

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 NORTH AMERICAN FUR PRODUCERS INC., NAFA PROPERTIES INC.,
3306319 NOVA SCOTIA LIMITED, NORTH AMERICAN FUR AUCTIONS
INC., NAFA PROPERTIES (US) INC., NAFA PROPERTIES STOUGHTON
LLC, NORTH AMERICAN FUR AUCTIONS (US) INC., NAFPRO LLC
(WISCONSIN LLC), NAFA EUROPE CO-OPERATIEF UA, NAFA EUROPE
B.V., DAIKOKU SP.Z OO and NAFA POLSKA SP. Z OO

(the "Applicants")

FACTUM OF THE APPLICANTS
(RE: Sanction Hearing, returnable April 12, 2024)

Date: April 5, 2024

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TO: SERVICE LIST

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FACTUM OF THE APPLICANTS

PART I – NATURE OF MOTION AND OVERVIEW

2. This factum is filed in support of the Applicants’ motion for Court approval of the Plan of Compromise and Arrangement dated January 11, 2024 (as it may be amended, restated, modified or supplemented in accordance with the terms thereof, the “**Plan**”). All capitalized terms not otherwise defined herein shall have the meaning ascribed to them under the Plan, the Meeting Order, or the Seventeenth Report of the Monitor dated April 5, 2024 (the “**Seventeenth Report**”).

3. On October 31, 2019, North American Fur Auctions Inc. and the other Applicants listed above (collectively “**NAFA**”) obtained relief under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c -C-36, as amended (the “**CCAA**”) by way of an Initial Order, which was amended and restated on November 8, 2019 (the “**Initial Order**”). Pursuant to the Initial Order, Deloitte

Restructuring Inc. was appointed as the monitor of the Applicants in the CCAA proceedings (in this capacity, the “**Monitor**”). The Initial Order granted a stay of proceedings, which has been extended several times, most recently on March 26, 2024, to April 15, 2024.

4. The Plan achieves a global resolution of these CCAA proceedings and is the product of lengthy and extensive consultation among key stakeholders. It has the support of the Monitor, the Syndicated Lenders, NAFA’s other secured lenders and an overwhelming majority of voting Affected Creditors which far exceeds the Required Majority. If sanctioned by this Court and implemented, the Plan will maximize distributions to Affected Creditors in a timely manner as a result of (i) the Secured Creditors agreeing to most of their Secured Claims being deemed Unsecured Claims under the Plan, (ii) a reduction of professional fees, and (iii) cessation of continued interest and fees accruing to the Secured Creditors.

5. At the Meeting (defined below) held on April 3, 2024, the Affected Creditors holding Eligible Voting Claims of NAFA that were present in person, virtually, or by proxy overwhelmingly voted in favour of the Plan, with 97.6 percent in number and 99.5 percent in value being in support of the Plan. This approval far exceeds the “double majority” required before the Plan can be sanctioned by the Court. The extent of the Affected Creditors’ support is also a strong indicator that the Plan is fair and reasonable and that the Affected Creditors, in their business judgment, believe that it fairly addresses their interests.

6. NAFA submits that the Plan meets the test for sanction by this Court. The Applicants have complied with the CCAA, nothing has been done that is not authorized under the CCAA, and the Plan represents a fair and reasonable balancing of stakeholder interests.

7. Based on the Monitor's analysis as of January 15, 2024 (and subject to the caveats and qualifications set out in the Sixteenth Report of the Monitor dated January 15, 2024 (the "**Monitor's Sixteenth Report**")), the Plan is projected to result in recoveries for Affected Creditors in respect of their Proven Claims. This recovery is predicated upon and made possible by a significant compromise from the Secured Creditors, who have agreed, upon the implementation of the Plan, to convert approximately \$7 million of secured debt to unsecured debt to create one class of creditors that can share all recoveries on a *pro-rata* basis.

8. In the event the Plan is not sanctioned, based on the Monitor's analysis, and without the Secured Creditors' compromise which is conditional on Plan sanction, it is likely that there will be little to no recoveries for the junior secured creditors with claims ranking behind the Syndicated Lenders and that there would be no recovery for unsecured creditors in a bankruptcy or liquidation.

9. A fundamental tenet of the Plan is a release of NAFA, the Monitor, the Agent, the Syndicated Lenders and other key stakeholders and representatives in these CCAA proceedings. The release provided in the Plan falls squarely within the provisions of the CCAA and the well-established test for releases in CCAA jurisprudence.

10. Based on these considerations, and the submissions below, as well as the Monitor's recommendation contained in the Sixteenth Report and the Seventeenth Report, the Applicants submit that the Plan should be sanctioned by this Court as fair and reasonable.

PART II – FACTS

11. The facts with respect to this motion are more fully set out and described in the Affidavit of Douglas Lawson sworn January 11, 2024 (the "**Meeting Order Lawson Affidavit**"), the

Monitor's Sixteenth Report, the Monitor's Seventeenth Report, and the Affidavit of Douglas Lawson sworn April 5, 2024 ("**Sanction Lawson Affidavit**").

The Plan is a Product of Negotiation and Consultation

12. Consistent with the objectives of the CCAA to achieve a fair balance of the interests of all Affected Creditors, the Plan is the product of extensive negotiations and consultations with key stakeholders, including the Agent, FCC, the Secured Shareholders, and the employees, all with the assistance of the Monitor. All of these key stakeholders were consulted and/or provided input into the deal terms that formed the basis for the Plan.¹

13. Each of the Monitor, the Agent, FCC, and the Secured Shareholders supports the Plan.²

14. The Plan provides for the consolidation of the Applicants for Plan purposes. The Monitor and NAFA have already provided evidence on the substantive grounds and the overwhelming benefits of consolidation at the Meeting Order hearing held on January 17, 2024 ("**Meeting Order Hearing**").³ Those grounds and submissions are echoed in the context of the Plan sanction hearing.

15. The primary features of the Plan are summarized in the Meeting Order Lawson Affidavit, and the Monitor's Sixteenth Report, and were previously set out to this Court at the Meeting Order Hearing. Some of the significant terms of the Plan include:⁴

¹ The Sixteenth Report of the Monitor dated January 15, 2024 ("**Sixteenth Report**") at para 40 page 14.

² The Applicants' Motion Record dated April 5, 2024 ("**NAFA Sanction MR**"), the Affidavit of Douglas Lawson sworn April 5, 2024 ("**Lawson Sanction Affidavit**"), Tab 2, page 12, para 14.

³ The Applicants Motion Record dated January 11, 2024 ("**NAFA Meeting MR**"), the Affidavit of Douglas Lawson sworn January 11, 2024 ("**Lawson Meeting Order Affidavit**"), Tab B, pages 25-26, at paras 39-44; Sixteenth Report at paras 54-59.

⁴ NAFA Meeting MR, Lawson Meeting Order Affidavit, Tab B, pages 24-32, at paras 38-60; Sixteenth Report at paras 51-85, pages 17-26.

- (a) The Plan is proceeding on a consolidated basis;
- (b) The Creditors with Proven Secured Claims have agreed that, upon the Plan Implementation Date, their Claims will be deemed to be converted to Unsecured Claims (with the exception of the Unaffected Secured Syndicate Claim);
- (c) The Plan creates a single class of Affected Unsecured Creditors. The Proven Secured Claims of the Secured Creditors (with the exception of the Unaffected Secured Syndicate Claim which was not voted at all) were voted in the same single class of Affected Unsecured Creditors;
- (d) The Unaffected Secured Syndicate Claim and certain other Unaffected Claims are unaffected by the Plan and will not be compromised or released;
- (e) The Monitor use NAFA's available cash to establish (a) a Creditor Distribution Pool; (b) an Administrative Reserve and (c) an Unresolved Claims Reserve;
- (f) After payment of the Unaffected Secured Syndicate Claim and establishing the Reserves, distributions will be made in accordance with the Plan from time to time as sufficient funds accumulate. Affected Creditors will receive their *pro rata pari passu* share of the distributions, net of costs;
- (g) The Plan does not contain a convenience class;
- (h) The Plan provides that only distributions in excess of \$25 will be made to Affected Creditors; and,

- (i) The Plan contemplates a releases, including third-party releases in favour of parties contributing to these CCAA proceedings and integral to the success of the Plan. The proposed releases of the directors and officers are limited in accordance with the limitations prescribed by section 5.1 of the CCAA.

16. If this Court sanctions the Plan, the Plan Implementation Date will be the date on which all conditions precedent are satisfied. The timing and mechanics for distributions under the Plan are set out in detail in the Monitor’s Sixteenth Report.⁵

Notice of the Meeting Provided to Affected Creditors

17. On January 17, 2024, this Court granted an order (the “**Meeting Order**”), among other things, permitting the Applicants to put the Plan before the Affected Creditors for approval at the Meeting.⁶

18. In accordance with the Meeting Order, the Monitor published on the Monitor’s website a copy of the Plan, the Notice of Meeting to Affected Creditors, the Meeting Order, the Sixteenth Report, a proxy form and instructions for completing the proxy form (the “**Meeting Materials**”).⁷

19. On January 22, 2024, in accordance with the Meeting Order, the Monitor emailed the Meeting Materials to Affected Creditors for which they had an email address. Between January 22, 2024 and January 29, 2024, the Monitor sent by regular mail the Notice of Meeting to Affected

⁵ Sixteenth Report at paras 74-83, pages 23-26; NAFA Sanction MR, Lawson Sanction Affidavit, Tab 2B, Exhibit B, Plan ss. 10.1 and 10.3, page 67.

⁶ NAFA Sanction MR, Lawson Sanction Affidavit, Tab 2C, Exhibit C, The Meeting Order, page 75.

⁷ The Seventeenth Report of the Monitor dated April 5, 2024 (“**Seventeenth Report**”) at paras 22 to 23, pages 8-9.

Creditors for which it had email addresses, which included the URL to the Monitor's Website with the Meeting Materials.⁸

20. In accordance with the Meeting Order, the Monitor and the Company solicited several fur industry trade websites. On or about February 15, 2024, the International Fur Federation posted a notice to its website advising of the Meeting and the Plan, and included a URL to the Monitor's Website.⁹

Affected Creditors Overwhelmingly Approve the Plan

21. The Meeting was originally scheduled for February 21, 2024 (the "**Original Meeting**"). In accordance with the Meeting Order, the Original Meeting was adjourned by the Chair of the Meeting to consider issues raised by certain Affected Creditors in the days leading up to the Meeting.¹⁰

22. Such issues were resolved consensually and the Meeting was reconvened on April 3, 2024 (the "**Meeting**"). In accordance with the Meeting Order, the Monitor provided email notice to all Affected Creditors at the Original Meeting in person or by proxy of the date of the reconvened Meeting and also published notice of the Meeting Date for the reconvened Meeting on the Monitor's Website.¹¹

23. The required quorum was present at the Meeting on April 3, 2024, and the Meeting was properly constituted.¹²

⁸ Seventeenth Report at para 24, page 9.

⁹ Seventeenth Report at para 25 and Appendix C, page 9.

¹⁰ Seventeenth Report at para 30, page 10.

¹¹ Seventeenth Report at para 32 and Appendix D, pages 10 and 11.

¹² Seventeenth Report at para 35, page 11.

24. According to the Monitor's tabulation, 84 in number representing \$25,011,086 in value of the Affected Creditors holding Eligible Voting Claims attended and voted in person, virtually or by proxy at the Meeting. According to the Monitor's tabulation, 82 Affected Creditors holding Eligible Voting Claims representing approximately \$24,883,940 in value voted in favour of the Plan. The Plan was overwhelmingly approved by 97.6 percent by number of Affected Creditors representing 99.5 percent in value of the Eligible Voting Claims present and voting at the Meeting.¹³

Projected Plan Recoveries

25. As set out in the Monitor's Sixteenth Report, and subject to certain important limitations and caveats set out therein, NAFA expects that, subject to certain exceptions, Affected Creditors will recover between 3.6% and 11% of their Proven Claims dependent on the future recoveries achieved from the Applicants' remaining assets.¹⁴ A notable exception is that, pursuant to the Plan, the Monitor will not make any distribution to any Affected Creditor with a Proven Claim whose calculated *pro rata* share would result in a distribution of less than \$25 from any distribution. Such Affected Creditor shall not be entitled to receive such distribution.¹⁵

PART III – ISSUES

26. The issues to be considered on this motion are whether the Court should:

(a) sanction the Plan, and

¹³ Seventeenth Report at para 42, page 13.

¹⁴ Sixteenth Report at para 48, page 16.

¹⁵ Sixteenth Report at paras 75 to 77, page 24 .

(b) approve and grant the releases.

PART IV – LAW & ARGUMENT

A. The Requirements for Plan Approval Have Been Met

27. Section 6 of the CCAA provides that a compromise or arrangement is binding on all creditors if: (i) a majority in number representing two-thirds in value of the classes of creditors present and voting at a meeting of creditors approve the compromise or arrangement, and (ii) and the compromise or arrangement has been sanctioned by the Court.¹⁶

28. The Plan received the overwhelming support of the Affected Creditors with Eligible Voting Claims, both in number and value, thus satisfying the first requirement set out in Section 6 of the CCAA. Correspondingly, the issue before the Court is whether it should approve and sanction the Plan.¹⁷

29. The exercise of the Court’s authority to sanction a CCAA plan is a matter of discretion. The criteria to be considered by the Court on a plan sanction motion are well established:¹⁸

- (a) there must be strict compliance with all statutory requirements;
 - (b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA;
- and

¹⁶ CCAA, s. 4 and 6.

¹⁷ Seventeenth Report at para 42, page 13; *Northland Properties Ltd. (Re)*, (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at para 23, affirmed (1989) 73 C.B.R. (N.S.) 195 (B.C.C.A.).

¹⁸ *CannTrust Holdings Inc., et al (Re)*, 2021 ONSC 4408 at para 13.

(c) the plan must be fair and reasonable.

(i) Compliance with all Statutory Requirements

30. When considering if a debtor has complied with all statutory requirements under the CCAA, the Court will typically consider whether:¹⁹

(a) the applicant comes within the definition of a “debtor company” under section 2(1) of the CCAA;

(b) the applicant has total claims in excess of \$5 million;

(c) the creditors were properly classified;

(d) the notice of meeting was sent in accordance with the Meeting Order;

(e) the meeting was properly constituted;

(f) the voting was properly carried out; and

(g) the plan was approved by the requisite majorities.

31. Each of the above factors are factual issues, all of which have been satisfied on the record.

In this case:

(a) the Court found that the Applicants qualified as “debtor companies” under the CCAA and that the Applicants’ liabilities exceeded the \$5 million threshold;²⁰

¹⁹ *Canwest Global Communications Corp.*, 2010 ONSC 4209 [“*Canwest Global*”] at para 15.

²⁰ NAFA Sanction MR, Lawson Sanction Affidavit, Tab 2A, Exhibit A, Initial Order at para 2, page 16.

- (b) the Affected Creditors were properly classified in the Meeting Order;²¹
- (c) the Court found it was appropriate for the Plan to proceed on a consolidated basis;²²
- (d) prescribed notices of the Meeting, which were approved by the Court,²³ were delivered to creditors within the timeframe and manner required by the Meeting Order;²⁴
- (e) the Meeting was properly constituted, and the voting was properly carried out in accordance with the Meeting Order;²⁵ and,
- (f) The Plan was approved by the requisite majorities of Affected Creditors under section [6\(1\)](#) of the CCAA.²⁶

32. The Monitor concluded that it is of the view that the Applicants have strictly complied with all their statutory requirements.²⁷

33. In addition, the Plan complies with the statutory requirements set out in subsections [6\(3\)](#), [6\(5\)](#) and [6\(6\)](#) of the CCAA, which provides that the Court may not sanction a plan of compromise and arrangement unless the plan contains certain specified provisions concerning certain Crown

²¹ Seventeenth Report at para 47(d), page 14; NAFA Sanction MR, Lawson Sanction Affidavit, Tab 2C, Exhibit C, Meeting Order at para 19, page 83.

²² NAFA Sanction MR, Lawson Sanction Affidavit, Tab 2C, Exhibit C(ii), Endorsement of J. Conway at para 6, page 139.

²³ NAFA Sanction MR, Lawson Sanction Affidavit, Tab 2C, Exhibit C, Meeting Order at para 12, page 81.

²⁴ Seventeenth Report at paras 23 to 26 and para 32, pages 9 and 32.

²⁵ Seventeenth Report at paras 33 to 41, pages 11-12.

²⁶ Seventeenth Report at para 42, page 13.

²⁷ Seventeenth Report at para 47(b), page 14.

claims, employee claims, and pension claims.²⁸ The Plan contains such specified provisions concerning such claims.²⁹

34. Based on the foregoing analysis, the Applicants submit that they have complied with all statutory requirements under the CCAA and this part of the test has been met.

(ii) No Unauthorized Steps Were Taken

35. The Court is entitled to rely on the reports of the court-appointed monitor when determining whether anything has been done, or is purported to have been done, that is not authorized by the CCAA.³⁰

36. The Applicants have acted in good faith and with due diligence throughout the course of these CCAA Proceedings, complying with the requirements of the CCAA and all Orders of the Court granted in these CCAA Proceedings.³¹

37. The Applicants did not take any unauthorized steps and no unauthorized steps have been alleged to have been taken in these CCAA Proceedings.³² The Applicants have provided stakeholders and the Court with many comprehensive affidavits providing updates on all key aspects of the restructuring and over the course of four years since these proceedings have been commenced, not a single hearing before this Court has proceeded on an opposed basis. The Court has been apprised of the key issues facing the Applicants throughout the process.³³

²⁸ CCAA, ss. 6(3), 6(5), and 6(6).

²⁹ NAFA Sanction MR, Lawson Sanction Affidavit, Tab 2B, Exhibit B, Plan at ss. 5.2, 5.3, 6.3 and 7.3, pages 56, 58, and 59.

³⁰ *Canwest Global*, *supra* note 19, at para 17.

³¹ Seventeenth Report at 47(a), pages 13 to 14.

³² Seventeenth Report at 47(f), page 14.

³³ This has consisted of seventeen Monitor reports and numerous stay extension motions whereby the Company has provided continued updates on its operations and restructuring efforts.

38. The Applicants are not aware of any basis for asserting that they have proceeded in a manner that is not authorized by the CCAA, and are not aware of any creditor asserting same.³⁴

39. The Applicants therefore respectfully submit that the second part of the plan sanction test has been met.

(iii) The Plan is Fair and Reasonable

40. Courts have emphasized that “perfection is not required” when assessing whether a plan is fair and reasonable.³⁵ Instead, a Court should consider the relative degrees of prejudice that would flow from granting or refusing to grant the relief sought under the CCAA and whether the plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available (if any).³⁶ The discretion of the Court should be guided by the objectives of the CCAA – namely to “enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators.”³⁷

41. Further, and as noted by Justice Gascon in *Abitibi*:³⁸

[c]onsidering that a plan is, first and foremost, a compromise and arrangement reached between a debtor company and its creditors, there is, indeed, a heavy onus on parties seeking to upset a plan where the required majorities have supported it. From that standpoint, a court should not lightly second-guess the business decisions reached by the creditors as a body.

³⁴ Seventeenth Report at para 47(a), (b) and (f), pages 13 to 14.

³⁵ *Abitibi Bowater Inc. (Re)*, 2010 QCCS 4450 [“*Abitibi*”] at para 33.

³⁶ *Re Canadian Airlines Corp.*, 2000 ABQB 442 [“*Canadian Airlines*”] at para 3; *Canwest Global*, *supra* note 19, at para 19.

³⁷ *Northland Properties Ltd. v. Excelsior Life Ins. Co. of Can.*, 1989 CanLII 2672 (BC CA) at para 17.

³⁸ *Abitibi*, *supra* note 35, at para 34.

42. The Applicants submit that this principle should be given even greater weight where, as in this case, creditors have overwhelmingly voted in favour of approval of the Plan.

43. In assessing whether a proposed plan is fair and reasonable, the Court will consider:³⁹

- (a) whether the claims were properly classified and whether the requisite majorities of creditors approved the plan;
- (b) what creditors would receive on bankruptcy or liquidation as compared to the plan;
- (c) alternatives available to the plan and bankruptcy;
- (d) oppression of the rights of creditors;
- (e) unfairness to shareholders; and
- (f) the public interest.

44. Each of these factors strongly supports the fairness and reasonableness of the Plan and approval thereof by this Court. In particular:

- (a) Classification: The Affected Creditors of the Applicants were classified in a single class. In accordance with section [22\(2\)](#) of the CCAA, the Affected Creditors were placed into a single class due to the commonality of interest of their Claims, being Unsecured Claims for the purposes of the Plan in this case. Affected Creditors will each receive a *pro rata* distribution from the Creditor Distribution Pool after all amounts owing to CCAA Priority Payment Claims and the Unaffected Secured Syndicate Claim

³⁹ [Canwest Global](#), *supra* note 19, at para [21](#).

- are paid in full. The classification of Affected Creditors, and substantive consolidation, was supported by the Monitor⁴⁰ and approved in the Meeting Order without objection;⁴¹
- (b) Creditor Approval: The Plan received profuse support (97.6% in number and 99.5% in value) from the Affected Creditors who voted on the Plan.⁴² Such overwhelming support creates an inference that the Plan is fair and reasonable because it demonstrates that assenting creditors believe that their interests are treated fairly and equitably under the Plan;⁴³
- (c) Recovery on Bankruptcy: The alternative to the Plan as presented will be a liquidation of the Applicants' assets whereby the remaining funds in the estate would go first to payout amounts owing to the Syndicate Lenders (including fees and interest which would continue to accrue thereon). The junior Secured Creditors would likely receive very little, if any, recovery, and the prospect of recovery for the unsecured creditors would be miniscule.⁴⁴ As such, if the Plan is not sanctioned on the terms thereof, then there will almost certainly be a significant number of creditors (including secured creditors) that will not receive any distributions from the Applicants, and the creditors of the Applicants, as a whole, will be significantly worse off than they would be if the Plan is sanctioned as presented;
- (d) Alternatives to the Plan: The Applicants and the Monitor have not identified any alternatives to the Plan and the only realistic alternative is a bankruptcy. Given the large

⁴⁰ Seventeenth Report at paras 47(i) and (j), page 15.

⁴¹ NAFA Sanction MR, Lawson Sanction Affidavit, Tab 2C, Exhibit C, Meeting Order at para 19, page 83.

⁴² Seventeenth Report at para 42, page 13.

⁴³ *Canadian Airlines*, *supra* note 36, at para 97.

⁴⁴ Sixteenth Report at paras 42-46 pages 14-15.

amount of secured debt still owing as compared to the value of the Applicants remaining (contingent) assets, the Plan, which provides for significant financial concessions by the Secured Creditors, is the only possible avenue of moving forward whereby there is a chance for realizations to all creditors.⁴⁵

- (e) No Oppression of Creditors: Creditor treatment must be equitable, however, “equitable treatment is not necessarily equal treatment.”⁴⁶ A plan can be fair and reasonable even if it does not provide exactly the same recoveries for all creditors, so long as there is sufficient rationale to explain any difference in treatment.⁴⁷ In the present case, the Plan treats all Affected Creditors equally in terms of voting and distributions under the Plan. The only parties under the Plan that receive different treatment are the Unaffected Creditors who are simply unaffected due to the legal nature of their claims, must be treated differently in accordance with applicable laws, including the CCAA.⁴⁸

This includes the Unaffected Secured Syndicate Claim, being \$1.2 million of the remaining \$3.6 million Proven Claim of the Syndicated Lenders, which will be paid before any distributions are made under the Plan. Treatment of the Unaffected Secured Syndicate Claim in this manner does not oppress other creditors as this claim would maintain its priority status regardless of whether the Plan is sanctioned and implemented. In fact, other creditors are receiving a benefit as a result of the Plan because the Syndicated Lenders are converting the remaining portion of their Proven Claim in the amount of \$2.4 million (which would rank ahead of all other Affected

⁴⁵ Sixteenth Report at para 41, page 14.

⁴⁶ [Sammi Atlas Inc., Re, 1998 CanLII 14900 \(ON SC\)](#) at para 4; [Air Canada \(Re\), 2004 CanLII 11700 \(ON SC\)](#) at para 9.

⁴⁷ [Canwest Global](#), *supra* note 19, at paras 22-24.

⁴⁸ CCAA, ss. 6(3) to 6(6).

Creditors) into unsecured debt for the purposes of the Plan, thereby allowing for recoveries for all other creditors;⁴⁹

(f) No Unfairness to Shareholder: Given that the Affected Creditors will not be paid in full, there is no unfairness to the shareholders who will be receiving no recoveries under the Plan (save and except to the extent they are Affected Creditors).⁵⁰

(g) The Plan is in the Public Interest: These CCAA Proceedings have been ongoing for over four years. It is in the public interest for this insolvency to be resolved and distributions to finally be made to the Affected Creditors (including former employees) efficiently and as soon as practicable. The Plan achieves this objective.

45. The Applicants therefore submit that the third part of the plan sanction test has been met.

B. The Plan Releases Are Appropriate

46. It is well established that courts have the jurisdiction to sanction plans of compromise and arrangement under the CCAA containing third party releases.⁵¹ Courts will generally approve such

⁴⁹ Sixteenth Report, at para 44, page 15.

⁵⁰ Sixteenth Report, at para 48, page 16.

⁵¹ [Pacific Exploration & Production Corporation \(Re\)](#), 2016 ONSC 5429 at para 23 [*“Pacific Exploration”*]; [Lydian International Limited \(Re\)](#), 2020 ONSC 4006 (CanLII) at para 53 [*“Lydian”*]; [Boreal Capital Partners Ltd., Court File No. CV-21-00672654-00CL](#) (August 9, 2022), [Order](#), at para 33 [*“Boreal”*] and [Endorsement](#) of Penny J at pages 6-8 [*“Boreal Endorsement”*].

third party releases where the releases are rationally tied to the resolution of the debtor's claims and will benefit creditors generally.⁵²

47. In *Lydian International Limited (Re)* (“**Lydian**”), Chief Justice Morawetz set out the following list of factors that should be considered with respect to the approval of releases in CCAA proceedings, including third party releases:⁵³

- (a) whether the released claims are rationally connected to the purpose of the plan;
- (b) whether the plan can succeed without the releases;
- (c) whether the parties being released contributed to the plan;
- (d) whether the releases benefit the debtors as well as the creditors generally;
- (e) whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and,
- (f) whether the releases are fair, reasonable and not overly-broad.

48. In *Green Relief*, in granting third party releases in the face of objections from creditors, Justice Koehnen highlighted that the quality of the claims that an objector may have is another factor Courts can consider.⁵⁴ There are no known objections to the releases sought in connection

⁵² *Pacific Exploration*, *supra* note 51, at para 23; *Metcalf & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587 at para 70.

⁵³ *Lydian*, *supra* note 51, at para 54 (cited with approval in *Green Relief Inc. (Re)*, 2020 ONSC 6837, at para 27 [“*Green Relief*”).

⁵⁴ *Green Relief*, *supra* note 53, at para 30.

with the Applicants' Motion and to the contrary, the releases contained in the Plan were highlighted for Affected Creditors who have put forth overwhelming support for the Plan.

49. It is not necessary for each of the factors set out in *Lydian* to be satisfied for the release to be granted. The Court will consider the particular circumstances of a case, and some factors may assume greater weight in one case than another.⁵⁵

50. The releases provided in the Plan (the "**Plan Releases**") are consistent with those frequently granted in CCAA plans, both as to the subject matter scope of the releases, the temporal scope of the releases and the proposed released parties, being the applicants, the monitor, certain secured lenders, and each of their directors, officers, employees, and advisors.⁵⁶

51. The Plan Releases contemplated in the Plan and proposed Sanction Order are in favour of the following parties:⁵⁷

- (a) each of the Agent, the Syndicated Lenders, and their counsel;
- (b) the Applicants' Representatives, including their Directors and Officers;
- (c) the Monitor and its legal counsel; and,
- (d) each and every present and former affiliate, affiliated funds, subsidiary, director, officer, member, partner, employee, auditor, financial advisor, legal counsel and agent of each of the parties listed at (a) to (c) (collectively, the "**Released Parties**").

⁵⁵ *Green Relief*, *supra* note 53, at para 28.

⁵⁶ *Boreal*, *supra* note 51, at para 33 and *Endorsement*; *Lydian*, *supra* note 51, at paras 59 to 62.

⁵⁷ NAFA Sanction MR, Lawson Sanction Affidavit, Tab 2B, Exhibit B, Plan at s.8.1, page 63.

52. The Plan Releases are limited in scope to matters relating to implementing the Plan or relating to the Affected Claims, any D&O Claims, the business and affairs of the Applicants and the administration and/or management of the Applicants, the Plan or the CCAA Proceedings.⁵⁸

53. The Plan Releases are necessary and appropriate in the circumstances when the facts of this case are applied to the factors set out in *Lydian*:

(a) Rational Connection: The Plan Releases are rationally connected to the purpose of the Plan, which is to resolve claims related to the Applicants' business and affairs, including any claims against former directors, officers, and employees and any indemnity claims that may arise therefrom against the Applicants.⁵⁹

(b) The Plan Requires the Releases: The Plan cannot succeed without the Plan Releases. For the Applicants to fulfill the purpose of the Plan, they must have finality in respect of its obligations and liabilities moving forward. Additionally, the issuance of a Sanction Order which provides for such releases is a Plan Implementation Condition without which the Plan cannot be implemented as proposed. Similar to the stakeholders in *Boreal*,⁶⁰ the Agent and the Syndicated Lenders require the release as part of their support of the Plan, which reflects the significant concessions they have given to make the Plan possible for the benefit of all stakeholders.⁶¹

(c) Released Parties were Necessary and Essential: The Released Parties were necessary and essential to the restructuring and have significantly contributed to the development

⁵⁸ NAFA Sanction MR, Lawson Sanction Affidavit, Tab 2B, Exhibit B, Plan at s.8.1, page 51.

⁵⁹ Seventeenth Report at para 52, page 18.

⁶⁰ *Boreal Endorsement*, *supra* note 51.

⁶¹ Seventeenth Report at paras 53 to 57, page 18.

of the Plan.⁶² Throughout these CCAA Proceedings, the Applicants made good faith efforts to address their financial issues and proceed with the restructuring. As has been reported to the Court throughout the CCAA process, the Monitor and its legal counsel have been closely involved in the restructuring and day-to-day operation of the business, including receiving and discharging certain expanded powers granted to it by this Court over aspects of the Applicants' business.⁶³ The Agent, the Syndicated Lenders, and their counsel have also been consulted throughout, and provided insight and strategic outlook, in the Applicants' restructuring process. The most significant of which has been the significant concessions given by the Agent and Syndicate Lenders, subject to the Plan being sanctioned and implemented, to convert \$2.4 million of their secured debt into unsecured debt and to stop charging interest and fees on their outstanding secured debt and fees from October 31, 2023 onwards.⁶⁴

The Applicants, and their current and former directors, officers, employees, and advisors have also been instrumental throughout these CCAA proceedings, by:⁶⁵

- i. working cooperatively and collaboratively with the Monitor as well as NAFA's creditors, and from time to time, NAFA's former employees;
- ii. preparing and providing to the Monitor information required for the former employee applications under the Wage Earner Protection Program;

⁶² Sixteenth Report at para 40, page 14.

⁶³ Seventeenth Report at para 3, page 2.

⁶⁴ Seventeenth Report at para 55 to 56 and 61, pages 18 and 19.

⁶⁵ NAFA Sanction MR, Lawson Sanction Affidavit, Tab 2, para 12, pages 11 to 12.

- iii. working to maintain the day-to-day operations of NAFA, including communicating with active auction houses to sell NAFA pledged furs, obtaining agreements from debtor farmers for consignment of furs, and maintaining NAFA's computer servers;
- iv. contributing valuable institutional knowledge to enable NAFA's operations to proceed efficiently and effectively, including filing and prosecuting insurance claims, pursuing challenging debt recoveries from around the world;
- v. assisting with and overseeing the significant employee and operational downsizing of NAFA, including selling assets (such as real estate) throughout the world, decommissioning foreign headquarters, transitioning NAFA assets to various purchasers throughout these proceedings, and converting NAFA to being a fully remote operation;
- vi. working to maintain NAFA's relations with its key stakeholders during restructuring proceedings, such as communicating with NAFA's creditors, trade associations, and debtors;
- vii. in the case of the directors and officers, providing crucial leadership, management, and strategy throughout NAFA's restructuring; and,
- viii. continuing to provide corporate services to NAFA necessary to the continued performance of the business, such as maintaining tax filings, liaising with

foreign counsel and advisors, and maintaining NAFA's security registrations around the world.

- (d) Releases Benefit the Debtor and its Creditors Generally: Without the Plan Releases, the Plan which provides for recoveries for Affected Creditors will fail and the alternative will be a bankruptcy and liquidation which is not expected to provide for any recoveries to Affected Creditors.⁶⁶
- (e) Creditors Aware of the Nature and Effect of the Releases: The Plan Releases were well publicized and highlighted for Affected Creditors at every possible juncture. Full disclosure of the Plan Releases was made to Affected Creditors in the Applicants' Motion Record dated January 11, 2024, in the Meeting Order and the Meeting Materials which were approved by the Court, and in the Monitor's Sixteenth Report, all of which were posted on the Monitor's Website.⁶⁷

The Monitor provided the Meeting Materials (or a link to the Meeting Materials) to all the Affected Creditors.⁶⁸ The Notice of Meeting to Affected Creditors (attached to the Meeting Order) included the Meeting Materials, expressly contained a disclaimer advising that the Plan provides for comprehensive releases.⁶⁹ The Meeting Materials also included the Monitor's Sixteenth Report, which described the Plan Releases in detail.⁷⁰

⁶⁶ Seventeenth Report at paras 62-63, pages 19 to 20.

⁶⁷ Seventeenth Report at paras 64 to 66, page 20.

⁶⁸ Seventeenth Report at para 24, page 9.

⁶⁹ NAFA Sanction MR, Lawson Sanction Affidavit, Tab 2B, Exhibit B, Meeting Order at Schedule D, page 134.

⁷⁰ Sixteenth Report at para 83, page 26.

In addition, prior to calling for the vote on the Plan Resolution at the Meeting, the Chair of the Meeting expressly drew attention to the Plan Releases by noting that the Plan “provides for releases in favour of NAFA, the Monitor, the Monitor’s counsel, the Agent, the Syndicated Lenders and each of their affiliates, subsidiaries, directors, officers, employees, and advisors.”⁷¹

The Plan, which includes the Plan Releases, was approved by an overwhelming majority of voting Affected Creditors. The Affected Creditors had sufficient time and ability to review and consider the Plan Releases, and almost all Affected Creditors attending the Meeting in person or by proxy voted in favour of the Plan.⁷²

The motion materials in support of the Sanction Order and the Monitor’s Seventeenth Report also provide clear information as to the nature of the Plan Releases.

- (f) Objections to the Releases (factor in *Green Relief*): Despite the fulsome notice of the Plan Releases, at no point did any creditor or other stakeholder express any concern, let alone objection, to the Plan Releases either when the Applicants’ sought the Meeting Order, at the Meeting or as of the date of filing this factum.⁷³ Moreover, the within CCAA Proceedings have been ongoing from October 31, 2019, and on a practical basis, any claims against the Released Parties (at least from March 1, 2022 onwards) would more than likely be statute barred, thereby further reducing any possible prejudice to granting the Plan Releases. Lastly, the Company is not aware of any outstanding

⁷¹ Seventeenth Report at para 66, page 20.

⁷² Seventeenth Report at para 42, page 13.

⁷³ Seventeenth Report at para 68, page 20.

actions or proceedings against the Applicants, and the claims process called for Directors & Officers claims, and none were received.⁷⁴

(g) The Releases are Fair, Reasonable, and not Overly Broad: The Releases are appropriately narrow in scope and explicitly do not release: (a) any Unaffected Claims including claims and Directors and Officers that cannot be released pursuant to section 5.1(2) of the CCAA; (b) the Applicants from any of their obligations under the Plan or any Order; and (c) a Released Party if the Released Party has been found to have committed fraud or willful misconduct.⁷⁵

54. The Monitor supports the Plan Releases and recommends the Court approve same.⁷⁶

55. For the foregoing reasons, the Plan Releases are fair, reasonable, and not only rationally connected to the overall purpose of the Plan but in fact integral to the success of the Plan and should be approved by the Court.

PART V – ORDERS REQUESTED

56. The Applicants respectfully request that this Court grant the relief requested and issue the proposed Sanction Order substantially in the form attached at Tab 3 of the Applicants' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5th DAY OF APRIL 2024 BY:



 David Ullmann / Stephen Gaudreau

⁷⁴ NAFA Sanction MR, Lawson Sanction Affidavit, Tab 2, paras 14 and 15, page 13.

⁷⁵ Seventeenth Report at para 67, page 20.

⁷⁶ Seventeenth Report at para 70, page 21.

SCHEDULE “A”— LIST OF AUTHORITIES

- | No. | List of Cases |
|------------|---|
| 1. | <u>Northland Properties Ltd. (Re)</u> , (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at para <u>23</u> |
| 2. | <u>CannTrust Holdings Inc., et al (Re)</u> , 2021 ONSC 4408 at para <u>13</u> |
| 3. | <u>Canwest Global Communications Corp.</u> , 2010 ONSC 4209 at paras <u>15</u> , <u>17</u> , <u>19</u> , <u>21</u> , <u>22-24</u> |
| 4. | <u>Abitibi Bowater Inc. (Re)</u> , 2010 QCCS 4450 at paras <u>33</u> and <u>34</u> |
| 5. | <u>Northland Properties Ltd. v. Excelsior Life Ins. Co. of Can.</u> , 1989 CanLII 2672 (BC CA) at para <u>17</u> |
| 6. | <u>Canadian Airlines Corp.</u> , 2000 ABQB 442 at paras <u>3</u> , <u>97</u> |
| 7. | <u>Sammi Atlas Inc., Re</u> , 1998 CanLII 14900 (ON SC) at para <u>4</u> |
| 8. | <u>Air Canada (Re)</u> , 2004 CanLII 11700 (ON SC) at para <u>9</u> |
| 9. | <u>Pacific Exploration & Production Corporation (Re)</u> , 2016 ONSC 5429 at para <u>23</u> |
| 10. | <u>Lydian International Limited (Re)</u> , 2020 ONSC 4006 (CanLII) at paras <u>53</u> , <u>54</u> , and <u>62</u> |
| 11. | <u>Boreal Capital Partners Ltd.</u> , Court File No. CV-21-00672654-00CL (August 9, 2022), <u>Order</u> , at para <u>33</u> and <u>Endorsement</u> of Penny J |
| 12. | <u>Metcalf & Mansfield Alternative Investments II Corp. (Re)</u> , 2008 ONCA 587 at para <u>70</u> |
| 13. | <u>Green Relief Inc. (Re)</u> , 2020 ONSC 6837, at paras <u>27</u> , <u>28</u> and <u>30</u> |

SCHEDULE “B”—STATUTORY PROVISIONS

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

Sections [4](#) , [6](#), [22\(2\)](#)

Compromise with unsecured creditors

4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Compromises to be sanctioned by court

- **6 (1)** If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under [sections 4](#) and [5](#), or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding
 - **(a)** on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
 - **(b)** in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the [Bankruptcy and Insolvency Act](#) or is in the course of being wound up under the [Winding-up and Restructuring Act](#), on the trustee in bankruptcy or liquidator and contributories of the company.
- **Court may order amendment**

(2) If a court sanctions a compromise or arrangement, it may order that the debtor’s constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.
- **Restriction — certain Crown claims**

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under [section 11](#) or [11.02](#) and that are of a kind that could be subject to a demand under

- (a) subsection 224(1.2) of the *Income Tax Act*;
- (b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or
- (c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
 - (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
 - (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a provincial pension plan as defined in that subsection.

- **Restriction — default of remittance to Crown**

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

- **Restriction — employees, etc.**

(5) The court may sanction a compromise or an arrangement only if

- (a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of
 - (i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and
 - (ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

- **(b)** the court is satisfied that the company can and will make the payments as required under paragraph (a).

- **Restriction — pension plan**

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

- **(a)** the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

- **(i)** an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

- **(ii)** if the prescribed pension plan is regulated by an Act of Parliament,

- **(A)** an amount equal to the normal cost, within the meaning of [subsection 2\(1\)](#) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

- **(A.1)** an amount equal to the sum of all special payments, determined in accordance with [section 9](#) of the *Pension Benefits Standards Regulations, 1985*, that were required to be paid by the employer to the fund referred to in [sections 81.5](#) and [81.6](#) of the *Bankruptcy and Insolvency Act* to liquidate an unfunded liability or a solvency deficiency,

- **(A.2)** any amount required to liquidate any other unfunded liability or solvency deficiency of the fund as determined on the day on which proceedings commence under this Act,

- **(B)** an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of [subsection 2\(1\)](#) of the *Pension Benefits Standards Act, 1985*,

- **(C)** an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

- **(iii)** in the case of any other prescribed pension plan,

- **(A)** an amount equal to the amount that would be the normal cost, within the meaning of [subsection 2\(1\)](#) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

- **(A.1)** an amount equal to the sum of all special payments, determined in accordance with [section 9](#) of the *Pension Benefits Standards Regulations, 1985*, that would have been required to be paid by the employer to the fund referred to in [sections 81.5](#) and [81.6](#) of the *Bankruptcy and Insolvency Act* to liquidate an unfunded liability or a solvency deficiency if the prescribed plan were regulated by an Act of Parliament,

- (A.2) any amount required to liquidate any other unfunded liability or solvency deficiency of the fund as determined on the day on which proceedings commence under this Act,
- (B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of [subsection 2\(1\)](#) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,
- (C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and
- (b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Classes of Creditors

Company may establish classes

- **22 (1)** A debtor company may divide its creditors into classes for the purpose of a meeting to be held under [section 4](#) or [5](#) in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.
 - **Factors**
- (2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account
- (a) the nature of the debts, liabilities or obligations giving rise to their claims;
 - (b) the nature and rank of any security in respect of their claims;
 - (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
 - (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

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 NORTH AMERICAN FUR PRODUCERS INC., NAFA
 PROPERTIES INC., 3306319 NOVA SCOTIA LIMITED, NORTH AMERICAN FUR AUCTIONS INC., NAFA PROPERTIES (US) INC.,
 NAFA PROPERTIES STOUGHTON LLC, NORTH AMERICAN FUR AUCTIONS (US) INC., NAFPRO LLC (WISCONSIN LLC), NAFA
 EUROPE CO-OPERATIEF UA, NAFA EUROPE B.V., DAIKOKU SP.Z OO and NAFA POLSKA SP. Z OO

(the “**Applicants**”)

Service Address of Recipients: See Service List

**ONTARIO
 SUPERIOR COURT OF JUSTICE
 COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANTS
 (Re: Sanction Hearing, returnable April 12, 2024)**

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