UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re: FORMERXBC HOLDING USA INC. (f/k/a XEBEC HOLDING USA INC.), *et al.*, Debtor in a foreign proceeding.[1]	Chapter 15 Case No. 22-10934 (KBO) Jointly Administered Re: D.I No. 170

ORDER (I) RECOGNIZING AND ENFORCING CCAA ORDER APPROVING ALLOCATION METHOD; AND (II) GRANTING RELATED RELIEF

Upon the motion (the "**Motion**")[2] of FormerXBC Inc. (f/k/a Xebec Adsorption Inc.), in its capacity as the authorized foreign representative (the "**Foreign Representative**") for the above-captioned debtors (collectively, the "**Debtors**") in a proceeding (the "**Canadian Proceeding**") commenced under Canada's Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, and pending before the Superior Court of Québec, in the Province of Québec, District of Montréal (the "**Canadian Court**"), seeking entry of an order (this "**Order**"), pursuant to sections 105(a), 1507, 1521, and 1522 of title 11 of the United States Code (the "**Bankruptcy Code**"): (i) recognizing and enforcing the terms, conditions, and provisions of the order issued by the Canadian Court (the "**Allocation Order**"), a copy of which is attached hereto as **Exhibit 1**; and (ii) granting such other and further relief as the Court deems just and proper; and it appearing

[1] The Debtors in the chapter 15 proceedings and the last four digits of their federal tax identification numbers are: FormerXBC Inc. (f/k/a Xebec Adsorption Inc.) (0228), 11941666 Canada Inc. (f/k/a Xebec RNG Holdings Inc.) (N/A), Applied Compression Systems Ltd. (N/A), 1224933 Ontario Inc. (f/k/a Compressed Air International Inc.) (N/A), FormerXBC Holding USA Inc. (f/k/a Xebec Holding USA Inc.) (8495), Enerphase Industrial Solutions Inc. (1979), CDA Systems, LLC (6293), FormerXBC Adsorption USA Inc. (f/k/a Xebec Adsorption USA Inc.) (0821), FormerXBC Pennsylvania Company (f/k/a The Titus Company) (9757), FormerXBC NOR Corporation (f/k/a Nortekbelair Corporation) (1897), FormerXBC Flow Services – Wisconsin Inc. (f/k/a XBC Flow Services – Wisconsin Inc.) (7493), California Compression, LLC (4752), and FormerXBC Systems USA, LLC (f/k/a Xebec Systems USA LLC) (4156). The location of the Debtors' corporate headquarters and the Debtors' foreign representative is: 730 Industriel Boulevard, Blainville, Quebec, J7C 3V4, Canada.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

that this Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334; venue being proper before the Court pursuant to 28 U.S.C. § 1410; and the Court having determined that appropriate and timely notice of the filing of the Motion having been given; and it appearing that the relief requested in the Motion is necessary and beneficial to the Debtors; and no other or further notice being necessary or required; and this Court having determined that the legal and factual bases set forth in the Motion, and all other pleadings and papers in these cases establish just cause to grant the relief ordered herein, and no objections or other responses having been filed that have not been overruled, withdrawn, or otherwise resolved, and after due deliberation therefor;

THIS COURT HEREBY FINDS AND DETERMINES THAT:

A. The findings and conclusions set forth herein constitute this Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. The findings by the Court in its previously entered Recognition Order [Docket No. 36], dated October 27, 2022, are hereby incorporated by reference herein and such Recognition Order shall continue in effect in all respects except to the extent this Order directly modifies or directly contradicts such Recognition Order.

C. On June 29, 2023, the Canadian Court entered the Allocation Order, which approved the allocation method with respect to the net proceeds held by the Monitor in the

Canadian Proceeding, under which the proceeds from sale transactions, the Intercompany Transactions, and the Restructuring Costs, secured debt reimbursements, and DIP financing receipts and payments are allocated between the Debtors' estates (the "**Allocation Method**"), as more fully described in the Monitor's Allocation Method Report.

D. The relief granted hereby is necessary and appropriate to effectuate the objectives of chapter 15 of the Bankruptcy Code to the protect the Debtors and the interests of their creditors and other parties in interest, is consistent with the laws of the United States, international comity, public policy, and the policies of the Bankruptcy Code, and will not cause any hardship to any party in interest that is not outweighed by the benefits of the relief granted.

E. Absent the requested relief, the efforts of the Debtors, the Canadian Court, and the Foreign Representative in conducting the Canadian Proceeding and effectuating the restructuring under Canadian law may be frustrated, a result contrary to the purposes of chapter 15 of the Bankruptcy Code.

F. Good, sufficient, appropriate, and timely notice of the filing of, and the hearing on, the Motion was given, which notice is adequate for all purposes, and no further notice need be given.

G. All creditors and other parties in interest, including the Debtors are sufficiently protected by the grant of relief ordered hereby. The relief granted herein will, in accordance with sections 1507(b) and 1521 of the Bankruptcy Code, reasonably assure: (i) the just treatment of all holders of claims against or interests in the Debtors' property; (ii) the protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in the Canadian Proceedings; and (iii) the distribution of proceeds of the Debtors' property substantially in accordance with the order prescribed by the Bankruptcy Code.

BASED ON THE FOREGOING FINDINGS OF FACT AND AFTER DUE DELIBERATION AND SUFFICIENT CAUSE APPEARING THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Motion is Granted as set forth herein.

2. All objections, if any, to the Motion or the relief requested therein that have not been withdrawn, waived, or settled by stipulation filed with the Court, and all reservations of rights included therein, are hereby overruled on the merits.

3. The Allocation Method is hereby approved, and the relief granted pursuant to the Allocation Order is hereby recognized by the Court and shall apply with respect to creditors located in the United States.

4. All persons and entities subject to the jurisdiction of the United States are permanently enjoined and restrained from taking any actions inconsistent with, or interfering with the enforcement and implementation of, the Allocation Order, or any documents incorporated into such Allocation Order.

5. The Foreign Representative is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion and the Allocation Order.

6. The Court retains jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and/or enforcement of this Order.

7. Notwithstanding any provision in the Bankruptcy Rules to the contrary: (a) this Order shall be effective immediately and enforceable upon entry; (b) neither the Foreign Representative nor the Debtors are subject to any stay in the implementation, enforcement, or realization of the relief granted in this Order; and (c) the Foreign Representative is authorized and empowered, and may in its discretion and without further delay, take any action and perform any act necessary to implement and effectuate the terms of this Order.

Dated: July 14th, 2023
Wilmington, Delaware

Ka B. Ow

KAREN B. OWENS
UNITED STATES BANKRUPTCY JUDGE

32163933.7

Exhibit 1

Allocation Order

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No.: 500-11-061483-224

DATE: June 29, 2023

BEFORE THE HONOURABLE CHRISTIAN IMMER, J.S.C.

IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF:

FORMERXBC INC., (FORMERLY, XEBEC ADSORPTION INC.)
11941666 CANADA INC., (FORMERLY, XEBEC RNG HOLDINGS INC.)
12224933 ONTARIO INC., (FORMERLY, COMPRESSED AIR INTERNATIONAL INC.)
APPLIED COMPRESSION SYSTEMS LTD.
FORMERXBC HOLDING USA INC. (FORMERLY, XEBEC HOLDING USA INC.)
ENERPHASE INDUSTRIAL SOLUTIONS, INC.
CDA SYSTEMS, LLC
FORMER XBC ADSORPTION USA INC., (FORMERLY, XEBEC ADSORPTION USA INC.)
FORMER PENSYLVANNIA COMPANY (FORMERLY, THE TITUS COMPANY)
FORMERXBC NOR CORPORATION (FORMERLY, NORTEKBELAIR CORPORATION)
FORMERXBC FLOW SERVICES – WISCONSIN INC. (FORMERLY, XBC FLOW SERVICES – WISCONSIN INC.)
CALIFORNIA COMPRESSION, LLC
-AND-
FORMERXBC SYSTEMS USA, LLC (FORMERLY XEBEC SYSTEMS USA, LLC)
Debtors / Petitioners

And

DELOITTE RESTRUCTURING INC.
Monitor

ORDER TO APPROVE A PROPOSED ALLOCATION PLAN (S. 11 *CCAA*)

[1] On September 29, 2022, the Court, relying on the *Companies' Creditors Arrangement Act* ("*CCAA*")[1], issued an Initial First Day Order ("**IFDO**")[2]. Since then, it has issued several amended and restated initial orders ("**ARIO**"). Presently, the Debtors/Petitioners are subject to a Fifth ARIO.

[2] As the Court has already explained in previous reasons[3], when the IFDO was filed, Xebec Group was comprised of a myriad of corporations across Canada, the USA, the Middle East and Asia. Only some of these entities are Debtors/Petitioners and therefore subject to the IFDO and the ARIOs.

[3] The Group has operated, *de facto*, from a cashflow perspective, on a consolidated basis. The operations and accounting of all entities are and remain, since the IFDO, intertwined due, amongst others, to the following factors:

3.1. Money transfers occur on a continuous basis between the various entities.

3.2. Assets are sold and purchased on a continuous basis amongst the entities.

3.3. Services are provided and expenses are paid for all entities of the Group by Xebec Adsorption inc.("**BLA**") and Xebec Adsorption USA, Inc. ("**XSU**"). In fact, XSU's sole function was to provide such services, while BLA, aside from providing such services and assuming such expenses, also carried on commercial operations.

3.4. The two secured creditors, National Bank of Canada ("**NBC**") and Export Development Canada ("**EDC**") hold security on some, but not all assets. NBC holds first ranking priority on BLA, Xebec RNG Holdings Inc. ("**GNR**"), Applied Compression Systems Ltd. ("**ACS**"), Compressed Air International Inc. ("**CAI**"), Enerphase Industrial Solutions Inc. ("**AIR**"), CDA Systems LLC ("**CDA**"), XSU and the Titus Company ("**TIT**"), while EDC holds first ranking priority on Nortkbelair Corporation ("**NOR**"), XBC Flow Services Wisconsin Inc. ("**XBC**"), California Compression, LLC ("**CAL**") and Xebec Systems USA, LLC ("**UEC**"), and second ranking security on BLA.

[4] As authorized by various ARIOs, interim financing was provided to BLA, but for the benefit of all Debtor Petitioners. Also, since the IFDO, XSU and BLA have assumed

---

1 R.S.C. (1985), c. C-36.
2 *Arrangement relatif à Xebec Adsorption Inc.*, 2022 QCCS 3596.
3 *Arrangement relatif à Xebec Adsorption Inc.*, 2022 QCCS 3888

significant portions of corporate expenses, as well as the restructuring costs which have benefited all entities.

[5] As early as its first report filed in support of the request for the IFDO, the Monitor reported that the Debtors/Petitioners intended to continue ordinary course intercompany transactions within the Xebec Group. The Monitor, presciently, anticipated that there would be circumstances where intercompany funding will be required between the Xebec Group entities in order to preserve value, maintain going concern operations and/or ensure an orderly wind-down of certain non-core operations. Consequently, the Monitor undertook to include in its future reports all relevant information with respect to material post-filing intercompany payments.

[6] In support of the request for the issuance of the first ARIO, the Monitor reiterated that it would include in its reports all relevant information with respect to material post-filing intercompany payments to take place during the CCAA process. This material post-filing intercompany payments information was then indeed provided in appendices to each of the subsequent Monitor's reports.

[7] To further streamline the process, the Monitor set up an Intercompany Protocol to "supplement the instructions already given to the Petitioners with the objective of ensuring good and uniform practice regarding intercompany and pre-filing payments and to facilitate the notifications to the secured lenders and the Monitor's reporting".

[8] It was clear that a reallocation of all these intercompany transactions would eventually need to be carried out.

[9] Hence, as early as the first ARIO, orders were issued by the undersigned to ensure that these issues were dealt with which were then, with very minor modifications, reiterated in each of the second, third and fourth ARIOs[4]. In the fifth ARIO, which is presently in effect[5] one finds the following orders:

> [28] **ORDERS** that, subject to the consent of the Monitor, each of the Petitioners is authorized to complete outstanding transactions and engage in new transactions with other Petitioners or their affiliates, including, without limitation, (a) intercompany funding transactions, (b) purchase and sale transactions for goods or services in the ordinary course of the Business, (c) allocation and payments of costs, expenses and other amounts for the benefit of the Petitioners, including, without limitation, debt repayments and interest costs, head office, shared services and restructuring costs (collectively, "Intercompany Transactions"), and to continue, on and after the date of this Order, to effect Intercompany Transactions. All Intercompany Transactions among the Petitioners shall continue on terms

---

4 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 271 ; *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 381 et *Arrangement relatif à FormerXBC Inc. (Xebec Adsorption Inc.)* 2023 834.

5 *Arrangement relatif à FormerXBC Inc.*, 2023 QCCS 922.

thereto, or to such governing principles, policies or procedures as the Monitor may require, or subject to this Order or further Order of this Court.

[29] **ORDERS** that, in conformity with the Third DIP Term Sheet, the Petitioners shall notify, at least two (2) days in advance, Export Development Canada ("EDC") of any monetary payment from a Petitioner to another Petitioner or their affiliates, and that the Monitor shall continue to report from time to time to the Court on such monetary payments constituting Intercompany Transactions.

[30] **ORDERS** that prior to the distribution of any net sale proceeds resulting from the sale or divestiture of any Business or Property (but excluding any distribution made in respect of any amounts owing under the CCAA Charges (as defined herein), as the case may, it being understood that in each such case, said distribution may in itself constitute an Intercompany Transaction to form part of a subsequent Intercompany Transactions Report, as defined herein), the Monitor shall prepare and file with the Court a report (each, an "**Intercompany Transactions Report**") detailing all Intercompany Transactions which occurred on or after the date of the Initial Order with respect to the applicable Petitioner(s), which Intercompany Transactions Report shall include the Monitor's proposed allocation of the net amount to be attributed to each Petitioner as a result of the applicable Intercompany Transactions, if any, and any net sale proceeds to be remitted by one Petitioner to another Petitioner as the case may be (the "**Proposed Allocation**").

[31] **ORDERS** the Monitor to serve a copy of the Intercompany Transactions Report upon the service list in these proceedings and DECLARES that any interested creditor shall be entitled to apply to this Court within five (5) calendar days of said notification to the service list of the Intercompany Transactions Report to contest or make representations with respect to the Proposed Allocation.

[The Court's underlining]

[10] As a result of the sale of most of the group's assets, significant proceeds have been collected. In May, realizing that there would be sufficient proceeds to present plans of arrangements for certain of the Debtors/Petitioners, the Monitor asked the Court to approve a Claims Procedure, which not only the undersigned, but also the U.S. Court did approve. The Debtors/Petitioners announced that they would present an allocation plan. June 27, 2023 was reserved for a hearing to approve such an allocation plan.

[11] The Monitor has indeed now prepared a detailed proposed allocation methodology which also contains the relevant information relating to the Intercompany Transactions Report (the "**Proposed Allocation Methodology**")[6].

---

6 Exhibit M-1, hereafter the ("**PAM Report**").

[12] This Proposed Allocation Methodology was presented at an information session held on June 20, 2023, prior notice having been provided to the service list on June 14. Minutes of this information session were prepared to which a list of attendees is appended[7].

[13] By way of its Application[8], the Monitor now asks this Court to approve this Proposed Allocation Methodology. Mr. Jean-François Nadon, testifying on behalf on the Monitor, presented in great detail the Proposed Allocation Methodology and answered all the questions posed by the Court.

[14] No one contested the Proposed Allocation Methodology.

[15] The Court will approve the Proposed Allocation Methodology.

[16] In the reasons that follow, the Court will first explain why (1) it has the power to render the orders sought. It will then (2) summarize the Proposed Allocation Methodology and its underlying considerations. Finally (3), it will explain why it is appropriate to exercise its discretion in favour of issuing the order sought.

1. This Court's powers

[17] The Supreme Court of Canada has given clear directions on the nature of the CCAA supervising judge's discretion to render orders and how this discretion should be exercised. In *Callidus*, the Court explains that s. 11 of the CCAA, which it qualifies as the "anchor of the discretionary authority", grants the CCAA Court discretion to make any "order that it considers appropriate" and which responds "to the circumstances of each case and [meets] contemporary business and social needs".[9] This authority is "not boundless". The Court must keep in mind "three "baseline considerations" which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence".[10] These teachings were reiterated in *Canada North Group*.[11] The Supreme Court adds that appropriateness must be assessed "by considering whether the order would advance the policy and remedial objectives of the CCAA".[12]

[18] In the present case, it is the Monitor who is making the application. A Monitor is an "independent and impartial expert, acting as "the eyes and the ears of the court"

---

7 Exhibit M-2.
8 *Application of the Monitor for the Approval of a Proposed Allocation Method,* June 16, 2023.
9 *9354-9186 Québec inc.* v. *Callidus Capital Corp.*, 2020 SCC 10 (CanLII), [2020] 1 SCR 521, par. 48 [« *Callidus* »].
10 Idem, par. 49.
11 *Canada* v. *Canada North Group Inc.*, 2021 SCC 30, par 21 ["*Canada North*"].
12 Idem.

throughout the proceedings".[13] S. 23 *CCAA* sets out the non-exhaustive list of statutory duties and functions of Monitor, which include at subparagraph (k) "carrying out any other functions in relation to the company that the court may direct". This subparagraph is the conduit by which the Monitor's "minimum powers" set out at s. 23 "may be augmented through the exercise of a court's discretion".[14]

[19] The undersigned did indeed "augment" such powers in directing, in each of the ARIOs, the Monitor to carry out " allocation and payments of costs, expenses and other amounts for the benefit of the Petitioners, including, without limitation, debt repayments and interest costs, head office, shared services and restructuring costs (collectively, "Intercompany Transactions"), and to continue, on and after the date of this Order, to effect Intercompany Transactions". It asked the Monitor to set up an Intercompany Transactions Report which would include the proposed allocation of the net amount to be attributed to each Petitioner. Through its reports, and through countless hours of detailed testimony by the partners in charge, Jean-François Nadon and Julie Mortreux, in the numerous hearings which were held since the inception of this file, the Monitor has kept the Court abreast of its efforts in carrying out these functions. As a result, the undersigned acquired what the Supreme Court in *Callidus* qualifies as "extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties".[15]

[20] In the present matter, no stakeholder has suggested to this Court that it does not have the power to approve the Proposed Allocation Method. The approval of the Proposed Allocation Methodology rests on numerous "building blocks" put in place throughout the CCAA process, a metaphor used by Justice Morawetz in *Target Canada Co. (Re)*.[16] Prior to each of the ARIOs having been rendered, any stakeholder could review and, if they saw fit, oppose their issuance. There was no contestation. It would be problematic if the foundational building blocks which were laid were now questioned. Once again, despite an information session having been held and attended by several stakeholders where the Proposed Allocation Methodology was presented in full and despite the holding of the present hearing, no one opposes this methodology.

[21] This Court therefore concludes that it has the power to approve an allocation methodology as long as the three basic requirements set out by the Supreme Court of Canada are met. Prior to examining these three requirements, the methodology being proposed must be summarized.

---

13 *Callidus*, par. 52.
14 *Ernst & Young Inc.* v. *Essar Global Fund Limited*, 2017 ONCA 1014, par. 106.
15 *Callidus*, par. 47.
16 *Target Canada Co. (Re)*, 2016 ONSC 316, par. 81.

2. The Proposed Allocation Method

[22] The Proposed Allocation Method contains three main components: a) the proceeds allocation; b) the intercompany transactions allocation and c) the allocation of Restructuring Costs, Secure Debt reimbursement and DIP financing.

(a) The Proceeds from Transaction allocation

[23] Assets of various entities of the Xebec Group were disposed of in numerous transactions carried out throughout the CCAA process, either as part of the Court authorized SISP, or otherwise.[17] Asset vesting orders were issued by this Court for most of these transactions save for those where the monetary value was below the maximum value the Court authorized the Monitor to carry out without express court authorization.

[24] The value of the proceeds ascribed to an entity is that appearing in the relevant transaction documents. Where several entities' assets were sold in the same transaction, the sales price allocation set out in the relevant transaction documents was deemed to be a proper allocation.

[25] Added to these proceeds is the estimated impact of the recovery which BLA earned from its subsidiary, Xebec UK, further to the sale of its subsidiary Tiger. The proceeds of the sale were paid to NBC in reduction of its secured debt in consideration of which NBC's security held on the shares of Tiger and on its assets was released and discharged. The Monitor explains the consequences of this in its Argumentation Plan as follows:

> 78. The Proposed Allocation Method Report assumes that the amount paid by Xebec UK, subrogated in the rights of NBC as secured creditor (in light of the repayment of the secured debt that it made as guarantor from the proceeds of the Xebec UK transaction), is repaid in full. This allows for the treatment of claims at Xebec UK, which claims include an intercompany claim of BLA against Xebec UK resulting in additional net proceeds to BLA (net of the amount estimated to pay the other known unsecured creditor, each on a pro rata basis).
>
> 79. The figures used in the illustration of the Proposed Allocation Method Report remain subject to a final resolution of the claims against Xebec UK and are not submitted for the approval of the Court at this stage, such that the final amount of Proceeds from transaction relating to the Xebec UK Transaction may vary.

[26] Taking into account all these proceeds which for illustration purposes total approximately $36M, it is then possible to calculate the proportion which the share of proceeds of each entity bears to this $36 M. This share will constitute the basis for

---

[17] For details see p. 10 of the PAM Report M-1.

allocating charges (the "**Pro-Rata Result Based Approach**"), unless another method is stipulated for allocation purposes.

[27] A few transactions are still being negotiated, including the significant Biostream Transaction which the Court described in its reasons of May 26, 2023. Negotiations are ongoing with third parties relating to the London Gas claim and the rights of third parties in the proceeds of the sale of Tiger by Xebec UK. Hence, although very useful for illustration purposes, the scenarios set out in the Proposed Allocation Methodology cannot be held to be etched in stone.

(b) The Intercompany Transactions

[28] This category comprises four subcategories which each have their particularities.

[29] Monetary transfers: the allocation of these transfers is based on the entries in the books and records of each relevant Debtor/Petitioner. They have been tracked and reported in the Monitor's reports. All advances are converted in Canadian dollars.[18]

[30] Sales and purchases: these relate to the allocation of sales and purchase made post-filing between entities, other than monetary transfers, and for which no payment was made. They are converted into Canadian dollars. The allocation of these sales and purchases is based on the entries appearing in the books and records of each relevant Debtor/Petitioner.[19]

[31] SXU corporate overhead charges: XSU's sole mission is to provide services and pay for expenses on behalf of various entities. Hence, XSU's payroll covers finance and operations employees for several entities. XSU also pays for other entities' expenses such as corporate and medical insurance premiums, employee plans, payroll, leases and other expenses. The Monitor carried out a detailed review of all expenses and invoices for one representative month. This provided a realistic portrait of the allocation of expenses and invoices to a given entity. The percentages generated by this exercise were then carried over to all the expenses, after conversion of such charges into Canadian dollars, to carry out the allocation.[20]

[32] BLA Corporate overhead charges: just as for XSU, BLA also incurs expenses which benefit all entities such as marketing, investor relation, integration, legal, IT, finance and accounting, D&O insurance, corporate and administration costs and head office rent and expenses paid by BLA on behalf of all entities. These expenses do not include the Restructuring Costs which are dealt with distinctly in the Proposed Allocation Methodology, as set out in c) below. These BLA corporate overhead expenses were already being allocated amongst all entities prior to the CCAA filing, by employing a

---

18 See p. 11 of the PAM Report M-1.
19 See p. 12 of the PAM M-1.
20 See p. 13 of the PAM M-1.

weighted method based on each entity's asset value, number of employees and sales level. The same percentages continued to be used after the IFDO. However, for the non-petitioner entities, their share of allocated expenses was attributed to BLA, just as any recovery from these entities would be for the benefit of BLA.

(c) Allocation of Restructuring Costs, Secure Debt Reimbursement and DIP Financing

[33] Restructuring Costs: they are set at $24.62M for illustration purposes and are broken down as follows:

33.1. the professional fees ($14.1M paid and $3.4M projected) of petitioners' counsel in Canada, in the USA and in foreign jurisdictions, of the Monitor and of its counsel in Canada and in the USA, of NBC's and EDC's counsel in Canada, in the USA and in the U.K., NBC's and EDC's financial advisors fee and National Bank Financial's ("NFB") monthly fee;

33.2. a theoretical amount of $1M representing the amount of the Administrative Charge

33.3. NFB's Transaction Fee ($975K) the payment of which was authorized by the Court;

33.4. the interest and fees on the DIP financing ($545K);

33.5. the KERP payments ($1.375M);

33.6. BLA and XSU restructuring expenses and payroll since May 2023 ($2.992M);

33.7. Foreign exchange variances, bank fees and other expenses ($144K).

[34] These Restructuring Costs will be allocated using the Pro-Rata Result Based Approach.

[35] DIP Financing: A total of $8.95M was received by BLA. The charge will be allocated using the Pro-Rata Results Based Approach.

[36] Secured Debt reimbursements NBC: over the months, regular payments were made in capital and interest and fees to reimburse the NBC secured debt. These reimbursements were allocated, amongst the Debtors/Petitioners on which NBC held a first ranking security, in proportion of these entities share of proceeds.

[37] Secured Debt reimbursements EDC: over the months, regular payments were made in capital and interest and fees to reimburse the EDC secured debt. These interest and fees reimbursements were recharacterized as capital reimbursements in conformity

with the "interest stops rule"[21] given that EDC's secured debt is not expected to be fully reimbursed. They were allocated between the Debtors/Petitioners on the assets of which EDC has a security interest, in proportion of their share of the proceeds.

[38] Finally, the outstanding letter of credit will be allocated to the relevant entity to which it relates.

[39] As a final remark, it must be stressed, once again, that the Monitor's report contains a scenario for illustration purposes only which estimates what net proceeds will be available for distribution. Also, future restructuring costs are based on projections which may or may not be borne out in reality. Foreign exchange rates may also play a role. Hence, the amount of final distributions remain to be determined. The Court reiterates that although very useful, these illustrations are not binding and no stakeholder should expect that these will be the proceeds available for distribution in due course.

3. Conclusions

[40] Having presented the Proposed Allocation Methodology and the considerations which underpin it, the Court must now apply the three requirements mandated by the Supreme Court of Canada to determine if it should order the approval of the Proposed Allocation Methodology.

[41] The context of this file makes it abundantly clear that the Monitor and the Debtors/Petitioners have acted diligently and in good faith. The Proposed Allocation Methodology was presented at an information session. No one is contesting the Monitor's application.

[42] The Court's examination must therefore focus on the appropriateness of the allocations which are proposed. The Proposed Allocation Methodology must treat all creditors equitably. [22]

[43] In *Bloom Lake*, Justice Hamilton, while sitting at the Superior Court, saw merit in the Proposed Allocation Methodology because it was put forth on a "principled basis, without reference to the result of any specific creditor" and noted that the Monitor had "developed rules that would be applied in the same way to each realization and costs as

---

[21] EDC has not made representations before this Court as to the appropriateness of this recharacterization. The interest stops rule was deemed to be applicable to CCAA proceedings in *Nortel Networks Corporation (Re)*, 2015 ONCA 681; application for leave dismissed *Ad Hoc Group of Bondholders* v. *Ernst & Young Inc. in its capacity as Monitor, et al.*, 2016 CanLII 24877 (SCC).

[22] *Arrangement relatif à Bloom Lake*, 2017 QCCS 3529, par. 16 ([« *Bloom Lake QCCS* »]; confirmed in *Ville de Fermont* c. *Bloom Lake*, 2018 QCCA 551 [«*Bloom Lake QCCA*»].

opposed". Otherwise, this could "lead to disputes as different creditors are treated differently".[23]

[44] Justice Daniel M. Brown, while still sitting as a judge of the Superior Court of Justice of Ontario, summarized the principles governing allocation of receiver's costs between various assets in six propositions: [24]

> (i) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
>
> (ii) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;
>
> (iii) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;
>
> (iv) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;
>
> (v) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a pro rata basis;
>
> (vi) Where an allocation appears prima facie as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.

[45] The Court finds these propositions to be highly relevant for the purpose of examining allocation of costs and expenses in a CCAA context such as in the present case where there are multiple petitioners whose operations give rise to a dizzying number of intercompany transfers and transactions, two secured creditors with security interests on different assets and multiple geographical situses.

[46] It also bears repeating that no third party has opposed this Proposed Allocation Methodology. It was put forward by the Monitor which, as already mentioned, is an impartial and independent expert. The Court therefore must start its examination from the viewpoint that the Proposed Allocation Methodology is, *prima facie*, equitable. In *Bloom Lake*, the Court of Appeal, relying on Justice Brown's sixth proposition, explained that when transaction documents make allocations, the onus falls on the opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.[25] The same can be

---

23 *Bloom Lake QCCS*, par. 13 and 14.
24 *Royal Bank of Canada* v. *Atlas Block Co. Limited*, 2014 ONSC 1531, par. 43.
25 *Ville de Fermont* c. *Bloom Lake*, 2018 QCCA 551, par. 18.

said, with even greater force, of the Monitor's proposed allocation, given the Monitor's status.

[47] Taking into consideration these principles, the Court concludes that the Proposed Allocation Methodology is indeed equitable and appropriate. Its principled approach, its adaptability to the ever changing proceeds and costs, and its transparency advances the policy and remedial objectives of the CCAA. More particularly:

47.1. The method provided is clear and can be easily applied.

47.2. It allows for easy recalibration if further proceeds are collected or expenses incurred.

47.3. When books and records can be relied on for a determinative allocation, such as for allocating Monetary Transfers and Intercompany Transactions, this was done.

47.4. When a strict accounting to allocate the costs was simply unrealistic and would not have been cost-effective and would have driven up even more the already impressive restructuring costs, a method was developed.

47.5. The methods once again first try to adhere as closely as possible to available data.

47.5.1. Historical pre CCAA filing work processes were used such as for BLA's corporate overhead recharge of certain expenses and adapted to the specific circumstances.

47.5.2. For XSU corporate overhead recharges, there was no allocation practice. The recharge process was therefore based on one month of actual numbers to determine the average allocation to various entities. This average was then applied to other months.

47.5.3. These methods were not open for Restructuring Costs and DIP financing. They were therefore allocated using the Prorata Result based Approach on the philosophy that a transaction which generated the greatest proceeds should also bear the greatest share of Restructuring costs and DIP financing.

47.5.4. For Secured debt reimbursements, allocation would also use the Prorata Result Based Approach, but solely for those where NBC had a first ranking security interest or EDC had a security interest.

[48] The Court finds nothing amiss with this Proposed Allocation Methodology and the finely tuned principled approach it puts forth. Hence, the Court has approved the Proposed Methodology more fully set out in the conclusions of this judgment.

FOR THESE REASONS, THE COURT:

[49] **GRANTS** the Application.

[50] **DECLARES** that, unless otherwise defined, all capitalized terms in this Order shall have the meaning ascribed thereto in the Application or in the Proposed Allocation Method Report (Exhibit M-1), as applicable.

[51] **APPROVES** the proposed methodology to allocate the net proceeds held in trust by the Monitor, including the main sections forming part of the Proposed Allocation Method Report and further detailed and illustrated therein, as well as in the Application, namely the following:

(a) Proceeds Allocation: Proceeds from transactions converted to Canadian dollars at the transaction date and allocated to the relevant Petitioner. Where multiple entities are parties to a transaction, the allocation of proceeds as between such entities shall be based on the allocation set forth in the relevant transaction documents.

(b) Intercompany Transactions: adjustments shall be made to reflect Intercompany Transactions having occurred since the Filing Date (September 29, 2022), which include:

a) Monetary Transfers between Petitioners having occurred from and after the Filing Date, based on the books and records of the relevant Petitioners and as reported in the Monitor's reports filed from time to time as part of the CCAA proceedings in accordance with the ARIOs;

b) Intercompany Transactions, excluding Monetary Transfers, for sales and purchases between Petitioners since the Filing Date, for which no payment has been received by the selling Petitioner, based on the books and records of the relevant Petitioners;

c) Corporate overhead recharge of certain expenses and payroll items incurred by XSU for and on behalf of other Petitioners from the Filing Date until the end of April 2023, which are allocated based on the average monthly expenses compiled by the Petitioners with the assistance of the Monitor; and

d) Corporate overhead recharge of certain expenses, excluding Restructuring Costs, from the Filing Date until the end of April 2023, which are allocated based on the methodology used by BLA in the course of fiscal year 2021 (based on asset value, employees and sales) and considering expenses paid by BLA on behalf of other entities directly recharged, and providing that the share of the non-Petitioners, being direct or indirect subsidiaries of BLA, is allocated to BLA.

(c) Allocation of Restructuring Costs, Secured Debt Reimbursements and DIP Financing receipts and disbursements and treatment of the impact of the Xebec UK Transaction and of any shortfall:

a) Restructuring Costs: shall be allocated using the *pro rata* result-based approach, based on the Proceeds from transactions (the "***Pro Rata* Result-Based Approach**"), amongst all Petitioners, and shall include, amongst others, the XSU and BLA disbursements since the month of May 2023;

b) Secured Debt Reimbursements made to EDC by the Petitioners since the Filing Date: shall be allocated based on the *Pro Rata* Result-Based Approach, but solely for Petitioners on which EDC has a security interest. Furthermore, the fees and interest payments paid to EDC since the Filing Date shall be re-characterized as capital reimbursements;

c) Secured Debt Reimbursements made to NBC by the Petitioners since the Filing Date: shall be allocated based on the *Pro Rata* Result-Based Approach, but solely for those Petitioners in respect of which NBC has a first-ranking security interest;

d) DIP Financing receipts and repayments: shall be allocated based on the *Pro Rata* Result-Based Approach, amongst all Petitioners;

e) Xebec UK Transaction impact: the deemed allocation to BLA of the net proceeds (which shall form part of its Proceeds from transactions) resulting from the Xebec UK Transaction completed as part of the SISP, taking into account Xebec UK's secured subrogation claim resulting from its payment to NBC as guarantor as well as the resolution of BLA's intercompany claim and any third-party claim(s) against Xebec UK; and

f) Shortfall: any resulting shortfall for a Petitioner shall be allocated to the other Petitioners with sufficient allocated funds available, based on the *Pro Rata* Result-Based Approach, but solely amongst Petitioners with sufficient allocated funds available (excluding Petitioners with insufficient funds).

(the whole, as further detailed and illustrated in the Proposed Allocation Method Report, being referred to as the "**Proposed Allocation Method**").

[52] **PRAYS ACT** of the fact that the amounts shown as "Allocated net proceeds prior to distribution to creditors" for each Petitioner in the Proposed Allocation Method Report are presented only for illustrative purposes of the application of the Proposed Allocation Method, and are based on estimates, restrictions and limitations further detailed in the

Proposed Allocation Method Report, such that the final amounts of net proceeds that will be available for distribution to creditors will be definitively determined at a later stage of the CCAA proceedings, applying the Proposed Allocation Method to any updated amounts and estimates;

[53] **RESERVES** the possibility for the Monitor to make modifications to the Proposed Allocation Method which do not materially affect the ultimate results of its application to the final amounts and estimates, including without limitation in order to allocate some minimum Restructuring Costs to Petitioners which, further to the application of the Proposed Allocation Method, would have no or nominal allocated Restructuring Costs, the whole subject to the approval of this Court;

[54] **CONFIRMS AND RESTATES** its order issued at the hearing that Exhibit M-3 filed in support of the Application shall be filed under seal and kept confidential until further order of this Court.

[55] **DECLARES** that this Order shall have full force and effect in all provinces and territories of Canada.

[56] **DECLARES** that the Monitor may, from time to time, apply to this Court for directions concerning the exercise of its powers, duties and rights hereunder or in respect of the proper execution of this Order.

[57] **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body in any Province of Canada and any Canadian federal court or in the United States of America, including without limitation the United States Bankruptcy Court for the District of Delaware, and any court or administrative body elsewhere, to give effect to this Order, and to assist the Petitioners and the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners and the Monitor as may be necessary or desirable to give effect to this Order in any foreign proceeding, to assist the Petitioners and the Monitor and their respective agents in carrying out this Order.

[58] **ORDERS** that any prior delay for the presentation of the Application is hereby abridged and validated so that the Application is properly returnable and dispenses with further service thereof.

[59] **PERMITS** service of this Order at any time and place and by any means whatsoever.

[60] **THE WHOLE** without costs.

CHRISTIAN IMMER, J.S.C.

Me Sandra Abitan
Me Julien Morissette
Me Sophie Courville
Me Jessica Harding
OSLER, HOSKIN & HARCOURT LLP
Representing the Debtors

Me Jocelyn T. Perreault
Me Marc-Étienne Boucher
McCARTHY TÉTREAULT
Representing the Monitor

Me Eli Karp
KND COMPLEX LITIGATION
Me David Assor
LEX GROUP ATTORNEYS
Representing the Class Action Applicants Maurice Leclair and Evert Schuringa

Me Samuel Perron
NORTON ROSE FULBRIGHT
Representing the Export Development Canada

Date of hearing: June 27, 2023