

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

FACTUM OF THE APPLICANTS

(Motion returnable December 16, 2013)

**(Re Stay Extension to June 16, 2014, Granting Additional Powers to the
Monitor, Fee Approval & Discharge of CRO and Related Relief)**

Dated: December 13, 2013

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PART I - INTRODUCTION

1. Timminco Limited ("**Timminco**") and Becancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**") were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to the initial order of the Ontario Superior Court of Justice dated January 3, 2012 (the "**Initial Order**"). FTI Consulting Canada Inc. was appointed as monitor of the Timminco Entities (the "**Monitor**") in these CCAA proceedings.

2. This motion is brought by the Timminco Entities seeking:

- (a) an Order, substantially in the form of the draft order included in the Motion Record at Tab 3,

- (i) extending the Stay Period (as defined below) until June 16, 2014 (the “**Stay Extension**”);
 - (ii) authorizing the CRO (as defined below) to execute the Ancillary Memphis Documents¹ on behalf of Timminco, or on behalf of Timminco’s subsidiaries, as appropriate;
 - (iii) approving the Proposed Cost Allocation Methodology (as defined below) as between the Timminco and BSI estates; and
 - (iv) approving the fees and disbursement of the Monitor and its counsel, Blake, Cassels & Graydon LLP incurred in respect of the Timminco Entities’ CCAA proceedings;
 - (v) approving the Twenty-First, Twenty-Second and Twenty-Third Reports of the Monitor (as defined in the Order); and
 - (vi) discharging Russell Hill Advisory Services Inc. (“**Russell Hill**”), the Court-appointed Chief Restructuring Officer (the “**CRO**”) of the Timminco Entities effective December 16, 2013, and approving the activities of Russell Hill undertaken in its capacity as CRO of the Timminco Entities; and
- (b) an Order, substantially in the form of the draft order included in the Motion Record at Tab 4, expanding the powers of the Monitor.

¹ Capitalized terms used herein but not defined have the meaning as defined in the Affidavit of Sean Dunphy sworn December 5, 2013, Applicants’ Motion Record, Tab 2 (the “December 5 Affidavit”).

PART II - THE FACTS

3. The Timminco Entities' primary business was the production and sale of silicon, which was carried on principally through BSI. BSI respectively purchased and produced silicon metal for sale to customers in the chemical (silicones), aluminum and electronics/solar industries.

December 5 Affidavit at para. 3.

4. Due to a number of factors, the Timminco Entities were facing severe liquidity issues and were unable to meet their ongoing payment obligations. As such, the Timminco Entities were granted protection from their creditors under the CCAA pursuant to the Initial Order of the Honourable Mr. Justice Morawetz.

December 5 Affidavit at para. 4.

STATUS OF THE CCAA PROCEEDINGS

5. Pursuant to sales transactions with QSI Partners Ltd. ("QSI") and Grupo FerroAtlantica, S.A. (together, the "Sales Transactions"), substantially all of BSI's operating assets were sold. Following the closings of the Sale Transactions, the Timminco Entities ceased having any active operations and only limited assets remain in the Timminco Entities' estate.

December 5 Affidavit at para. 5.

6. Pursuant to an Order of the Court dated June 15, 2012 (the "Claims Procedure Order"), a claims process was approved by which the Timminco Entities' creditors

were invited to file claims in the CCAA proceedings. The Monitor has reviewed all claims and been in contact with various claimants in an attempt to resolve any outstanding issues.

December 5 Affidavit at para. 7.
Twenty-Third Report of the Monitor dated December 6, 2013 (the "Twenty-Third Report") at paras 6, 27-30.

7. Shortly prior the resignation of all of their directors and officers, the Timminco Entities sought to appoint the CRO, which appointment was approved by order of the Court dated August 17, 2012. Additional powers were granted to the CRO by order of the Court dated November 5, 2012 allowing the CRO to settle claims of the Timminco Entities with the consent of the Monitor without having to incur the costs of seeking court approval. The terms of the CRO's engagement has been extended from time to time and is currently set to expire on December 16, 2013.

December 5 Affidavit at paras. 11-12.

8. To date, the CRO has undertaken a number of activities with respect to its mandate in the Timminco Entities' CCAA proceedings, including:

- (a) Resolution of administrative issues relating to the Timminco Entities' estate, including closure of the Timminco Entities' head office in March 2013 and settlement of document retention issues;
- (b) Resolution of issues relating to certain of the Timminco Entities' real and personal property that was not subject to the Sales Transactions, either through their sale or abandonment;

- (c) Settlement of a working capital dispute between the Timminco Entities and QSI; and
- (d) Settlement of outstanding litigation.

The CRO's activities in respect of the Timminco Entities' CCAA proceedings are described in greater detail in the First Report of the CRO dated December 5, 2013 (the "CRO Report"), at Tab 2D of the Timminco Entities' motion record.

December 5 Affidavit at para. 13.
CRO Report at paras. 6-48.

PROPOSED COST ALLOCATION METHODOLOGY

9. Although the Timminco Entities are separate entities with different stakeholders, many of the Timminco Entities' costs incurred during the CCAA Proceedings have been shared costs for the benefit of both Timminco and BSI which cannot be allocated specifically as between the entities.

December 5 Affidavit at paras. 28-32.

10. In order to account for the amounts in each of Timminco and BSI's estate, with a view to making a distribution to each entity's creditors, the Timminco Entities and the Monitor discussed and agreed upon a proposed methodology for allocating costs (the "Proposed Cost Allocation Methodology").

December 5 Affidavit at paras. 28-32.

11. The Proposed Cost Allocation Methodology provides as follows:

- realizations specifically attributable to one of Timminco or BSI would be applied to that company;
- realizations not specifically attributable to a company would be allocated based on realizations after specifically attributable costs;
- debtor in possession financing costs will be applied to BSI (as the operating entity);
- costs specifically attributable to a one of Timminco or BSI would be applied to that company; and
- costs not specifically attributable to a company would be allocated based on net realizations after specifically attributable costs.

Twenty-Third Report at para. 23.

PART III - ISSUES

12. The issues on this motion are whether the Court should:
 - (a) extend the Stay Period to June 16, 2014;
 - (b) approve the Proposed Cost Allocation Methodology;
 - (c) discharge Russell Hill as CRO of the Timminco Entities effective December 16, 2013, and approve the activities of Russell Hill undertaken in its capacity as CRO of the Timminco Entities; and
 - (d) approve the expansion of the Monitor's powers.

PART IV - LAW AND ARGUMENT

(1) THE STAY EXTENSION SHOULD BE GRANTED

(A) *The Court has the Jurisdiction to Grant the Stay Extension*

13. Pursuant to s. 11.02 of the CCAA, the Court may extend the stay of proceedings with respect to a debtor company where: (a) circumstances exist that make the order appropriate; and (b) the applicant has acted and is acting in good faith and with due diligence.

CCAA, s. 11.02(2), 11.02(3)

14. In *Century Services Inc. v. Canada (Attorney General)*, the Supreme Court of Canada held that the appropriateness requirement in s. 11 of the CCAA must be assessed in light of the policy objectives underlying the CCAA:

. . . Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA – avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. . . when an order is sought that does realistically advance the CCAA's purposes, the ability to make it is within the discretion of a CCAA court. [Citations omitted]

CCAA s. 11.

Century Services Inc. v. Canada (Attorney General), 2010 SCC 60, Applicants' Book of Authorities, Tab 1 at paras. 70-71.

15. A variety of purposes have been attributed to the CCAA including, but not limited, to: protecting the interests of creditors and permitting an orderly

administration of the debtor company's affairs, and, in appropriate circumstances, to effect a sale, winding up or a liquidation of a debtor company and its assets.

Re Lehndorff General Partner Ltd. (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), Applicants' Book of Authorities, Tab 2.

(B) The Court Ought to Grant the Stay Extension

16. The Initial Order granted a stay of proceedings to February 2, 2012 which has been extended from time to time, most recently to December 16, 2013 by Order dated September 13, 2013 (the "**Stay Period**"). An extension of the Stay Period to June 16, 2014 is necessary to continue assessing claims for the benefit of the Timminco Entities' creditors and to continue winding down the estate, more particularly described at paragraph 28-29 herein.

December 5 Affidavit at para. 23-27.
Twenty-Third Report at para. 31.

17. A Stay Extension up to and including June 16, 2014 would advance the policy objectives underlying the CCAA by allowing the Timminco Entities to continue working diligently towards assessing claims for the benefit of their creditors and continue to wind down their business in an orderly manner.

December 5 Affidavit at para. 26.

18. The Monitor continues to have sufficient funds on hand to cover the costs of the Timminco Entities' estate. The Timminco Entities do not believe that any creditor will suffer any material prejudice if the Stay Period is extended as requested.

December 5 Affidavit at para. 25.

19. The Timminco Entities have acted and continue to act in good faith and with due diligence in taking steps to deal with their business and wind down in an orderly manner and assessing the claims, both for the benefit of their creditors.

December 5 Affidavit at para. 25.

20. The Monitor supports the Timminco Entities' request to extend the Stay Period.

December 5 Affidavit at para. 27.

21. For the reasons described above, the Stay Period should be extended to June 16, 2014.

(2) THE PROPOSED COST ALLOCATION METHODOLOGY SHOULD BE APPROVED

(A) The Court has the Jurisdiction to Approve the Proposed Cost Allocation Methodology

22. Section 11 of the CCAA provides that a Court may, subject to the restrictions set out in the CCAA, make any order it considers appropriate in the circumstances.

CCAA, s. 11.

23. Courts have approved costs allocations as between different CCAA entities and different asset pools, for example, in *Re White Birch Paper Holding Company* and *Cummings Estate v. Peopledge HR Services Inc.*

Re White Birch Paper Holding Company, 2011 QCCS 5223 at paras. 29-32, 36-40, Applicants' Book of Authorities, Tab 3.

Cummings Estate v. Peopledge HR Services Inc., 2013 ONSC 2781, at paras. 31-34, Applicants' Book of Authorities, Tab 4.

(B) The Proposed Cost Allocation Methodology Ought to be Approved

24. Although many of the Timminco Entities' costs incurred during the CCAA proceedings have been shared costs for the benefit of both Timminco and BSI, there is a need to allocate these costs as between each entity as each estate has a different set of stakeholders.

December 5 Affidavit at paras. 28-32.

25. The Proposed Cost Allocation Methodology will allow the Monitor to account for the amounts in each of Timminco and BSI's estate, with a view to making a distribution to each entity's creditors.

December 5 Affidavit at paras. 28-32.

26. Counsel for each of the representatives of the Timminco Entities' three pension plans have been informed of the details of the Proposed Cost Allocation Methodology; each has advised that they have no objection to the Proposed Cost Allocation Methodology.

December 5 Affidavit at para. 30.

27. The Proposed Cost Allocation Methodology is fair and reasonable and balances the interests of stakeholders at each entity level.

28. For these foregoing reasons, the Proposed Cost Allocation Methodology should be approved.

(3) THE CRO SHOULD BE DISCHARGED AND ITS ACTIVITIES APPROVED

(A) The Court has the Jurisdiction to Approve the Activities of, and Discharge, the CRO

29. As noted above, s. 11 of the CCAA provides that a Court may, subject to the restrictions set out in the CCAA, make any order it considers appropriate in the circumstances.

CCAA, s. 11.

30. Courts have found that it is appropriate to approve the appointment of a chief restructuring officer for a company under CCAA protection. Just as approval of the appointment of a chief restructuring officer is within the Court's inherent jurisdiction to grant, so correspondingly does the Court have jurisdiction to approve the discharge of that chief restructuring officer.

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd., 2007 SKQB 121, Applicants' Book of Authorities, Tab 5.
Re Northstar Aerospace, Inc., 2012 ONSC 3974, at paras. 11-12, Applicants' Book of Authorities, Tab 6.

31. Indeed, Courts have granted orders discharging chief restructuring officers and releasing them from claims against them arising from their actions in CCAA proceedings.

Re Collins & Aikman Automotive Canada Inc., June 15, 2010, 07-CL-7105 Ont. S.C.J. Hoy J., Applicants' Book of Authorities, Tab 7.
Re First Leaside Wealth Management Inc. et al., December 7, 2013, CV-12-9617-00CL, Ont. S.C.J. Wilton-Siegel J., Applicants' Book of Authorities, Tab 8.

32. It is also within the Court's jurisdiction to approve the activities of the CRO taken in respect of the CCAA proceedings. This Court, for example, has periodically approved the actions of the CRO during these CCAA proceedings.

Re Timminco Limited et al, May 14, 2013, CV-12-9539-00CL, Ont. S.C.J.,
Morawetz J., Applicants' Book of Authorities, Tab 9.
Re Timminco Limited et al, March 5, 2013, CV-12-9539-00CL, Ont. S.C.J.,
Morawetz J., Applicants' Book of Authorities, Tab 10.

(B) It is Appropriate to Grant the Discharge of the CRO and Approve its Activities

33. The Timminco Entities have no ongoing business activities and their material assets have been disposed of. The most cost-effective way to deal with the remaining assets and issues in the Timminco Entities' CCAA proceedings is to terminate the CRO's mandate and expand the powers of the Monitor so that it may wind down the Timminco Entities' CCAA proceedings.

December 5 Affidavit at para. 14.

34. No party has raised an objection to any activities undertaken by the CRO as described in any of the previous affidavits of Sean Dunphy, President of Russell Hill, sworn in respect of the Timminco Entities' CCAA proceedings, and the Monitor supports this ground of relief.

December 5 Affidavit at paras. 15-16.

35. For the reasons described above and to the extent not already specifically approved in prior Orders made in the within proceedings, it is appropriate in the circumstances to approve the activities of the CRO, and discharge and release the CRO.

(4) THE MONITOR'S POWERS SHOULD BE EXPANDED

(A) The Court has the Jurisdiction to Approve the Expansion of the Monitor's Powers

36. The powers and duties of the Monitor are set out in sections 23-25 of the CCAA and in the Orders granted in these CCAA proceedings, including the Initial Order. These powers include, *inter alia*, the power to carry out any function in relation to the debtor that the court may direct.

CCAA, s. 23-25.
Initial Order, paras. 29-30.

37. Courts have granted monitors additional powers to carry out additional functions where necessary, and in particular, have expanded a Monitor's powers so as to "meet the exigencies of the particular proceeding."

Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007) at pg. 268, Applicants' Book of Authorities, Tab 11.
Re Calpine Canada Energy Ltd., 2006 ABQB 177, Applicants' Book of Authorities, Tab 12.
Re Indalex, October 27, 2009, 09-CV-8122-00CL, Morawetz J. Applicants' Book of Authorities, Tab 13.

(B) It is Appropriate to Approve the Expansion of the Monitor's Powers

38. The Timminco Entities and the Monitor have determined that the discharge of the CRO and expansion of the Monitor's power is the most efficient way to complete the activities required for the winding up of the Timminco Entities' estate.

December 5 Affidavit at para. 14.

39. A number of outstanding matters remain to be resolved in the Timminco Entities' proceedings, including dealing with the remaining assets of the Timminco

Entities, completing the claims process, addressing and dealing with decisions of the Ontario Superior Court of Justice and the Superior Court of Quebec and any appeals that may arise as a result and implementing the Proposed Cost Allocation Methodology as between Timminco and BSI.

December 5 Affidavit at para. 19.

40. The Timminco Entities and the Monitor considered alternatives to continuation of the CCAA proceedings with enhanced Monitor powers (such as a bankruptcy of Timminco and BSI), but concluded that the expansion of Monitor powers presented the least complex and least expensive course of action.

Twenty-Third Report at para. 33.

41. The additional powers proposed to be granted by the Monitor are necessary for the winding up of the Timminco Entities' estate and are in the best interests of the Timminco Entities' stakeholders. These powers are necessary to deal with the issues discussed in paragraph 30 above, as well as with other remaining issues in the Timminco Entities' estate.

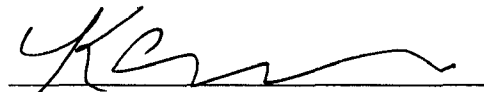
December 5 Affidavit at paras. 20-22.

42. For the foregoing reasons, it is just and appropriate to approve the expansion of the Monitor's powers.

PART V - ORDER REQUESTED

43. For the foregoing reasons, it is respectfully submitted that it is appropriate for this Court to grant the Orders sought at paragraph 2 herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of December, 2013.

A handwritten signature in black ink, appearing to be 'K. Elliott', written over a horizontal line.

Stikeman Elliott LLP

Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
2. *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List])
3. *White Birch Paper Holding Company*, 2011 QCCS 5223
4. *Cummings Estate v. Peopledge HR Services Inc.*, 2013 ONSC 2781
5. *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKQB 121
6. *Re Northstar Aerospace, Inc.*, 2012 ONSC 3974
7. *Re Collins & Aikman Automotive Canada Inc.*, June 15, 2010, 07-CL-7105 Ont. S.C.J. Hoy J.
8. *Re First Leaside Wealth Management Inc. et al.*, December 7, 2013, CV-12-9617-00CL, Ont. S.C.J. Wilton-Siegel J.
9. *Re Timminco Limited et al*, May 14, 2013, CV-12-9539-00CL, Ont. S.C.J., Morawetz J.
10. *Re Timminco Limited et al*, March 5, 2013, CV-12-9539-00CL, Ont. S.C.J., Morawetz J.
11. Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell 2007)
12. *Re Calpine Canada Energy Ltd.*, 2006 ABQB 177
13. *Re Indalex*, October 27, 2009, 09-CV-8122-00CL, Morawetz J.

SCHEDULE "B"
RELEVANT STATUTES

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

General power of court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

...

Stays, etc. – other than initial application

11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

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

...

Restriction – certain powers, duties and functions

11.08 No order may be made under section 11.02 that affects

(a) the exercise or performance by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act;

(b) the exercise or performance by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the Canada Deposit Insurance Corporation Act; or

(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the Winding-up and Restructuring Act.

...

Duties and functions

23. (1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than \$1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the Bankruptcy and Insolvency Act, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

Monitor not liable

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

Right of access

24. For the purposes of monitoring the company's business and financial affairs, the monitor shall have access to the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that is necessary to adequately assess the company's business and financial affairs.

Obligation to act honestly and in good faith

25. In exercising any of his or her powers or in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the Code of Ethics referred to in section 13.5 of the Bankruptcy and Insolvency Act.

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(RETURNABLE DECEMBER 16, 2013)**

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