

CANADA  
PROVINCE OF QUÉBEC  
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 IN ANNEX I**

**Mis-en-cause**

- and -

**SAMSON BELAIR/DELOITTE & TOUCHE  
INC.**

**Monitor**

- and -

**STICHTING HOMBURG BONDS**

- and -

**STICHTING HOMBURG CAPITAL  
SECURITIES**

**Petitioners**

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**DE BENE ESSE MOTION FOR AN ORDER LIFTING THE STAY OF PROCEEDINGS  
FOR THE PURPOSES OF SEEKING RELIEF IN RESPECT OF HOMBURG INVEST  
INC.'s ANNUAL GENERAL MEETING**

**(Sections 11.2 et seq. of the *Companies' Creditors Arrangement Act*, R.C.S. 1985 c. C-36)**

TO THE HONOURABLE LOUIS GOUIN J.S.C. OR TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN COMMERCIAL DIVISION, IN AND FOR THE JUDICIAL DISTRICT OF MONTRÉAL, THE PETITIONERS RESPECTFULLY SUBMIT THE FOLLOWING:

**I. PREAMBLE**

1. On September 9, 2011, this Court issued an order (the "**Initial Order**") pursuant to the *Companies' Creditors Arrangements Act* (the "**CCAA**") in respect of Homburg Invest Inc. ("**HII**"), Homburg ShareCo Inc. ("**ShareCo**"), Churchill Estates Development Ltd. ("**Churchill**"), Inverness Estates Development Ltd. ("**Inverness**") and CP Development Ltd. ("**CP**", and together with HII, ShareCo, (199) GP, Churchill and Inverness, the "**Debtors**").<sup>1</sup>
2. The court record shows that HII's decision to seek creditor protection under the CCAA was authorized by a written resolution of HII's former board of directors signed on the morning of September 9, 2011, shortly before the annual general meeting of shareholders of HII (the "**AGM**"). As submitted below, the incumbent board of directors knew or should have known that there was a real possibility that the outcome of the AGM would properly be the election of a slate of directors different from that proposed by management of HII.
3. In an apparent attempt to entrench and protect those individuals who were going to be replaced, the following actions were taken at the AGM:
  - (a) HII's Chief Financial Officer filed and used proxies (disputed herein) voting in favour of management's slate of directors. To do so, he relied on a power of attorney from Richard Homburg and Homburg Finance A.G. (collectively, the "**RH Group**"), representing approximately 72% of the voting rights and approximately 45% of the equity attached to HII's outstanding shares which he knew or should have known had been terminated *ab initio* and in any event had been revoked. Even if the power of attorney was valid and effective, the conditions precedent to the lawful exercise thereof had not been met for him to act upon it;
  - (b) access to the AGM was denied to the duly and irrevocably appointed new attorney of the RH Group, the AGM scrutineers at the registration table having been given strict instructions to restrict access to the meeting with security guards standing by to support those restrictions;

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<sup>1</sup> In addition to granting court protection in favour of the Debtors, the Initial Order extended the Stay of Proceedings to the following entities: Homburg Realty Fund (92) Limited Partnership ("**Partnership (92)**"), Homburg Realty Fund (199) Limited Partnership ("**Partnership (199)**"), Homburg Realty Fund (52) Limited Partnership ("**Partnership (52)**"), Homburg Realty Fund (53) Limited Partnership ("**Partnership (53)**"), Homburg Realty Fund (88) ("**Partnership (88)**"), Homburg Realty Fund (89) Limited Partnership ("**Partnership (89)**"), Homburg Realty Fund (105) Limited Partnership ("**Partnership (105)**"), Homburg Realty Fund (121) Limited Partnership ("**Partnership (121)**"), Homburg Realty Fund (122) Limited Partnership ("**Partnership (122)**") and Homburg Realty Fund (142) ("**Partnership (142)**") and together with Partnership (92), Partnership (199), Partnership (52), Partnership (53), Partnership (88), Partnership 89, Partnership (105), Partnership (121) and Partnership (122), the "**Applicant Partnerships**").

- (c) it is understood that at least one other significant shareholder's proxy was wrongfully not permitted to vote at the AGM; and
  - (d) while this was unfolding (and before the AGM was called to order), HII's counsel served a CCAA application returnable that afternoon, and HII issued a news release announcing that filing (10:51 a.m.), thereby setting the course for what had previously been characterized as a "last resort" option by HII.
- 4. As explained below, resort to CCAA protection was until then only a remote possibility to be used after having carried out the prior steps of a restructuring plan in the works for several months and which consisted essentially in an attempt to reorganize HII without court intervention. Without any explanation or justification, that plan was abandoned overnight. At the hearing on the initial CCAA application, neither the Debtors nor the Monitor provided any explanation for such a quick about-face.
  - 5. The most plausible explanation for the Debtors' haste to abandon all pending out-of-court efforts and "jump" into the CCAA process is that the CCAA offered an opportunity for protection from an expected challenge of the election and surrounding events that took place at the AGM.
  - 6. By their actions, certain directors and members of management of HII acted improperly and oppressively in the decisions taken at or in connection with the conduct of the AGM and the election of directors thereat, thereby fundamentally disregarding the corporate constitutional process of HII, in particular by acting upon the July PoA which they knew had been terminated, by failing to give effect to the revocation of the July PoA and by failing to give effect to the New PoA (all as defined below).
  - 7. As a result, the CCAA is being misused and the CCAA process which is currently being undertaken is undermined from its inception.

## II. ORDERS SOUGHT

- 8. Stichting Homburg Bonds ("**Stichting HB**") and Stichting Homburg Capital Securities ("**Stichting HCS**") (collectively, the "**Stichting Petitioners**") hereby seek the issuance of an order lifting the CCAA stay of proceedings for the purposes of having the following issues determined and dealt with by the Alberta Court of Queen's Bench (the "**Alta Q.B.**"):
  - (a) whether the July PoA (as defined below) was, at any relevant time, valid and enforceable;
  - (b) whether James F. Miles, the Chief Financial Officer of HII, had the power and authority to execute the proxy forms dated September 2, 2011 used by him at HII's AGM, whether such forms or proxy were valid and whether such proxy should properly have been accepted by the Chairman appointed in respect thereof;

- (c) whether the July PoA and any proxy forms executed thereunder were revoked by the execution and delivery of the New PoA (as defined hereinafter), notice of which was given the prior evening to counsel for HII and copies of which were delivered to HII's counsel and the scrutineers before the opening of the AGM;
  - (d) whether the sole director of the Stichting Petitioners, Henk Knuvers, who had been personally invited to the AGM by HII's Chief Executive Officer and who had travelled from Amsterdam to be there, was improperly denied access to the AGM and accordingly prevented from voting the shares in respect of which the New PoA had been granted;
  - (e) whether the Chairman exercised his duties and powers impartially and in a fair, proper and reasonable manner;
  - (f) whether the court should give effect to the votes that would have been cast at the AGM under the New PoA had the Stichting Petitioners been given the opportunity to do so and had the integrity and propriety of the voting procedure at the AGM been upheld; and
  - (g) which directors were lawfully elected at the AGM, and whether directors should be removed or appointed by the Court to remedy the situation.
9. The Stichting Petitioners submit that these issues are important, but discrete issues directly related to the corporate governance of HII and its integrity, all of which relate to events which took place before or on the same day as the filing of these CCAA proceedings. Whether those empowered with the control and direction of a company's debtor-in-possession restructuring have been lawfully elected is of fundamental importance. This Court ought not grant its protection to a debtor under the control and direction of persons who were not legitimately elected. These issues should be dealt with without delay.
10. The Stichting Petitioners also submit that while the CCAA is an appropriate tool to allow an insolvent company to restructure and reorganize its business, it may not be used as a shield against the oppressive and improper conduct of directors and officers who demonstrated complete disregard for due corporate process and entrenched themselves and the benefits associated with their position.
11. The key issues to be determined are governed by the *Business Corporations Act* (Alberta) (the "BCA") and subject to the Alta Q.B.'s exclusive jurisdiction. As such, they could properly be dealt with by the Alta Q.B., which has jurisdiction under the BCA to review the election of directors:

*144(1) A corporation or a shareholder or director may apply to the Court to determine any controversy with respect to an election or appointment of a director or auditor of the corporation.*

*(2) On an application under this section, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any one or more of the following:*

(a) an order restraining a director or auditor whose election or appointment is challenged from acting pending determination of the dispute;

(b) an order declaring the result of the disputed election or appointment;

(c) an order requiring a new election or appointment, and including in the order directions for the management of the business and affairs of the corporation until a new election is held or appointment made;

(d) an order determining the voting rights of shareholders and of persons claiming to own shares.

### III. THE STICHTING PETITIONERS

12. Stichting HB, is a foundation (in Dutch, *stichting*) governed by the laws of the Netherlands, and the trustee under the Trust Indenture made as of May 31, 2006 (the "**Corporate Bonds Trust Indenture**"). Four series of corporate bonds (the "**Corporate Bonds**") have been issued by HII and remain outstanding under the Corporate Bonds Trust Indenture for a total aggregate principal amount of €310,020,000.
13. Stichting HB is also trustee under the Trust Indenture made as of December 15, 2002 (the "**Mortgage Bonds Trust Indenture**"). Four series of mortgage bonds (the "**Mortgage Bonds**") have been issued by Shareco and guaranteed by HII for a total aggregate principal amount of €102,480,000.
14. Stichting HCS, another foundation governed by the laws of the Netherlands, is Trustee under the Trust Indenture made as of February 28, 2009 (the "**Perpetual Debt Trust Indenture**"). The aggregate amount of outstanding perpetual debt securities (the "**Perpetual Securities**") is €26,726,000.
15. The Stichting Petitioners represent claims in excess of approximately €440 million against the CCAA Debtors. This represents more than two-thirds of the CCAA Debtors' funded debt obligations (as stated in the CCAA Application dated September 9, 2011).

### IV. FACTUAL BACKGROUND

#### The July 6 Power of Attorney

16. Over the past several months, HII has been urged by the Dutch *Autoriteit Financiële Markten* (Authority of Financial Markets) (the "**AFM**") to take certain actions and provide information in several respects.
17. On April 22, 2011, HII received an instruction from the AFM (the "**April AFM Instruction**") requiring, *inter alia*, that it ensure that Mr. Richard Homburg no longer act as policymaker of HII or as a person of influence. The same instruction also required HII to appoint two directors or officers who were

residents of the Netherlands, the whole as appears from a copy of such instructions communicated, under seal of confidentiality, as **Exhibit P-1**.

18. On April 22, 2011, the AFM, along with *De Nederlandsche Bank* (the central bank of the Netherlands) (the "DNB"), issued a joint instruction (the "**April Joint Instruction**") ordering that HII submit an adequate and clear plan of control regarding HII, among other things addressing decision-making processes and risk controls with respect to strategic and long term goals.
19. On July 6, 2011, in order to assist HII in complying with the April AFM Instruction, Mr. Homburg and Homburg Finance A.G. (a company controlled by Mr. Homburg) executed a power of attorney (the "**July PoA**") appointing the President of HII, and failing his ability to act, the Chief Financial Officer of HII, as their attorney to vote on the election or removal of directors of HII, the whole as appears from a copy of the July PoA communicated as **Exhibit P-2**.
20. HII communicated the July PoA to the AFM, and on August 11, 2011, the AFM advised HII that it intended to revoke its license, including because the AFM was of the opinion that:
  - (a) Mr. Homburg still continued to have influence over HII and as such HII had not complied with the April AFM instruction;
  - (b) HII had not complied with the April Joint Instruction regarding the plan of control; and
  - (c) HII and/or Canadian law were impeding the AFM's ability to carry out its supervision duties, including because it was thought not possible for the AFM.

the whole as appears from a copy of the AFM letter communicated, under seal of confidentiality, as **Exhibit P-3**.

21. Significantly, the AFM noted the following deficiencies of the July PoA:
  - (a) the July PoA only sought to limit Mr. Homburg's voting rights with respect to the appointment and dismissal of directors of HII, and did not apply to voting rights on any other matters; and
  - (b) the July PoA was not effective given that Mr. Homburg already holds approximately 72% of the voting rights in HII and Section 2.1(d) thereof provided that it terminated on the date upon which "*not less than 66% of the voting rights attached to all of the issued securities of HII are owned or controlled by entities that are directly or indirectly owned by entities that are directly or indirectly owned or controlled by Richard Homburg*".
22. None of the issues raised by the AFM in respect of the July PoA were addressed or even raised by HII at or in connection with the AGM or the CCAA hearing, or with the Trustee at any of his meetings with HII or its advisers. Rather, the July PoA was depicted as a document susceptible of "comforting" the AFM.

23. As appears from the AFM Letter (Exhibit P-3), HII was given until September 15, 2011 to respond to the AFM's intention to revoke its license and to provide its views on how to satisfactorily address the AFM's concerns.
24. HII does not appear to have developed or considered seriously any other alternative to resolve the AFM's concerns, other than supporting the flawed July PoA, which was embraced to management's advantage, and most recently by filing under the CCAA. Indeed the AFM's letter of August 11<sup>th</sup> makes clear that HII and its advisors were unable to present suitable alternatives to address its concerns. It is disconcerting that the AFM should have concluded from the representations made to it that the laws of Canada were impeding its supervision of HII, when in fact it is clear that Canadian corporate law includes some of the most wide-ranging and flexible remedies anywhere in the world.

### *The New Power of Attorney*

25. On or about August 16, 2011, Mr. Knuvers was appointed as a director of Stichting HB and Stichting HCS, the trustees under the Corporate Bonds Trust Indenture, the Mortgage Bonds Trust Indentures and the Perpetual Debt Trust Indenture. A few days later on August 24, 2011, the previous director, Mr. Harm Kranenberg, resigned as director and Mr. Knuvers became the sole director of both Stichting Petitioners.
26. On July 25, 2011, Deloitte, acting in their capacity as financial advisor to HII since 2010, made a presentation to the Board of HII entitled *Strategic "Reset" and Road Map*, dated July 25, 2011 (the "**Deloitte Presentation**"). The Deloitte Presentation contained a detailed outline of the informal restructuring process, timeline and objectives contemplated by HII and its subsidiaries and was not included in the materials filed by HII with the Court. A copy of the Deloitte Presentation is communicated under seal of confidentiality as **Exhibit P-4**.
27. As appears from the Deloitte Presentation, while certain options were considered, such as a privatization of the business and a corporate restructuring, the possibility of a CCAA filing was qualified as one of "last resort" and was clearly referred to for information purposes only. In that regard, the Deloitte Presentation:
  - (a) plainly stated that "it is unlikely that HII will need to file under CCAA";
  - (b) focuses on the negative aspects of a CCAA filing (costs, delays, risks, stigma), without any real analysis of the financial metrics/implications of such an option, such implications being left "TBD" in regard to the CCAA option;
  - (c) provided a long series of steps to be implemented over the next several months none of which included any steps towards CCAA proceedings or even the need for contingency planning in that regard in the short term. In that regard, the presentation stated that:

*"The Company should work to be prepared for a filing before beginning the road shows in the event that the informal restructuring plans are not well received by bondholders".*

- (d) Meetings with such bondholders were expected to take place in November of 2011.
28. On August 22, 2011, at the invitation of HII, Mr. Knuvers travelled to Montreal to meet with HII's senior management as well as Deloitte. At that meeting, he was provided with an updated version of the Deloitte Presentation which was substantially unchanged but for an update of the financial information based on HII's result for the second quarter of 2011. This updated version of the Deloitte Presentation reiterated in no uncertain terms that a CCAA filing was not being seriously contemplated at this stage and constituted nothing but a last resort option, the whole as appears from a copy of the updated Deloitte Presentation communicated under seal of confidentiality as **Exhibit P-5**.
29. In addition, Mr. Knuvers was provided with a document entitled *Newco Business Plan* prepared by Deloitte and dated August 22, 2011. This document contained a detailed business and legal analysis of HII's comprehensive reorganization and a timeline for implementation over the next 6-9 months, but made no reference to the possibility of a CCAA filing, the whole as appears from a copy of such business plan communicated under seal of confidentiality as **Exhibit P-6**.
30. Mr. Knuvers was never asked for forbearance nor was he asked to seek same from the holders of Corporate Bonds or Mortgage Bonds in respect of any capital or interest payments that may become due over the course of the following months.
31. On or about August 29, 2011, Mr. Knuvers, the representative of the Stichting Trustees, was again invited to attend meetings in Montreal in the days preceding HII's AGM (the "**AGM**") scheduled for September 9, 2011.
32. On September 7, 2011, it was alleged that Mr. Miles delivered to HII's register and transfer agent proxies (the "**Miles Proxies**") on behalf of the RH Group's shares on their behalf with respect to the election of directors of HII. A copy of the Miles Proxies is communicated as **Exhibit P-7**.
33. During a meeting held the next day with HII, the terms of a new Power of Attorney ("**New PoA**") and of a Heads of Agreement (the "**Heads of Agreement**") that were in the course of being finalized with the RH Group were reviewed. Such agreements were in fact executed in the evening of September 8, 2011, the whole as appears from a copy of the Heads of Agreement communicated under seal of confidentiality as **Exhibit P-8** and a copy of the New PoA communicated as **Exhibit P-9**.
34. Pursuant to the terms of the Heads of Agreement (Exhibit P-8):



- (a) Homburg Canada Inc. ("HC"), an entity controlled by Mr. Homburg, would transfer all of the shares in the capital of Homburg L.P. Management, the general partner of various partnerships related to HII to a new foundation incorporated under the laws of the Netherlands;
  - (b) the RH Group would deposit 6,435,865 Class A shares and 2,352,754 Class B shares in the capital of HII (representing approximately 70% of the voting right and approximately 44% of the equity attached to HII's outstanding shares) in trust with a new foundation incorporated under the laws of the Netherlands;
  - (c) under the terms of such trust, the shares in HII would remain in trust with the trustees of the foundations until:
    - the repayment of all outstanding Mortgage Bonds; and
    - the repayment of all outstanding Homburg Capital Securities A issued under a Trust Indenture dated February 28, 2009, as amended from time to time;
  - (d) and any of the following conditions being satisfied:
    - Richard Homburg's direct and indirect shareholdings in HII had fallen below 20% of the total share capital of HII, or whichever lower percentage that the AFM may agree to; or
    - Richard Homburg became unable to manage his affairs (*handelingsonbekwaam*) or had deceased; or
    - the AFM had approved the release from trust.
35. The Heads of Agreement further provided as an interim measure pending implementation that RH Group would grant the New PoA over all Class A and Class B shares in the capital of HII held by them in favour of the Trustees.
36. The New PoA (Exhibit P-10) revoked all prior powers of attorney granted in respect of the Class A and Class B shares in the capital of HII held by the RH Group (including the July 6 PoA), and thereafter granted a new power of attorney over such shares in favour of the Stichting Petitioners. The Stichting Petitioners specifically required that the New PoA be governed by the laws of the Netherlands and made irrevocable such that Richard Homburg could not be able to revoke the power of attorney granted thereunder. The New PoA is much broader than the July PoA as it applies to any resolution presented to the shareholders and not just the election and dismissal of directors as was the case with the July PoA.
37. During an afternoon meeting on September 8, 2011, counsel to HII, Mr. Knuvers offered to HII that, after the execution of the New PoA and in order to avoid any dispute at the AGM, they would be prepared to vote the RH Group's shares in the share capital of HII in favour of a slate of five (5) directors comprised of four (4) of management's nominees and one independent director to be put forward the Stichting Petitioners.

38. Counsel to HII agreed to discuss the above compromise proposal with HII's Board and to speak with counsel to the Trustees at 7:00 p.m. that evening in order to convey HII's position on this proposal, at which time he wrote to counsel to the Trustees that:

*"Given the background relating to the proposal we're running this by Dutch counsel with a view to speaking to the AFM in the morning (Amsterdam time) before reverting."*

the whole as appears from a copy of an email communication dated September 8, 2011 communicated as **Exhibit P-10**.

39. Following the execution of the Heads of Agreement and New PoA, the undersigned attorneys, as special Canadian counsel to the Stichting Petitioners, sent a letter to counsel to HII, with a copy to Deloitte, financial advisor to HII, advising them, among other things, of the execution of the New PoA that provided the Trustees with a sufficient number of votes to elect a new board of independent directors at HII's annual meeting the next morning, the whole as appears from a copy of the above mentioned letter communicated as **Exhibit P-11**.
40. The Monitor testified on September 9, 2011 before this Court that the decision to file for CCAA, had been taken the prior evening, thus necessarily before any discussions with Dutch counsel or the AFM.
41. At that hearing it was learned that the authority for the CCAA filing was a written resolution of the outgoing Board of Directors which was effective that morning, leaving unanswered the question whether one of the single most important decisions that can be taken by a corporation for itself and its stakeholders was implemented through a written resolution, rather than a live meeting of the Board of Directors, with the benefit of legal and financial advisors in attendance to support their ultimate decision.
42. The only plausible inference for HII not waiting to discuss this potential solution with Dutch counsel and the AFM before deciding to file under the CCAA was a concern that a new board would be elected at the AGM the next morning and that such new board would take a fresh look at the decision to file for CCAA protection, the advice received, and other available alternatives.

### The AGM

43. At about 9:00 a.m. on September 9, 2011, the RH Group issued a press release announcing the execution of the New PoA, as appears from the press release and early warning report filed under securities laws communicated as **Exhibit P-12**.
44. At about 9:25 a.m. on that same day, Mr. Knuvers attended at the reception hall of the Queen Elizabeth Hotel reserved for the AGM only to learn that, despite the invitation had personally received from HII's management, only registered

shareholders were being granted access to the AGM. Many security guards were present to ensure that no one other than registered shareholders attended the AGM or had access to its Chairman.

45. Prior to the commencement of the AGM, a copy of the executed New PoA was remitted to HII's counsel and transfer agent at the entrance to the AGM as access to the AGM was restricted.
46. At 10:25 a.m., counsel to HII emailed a copy of the Debtors' *Motion for the Issuance of an Initial Order* pursuant to the provisions of the CCAA to the undersigned attorneys.
47. The Management Information Circular (the "**Circular**") sent to HII shareholders in connection with the AGM listed eight (8) management nominees to the HII board. Six (6) were current directors of HII (Messrs. Edward P. Ovsenny, Walter R. Fitzgerald, Philip O'Brien and Hatmut Fromm, as well as two nominees who resigned on September 1, 2011, Messrs. Michael H. Arnold and Trevor A. Carmichael) and two (2) were new nominees who are residents of the Netherlands (Jan-Willem Wattel and Jan Hielke Lamsma), both of whom were being nominated at the request of the AFM, the whole as appears from a copy of the Circular communicated as **Exhibit P-13**.
48. The AGM, which had been called for 10:00 a.m., was actually called to order by HII's newly appointed Chairman, Mr. Hatmut Fromm, at approximately 11:15 a.m.
49. Following the nomination of the six management nominee directors listed in the Circular who were standing for election, there was a nomination from the floor to elect Messrs. Fred Smithers and Harm Kranenberg, as well as four nominees on the management slate, Messrs. Edward P. Ovsenny, Philip O'Brien, Jan-Willem Wattel and Jan Hielke Lamsma, as directors of HII.
50. The AGM's voting results were published by HII several days after the AGM, and only after the intervention of the Nova Scotia Securities Commission. A copy of such results is communicated as **Exhibit P-14**.
51. Based on such voting results, excluding the votes purported to have been exercised by Mr. Miles under the July PoA, Messrs. Smithers and Kranenberg would have been elected in lieu of Messrs. Fitzgerald and Fromm.

#### **Rushed CCAA Filing**

52. During the hearing on the application for the Initial Order on September 9th, neither HII's CFO nor the Monitor could provide any explanation for the rush filing of the CCAA application on the morning of September 9, 2011.
53. The Monitor testified at the hearing that HII had not planned to file until at least after September 16, 2011 and that he was surprised when he was told on the

evening of September 8, 2011 that HII wanted to file the next morning. Like Mr. Miles, he was unable to explain why such a drastic and important decision was being taken at that time.

54. HII never raised the issue of forbearance with the Stichting Petitioners or, to its knowledge, any other creditors of HII prior filing under the CCAA.

## V. GROUNDS FOR THIS MOTION

55. The Stichting Petitioners submit that authorization of this Court to seek relief before the Alta Q.B. is not necessary or required under the circumstances. This being said, in order to limit the potential for litigation to the strict minimum, the Stichting Petitioners have thought advisable to seek permission of this Court on a *de bene esse* basis.
56. The Stichting Petitioners submit that serious irregularities occurred at or in connection with the AGM. These irregularities resulted in the unlawful, oppressive and improper election of two of HII's directors.
57. Moreover, these irregularities occurred concurrently with the sudden decision of the then incumbent directors to authorize the rushed filing of these CCAA proceedings, leapfrogging over and ignoring the plan and strategy being developed by HII and Deloitte in the days and weeks preceding the AGM.
58. In respect of the July PoA and without limitation to further submissions that may be made with additional information, the Stichting Petitioners submit that:
- (a) **The July PoA was null *ab initio*.** The July PoA provides that it terminates on the date upon which *not less than 66%* of the voting rights attached to all of the issued securities of HII are owned or controlled by entities that are directly or indirectly owned by entities that are directly or indirectly owned or controlled by Richard Homburg. As Mr. Homburg directly or indirectly owned more than 66% of the voting rights attributed to all of the issued and outstanding shares of HII on July 6, 2011 when the July PoA was executed, the July PoA never had any effect. This was brought to the attention of HII on August 11, 2011 by the AFM, and conveniently ignored by HII; and
  - (b) **The July PoA was revoked by the New PoA.** The terms of the July PoA provides that it terminates on the date that HII receives evidence satisfactory to it, acting reasonably, that Richard Homburg no longer, directly or indirectly, owns or has control or direction over 20% or more of the voting rights attached to all of the issued and outstanding securities of HII. Upon execution of the New PoA, is irrevocable, the RH Group no longer controlled or directed 20% or more of the voting rights attached to all of the issued and outstanding securities of HII. In addition, the New PoA specifically revoked any previous voting power of attorney

agreements, involving the July PoA, which under applicable law was revocable.

59. In respect of the Miles Proxy, the Stichting Petitioners submit that:
- (a) **the Miles Proxy was null *ab initio*.** To the extent that the July PoA was either null or revoked, any document purported to be executed thereunder is null and without effect;
  - (b) **The procedure set forth in the July PoA was disregarded.** First, the express terms of the July PoA appoint the President of HII, and only failing his ability to act, the Chief Financial of HII. No evidence of any inability of the President of HII to execute the proxy was ever presented. Second, the attorney only had authority to sign the proxy if the RH Group failed to provide what was required by HII. HII never required anything of the RH Group, thus the default authority was never triggered;
  - (c) **The Miles Proxy was late.** The Miles Proxy was not deposited before the deadline of 5:00 p.m. on September 7, 2011, set by HII for the filing of proxies before the AGM;
  - (d) **The Miles Proxy was not valid.** Only registered shareholders and beneficial shareholders who had instructed their broker that they intended to vote their shares in person at the AGM could vote by proxy at the AGM. Beneficial shareholders cannot simply deposit a proxy in respect of shares held in their broker's name; and
  - (e) **The Miles Proxy exceeds the scope of the July PoA.** The scope of the July PoA is limited to the election or removal of directors and the Miles Proxy contains discretionary powers which extend beyond such permitted scope.
60. The Stichting Petitioners respectfully submit that *prima facie* the above mentioned situation and conduct of HII's directors and members of management are cause for this Court to be concerned with the proper election and legitimacy of HII's board of directors currently managing the CCAA Restructuring of the Debtors. The protection of this Court should neither be available nor granted in such circumstances.
61. The question of whether those who are managing this debtor-in-possession process should be there in the first place is legitimate in the extraordinary circumstances present here, including the decision to authorize a CCAA filing at the time of an annual general meeting of shareholders which, if conducted properly and in compliance with applicable law, would have resulted in the slate of directors being modified and where such filing is not a true option but rather a last resort contingency which may materialize several months down the road.
62. The Stichting Petitioners submit that the recourses they seek to initiate before the Alta Q.B. do not qualify as proceedings against HII or its assets. The Stichting Petitioners are not seeking to gain an advantage over other creditors by

attempting to take realization measures against any of the Debtors. Rather, they wish to assert their right to have certain issues arising in the context of the AGM resolved by the competent court under the BCA.

63. The remedies sought by the Stichting Petitioners are declaratory or intended to correct certain actions taken by the Chief Financial Officer and the Chairman of HII in connection with the AGM and relating to the very constitution of the corporation itself. They are not directed "against" or "in respect of" HII, its assets or its subsidiaries or their assets.
64. In CCAA matters the role of the court is to establish the boundaries of the playing field and act as a referee in the restructuring process. While the Court has great leeway to make orders so as to effectively maintain the status quo between a debtor and its creditors, the corporate activities that take place before or during the course of the workout remain governed by the legal principles and requirements that normally apply to such activities. The CCAA court's discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by applicable corporate law.
65. The Stichting Petitioners submit that, at the very minimum, the CCAA Process should be managed by directors and officers who have or ought to have been duly appointed in accordance with applicable corporate law.
66. In light of the need to see these matters adjudicated on an urgent basis, the Stichting Petitioners request that this Court order the provisional execution of the orders sought herein notwithstanding any appeal.
67. This Motion is well founded in fact and in law.

**FOR THESE REASONS, MAY IT PLEASE THIS COURT TO:**

- [1] **GRANT** the present Motion;
- [2] **DECLARE** that the notices given of the presentation of the present Motion are proper and sufficient;
- [3] **DECLARE** that the Stay of Proceedings provided for in the Initial Order made by this Court on September 9, 2011 in this file is lifted for the purposes of allowing the Stichting Petitioners to submit the following issues to the Alberta Court of Queen's Bench (the "**Alta Q.B.**") for adjudication:
  - (a) whether the Power of Attorney dated July 6, 2011 (the "**July PoA**") granted by Mr. Richard Homburg and Homburg Finance A.G., was, at any relevant time, valid and enforceable;
  - (b) whether James F. Miles had the power and authority to execute the proxy forms dated September 2, 2011 used by him at Homburg Invest Inc.'s ("**HII**") Annual General Meeting held on September 9, 2011 (the "**AGM**") and whether such proxy should have been accepted by the Chairman appointed in respect thereof;
  - (c) whether the July PoA and any proxy forms executed thereunder were revoked by the execution and delivery of the Power of Attorney dated September 8, 2011 (the "**New PoA**") granted by Mr. Richard Homburg and Homburg Finance A.G.;
  - (d) whether the sole director of the Stichting Homburg Bonds and Stichting Homburg Capital Securities (the "**Stichting Petitioners**"), Mr. Henk Knuvers, was improperly denied access to the AGM and accordingly prevented from voting the shares in respect of which the New PoA had been granted;
  - (e) whether the Chairman appointed in respect of the AGM was permitted to, and in fact did, exercise his duties and powers in a fair, proper and reasonable manner;
  - (f) whether the court should give effect to the votes that would have been cast at the AGM under the New PoA had it been given and had the integrity and propriety of the voting procedure at the AGM been upheld; and
  - (g) which directors were lawfully elected at the AGM, and whether directors should be removed or appointed by the Court to remedy the situation.
- [4] **GRANT** such other relief as this Court may deem appropriate in the circumstances; and
- [5] **ORDER** the provisional execution of this Order be rendered herein notwithstanding any appeal.

THE WHOLE WITHOUT COSTS, save and except in case of contestation.

MONTRÉAL, September 16, 2011

A handwritten signature in black ink, appearing to read "Stikeman Elliott LLP", is written over a horizontal line.

STIKEMAN ELLIOTT LLP

Attorneys for the Stichting Petitioners  
Stichting Homburg Bonds and Stichting  
Homburg Capital Securities



CANADA  
PROVINCE OF QUÉBEC  
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 IN ANNEX I

Mis-en-cause

- and -

SAMSON BELAIR/DELOITTE & TOUCHE INC.

Monitor

- and -

STICHTING HOMBURG BONDS

- and -

STICHTING HOMBURG CAPITAL SECURITIES

Petitioners

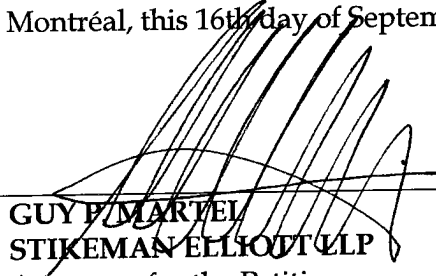
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ATTESTATION OF AUTHENTICITY  
ART. 82..1 C.C.P.

I, the undersigned, Guy P. Martel, lawyer, practicing at 1155, boulevard René-Lévesque West, Suite 4000, in Montréal, District of Montréal, Province of Quebec, H3B 3V2, solemnly affirm as follows:

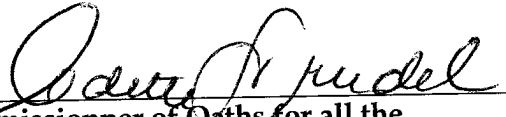
1. On September 16, 2011, at 11:25 A.M., I received an affidavit signed by Mr. Henricus Clemens Gertrudis Franciscus Knuvers, sole director of Stichting Homburg Bonds and Stichting Homburg Capital Securities (the "Foundations"), in support of the Petitioner's *De Bene Esse Motion for an Order Lifting the Stay of Proceedings for the Purposes of Seeking Relief in Respect of Homburg Invest Inc.'s Annual General Meeting*.
2. The above-mentioned affidavit was sent to me from Amsterdam, The Netherlands, via email (Kolkman@vandoorne.com) by Mtre Joost Kolkman, external counsel for the Foundations practicing at the law office of Van Doorne N.V.
3. The copy of this affidavit joined to the present attestation is a true copy of the Affidavit in PDF format received on September 16, 2011 from Mtre Kolkman.

Montréal, this 16<sup>th</sup> day of September, 2011



GUY P. MARTEL  
STIKEMAN ELLIOTT LLP  
Attorneys for the Petitioners

SOLEMNLY AFFIRMED before me in  
Montréal, this 16<sup>th</sup> day of September 2011



Commissioner of Oaths for all the  
judicial districts of Quebec

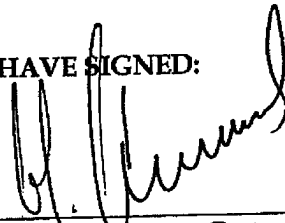
# 27644

**AFFIDAVIT**

I, the undersigned, Henricus Clemens Gertrudis Franciscus Knuvers, business man, having my principal place of business at Paasheuvelweg 16, 1105 BH, Amsterdam, The Netherlands, solemnly declare the following:

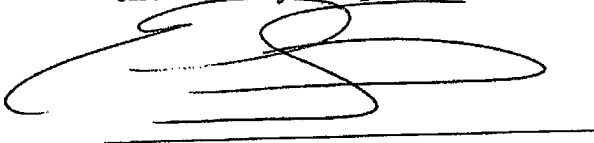
1. I am the sole director of Stichting Homburg Bonds and Stichting Homburg Capital Securities.
2. All the facts alleged in the *DE BENE ESSE MOTION FOR AN ORDER LIFTING THE STAY OF PROCEEDINGS FOR THE PURPOSES OF SEEKING RELIEF IN RESPECT OF HOMBURG INVEST INC.'s ANNUAL GENERAL MEETING* are true.

AND I HAVE SIGNED:



Henricus Clemens Gertrudis Franciscus  
Knuvers

Solemnly declared before me at Amsterdam, The Netherlands,  
on the 16<sup>th</sup> day of September, 2011



Elmar Dijkstra, a candidate civil-law notary, acting as a deputy of Mr. Daan ter Braak,  
civil-law notary, practising in Amsterdam, The Netherlands



NOTICE OF PRESENTATION

TO: Service List

**TAKE NOTICE** that the *De Bene Esse Motion for an Order Lifting the Stay of Proceedings for the Purposes of Seeking Relief in Respect of Homburg Invest Inc.'s Annual General Meeting* will be presented before the Honourable Louis Gouin J.S.C. or one of the Honorable Judges of the Superior Court, sitting in the District of Montréal, at the Montréal Court House, 1 Notre-Dame Street West, Montréal, Québec, at a date and time to be determined by the Court and communicated to the Service List.

**DO GOVERN YOURSELVES ACCORDINGLY.**

MONTREAL, September 16, 2011

A handwritten signature in black ink that reads "Stikeman Elliott LLP". The signature is written in a cursive, stylized font and is positioned above a horizontal line.

STIKEMAN ELLIOTT LLP

Attorneys for the Stichting Petitioners

Stichting Homburg Bonds and Stichting

Homburg Capital Securities

SUPERIOR COURT

N° 500-11-041305-117

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTRÉAL

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

HOMBURG INVEST INC. & *al.*

*Debtors*

- and -

HOMBURG REALTY FUND (199) LTD.  
PARTNERSHIP & *al.*

-and-

SAMSON BÉLAIR/DELOITTE & TOUCHE INC.

*Monitor*

-and-

STICHTING HOMBURG BONDS & *al.*

*Petitioners*

BS0350

File: 131425-1001

DE BENNE ESSE MOTION FOR AN ORDER  
LIFTING THE STAY OF PROCEEDINGS FOR THE  
PURPOSES OF SEEKING RELIEF IN RESPECT OF  
HOMBURG INVEST INC'S ANNUAL GENERAL  
MEETING, ATTESTATION OF AUTHENTICITY,  
AFFIDAVIT AND NOTICE OF PRESENTATION

ORIGINAL

Me. Guy P. Martel

(514) 397-3163

Fax: (514) 397-3493

STIKEMAN ELLIOTT

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