. Requires words that “show that the recipient must take the property for described persons or objects, **not beneficially**. The words “in trust” suffice, but are not necessary.” On their own, the words “in trust” and “trust” are not determinative of the existence of a trust, but “the words which nearly always reveal the intention [to create a trust] are ‘in trust’, or ‘as trustee’.”

Carling Development Inc. v Aurora River Tower Inc., 2005 ABCA 267 at para. 51 [*Carling*] [emphasis added] [BOA TAB 11];
Canada Trust Co. v Price Waterhouse Ltd., 2001 ABQB 555 at paras. 23, 24, 26 [BOA TAB 8].

- (b) **Certainty of Object** - the beneficiaries of the trust must be ascertainable - *i.e.* it must be possible to identify “**certain or ascertainable** persons or objects who are to benefit”. Certainty of object “requires that the persons or the class of persons who are the intended beneficiaries must be **sufficiently certain** so that the trust can be performed”.

Carling at para. 51 [emphasis added] [BOA TAB 11];
Bruderheim Community Church v Moravian Church in America (Canadian District), 2020 ABCA 393 at para. 16 [emphasis added] [BOA TAB 7].

- (c) **Certainty of Subject** - the trust property must be identifiable, requiring “clear identification of the property which is the subject matter”.

Carling at para. 51 [BOA TAB 11].

B. Quistclose Trusts are Constructive Trusts

77. A Quistclose trust, in Alberta, is a form of equitable constructive trust. As stated by the Alberta Court of Appeal in *Carevest Capital Inc. v Leduc (County)*:

[13] In *Quistclose* a type of constructive trust was imposed in order to create a proprietary remedy.

Carevest Capital Inc. v Leduc (County), 2012 ABCA 161 at para. 13 [*Carevest*] [BOA TAB 10].

78. A constructive trust is a form of equitable trust.

Rawluk v Rawluk, [1990] 1 SCR 70 at pp. 85 – 86 [BOA TAB 23];
Soulos v Korkontzilas, [1997] 2 SCR 217 at paras. 11, 34 (per McLachlin J., for the majority) [*Soulos*] [BOA TAB 25].

79. The three certainties must be capable of being established in order for a valid Quistclose trust to exist. Furthermore, in addition to the three certainties, the two-part test in the English case, *Barclays Bank Ltd. v Quistclose Investments Ltd.*, as subsequently applied and modified in Canadian decisions, must be met:

Two questions arise, both of which must be answered favourably to the respondents if they are to recover the money from the bank. The **first** is whether as between the respondents and Rolls Razor Limited, **the terms upon which the loan was made were such as to impress upon the sum of GBP 209,719 8s. 6d. a trust** in their favour in the event of the dividend not being paid. The **second** is whether, in that event, **the bank [the original recipient of the funds] had such notice of the trust or of the circumstances giving rise to it as to make the trust binding upon them**

Westar Mining Ltd. (Re), 2003 BCCA 11 at para. 12 [BOA TAB 27];
Giles v Westminster Savings Credit Union, 2007 BCCA 411 at para. 31 [BOA TAB 18];

Barclays Bank Ltd. v Quistclose Investments Ltd., [1970] AC 567 (HL (Eng)) at p. 579, as quoted in *Carevest* at para. 11 [emphasis added] [BOA TAB 10].

80. Accordingly, in addition to the three certainties, the two additional requirements for establishment of a Quistclose trust are that: (1) funds were advanced for a specific purpose but not used for that purpose, and (2) the recipient had notice of the purpose.

Ontario (Training, Colleges and Universities) v Two Feathers Forest Products LP, 2013 ONCA 598 at paras. 11, 38 [*Two Feathers*] [BOA TAB 22].

V. ARGUMENT

A. The LNTPs and Settlement Agreement Should Be Interpreted In Accordance With Their Terms; Which Fail to Establish Any Trust.

81. It is not disputed that the LNTPs and the Settlement Agreement contain no express terms establishing or even referring to, any form of trust. Similarly, none of the correspondence between NVD and NMSI, prior to the Date of Bankruptcy, referred to, identified, or even stated that any trust existed or that the Pre-Payment was held in trust.
82. The LNTPs and Settlement Agreement should be interpreted in accordance with their terms, not, as NVD argues, contradictory parol evidence.
83. The parol evidence rule is particularly applicable in the circumstances, where such parol evidence is set out after the Date of Bankruptcy, with no contemporary written documentation or correspondence, as at or around the execution of the relevant agreements.
84. Unless a recognized exception applies, none of which are applicable in the present circumstances, parol evidence is inadmissible in interpreting the terms of a written contract. As stated by the Alberta Court of Appeal:

[15] **When the deal is complete in the written contracts**, and not subject to an escrow, **other evidence (parol evidence) is inadmissible to vary or contradict a clear written contract:** [citations omitted] [...]

[19] **Nor can the court find a collateral parol contract inconsistent with the express written contract:** *Catre Ind. Alta v. R.* (1989), 99 A.R. 321; *Hawrish v. Bank of Montreal* [1969] S.C.R. 15. **Collateral contracts are viewed suspiciously and must be proved strictly, along with clear intent to contract:** *Hawrish*.

Gainers Inc. v Pocklington Finance Corporation, 2000 ABCA 151 at paras. 15, 19 [BOA TAB 16];
Guaranty Properties Limited v Edmonton (City of), 2000 ABCA 215 at paras. 20, 23
[*Guaranty v Edmonton*] [BOA TAB 17].

85. Furthermore, particular caution should be taken when parol evidence is utilized in an effort to establish a trust in a commercial context. In *Ja-Ker Financial Corporation v Norris*, this Honourable Court stated:

"[33] The "judicial reluctance" to recognize an undocumented trust relationship between arms-length commercial parties is particularly

warranted in this case where the alleged existence of such relationship is based entirely upon parole evidence.

[34] The rule against the admission of parole evidence has been formulated as follows:

If there be a contract which has been reduced to writing, verbal evidence is not allowed to be given ... so as to add to or subtract from, or in any manner to vary or qualify the written contract.

... parole testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract.

Chitty on Contracts (Thomson Reuters (Legal) Limited, Thirteenth Edition, 2008) - pages 864 to 865,”

Ja-Ker Financial Corporation v Norris, 2015 ABQB 756 at paras. 33 - 34
[emphasis added] [BOA TAB 20].

86. None of the LNTPs or the Settlement Agreement establish or refer to, any trust or similar arrangement.
87. NVD's argument entirely relies upon this Honourable Court finding that a relationship, between commercially sophisticated parties, who have entered into executed written agreements, that contain no trust provisions or indications thereof, somehow was intended to create a collateral trust; absent anything substantiating same. NVD's arguments are solely based upon parole evidence arising after the Date of Bankruptcy, with no written documents prior to the Date of Bankruptcy being provided to evidence same. The numerous emails between NVD and NMSI, following the delivery of the NVD Termination Notice but prior to the Date of Bankruptcy, as tendered by NVD, contain no reference to a trust.

Hale Affidavit at Exhibits "F", "G". The NVD Termination Notice enclosed in Exhibit "F" states, with respect to payment obligations: "We look forward to receipt of an invoice from Nomodic for the termination charges (if any) for discussion, and to the eventual receipt of: a) refund of the balance of payments made to Nomodic; and b) all work performed on and/or goods purchased for the project, all in accordance with Section 7 of the LNTP." [emphasis added].

88. This is underscored by the terms of the LNTPs and the Settlement Agreement, as:
 - (a) the NVD LNTP contains an "entire agreement clause" which states that, the NVD LNTP "... (b) except with regard to any separate Non-Disclosure Agreement to

which the parties may be party with regard to the Project, constitutes the **entire agreement** between them with respect to the Preliminary Work therefore unless and until a Definitive Agreement on terms mutually agreed is signed by both parties, and (c) **supersedes all previous oral or written agreements, representations or negotiations** concerning the Preliminary Work or the Project.”;

Hale Affidavit at Exhibit “A”, s. 5 [emphasis added];
Guaranty v Edmonton at paras. 26 – 28 [BOA TAB 17].

- (b) the Settlement Agreement states that the parties have had an opportunity to obtain legal advice and “...The parties further acknowledge that, **other than the consideration promised herein, no representation of fact or opinion, threat or inducement has been made or given** by any party to induce the signing of this Release.”; and,

Hale Affidavit at Exhibit “I”, and Volk Affidavit at Exhibit “D”, each at s. 14 [emphasis added].

- (c) the LNTPs and the Settlement Agreement refer to the corresponding payments contemplated by each agreement as being made in respect of: (i) in the case of the NVD LNTP, “...part of **the contract price due to the Contractor credited towards the contract price of any resulting Definitive Agreement...**”; and, (ii) in the case of the Settlement Agreement, “...a settlement of all issues outstanding between them, including relating to the reasonable costs, expenses, and termination charges under the Champion LNTP and under the Nomodic LNTP, pursuant to the terms of this Mutual Release and Settlement Agreement...”.

Hale Affidavit at Exhibit “A”, s. 3 and Exhibit “I”, recitals [emphasis added]; Volk Affidavit at Exhibit “A” (no section numbering) and Exhibit “D”, recitals [emphasis added].

89. The existence of a collateral trust, of any kind – whether express or Quistclose – is directly at odds with the terms of the commercial agreements. Under the Settlement Agreement and the NVD LNTP, the parties saw fit to include contractual terms specifically excluding collateral agreements. Now NVD seeks to resile from those terms. The absence of any contemporary documentation with respect to any alleged trust is concerning; particularly as the Settlement Agreement was entered into when NMSI was clearly insolvent (ATB having demanded repayment of the Indebtedness, just days earlier).

90. If the purported trust is given effect, it would elevate an otherwise unsecured claim to a super-priority proprietary claim; in circumstances where the parties, as between themselves, entered into arrangements and contracts specifically excluding such terms. The parole evidence rule exists to address exactly this sort of situation, and no weight or consideration should be given to the interpretation put forward by NVD; as NVD's interpretation hinges on and requires this Honourable Court to disregard the terms bargained for by the parties, in favour of substituting an unwritten, undocumented, oral trust; the first reference to which, between the parties, is after the Date of Bankruptcy. Elevating NVD's otherwise unsecured claims, by way of the creation of any trust, would constitute a preference under section 95 of the BIA.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, at s. 95(1) [BOA TAB 1].

B. No Express Trust, In Favour of NVD, Exists With Respect to Either the RBC Funds or the Cheque Funds.

(i) *There is no express trust with respect to the RBC Funds*

91. There is no express trust with respect to the RBC Funds. The RBC Funds were deposited in the RBC Account by way of the Pre-Payment, made under the NVD LNTP. Accordingly, the relevant agreement to be assessed is the NVD LNTP.

First Report at paras. 17 - 18; Hale Affidavit at para. 9 and Exhibit "B".

92. Any express trust claimed with respect to the Pre-Payment must fail, as there is no certainty of intention. There is no reference to any trust in the NVD LNTP, nor any other provision evidencing an intention for NMSI to hold such Pre-Payment in trust. The NVD LNTP describes the purpose of the Pre-Payment, in unequivocal terms, as follows:

"to pay Contractor for the Preliminary Work the sum of \$3,572,149.52 ("Preliminary Work Price"). The Preliminary Work Price is exclusive of any duties, taxes or similar fees. The parties further agree that the Preliminary Work Price shall be part of the contract price due to the Contractor under the Definitive Agreement (as defined below), if one is reached, and that all payments made pursuant hereto shall be credited towards the contract price of any resulting Definitive Agreement."

Hale Affidavit at Exhibit "A", s. 3 [emphasis added].

93. The NVD LNTP clarifies that the Pre-Payment was a payment for services and the early advance of same was the basis for a reduction in the contract price chargeable to NVD:

“3. Preliminary Work Price: Limited Partnership agrees to pay Contractor for the Preliminary Work the sum of \$3,572,149.52 ("Preliminary Work Price"). The Preliminary Work Price is exclusive of any duties, taxes or similar fees. The parties further agree that the Preliminary Work Price shall be part of the contract price due to the Contractor under the Definitive Agreement (as defined below), if one is reached, and that all payments made pursuant hereto shall be credited towards the contract price of any resulting Definitive Agreement.

4. Prepayment Bonus: The Contractor acknowledges NVD LP’s commitment to this project by entering into this LNTP which includes a significant prepayment and as a result will offer a 1.5% of this initial payment (\$52,500) reduction in total project costs pertaining to this scope of work once the Class A estimate is complete. [...]

Hale Affidavit at Exhibit “A”, ss. 3 - 4 [emphasis added].

94. Further reasoning for the Pre-Payment was stated in the recitals to the Champion LNTP:

“Northern Vision Development LP ("Owner") requires to spend a portion of the allocated budget for the Project in 2022 and therefore, Nomodic Modular Structures Inc ("Nomodic") has entered into a Limited Notice to Proceed with Owner for the purchase, fabrication, delivery and installation of a 117-room modular Hyatt Place Hotel in Whitehorse, VT (the "Project") based on a Class C Estimate. The purchase price will change as the design develops and is submitted for a building permit.”

Volk Affidavit at Exhibit “A” (no section numbering) [emphasis added].

95. The Pre-Payment was a payment for services rendered or to be rendered and was expressly contemplated to be “part of the contract price” and credited towards any future Definitive Agreement. The Pre-Payment (which constitutes the source of the RBC Funds) cannot be both a trust fund, held for NVD’s benefit, and simultaneously a *payment* of a debt or for services provided and to be provided to NVD, by NMSI. The corresponding duty of NMSI, under the NVD LNTP, to account back to NVD for any remainder on termination, is an unsecured contractual claim.
96. While NVD has asserted that the parties’ intention was that NMSI “would not use the funds representing the Pre-Payment for anything except the Project and in accordance with the LNTP”, that is always the case when a pre-payment is made under a contract. It is not sufficient, without more, to create a trust. Particularly where, as with the NVD LNTP, the contract at issue contains an “entire agreement clause”.

Hale Affidavit at para. 10 and Exhibit “A”, s. 5.

97. As a result, the Pre-Payment is not subject to any express trust and, accordingly, the RBC Funds are equally not subject to an express trust.

(ii) There is no express trust with respect to the Cheque Funds

98. The Additional Cheque is not subject to an express trust, as the three certainties are not present.

99. The Additional Cheque is not expressly referred to in the Settlement Agreement. However, the Settlement Agreement indicates that the purpose of the payments contemplated thereunder were to pay outstanding debt claims:

“NVD, Nomodic and Champion have **reached a settlement of all issues outstanding between them, including relating to the reasonable costs, expenses, and termination charges under the Champion LNTP and under the Nomodic LNTP**, pursuant to the terms of this Mutual Release and Settlement Agreement (the "Agreement").

[...] 1. Nomodic shall **refund \$2,405,490.71 to NVD** on or before October 6th, 2023 by way of certified cheque, bank draft or wire.”

Hale Affidavit, Exhibit “I” and Volk Affidavit, Exhibit “D”, each at Recitals and s. 1 [emphasis added].

100. The Settlement Agreement is consistent with an unsecured creditor relationship, associated with a failed construction project and breach of contract claims, as existed between Champion, NVD, and NMSI, following the delivery of the NVD Termination Notice. Specifically, (i) Champion was contractually obligated to account back to NMSI for any unused funds on the termination of the Champion LNTP, as “**Champion shall refund all pre-payments** to Nomodic for return to Owner, less any reasonable expenses and monies spent on procurement of long leads within seven (7) days Notice.”; and, (ii) NMSI was contractually obligated to account back to NVD for any unused funds on the termination of the NVD LNTP, as “**In the event of termination of this LNTP, Contractor shall cease all further work on the Preliminary Work, including terminating all Subcontractor work, Contractor shall be entitled to retain all payments received prior to termination, ... the remaining amount will be refunded to the Limited Partnership within 30 days of the Termination Charge agreed to date.**”

**Volk Affidavit at Exhibit “A” (no section numbering) [emphasis added];
Hale Affidavit at Exhibit “A”, s. 7 [emphasis added].**

101. Accordingly, prior the Settlement Agreement, NMSI had certain unsecured unliquidated claims against Champion, while NVD had similar unsecured unliquidated claims against NMSI. There is no evidence establishing any form of express trust.

C. A Quistclose Trust is a Constructive Trust and is Not Appropriate in the Circumstances.

102. NVD has categorized the Trust Claim as an “express” Quistclose trust. As described by the Alberta Court of Appeal in *Carevest*, a Quistclose trust, in Alberta, is considered to be a type of constructive trust.

Carevest at para. 13 [BOA TAB 10].

103. The imposition of a constructive trust, in the present circumstances, is not appropriate. The common law recognizes that third-party interests should not be affected by the imposition of a constructive trust, and in particular, “[t]here must be **no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected**”.

Brookfield Bridge Lending Fund Inc. v Karl Oil and Gas Ltd., 2009 ABCA 99 at paras. 10, 21 [*Karl Oil and Gas*] [emphasis added] [BOA TAB 6], quoting *Soulos* [BOA TAB 25]; *Two Feathers* at paras. 22 – 23 [BOA TAB 22].

104. The judicial reluctance to impose a constructive trust which would affect third parties comes to the forefront in bankruptcy proceedings. In *Kingsett Mortgage Corp et al. v Stateview Homes et al.*, Justice Steele canvassed the authorities regarding constructive trusts to assess whether a proprietary remedy might be appropriate, with the effect of elevating unsecured breach of trust claims, against the bankrupt, into proprietary claims. In holding that it was not appropriate, the Court stated:

“Finally, **the court is generally reluctant to grant an equitable remedy such as a constructive trust where doing so would upset the priority scheme set out in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “BIA”).** In a bankruptcy, there can be many parties that are negatively impacted, and **Parliament has established a priority scheme to deal with what money is available in the bankrupt’s estate.**”

... [67] A constructive trust is an equitable remedy that the court has jurisdiction to impose. The constructive trust is a proprietary remedy. It is granted over specified property. Where a constructive trust is granted, the property is removed from the bankrupt’s estate, which effectively reorganizes the BIA priorities: [... citations omitted...]

[70] A constructive trust arising from a wrongful act may be imposed by the court. As set out in *Soulos*, at para. 45, there are certain conditions that generally should be met before a constructive trust is ordered:

[...] d. **There must be no factors which would render the imposition of a constructive trust unjust in all the circumstances of the case.**

[71] In considering the above in the context of an insolvency proceeding, courts in Canada have given significant weight to the fourth factor, specifically the impact on other creditors: [citations omitted]. **If a constructive trust is ordered in respect of a bankrupt, there is an obvious impact on the other creditors of the bankrupt's estate. Accordingly, the use of a constructive trust as a remedy in insolvency proceedings is used "only in the most extraordinary cases" and the test to show that there is a "constructive trust in a bankruptcy setting is high."** *Creditfinance*, at paras. 32 and 33.

[...] [75] Further, **a constructive trust, which is not otherwise available, cannot be imposed by the court for the purpose of altering the priority scheme under the BIA:** *Barnabe v. Touhey*, 1995 CanLII 1672 (ON CA), [1995] 26 O.R. (3d) 477 (C.A.).

[76] For a court to order a constructive trust remedy in a bankruptcy case, there must be a close and causal connection between the property over which the party seeks the constructive trust and the misappropriated trust property. [...]

[79] I am not satisfied that Tarion has established a close causal connection between the deposits and the proceeds from the sale of the real property such that a proprietary remedy is appropriate in the circumstances.

[80] In addition, **I am not satisfied that "extraordinary circumstances" exist in this case such that a constructive trust ought to be ordered. As noted, a remedial constructive trust would upset the BIA priority scheme.** Here we have a situation where, on the one hand, if the Stateview entities had not breached the trusts, the creditors would not have had access to the deposits. However, on the other hand, had the Stateview entities not breached the trusts, the Stateview entities may have appeared less financially secure, and the creditors may not have extended credit or additional credit to the Stateview entities."

Kingsett Mortgage Corp et al. v Stateview Homes et al., 2023 ONSC 2636 at paras. 5, 67, 70 – 71, 75 – 76, 79 – 80 [emphasis added] [BOA TAB 21], citing *Soulos* at paras. 36, 45 [BOA TAB 25], *Caterpillar Financial Services v 360networks corporation*, 2007 BCCA 14, 61 B.C.L.R. (4th) 334, at para. 66, *KPMG (Trustee in Bankruptcy of Ellingsen) v Hallmark Ford Sales Ltd.*, 2000 BCCA 458, 190 D.L.R. (4th) 47, at para. 71, *Creditfinance Securities Limited v DSLC Capital Corp.*, 2011 ONCA 160, 277 O.A.C. 377, at para. 44, *Barnabe v Touhey*, 1995 CanLII 1672 (ONCA), and *306440 Ontario Ltd. v. 782127 Ontario Ltd. (Alrange Container Services)*, 2014 ONCA 548 at paras. 26 – 27.

105. In *Ontario (Minister of Training, Colleges and Universities) v. Two Feathers Forest Products LP* ("**Two Feathers**"), the Ontario Court of Appeal considered recent developments in the English law of Quistclose trusts, and stated:

[23] As I have concluded that the requirements for a Quistclose trust have not been met in this case, I do not need to decide to what extent that expansion should be adopted in Ontario. **However, when that decision does have to be made, the Court will have to consider a number of commercial consequences, one of the most significant of which is the potential effect on the creditors of the borrower (or grantee) of the subject funds.** For example, as in this case, **where funds are advanced to a business with no registration under the *Personal Property Security Act*, RSO 1990, cP-10, creditors will have no notice, and in many cases no knowledge, that they are dealing with a debtor whose money is subject to a trust and not available to general creditors.**”

Two Feathers at paras. 22 – 23 [BOA TAB 22].

106. The effect of imposing a constructive trust over the Disputed Funds, as against creditors of the Bankrupts’ estates, is sufficient reason to refuse its granting. Furthermore, in the present circumstances which include NMSI’s bankruptcy proceedings, there are no extraordinary circumstances that would justify establishing a constructive trust. The factual background is clear, NVD provided the initial Pre-Payment for tax purposes and to obtain a corresponding discount on the Preliminary Work. The Project failed, and the parties had unliquidated unsecured claims, which were settled under the Settlement Agreement. Now NVD seeks to elevate its unsecured claim, by establishing a constructive trust, which directly contradicts the terms and conditions set out in the LNTPs and the Settlement Agreement; to obtain a preference.

D. No Quistclose Trust Exists With Respect to the RBC Account or the Additional Cheque.

(i) No Quistclose Trust can be established over the RBC Account.

107. No Quistclose trust can be established over the RBC Funds and the RBC Account.

108. Where a Quistclose trust is alleged with respect to a “general, long-term purpose”, the requirement for a “specific purpose” will not be met and no Quistclose trust arises.

Two Feathers at para. 38 [BOA TAB 22], citing *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 [*Cliffs Over Maple Bay*] [BOA TAB 14].

109. No Quistclose trust, with respect to the RBC Funds, exists, as:

(a) there is **no certainty of intention** with respect to the Pre-Payment being held under trust conditions. There are no express statements regarding trusts in the NVD LNTP, which, as described above, contains (i) an “entire agreement clause”;

(ii) a mutual agreement that “Neither party shall have any obligation to the other party with respect to the full Work or otherwise other than as specifically set forth in this LNTP related to the Preliminary Work”; (iii) a negotiated contractual provision granting NVD a pre-payment bonus, in the form of a 1.5% reduction in the contract price; and, (iv) that the Pre-Payment would be credited under the Definitive Agreement, all of which is inconsistent with any intention to retain a proprietary interest in the Pre-Payment. The NVD LNTP is a commercial agreement between arm’s-length parties; there is no need to go beyond the terms of the contract, which include that the Pre-Payment was paid “for the Preliminary Work” and “shall be credited towards the contract price of any resulting Definitive Agreement”;

**Hale Affidavit at Exhibit “A”, ss. 3, 4, 5, 8;
Regarding the pre-payment bonus as a negotiated term, see Hale Affidavit at Exhibit
“G”, email dated September 6, 2023: “...This LNTP is irregular because of the large
transfer of unexpected funds (which you appear to have breached by sending the
money to a vendor in advance of approval from NVD).” [emphasis added].**

- (b) the Pre-Payment was specifically and explicitly **intended to be used for general purposes**, which is inconsistent with the creation of a Quistclose trust. The Pre-Payment was delivered in connection with the ongoing Project and, potentially, a further Definitive Agreement. Schedule “A” to the NVD LNTP includes broad, discretionary categories for which the funds were to be used; including, among others, “Nomodic general expenses and fees as applicable to this defines [sic] scope of services”. As a result, the NVD LNTP does not satisfy the first requirement of a Quistclose trust: that the funds be advanced for a “specific purpose” rather than a general or long-term one.

**Hale Affidavit at Exhibit “A”, s. 1, Schedule “A”:
Two Feathers at para. 38 [BOA TAB 22].**

110. Regarding “specific purposes”, NVD cites the decision of Applications Judge Smart in *Carevest Capital Inc. v 1262469 Alberta Ltd.* (“**Carevest AJ**”) as an example, that “pay the balance of the off site levy to the Leduc County” is a sufficiently specific instruction to impress funds with a Quistclose trust. *Carevest AJ* was reversed by the Court of Appeal on other grounds, namely that an express trust had been created by a solicitor’s letter describing the funds as “...forwarded to you on the trust condition...”, and so there was “...no room for a Quistclose trust in the transaction...”.

Carevest Capital Inc v 1262459 Alberta Ltd., 2011 ABQB 148 [BOA TAB 9], aff'd Justice Chambers (unreported), rev'd *Carevest, supra* [BOA TAB 10];
Carevest at paras. 4, 15 [BOA TAB 10];
Bench Brief of NVD, filed on June 18, 2024 [NVD Brief] at paras. 46 - 47.

111. The circumstances at bar are analogous to those considered by the Ontario Court of Appeal in *Two Feathers*, where the Court summarized its rationale for dismissing a Quistclose trust claim as follows:

"[38] This court has not yet applied the Quistclose trust concept. However, the British Columbia Court of Appeal in [page 240] *Cliffs Over Maple Bay Investments Ltd. (Re)*, [2011] B.C.J. No. 677, 2011 BCCA 180, 17 B.C.L.R. (5th) 60 recently reversed a decision of a motion judge that had implied a Quistclose trust in circumstances where funds were loaned to be used for a general, long-term purpose, as in this case. There, funds were advanced by a debtor-in-possession lender in the context of a *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 order "[t]o facilitate further construction of [a] golf course and development of [a series of] home lots and source an irrigation solution for the golf course": at para. 56. In rejecting the implication of a Quistclose trust for a number of reasons, the British Columbia Court of Appeal stated [at para. 69]:

In short, although it is obvious that Cliffs agreed as a matter of contract that the funds would be used for the general purpose stated, I disagree that this restriction gives rise to any inference of an intention on the part of both parties . . . to create the specialized vehicle that is a Quistclose trust[.]

[39] To summarize my analysis, the ministry entered into a detailed funding agreement with Two Feathers setting out the terms under which the ministry granted funding for Two Feathers to provide on-the-job skills training to residents of Northern Ontario. Although the funds provided were intended to be used only for the purpose described in the funding agreement, there is no basis to infer a mutual intention that the funds were to be held on trust for the ministry. To the contrary, under the budget attached to the funding agreement, **the recipient, Two Feathers, had significant discretion to spend the majority of the funds as long as it was for the general purpose stated**, as in the *Cliffs Over Maple Bay* case. And, **most importantly, art. 17 of the funding agreement defines the relationship between the parties with respect to any funds that have to be returned to the ministry under the agreement as a debt, not a trust.**"

Two Feathers at paras. 38 – 39 [BOA TAB 22], citing *Cliffs Over Maple Bay* [emphasis added] [BOA TAB 14].

112. In fact, the NVD LNTP contemplated that upon termination, NVD would have a claim, against NMSI, in debt, and NMSI would retain any payments made to that date:

“...In the event of termination of this LNTP, Contractor shall cease all further work on the Preliminary Work, including terminating all Subcontractor work, **Contractor shall be entitled to retain all payments received prior to termination**, and Contractor shall submit an invoice to Limited Partnership for any additional time, labor, materials, costs, expenses, transportation to deliver any goods purchased prior to termination and other charges incurred through the date of termination not covered by such payments however approved by the Limited Partnership **The mutually agreeable Termination Charges will be subtracted from the total amount remaining and the remaining amount will be refunded to the Limited Partnership within 30 days of the Termination Charge agreed to date.**”

Hale Affidavit at Exhibit “A”, s. 7(a) [emphasis added].

113. In addition to the above, even when examining NMSI’s subsequent conduct, NMSI did not act in a manner consistent with a Quistclose trust having been imposed over the RBC Funds. NMSI’s stated concerns on the eve of bankruptcy related to (i) potential *statutory* trust obligations; and, (ii) ensuring that certain payments were made in the course of winding down its business. NMSI never included a payment to NVD in the payment requests of October 2 and October 5, 2023.

Ashraf Undertaking Responses at Bates No. 000010 (Undertaking No. 9) and Schedule “9” (Bates No. 000277).

(ii) No Quistclose Trust can be established over the Additional Cheque.

114. There is no Quistclose trust applicable to the Cheque Funds. The creation of a Quistclose trust, with respect to the Additional Cheque, is inconsistent with the commercial arrangements between the parties. Specifically, no Quistclose trust, with respect to the Additional Cheque, exists, as:

- (a) while NVD frames the Additional Cheque as having been tendered to NMSI while impressed with a trust, it is more consistent with the payment of an unsecured obligation. The Volk Affidavit, the source of the parol evidence regarding the parties’ intention concerning the Additional Cheque, asserts that “Champion was not indebted to Nomodic [NMSI], nor was there any other reason to make a payment or transfer to Nomodic [NMSI] other than as discussed above”. On the basis of the existing record, Mr. Volk is clearly mistaken. The Champion LNTP included specific covenants for Champion to account back to NMSI if the Champion LNTP was terminated, and Champion’s own evidence includes an accounting indicating that \$1,639,158.54 was to be returned to NMSI by

Champion, from the remainder of the Pre-Payment. As described by the Trustee in the First Report, “[...] of the original initial amount of \$2.1 million received by Champion, **Champion agreed to return \$1.6 million to NMSI. The difference between the \$1.6 million and the \$2.1 million represents Champion’s costs incurred on the Project as those costs were agreed upon by the parties.**”

Volk Affidavit at para. 14 and Exhibit “C”; First Report at para. 26(d) [emphasis added].

- (b) NVD was not a creditor of Champion, and the NVD LNTP specifically provides that there is no contractual relationship between NVD and Champion (a sub-contractor of NMSI);

Hale Affidavit at Exhibit “A”, s 8 (“...This LNTP does not create any contract between Contractor, Champion Canada ULC and Limited Partnership for the full Work...”).

- (c) unlike the *Quistclose* decision, where funds were transferred for the specific purpose of paying creditors of the transferor, NVD had no claims against Champion, and no relationship to or privity with Champion. In transferring the Additional Cheque to NMSI, in the exact amount outstanding as between Champion and NMSI, Champion was simply complying with its obligation to account, to NMSI, under the Champion LNTP;
- (d) despite NVD’s claims, there is nothing in the LNTPs or the Settlement Agreement, referring to any sort of agency relationship between NMSI and either NVD or Champion. The relationship between the parties, under the LNTPs, is for the development of the Project; not an agency relationship. Champion was not a debtor of NVD. As a result there is no room for the application of agency in the circumstances. In paying NMSI, Champion was satisfying a pre-existing contractual obligation Champion had to NMSI; and,
- (e) even if a Quistclose trust were established (which is denied), the operation of a Quistclose trust results in an obligation for the recipient (in this case NMSI), who has notice of the purpose, to return the funds to the transferor. As a result, if the Additional Cheque were subject to a Quistclose trust, Champion would at most have a breach of trust claim against NMSI. The advice from NMSI’s counsel that there was an “agreement that it [NMSI] would remit those funds to a customer in connection with an agreed upon rebate” falls far short of the level of specificity required to put ATB on notice of the purpose of the alleged Quistclose trust.

E. Any Trust Interest NVD May Have, Which ATB Refutes and Denies, is Subordinate to ATB's Security Interests.

115. To the extent NVD has any valid trust over or with respect to any of the Disputed Funds, which is refuted, such interests are subordinate to ATB's valid and perfected Security Interests. Any trust established in the current circumstances would be subject to the AB PPSA. Specifically, section 3(1) of the AB PPSA states:

Application of Act

3(1) Subject to section 4, this Act applies to

(a) every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and

(b) without limiting the generality of clause (a), a chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, **trust** and transfer of chattel paper **where they secure payment or performance of an obligation**.

Personal Property Security Act, R.S.A. 2000, c. P-7 [AB PPSA] at s. 3(1) [emphasis added] [BOA TAB 2].

116. As stated by professors Ronald Cumming, Catherine Walsh, and Roderick Wood:

“For a trust to be a security trust, its function must be to secure an obligation, not just embody the obligation as an inherent aspect of the trust relationship.

One test that has been applied by the courts to determine whether a transaction is a trust or security agreement is **whether the relationship between the parties is that of creditor and debtor, on the one hand, or trustee and beneficiary, on the other**. Only when a creditor-debtor relationship exists can a security agreement be involved.

[...] It is clear from the wording of the PPSA that the drafter contemplated situations in which a trust arrangement created by contract is also a security agreement. The result is that two legal regimes apply to a trust that secures payment or performance of an obligation: equity and the PPSA. Since a trustee and a beneficiary or a settlor and beneficiary can be in a debtor-creditor relationship, **the issue to be determined in this context is whether the trust is being used as the vehicle to secure the obligation that is the basis of this relationship or is merely the source of the obligation**. Under a security trust either the secured party or the debtor can be the trustee or the beneficiary.”

Ronald C.C. Cumming, Catherine Walsh, Roderick Wood, *Personal Property Security Law*, 2nd ed. (Toronto: Irwin Law, 2012) at pp. 139 – 140 [emphasis added] [BOA TAB 24];

cited in *E Construction Ltd v Sprague-Rosser Contracting Co Ltd*, 2017 ABQB 657 at paras. 38 – 39 [BOA TAB 15].

117. In the current circumstances there was a direct creditor-debtor relationships between:

- (a) **NMSI and NVD**, as the NVD LNTP clearly establishes that: (i) the Pre-Payment was made on account of the Preliminary Work, (ii) NMSI was entitled to “retain all payments received prior to termination”, and (iii) “[t]he mutually agreeable Termination Charges will be subtracted from the total amount remaining and the remaining amount will be refunded to the Limited Partnership...”;

Hale Affidavit at Exhibit “A”, ss. 1, 3, 7(a).

- (b) **NMSI and Champion**, as the Champion LNTP states that “If Owner abandons the Project prior to Nomodic and Champion executing a manufacturing agreement by February 28th, 2022; Champion shall refund all pre-payments to Nomodic for return to Owner, less any reasonable expenses and monies spent on procurement of long leads within seven (7) says Notice”; and,

Volk Affidavit at Exhibit “A” (Champion LNTP, no section numbers).

- (c) the parties negotiated the quantum of their then undetermined and unsecured claims, being the “Termination Charges”, as part of the Settlement Agreement.

Hale Affidavit at Exhibit “I” and Volk Affidavit at Exhibit “D”, each at Recital E; Hale Affidavit at Exhibit “A”, s. 7(a).

118. With respect to the RBC Funds, any potential trust would serve only one purpose: protecting NVD’s residual, contractual claim, to the balance of the Pre-Payment, as contemplated by the NVD LNTP. Such potential trust would “secure the obligation which is the basis for the relationship”, *i.e.* the payment and performance of NMSI’s contingent obligation to account back to NVD with respect to any balance of the Pre-Payment. This clearly falls within the PPSAs definition of a “security interest”³;

PPSA at s. 1(1)(tt) (definition of “security interest”) [BOA TAB 2].

³ “(tt) “security interest” means

- (i) **an interest** in goods, chattel paper, investment property, a document of title, an instrument, money or an intangible **that secures payment or performance of an obligation**, other than the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of the agent of the seller unless the parties have otherwise evidenced an intention to create or provide for investment property interest in the goods, [...] [emphasis added].

119. ATB has a valid and enforceable Security Interest which has been perfected in accordance with the PPSA, and has priority over any unperfected interest subject to the PPSA, in favour of Champion or NVD; regardless of whether such interest takes the form of a trust.

PPSA at s. 35(1)(b) [BOA TAB 2]; First Report at para. 14.

F. ATB is Neither a *Trustee de Son Tort* Nor a Knowing Recipient, With Respect to the Additional Cheque

120. ATB is neither a trustee *de son tort* nor a knowing recipient with respect to the Additional Cheque. The RBC Funds are not held by ATB so are not applicable.

(i) ATB is not a trustee de son tort.

121. NVD acknowledges that a person “will not always become a trustee *de son tort* by simply dealing with trust property. The person must additionally purport to act as a trustee.”

NVD Brief, at para. 75, citing A.H. Oosterhoff, Robert Chambers & Mitchell McInnis, Oosterhoff on Trusts, 8th ed. (Toronto: Thompson Reuters Limited, 2024) at 1182 [Oosterhoff].

122. To address this issue, NVD has attempted to characterize the October 6 Email as proof that ATB had offered to act as a trustee with respect to the Additional Cheque. NVD makes two arguments in this regard:

- (a) **First**, that Mr. Ashraf requested on multiple occasions that the Additional Cheque be deposited in the ATB Operating Account. This request being the basis for establishing ATB as a *trustee de son tort* is unreasoned. ATB, requesting that NMSI, an insolvent borrower who has ceased operations and is on the verge of bankruptcy, deposit funds subject to ATB’s Security Interests in ATB’s account, cannot be an agreement to act as trustee, on behalf of some unknown trust; and,
- (b) **Second**, as characterized in NVD’s bench brief, ATB “represented to Nomodic that ATB would carry out the terms of any trust that existed with respect to those funds”.

NVD Brief at para. 77.

This proposition implies significant terms into the October 6 Email which are simply not present. Mr. Ashraf’s October 6 Email stated, in pertinent part

“...ATB refused to do this because Nomodic advised ATB that the cheque may be subject to a priority or trust claim. ATB requested

that the funds be deposited into the account and that Nomodic assign itself into bankruptcy, advising that **if it was determined that these were trust funds in priority to ATB's claim, ATB would distribute same in accordance with priority. In the alternative, ATB requested that you assign Nomodic into bankruptcy forthwith and provide the cheque to the Trustee.**

Ashraf Affidavit at Exhibit "S" (Bates No. 240) [emphasis added].

A statement, that funds would be distributed, to unidentified parties, if any such claims **are determined to be in priority** to ATB's Security Interest, is not the equivalent of an offer to carry out the terms of an unknown potential trust in favour of some unidentified beneficiaries. There is, and was then, absolutely no indication that there was any trust or priority claim with NVD as the beneficiary.

123. As stated in the paragraph of *Oosterhoff on Trusts*, cited by NVD: "The doctrine is based instead on the fact of taking control of the property and administering it on behalf of the beneficiaries. The second half of that description is important. [...] The person additionally must purport to act as a trustee." As described above, ATB did not have sufficient information to even identify the type of trust or other priority interest claimed, the beneficiaries or claimants, or any other details, whatsoever, of the purported trust; let alone purport to act as trustee.

Oosterhoff at 18.6 (p. 1183), Tab 1 to the NVD Book of Authorities, filed on June 18, 2024.

124. The October 6 Email does not reference NVD. The issues framed by NMSI's counsel in the October 4 Counsel Response were with respect to claims arising under "Ontario legislation". The Mr. Ashraf's October 6 Email reflects ATB's valid concerns, that the Bankrupts were "concealing and wrongfully withholding property subject to the various security interests in favour of ATB, including the Additional Cheque, and have taken steps to delay ATB's enforcement of its rights as a secured creditor" and that "...there is a real risk that the Debtors' assets will dissipate or deteriorate."

Ashraf Affidavit at paras. 40, 44(b)(i).

125. Faced with the prospect that the Additional Cheque, one of the few remaining significant assets of NMSI, might be cancelled (as Champion attempted to), concealed, or otherwise become unrecoverable, ATB offered NMSI two solutions: (i) deposit the Additional Cheque in the ATB Operating Account; or, (ii) make an assignment in bankruptcy and deliver the

Additional Cheque to the Trustee. Mr. Read made the determination, on the morning of the Date of Bankruptcy, to deposit the Cheque in the ATB Operating Account.

**Volk Affidavit at para. 15: "...Thereafter, I attempted to put a stop-payment on the Champion Cheque, with the intention of forwarding the applicable funds directly to NVD...";
Supplemental Affidavit at paras. 7, 9.**

126. There is nothing nefarious or improper about ATB's decision to apply the Cheque Funds, once NMSI determined that it would not deliver the Additional Cheque to the Trustee. ATB had notified NMSI, pursuant to the ATB Termination Notice, that funds in the ATB Operating Account would be applied against the Indebtedness. Mr. Read deposited the Additional Cheque into the ATB Operating Account.
127. NVD has asserted that "Nomodic's management had direct and personal incentive to disregard the obligations of the trust in favour of NVD" due to the fact that many (but not all) of the payments proposed by NMSI on October 2 and 5, 2023, related to obligations for which the directors and officers of NMSI might be personally liable. That explanation fails to account for the potential liability of Mr. Read if he were to knowingly assist in a breach of trust, or the fact that Mr. Read nonetheless deposited the Additional Cheque with ATB; after ATB refused to make the proposed payments.

(ii) ATB is not a knowing recipient of the Additional Cheque

128. ATB is not a knowing recipient with respect to the Additional Cheque. There is no evidence or correspondence concerning any trust issues, claims, or concerns, with respect to the Additional Cheque. As a result, NVD instead seeks to imply that ATB should have been aware of a general trust relationship, between NVD and NMSI, and as a result was a knowing recipient, with respect to the Additional Cheque. This is neither accurate nor sufficient.
129. As stated by the majority of the Supreme Court in *Citadel General Assurance Co. v Lloyds Bank Canada*, liability for knowing receipt requires the establishment of, among other requirements, the following:
- (a) Preliminarily, there must be a trust in existence; and,

***Citadel General Assurance Co v Lloyds Bank Canada*, [1997] 3 SCR 805 at para. 18 – 19 [*Citadel*]
[BOA TAB 13].**

- (b) the recipient of the funds must have knowledge of the breach of trust, which may be satisfied by constructive knowledge,

“[m]ore specifically, relief will be granted where a stranger to a trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property. It is this lack of inquiry that renders the recipient’s enrichment unjust.”

The requirement is necessary because, “[t]o show that the defendant’s enrichment is unjustified, one must necessarily focus on the defendant’s state of mind ... Indeed, without constructive or actual knowledge of the breach of trust, the recipient may very well have a lawful claim to the trust property. It would be unfair to require a recipient to disgorge a benefit that has been lawfully received.”

Citadel at paras. 48 – 49, 51 [BOA TAB 13].

130. NVD’s claim fails at the preliminary stage, as there is no trust affecting the Additional Cheque. Nonetheless, with respect to knowledge, the only clear information provided to ATB indicating any sort of competing claim to the Additional Cheque was the statement in the October 5 Email that “[t]he Cheque was provided to Nomodic pursuant to an agreement that it would remit those funds to a customer in connection with an agreed upon rebate. On that basis, there may be a competing claim for those funds in the bankruptcy process;”. This does not constitute notice of Trust Claims.

Supplemental Affidavit at para. 32, Exhibit “J” (Bates No. 42).

131. Furthermore, ATB did make inquiries. Contrary to NVD’s assertions, ATB was not reckless and made numerous appropriate inquiries. Specifically:

- (a) ATB first requested further details concerning the purported trust in February 2023, almost immediately after it was first disclosed to ATB. In reply, ATB was presented with the explanation that the Pre-Payment (the initial source of funds deposited into the RBC Account) was: (i) “accelerated” for tax purposes; (ii) intended to result in accumulated interest being returned to NVD by way of a predetermined flat fee; and, (iii) would be advanced to the fabricator (i.e. Champion) in two tranches, based upon a predetermined supply agreement. This explanation aligns with the

recitals set out in the Champion LNTP, which referred to the fact that NVD “requires to spend a portion of the allocated budget for the Project in 2022”;

**Ashraf Undertaking Responses at Bates No. 000004 (Undertaking No. 3) and Schedule “3”
(Bates No. 000104)**

Volk Affidavit, at Exhibit “A”, recitals (no section numbers):

- (b) no trust agreement or documents evidencing same were provided to ATB, at any time, despite numerous requests;

**Ashraf Undertaking Responses at Bates Nos. 000005 (Undertaking No. 3), 000011
(Undertaking No. 9);**

**Supplemental Affidavit at paras. 28 – 29, 36, 39;
Ashraf Affidavit at paras. 34, 38.**

- (c) in late September and early October 2023, in light of NMSI’s deteriorating financial condition, ATB’s counsel delivered the October 4 ATB Email, to NMSI, which requested details regarding “concerns that certain of the funds in the RBC accounts are impressed with a trust under the Construction Act (Ontario)”, including “the basis of the potential trust claim and any supporting documents” and “the potential quantum of the funds ... ultimately subject to any potential trust / priority claim”;

**Ashraf Undertaking Responses at Bates No. 000010 (Undertaking No. 9) and Schedule “9”
(Bates No. 000270).**

- (d) in response to these questions, NMSI’s experienced, senior insolvency counsel advised that “UNFORTUNATELY, **IT APPEARS THAT THERE HAD BEEN A MISCOMMUNICATION ON THIS POINT.** WE HAVE DETERMINED THAT THE DIRECTORS AND OFFICERS MAY BE LIABLE FOR VACATION PAY (IN ONTARIO)...” and instead flagged potential statutory claims against the funds, stating that “**IN TERMS OF THE RBC ACCOUNT THAT IS FULLY CONTROLLABLE BY NOMODIC,** WE BELIEVE THAT THERE SHOULD BE A REVIEW AS TO THE SOURCE OF THE FUNDS **BEFORE THEY ARE SIMPLY MOVED OVER TO THE ATB ACCOUNT TO ENSURE THAT THEY ARE ACTUALLY CAUGHT BY THE SECURITY AND ARE NOT CAUGHT BY APPLICABLE ONTARIO LEGISLATION**”. While the correspondence indicates a chaotic situation in which claims against the Bankrupts’ various accounts and assets were still being assessed, any uncertainty regarding whether the potential trust claims related to the RBC Account, were dispelled;

**Ashraf Undertaking Responses at Bates No. 000010 (Undertaking No. 9) and Schedule "9"
(Bates No. 000277).**

- (e) NMSI, through its counsel, advised of its specific intent to pay various creditors from the RBC Account *and* the Additional Cheque, which is inconsistent with any trust relationship. This proposal was again put forward by experienced senior counsel in the context of negotiations regarding the wind-down of NMSI's business;

**Ashraf Undertaking Responses at Bates No. 000010 (Undertaking No. 9) and Schedule "9"
(Bates No. 000277); Supplemental Affidavit at para. 31 and Exhibit "J"
(Bates No. 42)**

- (f) on the same day and following delivery of the October 4 Counsel Response, ATB, through its counsel, reiterated its request for "copies of the documents on the source of funds in the RBC Account and those which underlie the corresponding potential claims against same", no such documents were provided; and,

**Ashraf Undertaking Responses at Bates No. 000011 (Undertaking No. 9) and Schedule "9"
(Bates No. 000274).**

- (g) although NVD argues that ATB was under a duty to inquire of Champion or NVD with respect to possible claims against the Additional Cheque, that is not the requirement. The Supreme Court was clear in *Citadel*: "It follows that a bank which is enriched by the receipt of trust property and has knowledge of facts that would put a reasonable person on inquiry is under **a duty to make inquiries of its customer regarding a possible breach of trust.**" ATB made multiple inquiries regarding potential claims, but beyond the reference by NMSI's counsel to "Ontario legislation", no further trust detail was provided.

**NVD Brief at para. 109: "It is also important that at no point did ATB reach out to, or even attempt to contact, NVD or Champion to inquire about the Champion Cheque [Additional Cheque] ...":
Citadel at para. 52 [emphasis added] [BOA TAB 13];
Ashraf Undertaking Responses at Schedule "9" (Bates No. 000277).**

132. NVD's argument is the exact argument rejected by the Alberta Court of Appeal in *Karl Oil and Gas*, where Justice Slatter (Rombotham J.A. concurring) stated:

"The appellant had a perfected prior secured interest. The decision under appeal **essentially assumes that a secured creditor has a positive duty to monitor the fiduciary activities of its borrowers.** On the assumption that the secured creditor has a "better opportunity" to prevent breaches of trust, it **essentially becomes a guarantor for any such breaches of**

trust. This analysis discounts the fact that the underlying risk of misappropriation was created by the respondents allowing the commingling of the trust funds, and **transfers the duty of monitoring that risk to the appellant. This is contrary to the principle stated in Soulos v. Korkontzilas that “the interests of intervening creditors must be protected” [...]**

The respondents argue that it should be assumed the appellant knew Vanquish dealt with trust funds, and so the appellant is not a party “without notice” and would not be protected in equity. “This argument also overlooks the effect of the imposition of a constructive trust on the unsecured creditors. But in any event, **the mere knowledge that Vanquish dealt with trust funds from time to time is not sufficient. Without knowledge that the funds it received were being paid in breach of trust or were trust assets, the appellant would not lose its protection under the rule in Soulos v. Korkontzilas.** This is just another way of saying that the appellant had a duty to police Vanquish’s management of the trust funds.”

Karl Oil and Gas at paras. 21, 24 [emphasis added] [BOA TAB 6].

133. The best evidence of ATB’s knowledge and assessment of, competing claims to the Additional Cheque, at the time it was applied against the Indebtedness is set out in the Ashraf Affidavit. As required when a secured creditor applies for an involuntary bankruptcy order under the BIA, ATB’s evidence in support of the Bankruptcy Application included an estimate of the value of ATB’s Security. This is most recent statement of ATB’s understanding, provided hours before the Bankruptcy Orders were granted and before ATB became aware of NVD’s Trust Claim. In the Ashraf Affidavit, ATB assigned zero value to various assets which ATB knew were encumbered by interests in priority to the Security, such as a \$500,000 guaranteed investment certificate secured in favour of RBC. With respect to the Additional Cheque, however, ATB’s evidence was that “**...ATB has been advised that this amount [the Cheque Funds] may be subject to other claims but the Debtors have not provided any specifics or supporting documents regarding these potential claims. On the assumption that the Additional Cheque may be cashed, its face value has been included in the Estimated Security Value;**”. The Ashraf Affidavit was sworn after the October 6 Email was delivered; in fact, the October 6 Email is an exhibit to same.

Ashraf Affidavit at paras. 17(a)(iii) , 17(b [emphasis added], 17(c) – (e), and Exhibit “S”.

G. Tracing Is Not Available to Assist NVD.

134. In the further alternative, if this Honourable Court finds that the Additional Cheque was impressed with a trust or was intended by the parties to be impressed with a trust, then tracing is not available with respect to the Cheque Funds.

135. The Saskatchewan Court of Appeal described tracing as follows:

“Tracing at common law and equity is a proprietary remedy. It involves following an item of property either as it is transformed into other forms of property or, as it passes into other hands, so that the rights of a person in the original property may extend to the new property. ***In establishing that one piece of property may be traced into another, it is necessary to establish a close and substantial connection between the two pieces of property, so that it is appropriate to allow the rights in the original property to flow through to the new property.*** The question has most often arisen in the context of a trust, when the trustee has improperly disposed of the trust assets.”

Agricultural Credit Corp of Saskatchewan v Pettyjohn (1991), 1991 CanLII 7979 (SK CA), 90 Sask R 206;79 DLR (4th) 22 (CA) at para. 55 [BOA TAB 3], as quoted in *Imor Capital Corp v Horizon Commercial Development Corp*, 2018 ABQB 39 at para. 59 [*Imor Capital*] [emphasis added] [BOA TAB 19].

136. The test is whether “despite the co-mingling, the trust funds can be identified or traced.”

Imor Capital at paras. 50, 58 [BOA TAB 19];
The Guarantee Company of North America v Royal Bank of Canada, 2019 ONCA 9 at para. 99 [BOA TAB 26], citing *Imor Capital* at para. 58 [BOA TAB 19].

137. In *Bassano Growers v Price Waterhouse*, the Alberta Court of Appeal upheld a Chambers Justice who held that “[b]ecause the funds in question were commingled and cannot be identified there is no certainty of subject matter, one of the essential requirements for a common law trust.”

Bassano Growers v Price Waterhouse, 1998 ABCA 198 at para. 8 [*Bassano*] [BOA TAB 5].

138. Despite having asserted a Trust Claim, to the Cheque Funds, NVD has not shown that Champion held the Cheque Funds in a segregated account or that Champion internally earmarked the Pre-Payment, in some manner, as being the property of any other person. What is in evidence is a contractual provision, creating an unsecured obligation, for Champion to “...refund all pre-payments to Nomodic for return to Owner” if the Champion LNTP was terminated. Even if we assume that the RBC Account was initially impressed

with a trust, the RBC Funds cannot be traced into Champion and back through the Additional Cheque.

139. Furthermore, the intervention of a third party's interest may extinguish a proprietary interest. As stated by the Court of Appeal:

"A trust, however, creates proprietary interests that may affect the rights of third parties who deal with the trust property. In some cases those third parties may not even be aware of the existence of the trust, or that the property they are dealing with is trust property. **Since it would be unfair to allow the consensual act of those who created the trust to prejudice the rights of third parties, the courts of equity always studiously protected the interests of the "bona fide purchaser for value without notice". Whatever proprietary rights might be created by the trust will be extinguished if the trust property comes into the hands of such a third party. The effect of the bona fide third-party rule is that much of the risk of a breach of trust by the trustee will fall on the beneficiaries.**

[...] [12] So long as there is a positive balance in the account the analysis is easy. **The trust attaches to the trust account and protects the net balance from the claims of any secured creditors:** *Bank of Nova Scotia v. Société Générale (Canada)*, 1988 CanLII 166 (AB CA), [1988] 4 W.W.R. 232, 58 Alta. L.R. (2d) 193 (C.A.).

[13] But once the trust funds are disbursed to bona fide third parties for value without notice, the funds are released from the trust. **The beneficiaries can no longer follow the funds.** [...]

Karl Oil and Gas at paras. 9, 12 – 13 [emphasis added] [BOA TAB 6].

140. ATB extended the Facilities to NMSI (thus having given value), and NMSI deposited the Additional Cheque, used as a partial repayment thereof. To the extent it ever existed, certainty of subject matter was lost immediately upon the deposit of the Additional Cheque, as the funds were utilized to partially repay the Line of Credit Facility, which remains in a deficit, and the ATB Operating Account had a balance of \$0 immediately thereafter. Not only were the funds commingled such that they cannot be identified, but without a positive balance in the ATB Operating Account or the Line of Credit Facility, there are simply no funds to trace. As in *Karl Oil and Gas*, "...if the fund is wholly dissipated before any additions are made to it, the interest of the trust in the mixed funds is extinguished."

Bassano at para. 8 [BOA TAB 5];
Karl Oil and Gas at para. 15 [BOA TAB 6], quoting Goff & Jones, *The Law of Restitution*, 7th ed. (London: Sweet & Maxwell, 2007) at 2-038.

VI. CONCLUSION

141. ATB respectfully requests that this Honourable Court: (i) declare that NVD does not have any valid trust claim against the Disputed Funds; and, (ii) direct the Trustee to pay over the remaining balance of the RBC Funds, to ATB.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20TH OF JUNE, 2024.

“McCarthy Tétrault LLP”

Pantelis Kyriakakis / Nathan Stewart
Counsel to ATB Financial

VII. LIST OF AUTHORITIES

Statutes

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, at section 95(1);
2. *Personal Property Security Act*, R.S.A. 2000, c. P-7, at sections 1(1)(tt), 3(1), and 35(1)(b);

Case Law

3. *Agricultural Credit Corp of Saskatchewan v Pettyjohn* (1991), 1991 CanLII 7979 (SK CA), 90 Sask R 206;79 DLR (4th) 22 (CA);
4. *Barclays Bank Ltd. v Quistclose Investments Ltd.*, [1970] AC 567 (HL (Eng));
5. *Bassano Growers v Price Waterhouse*, 1998 ABCA 198;
6. *Brookfield Bridge Lending Fund Inc. v Karl Oil and Gas Ltd.*, 2009 ABCA 99;
7. *Bruderheim Community Church v Moravian Church in America (Canadian District)*, 2020 ABCA 393;
8. *Canada Trust Co. v Price Waterhouse Ltd.*, 2001 ABQB 555;
9. *Carevest Capital Inc v 1262459 Alberta Ltd.*, 2011 ABQB 148;
10. *Carevest Capital Inc. v Leduc (County)*, 2012 ABCA 161;
11. *Carling Development Inc. v Aurora River Tower Inc.*, 2005 ABCA 267;
12. *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60;
13. *Citadel General Assurance Co v Lloyds Bank Canada*, [1997] 3 SCR 805;
14. *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180;
15. *E Construction Ltd v Sprague-Rosser Contracting Co Ltd*, 2017 ABQB 657;
16. *Gainers Inc. v Pocklington Finance Corporation*, 2000 ABCA 151;
17. *Guaranty Properties Limited v Edmonton (City of)*, 2000 ABCA 215
18. *Giles v Westminster Savings Credit Union*, 2007 BCCA 411;
19. *Imor Capital Corp v Horizon Commercial Development Corp*, 2018 ABQB 39;
20. *Ja-Ker Financial Corporation v Norris*, 2015 ABQB 756;
21. *Kingsett Mortgage Corp et al. v Stateview Homes et al.*, 2023 ONSC 2636;

22. *Ontario (Training, Colleges and Universities) v Two Feathers Forest Products LP*, 2013 ONCA 598;
23. *Rawluk v Rawluk*, [1990] 1 SC.R. 70;
24. Ronald C.C. Cumming, Catherine Walsh, Roderick Wood, *Personal Property Security Law*, 2nd ed. (Toronto: Irwin Law, 2012);
25. *Soulos v Korkontzilas*, [1997] 2 SCR 217;
26. *The Guarantee Company of North America v Royal Bank of Canada*, 2019 ONCA 9;
and,
27. *Westar Mining Ltd. (Re)*, 2003 BCCA 11.

SCHEDULE "A"

Summary of Information Provided to ATB Over Time

1. The material dates in relation to information provided by NMSI, to ATB, with respect to the RBC Account, and ATB's assessment of same, are as follows, in chronological order:

- (a) February 28, 2023: Ms. Walby-Parchoma of ATB delivered an email to Mr. Metuh of NMSI with questions regarding NMSI's financial condition, in the context of determining NMSI's liquidity requirements and borrowing base, including, among others, "Please provide current RBC statements from August 2022 to February 2023 along with trust agreements requiring GIC for the NVD Hyatt Place deposit."

Ashraf Undertaking Responses at Bates Nos. 00004 (Undertaking No. 3) and 000012 (Undertaking No. 9), and Schedule "3" (Bates Nos. 000103 – 000105).

- (b) March 2, 2023: Mr. Metuh replies to Ms. Walby-Parchoma and states that, per Mr. Read:

"...for tax purposes pertaining to the 2021 sale of a hotel property, Nomodic's customer accelerated the issuance of deposit funds for it's Hyatt project in Whitehorse, YK with instruction that Nomodic hold the funds in a manner that protects and returns deposit interest to the customer similar to that of the customer's own savings account, the proceeds of which (accumulated interest) be returned to the customer by way of a predetermined flat fee. The deposit funds ultimately earmarked for payment to Nomodic's modular fabricator for the production of a 'prototype unit', in two tranches, through a transparent predetermined supply agreement."

Ashraf Undertaking Responses at Bates No. 000004 (Undertaking No. 3) and Schedule "3" (Bates No. 000104).

- (c) March 6, 2023: Ms. Walby-Parchoma delivers a further email to Mr. Metuh requesting information on Nomodic's RBC accounts and asking, among other things: "\$497,000 was sent to ATB account on January 23rd and then returned on January 30th. Why was this transaction done?" On the same day, Mr. Metuh replies: "Utilized funds in the RBC account to make critical payment through the ATB account to vendors as we had a BC Housing receivable get pushed into the following week. Once the BC Housing funds were received, the funds were returned into RBC. As you can guess, I got in shit for proceeding in this direction."

Ashraf Undertaking Responses at Bates No. 000008 (Undertaking No. 6) and Schedule "6" (Bates Nos. 000249).

- (d) March 6, 2023: Correspondence between Ms. Walby-Parchoma and Mr. Metuh concerning the calculation of the minimum liquidity requirement under the Commitment Letter in which Ms. Walby-Parchoma took a conservative approach to the determination of minimum liquidity requirements, advising that “Definition would be availability under RLOC⁴ and all unencumbered cash held by the Borrower. So your RBC \$500,000 GIC which is securing the L/C would be excluded. Same goes for the \$1.66MM GIC which is encumbered by Hyatt trust conditions. [...]”

Ashraf Undertaking Responses at Schedule “9” (Bates Nos. 000282 - 000283).

- (e) March 7, 2023: Internal email in which Ms. Walby-Parchoma advises another ATB account manager, Mr. Govett: “FYI - not great responses on the two transactions I questioned. Nomodic #8432 - transaction for \$497k. They used Hyatt trust funds for near term liquidity before transferring back to RBC account so they could purchase new GIC for \$1.66MM. This shows the importance of an ATB GIC to maintain the minimum liquidity and \$1MM equity in April. If one receivable is delayed, their liquidity is compromised...”

Ashraf Undertaking Responses at Schedule “9” (Bates No. 000287).

- (f) October 2, 2023: Following the delivery of the ATB Termination Notice, and the Demand and 244 Notices, ATB became aware that NMSI: (i) had available RBC Funds, despite having requested additional funding from ATB on the prior day; and, (ii) had utilized those RBC Funds to pay various subordinate claims, on or around September 29, 2023, including, among others, payroll and employee expenses in the amount of \$289,194.57.

Ashraf Affidavit at para. 32; Supplemental Affidavit at paras. 19 – 20, Exhibit “ F” (Bates No. 24).

- (g) October 2, 2023: NMSI’s counsel delivered the October 2 Payment Request Email, which referred to funds in unspecified Outside Accounts having been used to pay various amounts and set out NMSI’s October 2 Payment Request, to use additional Outside Account funds to pay employee wages and legal costs and expenses. The October 2 Payment Request Email also stated that: “... Nomodic has a small

⁴ Revolving line of credit.

amount of accessible cash in another bank account and could use the funds in that account to pay the above amounts...”

Supplemental Affidavit at para. 20, Exhibit “ F” (Bates No. 23).

- (h) October 2, 2023: ATB, through counsel, delivers the ATB October 2 Response requesting details concerning the quantum of funds in the Outside Accounts, details regarding CRA claims, and clarification as to whether NMSI was “...proposing to transfer all funds from the accounts not currently held by ATB into ATB accounts or is the request that ATB agree to allow these payments to be made using its collateral?”

Supplemental Affidavit at para. 21, Exhibit “ G” (Bates No. 26).

- (i) October 2, 2023: NMSI’s counsel delivers the October 2 Bankrupts’ Response, which: (i) identified the Outside Accounts as the RBC Account and the Joint RBC Account; and, (ii) stated, in pertinent part:

“There is \$2,300,000.00 between the two RBC accounts. Nomodic has access to one of the accounts which contains approximately \$1,200,000.00. Nomodic and another party are joint signatories on the other account (containing approximately \$1,100,000.00) which pertains to a particular project (Sudbury).

A resolution regarding the joint account will require some negotiation over the course of the month of October.

[...] There is approximately \$180,000 owing to CRA for source deductions. As discussed, GST is current.

Nomodic proposed to pay CRA from the accessible RBC account tomorrow. It also proposes to pay the employees referenced in my email of 11:57 am from that account. It also proposes to pay BLG from that account. [...]

Once the payments contemplated above have been made, Nomodic will arrange for the balance of the cash in the RBC account that it controls to be paid to ATB. Again, the joint account will require some negotiation before that issue is resolved.”

Supplemental Affidavit at para. 22, Exhibit “ H” (Bates Nos. 30 – 31).

- (j) October 2, 2023: Mr. Lambert of NMSI follows up on the October 2 Bankrupts’ Response with the October 2 Lambert Email containing further details regarding

payments proposed to be made from the RBC Account, including a key employee retainer, CRA payments, employee expense claims, and legal fees;

Supplemental Affidavit at para. 24 and Exhibit "I" (Bates Nos. 35 – 36).

- (k) October 3, 2023: Mr. Lambert advised ATB directly that he would transfer the RBC Funds to ATB that afternoon if ATB agreed to process source deductions. ATB agreed but the funds were not transferred;

Ashraf Affidavit at para. 33.

- (l) October 3, 2023: Following the delivery of the Receivables Listing Email (discussed below in the context of the Additional Cheque), Mr. Ashraf delivers an email to Mr. Lambert asking, "Just checking the status of wire transfer to move funds over to ATB?" Mr. Lambert replies, "BLG [counsel to NMSI] will be in touch."

Ashraf Undertaking Responses at Schedule "4" (Bates No. 000242 - 000243).

- (m) October 4, 2023: ATB's counsel delivers the October 4 ATB Email requesting additional information regarding the various RBC accounts, including "...the basis of the **potential trust claim** and any supporting documents and details underpinning same; and, the potential quantum of the funds currently on deposit with RBC, which are ultimately subject to any potential trust / priority claim." [emphasis added] and "What further payment(s), if any, does Nomodic intend to make from any of the RBC accounts and, if so, what are the details of such payments and from what accounts will they be made?";

Ashraf Undertaking Responses at Bates No. 000010 (Undertaking No. 9) and Schedule "9" (Bates No. 000270).

- (n) October 4, 2023: NMSI's senior insolvency counsel delivers the October 4 Counsel Response advising that, among other things:

"UNFORTUNATELY, IT APPEARS THAT THERE HAS BEEN A MISCOMMUNICATION ON THIS POINT. [...] WE HAVE DETERMINED THAT THE DIRECTORS AND OFFICERS MAY BE LIABLE FOR VACATION PAY (IN ONTARIO) UP TO THE DATE OF TERMINATION. [...] IN TERMS OF THE RBC ACCOUNT THAT IS FULLY CONTROLLABLE BY NOMODIC, WE BELIEVE THAT THERE SHOULD BE A REVIEW AS TO THE SOURCE OF THE FUNDS BEFORE THEY ARE SIMPLY MOVED OVER TO THE ATB ACCOUNT TO ENSURE THAT THEY ARE ACTUALLY CAUGHT BY THE SECURITY AND ARE NOT CAUGHT BY APPLICABLE ONTARIO LEGISLATION.

[...] **NOMODIC IS PROPOSING TO PAY CRA FOR SOURCE DEDUCTIONS (ROUGHLY \$180,000.00), BLG (\$25,000.00), GST (\$12,278.00), REIMBURSABLE EMPLOYEE EXPENSES (\$12,118.04) - WE HAVE AN ITEMIZED LIST, IT SUPPLIER (\$25,000.00) – WE ARE ATTEMPTING TO LOCATE THE INVOICE (UNFORTUNATELY, DUE TO UNPAID AMOUNTS, THE SUPPLIER HAS SHUT OFF ACCESS TO THE SERVER).**”

Ashraf Undertaking Responses at Bates Nos. 000010 - 000011 (Undertaking No. 9) and Schedule “9” (Bates Nos. 000270, 000276, 000277).

- (o) October 4, 2023: ATB’s counsel responds to the October 4 Counsel Response, asking: “...Can you please provide us with copies of the documents on the source of funds in the RBC Account and those which underlie the corresponding **potential claims** against same.” [emphasis added]. No documents were provided.

Ashraf Undertaking Responses at Bates No. 000011 (Undertaking No. 9) and Schedule “9” (Bates No. 000274).

- (p) October 6, 2023: NMSI is petitioned into bankruptcy upon ATB’s application. ATB’s estimate of the value of its Security, as set out in the Ashraf Affidavit sworn on the Date of Bankruptcy, referred to (but excluded from the calculation) various assets ATB believed were not collectable or had no realizable value, but included the RBC Funds as an asset subject to the Security, and stated that:

“...ATB has been advised that the assets comprising the Estimated Security Value are subject to various claims, including a priority claim of approximately \$197,000 due to Canada Revenue Agency in respect of source deductions. To date, the Debtors [Bankrupts] have failed to provide the corresponding agreements associated with such claims or sufficient details for the validity and priority of such claims.

19. For clarity, the Estimated Security Value is based upon the facts known to ATB, as at October 5, 2023, and it may be necessary to revise such Estimated Security Value if additional assets of the Debtors [Bankrupts] are disclosed or located in the future (as was the case recently with the Additional Cheque, as discussed below). However, I verily believe, based upon my review of the financial information provided to ATB by the Debtors [Bankrupts] to date, that the Estimated Security Value is a reasonable estimate of the value of the Debtor Security and is accurate to the best of ATB’s knowledge. [...]”

**Ashraf Affidavit at paras. 17(a)(i) and 18 – 19.
Bankruptcy Order pronounced on October 6, 2023 at paras. 2 - 5;
First Report at para. 1;
Supplemental Affidavit at para. 13.**

2. The material dates in relation to information provided by NMSI, to ATB, with respect to the Additional Cheque, and ATB's assessment of same, are as follows, in chronological order:

(a) October 3, 2023: The Receivables Listing Email is delivered, to ATB, by Mr. Lambert. The Receivables Listing Email advised that:

“Attached is the current AR listing with notes on which amounts can be targeted for collections or that will require negotiations with various parties for the full release (joint signatory account).

There was also an agreement reached last week with a manufacturer to provide a refund to Nomodic for approximately \$1.6M, there was supposed to be a cheque sent but it will require follow up – these relate to the NVD Hyatt project that has been cancelled. This would have been tied to the GIC held at RBC, Total funds were due back to NVD of \$2.4M, this would have consisted of the manufacturer refund as well as funds from the GIC. I do not know the status of the manufacturer cheque at this time and will require some leg work.”

Supplemental Affidavit at para. 17 and Exhibit “E” (Bates No. 20).

(b) October 4, 2023: NMSI advised ATB that it was in receipt of the Additional Cheque;

Ashraf Affidavit at para. 36; Supplemental Affidavit at para. 27.

(c) On or around October 4 – 5, 2023: Telephone calls between representatives of ATB and NMSI in which Mr. Read advised that NMSI would deposit the Additional Cheque if certain payments were processed by ATB;

Supplemental Affidavit at paras. 33 – 36.

(d) October 5, 2023: ATB requested that the Additional Cheque be deposited into an ATB account or, alternatively, following a voluntary assignment in bankruptcy by NMSI, delivered to the Trustee;

Ashraf Affidavit at paras. 37 – 39; Supplemental Affidavit at para. 28.

(e) October 5, 2023: NMSI's counsel delivered the October 5 Email, which advised, in pertinent part, that (i) Champion had issued the Additional Cheque; (ii) “Nomodic is prepared to deposit the Cheque into its ATB account on the conditions that, one the Cheque has cleared, ATB will: 1. make the following amounts available (in the form of bank drafts) for payment by Nomodic to the following: [... details excluded ...]”; and, (iii) “Nomodic has asked us to make sure that ATB is aware that: a. The Cheque was provided to Nomodic pursuant to an agreement that it would remit

those funds to a customer in connection with an agreed upon rebate. On that basis, there may be a competing claim for those funds in the bankruptcy process;”. There was no reference to NVD or any trust;

Supplemental Affidavit at paras. 28 – 31, Exhibit “J” (Bates No. 42).

- (f) October 6, 2023: The October 6 Email is delivered by Mr. Ashraf, of ATB, to Mr. Read, of NMSI, advising in pertinent part that:

“...On October 5, 2023, you advised that you had the intention of depositing the cheque if ATB agreed to facilitate certain payments. ATB refused to do this because Nomodic advised ATB that the cheque may be subject to a priority or trust claim. ATB requested that the funds be deposited into the account and that Nomodic assign itself into bankruptcy, advising that if it was determined that these were trust funds in priority to ATB’s claim, ATB would distribute the same in accordance with priority. In the alternative, ATB requested that you assign Nomodic into bankruptcy forthwith and provide the cheque to the trustee.”

Ashraf Affidavit at Exhibit “S” (Bates No. 240).

- (g) October 6, 2023: Mr. Read deposited the Additional Cheque in the ATB Operating Account approximately two (2) hours after the October 6 Email and at least a few hours prior to the hearing of the Bankruptcy Application.

First Report at paras. 30, 32(a), and Appendix “I”; Supplemental Affidavit at paras. 7, 9, 11(c).