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January 16, 2014

Our File: 58083-2

TO: SEE ATTACHED SERVICE LIST

Dear Sir/Madam:

**Re: Plumb-Line Group Holdings Inc., PLG Residential Services Inc., PLG Corporate Services Inc., Asty Construction Inc., Con-Forte Contracting Company Inc. and Sas-Can Masonry and Restoration Inc. (collectively referred to as "Plumb-Line Group") –
In Bankruptcy**

Enclosed please find the Reply Bench Brief of the Trustee, Deloitte Restructuring Inc. in response to the Bench Brief submitted by Kevin Barr of Norton Rose Fulbright Canada LLP, on behalf of certain Lien Claim Respondents and their counsel on January 8, 2014.

Yours truly,

FIELD LLP



Douglas S. Nishimura

DSN/ch
Encl.

Deloitte Restructuring Inc. re: Plumb-Line Group of Companies

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COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE BANKRUPTCY OF
PLG CORPORATE SERVICES INC.
PLG RESIDENTIAL SERVICES INC.
SAS-CAN MASONRY AND RESTORATION INC.
ASTY CONSTRUCTION INC.
CON-FORTE CONTRACTING COMPANY INC.
PLUMB-LINE GROUP HOLDINGS INC.
(collectively referred to as the "Plumb-Line Group")

APPLICANT **DELOITTE RESTRUCTURING INC., in its capacity as Trustee in
Bankruptcy and not in its personal capacity**

DOCUMENT **REPLY BENCH BRIEF OF DELOITTE RESTRUCTURING INC., in
its capacity as Trustee in Bankruptcy and not in its personal capacity**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
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File No. 58083-2

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INTRODUCTION

1. The following are the written submissions of Deloitte Restructuring Inc., in its capacity as Trustee in Bankruptcy of the Plumb-Line Group (the "**Trustee**") made in response to the Reply Brief of Stuart Olsen Dominion Construction Ltd., Chandos Construction Ltd., ITC Residential AB I Inc., Western Surety Co., Volker Steven Contracting Ltd., 1571279 Alberta Ltd. and 1328368 Alberta Ltd. (collectively referred to as the "**Lien Claim Respondents**") in opposition to the Application made by the Trustee on December 17, 2013.
2. The Lien Claim Respondents raised the following issues in their Brief which require further submission from the Trustee. These issues are:
 - (a) Use of inherent jurisdiction to "fill gaps" in the legislation;
 - (b) The assertion that the Trustee is abusing the process of the Court; and
 - (c) The assertion that the Bankruptcy Court has no jurisdiction over the Lien Claim Respondents because they are "strangers" to the bankruptcy.
3. With respect to all other submissions in the Lien Claim Respondents' Brief, it is submitted that they are not in respect of jurisdiction or are answered in the previous submissions of the Trustee.

LAW AND ARGUMENT

Filling Gaps

4. The Lien Claim Respondents submit that reports may only be permitted under inherent jurisdiction and then only where there is a legislative gap to fill. It is the submission of the Trustee that the premise of this argument is flawed. This submission ignores the fact that the Trustee centrally relies upon the *Judicature Act* as legislative (not inherent) authority for its proposed process. It is submitted that the *Judicature Act* provides a legislative mandate giving jurisdiction to the Court to make general orders with respect to all proceedings before it including those under the *Builders' Lien Act* ("**BLA**"). Therefore, use of inherent jurisdiction is not required - the *Judicature Act* provides express statutory authority.
5. Further, to the extent inherent jurisdiction can be used to supplement and enhance a Court process, this is an appropriate case. The BLA is not a complete code with respect to process, as argued by the Lien Claim Respondents. While certain provisions of the BLA do call for an Affidavit Proving Lien (upon the service of a Notice to Prove Lien by a Respondent), the BLA does not require that affidavit in order for a claimant to prove its lien in all circumstances. As set

forth in the Trustee's written and oral submissions, an application under section 53 of the BLA is analogous to the process proposed by the Trustee. In that section, there is no requirement for an Affidavit Proving Lien, though the court can consider one if it has been filed. There is actually no express limit on the type of evidence which may be used. Accordingly, this Court has jurisdiction to permit a report in determining the validity of a lien. The only issue for the Court is whether it would be appropriate to do so (which topic is not addressed herein).

6. It is further submitted that the *Rules of Court* expressly mention only two methods by which evidence may be given to the Court, namely, affidavits and *viva voce* evidence. The position taken by the Lien Claim Respondents would mean that all previous proceedings where reports by Trustees, Receivers and Monitors were accepted were improperly heard, since there is no "gap" in the Rules to fill in any of those cases. Of course, there have in fact been a vast number of decisions which have specifically permitted the use of such reports. Accordingly, the Lien Claim Respondents' position is not accepted by the courts.

Abuse of Process/Efficiency

7. The Lien Claim Respondents have argued that the Trustee is abusing the court process in its proposal to use a report and provide written interrogatories. Nothing could be further from the truth. The Trustee is attempting to be as efficient as possible in resolving lien claims by the Plumb-Line Group.
8. The previously cited jurisprudence with respect to the *Judicature Act* specifies that the ability of the Court to make any order it sees fit with respect to process is aimed at speeding up the Court process and making it more efficient. Despite attempts by the Lien Claim Respondents to distinguish the case law, the statements in those cases are not limited in scope.
9. The goal of efficiency and timeliness is in keeping with the mandate in the *Rules of Court*, set forth in Rules 1.2 and 1.3. These Rules state:

Purpose and intention of these Rules

1.2(1) The purpose of these Rules is to provide a means by which claims can be fairly and justly resolved in or by a Court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it. [emphasis added]

Division 2 Authority of the Court

General authority of the Court to provide remedies

1.3(1) The Court may do either or both of the following:

(a) give any relief or remedy described or referred to in the Judicature Act;

(b) give any relief or remedy described or referred to in or under these rules or any enactment.

(2) A remedy may be granted by the Court whether or not it is claimed or sought in an action.

10. The Trustee, in using a single report with respect to the various lien claims will be creating efficiency. Further, the potential hearing of liens claims with similar issues (such as set-off) could speed up the Court process. The use of written interrogatories will be faster and more efficient than a process under which the Trustee first attends questioning, provides what answers it can, but then heavily relies on undertakings to complete its answers.

11. The Lien Claim Respondents have complained that they have a right to a "dynamic" questioning. This argument relies on a false assumption namely, that there is utility in such a questioning. It is

accepted by all parties that the Trustee was not present during either the negotiation or performance of relevant contracts. Accordingly, all of the information available to the Trustee will be found either in the records of the Plumb-Line Group or from individuals who the Trustee will have to seek out. The "dynamic" questioning will only result in a large number of undertakings. Written interrogatories will provide equally as fulsome and complete information as a question followed by an undertaking response.

12. Further, nothing prohibits the Lien Claim Respondents from applying at a later date for an order permitting oral questions, if the circumstances so dictate.
13. It is submitted that the only practical purpose of the Lien Claim Respondents' objection to the process is to delay the matters and to cause the Trustee to unnecessarily expend more time and resources in pressing lien claims. The Lien Claim Respondents have only raised what they hope will be successful, technical objections and have provided no practical reason why the proposed process is impractical, inefficient or unfair.

"Stranger to the Bankruptcy" Argument

14. The Lien Claim Respondents assert that they are "strangers" to the bankruptcy and therefore, the Bankruptcy Court has no jurisdiction over them. They cite *Sam Levy & Associates v. Azco Mining Inc.*, [2001] SCC 92, in support of this proposition. In this regard, it is important to note the following:
 - (a) The Supreme Court in *Sam Levy & Associates, supra*, did not hold that the Bankruptcy Court never has jurisdiction over "strangers" in all cases. This is decided on a case by case basis. The real issue is the substance or nature of the case. The Bankruptcy Court may in fact have jurisdiction over disputes which are related to the bankruptcy estate or case, even if contracts, property or civil rights are involved.
 - (b) In the present case, the Trustee is required, pursuant to section 16 of the *Bankruptcy and Insolvency Act* (the "BIA"), to recover all property of the bankrupt, and third parties are required to deliver such property under section 17. A lien claim is a chose in action and therefore included in the definition of "property" under section 2 of the BIA. The Bankruptcy Court is an appropriate forum for a process to deal with these matters.
 - (c) Finally, the real question here is not whether the matter is under the jurisdiction of the Bankruptcy Court versus the Court of Queen's Bench's of Alberta simpliciter rather, it is

whether a superior court (in bankruptcy or ordinary civil court) has jurisdiction to accept a report as evidence. Based on the previous submissions, it does. In other words, even if the matter is not heard by the Bankruptcy Court, the Trustee would make the same proposal.

15. In *Sam Levy & Associates, supra*, there was a legitimate procedural prejudice to the respondents in that case which is absent here. In the present case, of course, there would be no change in location or court. Further, hearing the actions separately in this case could result in a different adjudicator making decisions in each case and potentially coming to inconsistent conclusions on points of law. Accordingly, *Sam Levy & Associates, supra*, is distinguishable and of little use in this case.
16. The Lien Claim Respondents have noted there is no precedent for the proposed process to determine liens. While we have not discovered a case where a Trustee or Receiver used a process to prove liens, it is notable that in many insolvency cases there are lien claims against the insolvent party. In such cases, it is not uncommon for the court having jurisdiction over the insolvency case to hear applications regarding the validity of the various liens. For example, in the *Smoky River Coal* case, the Judge having conduct of the CCAA (and later the Receivership proceedings) heard all of the claims for various types of liens including builders' liens and woodmans' liens in the single proceeding. This is similar to the process proposed by the Trustee and has obvious benefits of efficiency and consistency.

Conclusion

17. For the foregoing reasons, and the reasons given in previous submissions, the Trustee submits that this Honourable Court has jurisdiction to permit the proposed process for resolution of lien claims.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
FIELD LLP

Per: 

**Douglas S. Nishimura, solicitor for the
Trustee, Deloitte Restructuring Inc.**