

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTRÉAL

No. : 500-11-041305-117

SUPERIOR COURT  
Commercial Division  
(Sitting as a court designated pursuant to the  
*Companies' Creditors Arrangement Act*,  
R.S.C., c. C-36, as amended)

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IN THE MATTER OF THE PLAN OF  
COMPROMISE OR ARRANGEMENT OF:

HOMBURG INVEST INC.

- and -

HOMBURG SHARECO INC.

- and -

CHURCHILL ESTATES DEVELOPMENT  
LTD.

- and -

INVERNESS ESTATES DEVELOPMENT  
LTD.

- and -

CP DEVELOPMENT LTD.

Debtors

- and -

THE ENTITIES LISTED ON ANNEX I

Mises-en-  
cause

- and -

SAMSON BELAIR/DELOITTE & TOUCHE  
INC.

Monitor

- and -

STICHTING HOMBURG BONDS

- and -

1028167 ALBERTA LIMITED

Petitioners

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MOTION IN APPEAL OF THE DISALLOWANCE OF PROOFS OF CLAIM FILED  
PURSUANT TO THE "CLAIMS PROCESS ORDER" ISSUED ON APRIL 30, 2012

TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN COMMERCIAL DIVISION, IN AND FOR THE JUDICIAL DISTRICT OF MONTRÉAL, THE CLAIMANTS/PETITIONERS, STICHTING HOMBURG BONDS AND 1028167 ALBERTA LIMITED RESPECTFULLY SUBMIT THE FOLLOWING:

1. INTRODUCTION

1. As appears from the Court record in these proceedings (the "CCAA Proceedings"), on April 30, 2012, the Honourable Justice Louis Guin, j.c.s., rendered an order (the "CPO") authorizing the conduct of a "Claims Process" with respect to claims to be filed in the present CCAA Proceedings.
2. The present Motion is filed pursuant to paragraph 29 of the CPO, whereby the Petitioners, Stichting Homburg Bonds (the "SHB" or the "Trustee") and 1028167 Alberta Limited, seek to appeal the *Notices of Revision or Disallowance* further described below.

2. FACTS

3. On July 6, 2012, the Petitioners filed Proofs of Claim (collectively, the "POCs", each a "POC") in respect of each of Homburg Shareco Inc. ("Shareco"), Homburg Invest Inc. ("HII"), Homco Realty Fund (52) Limited Partnership ("Homco 52"), Homco Realty Fund (61) Limited Partnership ("Homco 61"), and Homco Realty Fund (88) Limited Partnership ("Homco 88"). Copies of the relevant extract of each POC are communicated herewith, *en liasse*, as **Exhibit R-1**.
4. As appears from the POCs, a portion of the amounts claimed therein were attributed to the costs and expenses incurred by the Petitioners as at the date of such POCs, subject to adjustment for such costs and expenses which might be incurred thereafter (collectively, the "Expenses").
5. On May 10, 2013, Samson Bélair/Deloitte & Touche Inc., in its capacity as Monitor (the "Monitor"), issued several *Notices of Revision or Disallowance* (collectively, the "NRDs", each an "NRD") to the Petitioners, indicating that it had disallowed, in part or in full the POCs, including the Petitioner's claim for payment of the Expenses, for the reasons further stated in the NRDs. A copy of each NRD is communicated herewith, *en liasse*, as **Exhibit R-2**.

3. GROUND FOR APPEAL

6. The Petitioners respectfully submit that the Monitor's grounds of disallowance of that portion of the POCs relating to their claim for the payment of the Expenses are unfounded in fact and in law, including for the reasons set forth herein.
7. The Petitioners' position is respectfully submitted based, notably, on the following preliminary observations:

- (a) the Indentures (as defined below) specifically provide for the reimbursement of any fees and expenses incurred by the Trustee, whether before or after default, and as such give rise to a valid claim therefor;
  - (b) the Trustee represents bondholders holding a very substantial amount in value, which, based upon the Monitor's current summary of claims, represents an overwhelming majority of the total third party claims owed by the Debtors; and
  - (c) The Trustee's representation, involvement and other contributions have been constructive and pro-active, extending far beyond those limited functions which indenture trustees engage in customarily, including through:
    - (i). consultations and other input in respect of the process and business strategy;
    - (ii). website, communications and information newsletters to or for the benefit of bondholders; and
    - (iii). participation with HII and the Monitor in formal and informal meetings in the Netherlands, and significant and meaningful input in the initiation and completion of the Investment Proposal Process.
8. In support of this Motion, the Petitioners also submits the following information below.
- A) Trust Indentures**
9. SHB is a trustee under the following trust indentures, the terms and conditions of which govern the issuance of several series of bonds by HII:
- (a) a Trust Indenture made as of May 31, 2006, between HII and the Trustee, as supplemented by several Supplemental Indentures (the "**Corporate Bonds Indenture**"); and
  - (b) a Trust Indenture made as of December 15, 2002 between Shareco and Stichting Homburg Mortgage Bond (now Stichting Homburg Bonds), as guaranteed by HII pursuant to a Guarantee Agreement dated December 15, 2002 (the "**Guarantee Agreement**") and supplemented by several Supplemental Indentures (together, the "**Mortgage Bonds Indenture**", and collectively with the Corporate Bonds Indenture, the "**Indentures**").<sup>1</sup>

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<sup>1</sup> Secured guarantees were also granted by partnerships in respect of certain bond issuances.

Copies of the Corporate Bonds Indenture and the Mortgage Bonds Indentures have already been filed in the court record as Exhibit R-10 and Exhibit R-12, respectively, to the Debtors' *Amended Motion for an Initial Order* dated September 9, 2011.

**B) Trustee's Role in the CCAA Proceedings**

10. As appears from the POCs, the Trustee has incurred substantial costs and expenses in these CCAA Proceedings, in a manner consistent with its role under the Indentures. Since the filing of the POCs in July 2012, the Trustee has continued to incur costs and expenses and is expected to continue incurring expenses in connection with the implementation of the CCAA restructuring.
11. The Trustee has acted in good faith and in the best interests of the bondholders, and its participation has not only benefitted bondholders' interests, but also those of other holders of unsecured claims.
12. The Trustee's contributions were in addition:
  - (a) necessary and useful in light of the size and complexity of the business being restructured;
  - (b) responsive not only to the role of indenture trustee, but included a broader role in communicating with bondholders and otherwise advancing their interests; and
  - (c) not duplicative of the role or function of any other formal or informal representative or committee, none having been recognized or formed.

**C) Powers of Trustee**

13. The Trustee is the duly authorized representative of the bondholders under the Indentures, and holds in trust for them all the "*rights, privileges and benefits*" conferred by the relevant Indentures and by law (s. 16.11 of the Indentures). As a general rule, the Trustee is tasked with exercising the collective rights of the bondholders under the Indentures (s. 13.5 of the Indentures).
14. The Indentures grant certain specific powers to the Trustee, some of which have been used in the course of these proceedings:
  - (a) to enforce rights of action without the possession of any of the debt obligations, "or the production thereof at the trial or other proceedings relative thereto" (s. 13.4 of the Indentures), such as has been done through the filing of the POCs;
  - (b) to enforce rights of action (ss. 8.1, 13.4 and 13.16 of the Mortgage Bonds Indenture and s. 7 of each Supplemental Mortgage Bonds Indenture);

- (c) to convene meetings of bondholders at the issuer's request, including appointing the Chairman thereof (Art. 15 of the Indentures) as has been done for certain series of Mortgage Bonds; and
- (d) to execute supplemental indentures as provided for in the Indentures or in any extraordinary resolution adopted thereunder (s.15.11 of the Indentures) as has been done for certain series of Mortgage Bonds.

**D) Trustee's Advisors and Expenses**

- 15. The Indentures provide that the Trustee (i) may employ or retain such experts or advisors, including counsel or accountants, as it may reasonably require for the purposes of discharging its duties under the Indentures and (ii) may pay remuneration for services rendered (s. 16.4 of the Indentures).
- 16. The Indentures require HII (in the Corporate Bonds Indenture) or Shareco (in the Mortgage Bonds Indenture) to pay or reimburse reasonable remuneration and expenses of the Trustee (s. 12.1).
- 17. The Guarantee Agreements under the Mortgage Bonds Indenture and certain Supplemental Indentures similarly provide that the Trustee will be reimbursed for all costs and expenses incurred in connection with the enforcement thereof (s. 15 of the main Guarantee Agreement and ss. 14 of the Guarantee Agreements under each Supplemental Indenture).

**E) Funding Order**

- 18. In December 2011, a settlement agreement was entered into by the Trustee and HII (the "**Settlement Agreement**"), the terms of which included that the Trustee would nominate an additional independent member of the Board of Directors of HII and would amend its October 2011 *Motion for the Payment of Fees, Disbursements and Expenses of the Indenture Trustees and the Indenture Trustees' Advisors and Related Relief* filed in the court record (as amended, the "**Amended Fee Motion**").
- 19. The Trustee's Amended Fee Motion led to the issuance by this Court of an order on February 15, 2012 (the "**Funding Order**") providing, *inter alia*, for the following:

*[2] ORDERS that the Petitioners shall advance from the available cash of the Debtors ... amounts equivalent to the reasonable fees and expenses incurred as and from December 3rd, 2011 in connection with the CCAA proceedings and the Restructuring by the Trustees' Advisors, the aggregate of which advances (the "Stichting Advances") up to the maximum amount to be distributed or paid (i) shall become due and payable to the Debtors immediately prior to any distribution or payment, including pursuant to a sale of assets, liquidation or realization of security or otherwise (each a "Distribution Event"), to be made to or for*

*the benefit of the holders of the Securities, as the case may be, (ii) shall be set-off/compensated against the aggregate of any distribution to be made to or for the benefit of the holders of Securities pursuant to any such Distribution Event and (iii) shall be allocated, as between the holders of Securities, on a pro-rata basis, based on the amount, if any, to be distributed or paid in respect of each of the Corporate Bonds, Mortgage Bonds and Capital Securities as a percentage of the total amount to be distributed in respect of all Securities.*

20. Neither the Settlement Agreement, nor the Funding Order affected the validity of, much less released, any claim for the fees and expenses of the Trustee or the Trustee's right to file a proof of claim therefor.
21. Rather, what the Settlement Agreement contemplated, and the Funding Order sets out, was in substance and in effect a funding and reimbursement mechanism. Once the distributions are properly calculated on the bondholders' claims under the Plan, the Funding Order can be given effect so as to ensure that the advanced funds are compensated against distributions.
22. The funding and repayment method should not be confused with the underlying obligations of the parties. The Trustee's right to make a claim for its Expenses is entirely separate from the means with which it financed their incurrence during the CCAA proceedings.
23. Thus, the Funding Order did not preclude the Trustee from including the Expenses as part of its claims against HII, nor did it purport to do so directly or indirectly. While the Trustee was prohibited from "institut[ing] any proceedings pursuant to 11.5 [Removal of directors] of the CCAA" (s. 7(b)) and certain shareholder matters, the Settlement Agreement otherwise stated that the parties' agreement to work and collaborate with each other was "*without prejudice, to the right of each Party to appropriately advance its legitimate interest or those of any party it represents in the context of the Restructuring*" (s. 5(i)).

#### **4. CONCLUSION**

24. As appears from the POCs, the Petitioners have incurred substantial costs and expenses in these CCAA Proceedings. The Expenses incurred over the course of the CCAA Proceedings were reasonable in the circumstances, in particular taking into account the factors referred to above.
25. In addition, the Petitioners respectfully submits that there are a number of ways in which trustees or other creditor representatives can seek and obtain funding under the CCAA proceedings, including in the following manner:
  - (a) agreement for the payment of fees and expenses on a consensual basis, whether as part of the initial order or a subsequent order;

- (b) payment, security or advances for fees or expenses pursuant to a Court order, including under s. 11.52 of the CCAA;
  - (c) consensual advances from bondholders or third parties, which may be repayable against potential distributions; and
  - (d) provisions in the CCAA plan providing for the payment thereof.
26. HII is contractually obliged to reimburse the Expenses of the Trustee pursuant to the Indentures. This obligation is wholly independent of the arrangements put in place to finance their incurrence, including through a third party arrangement such as under the Funding Order.
27. Therefore, the Petitioners respectfully submits that the amount for their Expenses must be considered as validly forming part of the claims which must be treated in accordance the *Second Joint and Amended Plan of Compromise and Reorganization* dated May 3, 2013 (the "**Plan**"), or any amendment thereto, notwithstanding the mechanism set forth in the Funding Order or otherwise contemplated in such Plan.
28. Alberta Ltd. and the Trustee, on behalf of itself and the bondholders, expressly reserve the right to propose any amendment to this Motion or to the Plan at the creditors meeting or otherwise in order to provide for the payment or reimbursement in full of the Expenses.

**WHEREFORE, MAY THIS COURT:**

**GRANT** the Petitioners' *Motion in Appeal of the Disallowance of Proofs of Claim Filed Pursuant to the "Claims Process Order" Issued on April 30, 2012* (the "**Motion**");

**SHORTEN**, if necessary, all delays of service and presentation and **VALIDATE** the service and presentation thereof for all purposes according to the law;

**REVERSE and ANNUL**, in part, Samson Bélair/Deloitte & Touche Inc. the (the "**Monitor**")'s *Notices of Revision or Disallowance* filed as Exhibit R-2 in support of the Motion, and sent in respect of the Petitioners' Proofs of Claim filed as Exhibit R-1 in support of the Motion (the "**POCs**");

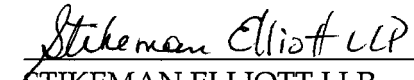
**DECLARE** that the costs and expenses incurred by Stichting Homburg Bonds ("**SHB**" or the "**Trustee**") in relation with its role as trustee under the Indentures, as defined in the Motion (collectively, the "**Expenses**"), as well as those of 1028167 Albert Limited and claimed in each of their POCs filed as Exhibit R-1 in support of the Motion, together with any additional expenses incurred from and after the period covered in such POCs, constitute "Proven Claims" against Homburg Invest Inc. ("**HII**") under and pursuant to the Second Joint Amended and Restated Plan of Compromise and Reorganization dated May 3, 2013 (the "**Plan**"), and any amendment thereto in order to give effect to this Order;

**ORDER** the Monitor and HII to recognize, list and admit such claims for the payment of the Expenses as a Proven Claim under and pursuant to the Plan in the name of and for the benefit of the Petitioners, the whole under reserve of the Petitioners' rights to file a further proof of claim, or amend its POCs, in order to claim any further amounts; and

**RESERVE** the Petitioners' rights to amend the present Motion in order to more fully describe its grounds of appeal and/or to amend the present Motion in order to raise such other or further grounds of appeal as may avail.

**THE WHOLE WITH COSTS.**

**MONTRÉAL**, May 17, 2013

  
\_\_\_\_\_  
STIKEMAN ELLIOTT LLP  
Attorneys for the Petitioners



**ANNEX I**

**APPLICANT PARTNERSHIPS**

1. **HOMCO REALTY FUND (52) LIMITED PARTNERSHIP**
2. **HOMCO REALTY FUND (88) LIMITED PARTNERSHIP**
3. **HOMCO REALTY FUND (89) LIMITED PARTNERSHIP**
4. **HOMCO REALTY FUND (92) LIMITED PARTNERSHIP**
5. **HOMCO REALTY FUND (94) LIMITED PARTNERSHIP**
6. **HOMCO REALTY FUND (105) LIMITED PARTNERSHIP**
7. **HOMCO REALTY FUND (121) LIMITED PARTNERSHIP**
8. **HOMCO REALTY FUND (122) LIMITED PARTNERSHIP**
9. **HOMCO REALTY FUND (142) LIMITED PARTNERSHIP**
10. **HOMCO REALTY FUND (199) LIMITED PARTNERSHIP**

CANADA  
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IN THE MATTER OF THE PLAN OF  
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Debtors

- and -

THE ENTITIES LISTED ON ANNEX I

Mises-en-cause

- and -

SAMSON BELAIR/DELOITTE & TOUCHE  
INC.

Monitor

- and -

STICHTING HOMBURG BONDS

Petitioner

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ATTESTATION OF AUTHENTICITY  
ART. 82.1 C.C.P.

I, the undersigned, Danny Duy Vu, lawyer, practicing at 1155 René-Lévesque Blvd. West, 40<sup>th</sup> Floor, in city and District of Montréal, Province of Quebec, H3B 3V2, solemnly affirm as follows:

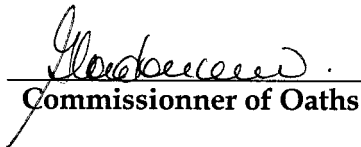
1. On May 17, 2013, at 5:48 A.M., I received an affidavit signed by Karel de Vries, Director of Stichting Homburg Bonds, in support of the *Motion in Appeal of a Disallowance of Proofs of Claim, filed Pursuant to the "Claims Process Order" Issued on April 30, 2012.*
2. The above-mentioned affidavit was sent to Stikeman Elliott from Amsterdam, The Netherlands via email (email address: karelfjdevries@planet.nl) by Karel de Vries.
3. The copy of this affidavit joined to the present attestation is a true copy of the email received on May 17, 2013 from Karel de Vries.

Montréal, this 17th day of May, 2013



**DANNY DU Y VU**  
**STIKEMAN ELLIOTT LLP**  
Attorneys for the Petitioner  
Stichting Homburg Bonds

**SOLEMNLY AFFIRMED** before me in  
Montréal, this 17<sup>th</sup> day of May 2013



Commissioner of Oaths



PRIVILEGED AND CONFIDENTIAL

AFFIDAVIT

I, the undersigned, Karel de Vries, business person, having my principal place of business at Prinsenhage 9, Vught 5263 CT, The Netherlands, solemnly declare the following:

1. I am a director of Stichting Homburg Bonds.
2. All the facts alleged in the *Motion in Appeal of the Disallowances of Proofs of Claim Filed Pursuant to the "Claims Process Order" Issued on April 30, 2012* are true.

AND I HAVE SIGNED:

  
KAREL DE VRIES

Seen by me, Guido Tjado Tjadens, civil-law notary in Amsterdam,  
for legalization of the signature written on this document of  
Mr Karel Frans Jan de Vries, born on 21 July 1948 in 's-Gravenzande,  
The Netherlands, holder of a Dutch passport with number NR09F5186 issued in  
Vught, The Netherlands, on October 15, 2010, and sworn to before me.  
Amsterdam, May 17, 2013.



NOTICE OF PRESENTATION

To: Mtre. Sandra Abitan  
Mtre. Martin Desrosiers  
**OSLER, HOSKIN &  
HARCOURT LLP**  
1000 de la Gauchetière Street West  
Suite 2100  
Montréal (Quebec) H3B 4W5  
Attorneys for HII Group

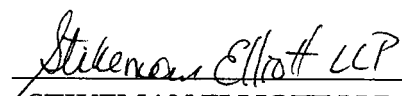
To: Mr. Pierre Laporte  
Mr. Benoît Clouâtre  
**SAMSON BÉLAIR/DELOITTE &  
TOUCHE INC., in its capacity as  
Court-appointed Monitor of  
Homburg Invest Inc. and related  
entities**  
1 Place Ville Marie, Suite 3000  
Montréal (Quebec) H3B 4T9

To: Mtre. Mason Poplaw  
Mtre. Jocelyn Perreault  
**MCCARTHY TÉTRAULT LLP**  
1000 de la Gauchetière Street West  
Suite 2500  
Montréal (Quebec) H3B 0A2  
Attorneys for the Monitor

**TAKE NOTICE** that the *Motion in Appeal of the Disallowance of Proofs of Claim Filed Pursuant to the "Claims Process Order" Issued on April 30, 2012* will be presented for adjudication before the Honourable Louis Gouin J.S.C., coordinating judge, sitting Commercial Division in and for the District of Montréal, at the Montréal Court House, 1 Notre-Dame Street East, Montréal, Quebec, at a date and at a time to be determined by Mr. Justice Gouin.

**DO GOVERN YOURSELVES ACCORDINGLY.**

**MONTRÉAL, May 17, 2013**

  
\_\_\_\_\_  
**STIKEMAN ELLIOTT LLP**  
Attorneys for the Petitioners

SUPERIOR COURT

N° 500-11-041305-117

CANADA  
PROVINCE OF QUEBEC  
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BS0350

O/Ref.: 131425-1001

MOTION IN APPEAL OF A DISALLOWANCE  
OF PROOFS OF CLAIM, FILED PURSUANT TO  
THE "CLAIMS PROCESS ORDER" ISSUED ON  
APRIL 30, 2012, LIST OF EXHIBITS AND  
EXHIBITS R-1 TO R-2

ORIGINAL

Mtre. Danny Duy Vu

(514) 397-6495

Fax: (514) 397-5428

STIKEMAN ELLIOTT

Stikeman Elliott LLP BARRISTERS & SOLICITORS

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