

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)

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

HOMBURG INVEST INC. et als.
SAMSON BELAIR/DELOITTE & TOUCHE
INC.

Monitor

- and -

STICHTING HOMBURG BONDS

Petitioners

- and -

HOMBURG CANADA INC.

Mise-en-Cause

**MOTION FOR THE PAYMENT OF THE FEES AND EXPENSES OF STICHTING
HOMBURG BONDS AND OTHER RELIEF**

TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING
IN COMMERCIAL DIVISION, IN AND FOR THE JUDICIAL DISTRICT OF
MONTRÉAL, THE PETITIONER, STICHTING HOMBURG BONDS
RESPECTFULLY SUBMITS THE FOLLOWING:

I. INTRODUCTION

1. Stichting Homburg Bonds ("SHB" or the "Trustee"), the indenture trustee representing Debtholders (the "Debtholders") of Homburg Invest Inc. et al. (the "HII Group"), holding in excess of \$593 million in claims, representing approximately 85% of the unconsolidated third party claims proven against Homburg Invest Inc. ("HII"), is hereby seeking the issuance of various orders by this Court in connection with the fees and expenses incurred by SHB in connection with the representation of the Debtholders' interests, both before and after the HII Group's filing for creditor protection under the *Companies' Creditors Arrangement Act* (the "CCAA").

A. Background

2. This Motion is filed in a very specific context where:
 - (a) an appeal (the "**Pre-December 3 Appeal**") of the Monitor's decision to disallow SHB's claims for fees and expenses incurred prior to December 3, 2011 in the amount of \$2.1 million (the "**Pre-December 3 Expenses**") as claims under and pursuant to the CCAA plans filed by the HII Group (the "**Plans**") is pending before this Court;
 - (b) an appeal (the "**Post-December 3 Appeal**") of the Monitor's decision to disallow SHB's claims for fees and expenses incurred after December 3, 2011 in the amount of \$6.48 million as at June 30, 2013 (the "**Post-December 3 Expenses**", together with the Pre-December 3 Expenses, the "**Expenses**") as claims under and pursuant to the Plans is also pending before this Court; and
 - (c) judicial proceedings are about to be filed by Homburg Canada Inc. ("**HCI**") against SHB and certain existing and former directors in the Netherlands (the "**Dutch Proceedings**") seeking a condemnation in the amount of \$2.1 million in connection with SHB's alleged failure to meet its contractual obligations under an agreement dated December 3, 2011 and entitled the *Amendment to the Heads of Agreement and Voting Agreement* (the "**AHOA**").
3. As stated in greater detail below, under the AHOA, HCI has paid to SHB an amount equivalent to the Pre-December 3 Expenses (i.e. \$2.1 million) in consideration for SHB agreeing to the waiver and termination of certain rights and obligations under the agreements entitled *Heads of Agreement* (the "**HOA**") and *Voting Power of Attorney and Standstill Agreement* (the "**POA**"), both dated September 8, 2011. These are the agreements which, *inter alia*, allowed SHB to exercise the right of HII's shareholders and gave rise to a "proxy battle" in the early days of these CCAA proceedings.
4. The termination of the above mentioned rights allowed HCI and other entities related to Richard Homburg (the "**RH Group**") to complete the transfer of their controlling interests over the HII Group into the hands of HII in return for an amount of about \$21 million, as contemplated under the Purchase Agreement dated November 17, 2011, which agreement was approved by this Court on January 12, 2012.
5. In the context of the Dutch Proceedings, HCI is taking the position that SHB and its directors should be condemned to pay an amount of \$2.1 million given their failure to use "best commercial efforts" to recover their fees and expenses in the context of these CCAA proceedings and to reimburse the sum of \$2.1 million paid by HCI under the AHOA, and in so doing, suggests that SHB should agree

to deduct the Pre-December 3 Expenses from the distribution to be made to the Debtholders pursuant to the Plans.

6. SHB is of the view that it, in all circumstances and at all relevant times, duly fulfilled its duties and obligations to HCI. Accordingly, SHB and its directors deny any liability in connection with the reimbursement of the Pre-December 3 Expenses to HCI and will be vigorously contesting the Dutch Proceedings. This being said, given the uncertainty inherent to any judicial proceeding, the risk of an adverse judgment in the context of the Dutch Proceedings cannot be ruled out. In such a scenario, given that SHB has very little, if any, assets of its own, the directors and former directors which are being sued in the context of these proceedings would have to pay the sum of \$2.1 million from their personal assets, without any ability to be indemnified by SHB or the HII Group for their loss.
7. In this context, SHB seeks the issuance of the following orders from this Court:

Payment of Fees by HII:

- (a) an order declaring that SHB's Pre-December 3 Expenses and Post-December 3 Expenses are expenses, which, as a result of the Trustee's "substantial contribution" to the CCAA Proceedings, must be supported and paid in full by HII following the implementation of the Plans without being compromised;
- (b) subsidiarily, should this Court refuse to grant the above relief, an order granting the Pre-December 3 Appeal and the Post-December 3 Appeal.

Payment of Fees by Debtholders:

if conclusion a) is not granted:

- (c) an order declaring that any portion of the Pre-December 3 Expenses, if any, which, following the implementation of the Plans, remains unpaid (taking into consideration the value attributed by the Monitor to any equity issued under the Plans) shall be deducted from the Debtholders' recovery under the Plans by the Monitor and remitted to SHB.

Reimbursement to HCI:

- (d) if any of the conclusions in a), b) or c) are granted, authorizing SHB to remit any amount recovered in respect of its Expenses up to an amount not exceeding \$2.1 million to HCI in satisfaction of SHB's alleged obligations under the AHOA.

Establishment of a Reserve:

if this Court refuses to grant orders resulting in the full payment of an amount of \$2.1 million to HCI:

- (e) an order ordering the Monitor to set aside a reserve in an amount equal to any portion of the Pre-December 3 Expenses, if any, which, following implementation of the Plans, remains unpaid (taking into consideration the value attributed by the Monitor to any equity issued under the Plans) from the distribution to be made to the Debtholders under the Plans pending adjudication of the Dutch Proceedings and/or further order of this CCAA Court.

II. FACTS

A. Trust Indentures

- 8. SHB is a trustee under, *inter alia*, 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**"). A copy of the Corporate Bonds Indenture is filed as **Exhibit R-1**.
 - (b) a Trust Indenture made as of December 15, 2002 between Shareco and Stichting Homburg Mortgage Bond (now Stichting Homburg Bonds), as supplemented by several Supplemental Indentures (the "**Mortgage Bonds Indenture**", and collectively with the Corporate Bonds Indenture, the "**Indentures**"). HII has unconditionally and irrevocably guaranteed all amounts payable by Shareco under the Mortgage Bonds Indenture pursuant to a Guarantee Agreement dated December 15, 2002 (the "**Guarantee Agreement**"). A copy of the Mortgage Bonds Indenture and Guarantee Agreement are filed, *en liasse*, as **Exhibit R-2**.

B. Status and Powers of the Trustee

- 9. Under the Indentures, the Trustee is the duly authorized representative of the bondholders and holds in trust for said bondholders all the "*rights, privileges and benefits*" conferred by the relevant Indentures and by law (s. 16.11 of the Indentures).
- 10. The Indentures grant broad powers to the Trustee upon the occurrence of an event of default, including exercising its discretion to declare the principal and interest of all outstanding bonds or debentures to be due and payable (s. 13.2 of the Indentures).

11. In addition, the Trustee is tasked with exercising the rights of the bondholders under the Indentures:
 - (a) all rights of action under the Indentures may be enforced by the Trustee without the possession of any of the debt obligations, "*or the production thereof at the trial or other proceedings relative thereto*" (s. 13.4(b) of the Indentures);
 - (b) as a general rule, the exercise of any rights or remedies under the Indentures, at law or in equity lies with the Trustee, not with the bondholders (s. 13.5 of the Indentures);
 - (c) subject to certain conditions (described below), the Trustee may be directed by the bondholders to exercise remedies on their behalf.
12. The Mortgage Bonds Indenture also provides the Trustee with an independent right of action against the issuers of the bonds, stating that:
 - (a) "*the Trustee shall be the joint and several creditor ('hoofdelijk schuldeiser')*", together with the bondholders of each series of the Mortgage Bonds; and
 - (b) the Trustee has its "*own independent right to demand performance by the Corporation*" of Shareco's obligations under the Indentures (s. 8.1 of the Mortgage Bonds Indenture and s. 7 of each Supplemental Mortgage Bonds Indenture).
13. The Mortgage Bonds Indenture further provides that the Trustee may take certain steps, including to enforce the rights of the Trustee and the bondholders (s. 13.4), or generally proceed to take any authorized remedy, in which case Shareco agrees that judgment may be rendered against it "*in favour of the Bondholders or in favour of the Trustee, as trustee for the Bondholders*" (s. 13.16). Furthermore, where applicable, only the Trustee (not the bondholders) may exercise the powers of sale or appointment of a receiver or receiver and manager (s. 13.5).
14. In sum, the Trustee is tasked with exercising the rights of the bondholders under the Indentures, and pursuant to the "no action" clause found at s. 13.5 of the Indentures, the exercise of any rights or remedies generally lies with the Trustee, not with the bondholders.
15. In light of the foregoing, the Trustee respectfully submits that it was not only permitted pursuant to the provisions of the Indentures, to take, analyze and consider all necessary or useful actions for the protection of the Debtholders' rights and interests, but was also expected to do so by them, particularly in light of the unexpected development which the CCAA filing represented, occurring as it did in a jurisdiction and according to rules which were foreign to substantially all of them. These actions included exploring various options leading to an eventual Settlement Agreement (as defined hereinafter). This also included

securing various contractual rights for the benefit of the Debtholders. While these rights were objected to and criticized by HII and the Monitor, the position was never litigated and neither party should seek at this juncture to reopen these questions. A settlement ensued which resolved all matters without any party conceding its position.

16. The Trustee having been provided with the opportunity to secure certain contractual rights, was entitled to ensure they were performed. Indeed, the real question is not for whose benefit the Trustee was acting, that question is settled by section 16.11 of the Indentures, but rather on what basis the Trustee could have properly turned down that opportunity in a situation where it could potentially be in the interest of the Debtholders to hold and exercise those rights.

C. Trustees' Advisors

17. The Indentures provide that the Trustee may employ or retain such experts or advisors, including counsel, auditors or accountants, as it may reasonably require for the purpose of discharging its duties under the Indentures and that the Trustee may pay remuneration for services rendered (s. 16.4 of the Indentures).
18. As such, during the course of the CCAA Proceedings, the Trustee retained the services of the following professionals (collectively, the "Trustee's Advisors"):
 - (a) Mr. Henk Knuvers, Ms. Marian Hogeslag, Mr. Wouter de Jong, Mr. Hendrik Stadman Robaard, and Mr. Karel de Vries to act as directors of each Trustee;
 - (b) the undersigned attorneys ("Stikeman"), as of August 2011, and Cox & Palmer ("C&P"), from October 2011 to the present, as Canadian counsel, and Van Doorne N.V. ("Van Doorne"), from August 2011 to March 2012 and Lemstra Van der Korst N.V. ("Lemstra"), from April 2012 to the present, as Dutch counsel, in order to assist in connection with these CCAA Proceedings and advise the Trustee as to its duties, rights and remedies, as well as, in the case of Stikeman, to represent the Trustee before this Court; and
 - (c) from September to December 2011, PricewaterhouseCoopers Inc. ("PwC"), through Stikeman, to act as financial advisors in connection with these CCAA Proceedings and to assist the Trustee in reviewing financial data, communication with Debtholders, evaluating available options and preparing for discussions and negotiations with the stakeholders involved in these proceedings.
19. In so doing, and as stated in the Pre-December 3 Appeal and the Post-December 3 Appeal, the Trustee incurred substantial costs and expenses in a manner wholly consistent with its role under the Indentures, pursuant to which it represents claims in excess of \$593 million, or approximately 85% of HII's

unconsolidated third party debt, as reflected in the Monitor's Twenty-Third Report dated May 8, 2013 (Appendix D). Indeed, the Monitor recognized at the outset that the Debtholders represented the 1st and 2nd largest creditor groups of HII, as appears from the Monitor's First and Second Reports, dated September 19 and October 5, 2011, respectively.

20. There are approximately 9,500 Debtholders that are or were at one time represented by the Trustee. The debt obligations under the Indentures are not concentrated in the hands of institutional or other funds, but rather, are held by a dispersed set of individual holders, each with relatively small positions. In this regard, for most of these CCAA Proceedings (i.e. until the active involvement of the Catalyst Capital Group Inc.), the largest position held by a single holder was in the principal amount of €2,340,000. Average holding by a Debtholder was approximately €31,999. Throughout the duration of these CCAA proceedings very few Debtholders have disposed of their claims against the HII Group.
21. A large number of Debtholders are retirees residing in the Netherlands who, from the beginning, have relied on the Trustee for the recovery of their investments in the context of these CCAA proceedings and for information regarding HII's restructuring process.
22. The current situation is distinct from those encountered in most CCAA proceedings, where the indenture trustee is a trust company and a core group of institutional debtholders holding significant blocks of debt obligations, and with sufficient resources to retain and instruct counsel at the outset of a CCAA filing, are in a position to organize themselves. In the case at hand, there has been a need for a representative unrelated to the HII Group or to the Monitor to act on behalf of bondholders. Consistent with the Indentures, the Trustee has taken on this role, which in current modern practice, is less prevalent, given that typically, ad hoc bondholder committees would fill this role.
23. In sum, the involvement and actions of SHB have meaningfully contributed to the successful approval of the Plans, and have ultimately benefited not only the Debtholders, but all creditors.

D. Obligations of the Corporation

24. Under the Indentures, the "Corporation" is either HII (in the Corporate Bonds Indenture) or Shareco (in the Mortgage Bonds Indenture).
25. Section 12.1(e) of the Indentures (Exhibits R-1 and R-2) imposes on the Corporation an obligation to fund the employ, by the Trustee, of the Trustees' Advisors on the following terms:

To Pay Trustee. That the Corporation will pay to the Trustee reasonable remuneration for its services hereunder and will pay or reimburse the Trustee upon its request for all reasonable expenses, disbursements and advances incurred or made by the Trustee in the administration or execution of the

trusts hereby created (including the reasonable compensation and the disbursements of its counsel and all other advisers and assistants not regularly in its employ), both before any default hereunder and thereafter until all duties of the Trustee under the trust hereof shall be finally and fully performed, except any such expense, disbursement or advance as may arise from its negligence or bad faith.

[our emphasis]

26. Moreover, the Guarantee Agreements executed by HII under the Mortgage Bonds Indenture and by certain partnerships under the Supplemental Indentures provide that the Guarantor shall reimburse the Trustee for "*all costs and expenses including, without limitation, reasonable attorney's fees and disbursements*" incurred in connection with the enforcement of said guarantees (s. 15 of the main Guarantee Agreement and ss. 14 of the Guarantee Agreements under each Supplemental Indenture).
27. As appears from the clear language of the Indentures and Guarantee Agreements, the only limitation to the reimbursement of fees and expenses by the Trustee is that they are reasonable, and incurred absent any negligence or bad faith, which as described below, do not apply, considering the very reasonable and diligent manner in which the Trustee incurred fees during these CCAA proceedings.
28. The obligation to pay fees and expenses relates to the administration and execution of the trusts created under the Indentures. It is not limited narrowly to those enforcement recourses that are specifically provided for in the Indentures (most of which were in any event stayed by the Initial Order). Such an interpretation would be unworkable given the complexity inherent to any CCAA restructuring. Indeed, in the case at hand, the role played by the Trustee during the Pre-December Period is unprecedented, and as a matter of necessity to a meaningful restructuring of the HII Group, went well beyond the explicit terms of the Indentures.
29. Moreover, it would be inappropriate to interpret the Indentures as controlling the way by which the Trustee chooses in its discretion to best represent or advance the interests of the bondholders, including whether doing so may be usefully achieved by securing a proxy and indemnity from a controlling shareholder.
30. In many respects, and as difficult as the disagreements that occurred in the first months of the restructuring may have been, it is undeniable that the initial debate led to a settled outcome in the form, *inter alia*, of the Settlement Agreement and Funding Order, which ultimately allowed the Trustee and HII to engage in a constructive relationship, actively contributing to the "*orchestra*", alongside its "*conductor*" (i.e. the *Monitor*).

E. Power of Attorney and Heads of Agreement

31. On September 8, 2011, the POA and the HOA between the Trustee and the RH Group were executed, the whole as appears from a copy of the POA filed under confidential seal as **Exhibit R-3** and a copy of the HOA filed under confidential seal as **Exhibit R-4**.
32. Pursuant to the terms of the HOA:
- (a) HCI, an entity controlled by Richard Homburg, would transfer all of the shares in the capital of Homburg L.P. Management Inc. ("HLPM"), 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.
33. The HOA further provided as an interim measure pending implementation, that the RH Group would grant the POA over all Class A and Class B shares in the capital of HII held by them in favour of SHB and Stichting Homburg Capital Securities ("SHCS", together with SHB, the "Trustees").
34. The POA 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, and thereafter granted a new power of attorney over such shares in favour of the Trustee. The Trustee specifically required that the POA be governed by the laws of the

Netherlands and made irrevocable, such that Richard Homburg would be prevented from revoking the power of attorney granted thereunder.

35. The HOA and the POA allowed the Trustee to vote the above mentioned shares in the share capital of HII at the annual general meeting of shareholders of HII held on September 9, 2011. The representatives of SHB were, however, denied access to such meeting and prevented from exercising their rights under the HOA and the POA. The HII Group sought and obtained CCAA protection later that day.

F. Settlement Between the Parties

36. The first months of these CCAA proceedings were marked by litigation between SHB and the HII Group in connection with a number of issues, including:
- (a) a *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* dated September 16, 2011 (the "**Motion to Lift the Stay**");
 - (b) a *Motion for Amendments to the Initial Order* dated September 16, 2011 (as amended on October 4, 2011, the "**Motion for Amendments**");
 - (c) a *Motion for the Payment of Fees, Disbursements and Expenses of the Indenture Trustees and the Indenture Trustees' Advisors and Related Relief* dated October 4, 2011 (the "**Funding Motion**"); and
 - (d) a *Motion to Amend Certain Limited Partnership Agreements and for Ancillary Relief* dated November 10, 2011 (as amended on November 11, 2011, the "**Partnerships Motion**").
37. In parallel, HII was facing significant issues with HCI, who up until July 2011, managed HII's business and assets. These issues included the following:
- (a) HCI's control over the general partners of virtually all of HII's subsidiaries;
 - (b) material intercompany payables owing to HCI by HII and to HII by HCI related entities;
 - (c) HII's potential liability for the termination of HCI's management agreement; and
 - (d) the uncertainty surrounding the outcome of the Partnerships Motion which was being contested by the Trustees and the potential tax consequences of implementing a favorable judgment.

38. Following several weeks of intensive negotiations, HII, HCI and SHB entered into the following agreements, which settled a significant number of issues between these parties:

- (a) the *Purchase Agreement* between HII and HCI dated November 17, 2011;
- (b) the AHOA, filed under confidential seal as **Exhibit R-5**, and the *Amended Power of Attorney and Standstill Agreement* ("APOA") dated December 3, 2011, filed under confidential seal as **Exhibit R-6**; and
- (c) the *Settlement Agreement* between HII and SHB dated December 3, 2011, filed under confidential seal as **Exhibit R-7**.

i. The Purchase Agreement

39. The key terms and conditions of the Purchase Agreement can be summarized as follows:

- (a) the acquisition by the HII Group of the property management formerly conducted by HCI in respect of HII's business and assets with certain limited exceptions;
- (b) the granting to the HII Group of various options to take control of HII's subsidiaries;
- (c) the settlement of various outstanding claims between the HII Group and the RH Group;
- (d) a consideration of \$21 million payable to the RH Group by HII as follows:
 - i. \$10.5 million in cash on closing;
 - ii. \$7,408,904 to be satisfied by the irrevocable renunciation to and waiver by HII of all rights to the payment of an outstanding promissory note signed by Resolution Real Estate Limited, an entity of the RH Group; and
 - iii. \$3,149,796.45 to be satisfied by the transfer by HII of certain condominiums situated in Calgary, Alberta.
- (e) limited releases by and between the parties.

40. The Purchase Agreement was subject to certain conditions, including the conclusion of a settlement agreement by and among the Trustees and certain entities of the HII Group and the fulfillment by the Trustees of their obligations thereunder, including without limitation the withdrawal of certain motions or proceedings before this Court.

41. The implementation of the Purchase Agreement also required an agreement between the RH Group and the Trustees given that by entering into the Transaction contemplated in the Purchase Agreement, the entities of the RH Group would have breached their obligations towards the Trustees under the HOA.

ii. The AHOA/APOA

42. The AHOA provides for the termination of key rights and obligations set forth in the HOA in order to allow HCI to complete the transactions contemplated in the Purchase Agreement. The key terms and conditions of the AHOA can be summarized as follows:

- (a) a transaction whereby HCI would transfer all of the shares in the capital of HLP, the general partner of many partnerships related to HII to a new Dutch foundation (Stichting);
- (b) a transaction whereby the RH Group would deposit Class A shares and Class B shares in the capital of HII representing about 70% of the voting rights and about 44% of the equity attached to HII's equity;
- (c) payment of an amount of \$2.1 million (the "Termination Amount") to the Trustees; and
- (d) the execution of the APOA to reflect the changes made to the HOA.

43. Section 3 of the AHOA reads as follows:

"3. REIMBURSEMENT OF TERMINATION AMOUNT

3.1 The Trustees acknowledge and agree that, as of the date hereof, the Trustees have reached an agreement to effect a settlement of the issues in dispute between them and HII, including but not limited to the issue of HII's responsibility to pay or contribute to the fees and expenses of the Trustees and its advisors in connection with the Trustees' participation in the CCAA Proceedings from and after the date hereof.

3.2 The Trustees agree that:

- a) they shall use commercial best efforts to obtain the approval of the CCAA Court to their motion for funding (Funding Motion) as soon as practicable after the date hereof;*
- b) whether or not the Funding Motion is granted, the Trustees shall use commercial best efforts to recover their fees and expenses, including the Termination Amount, in the context of the proceedings initiated by HII and certain of its subsidiaries through the Companies' Creditors Arrangement Act (the CCAA Proceedings) and to reimburse to HC, to the maximum extent*

*practicable from any such recovery, the Termination Amount;
and*

- c) *any reimbursement due to HC shall be remitted to HC by the Trustees within ten (10) days of receipt of recovery through the CCAA Proceedings."*

iii. **The Settlement Agreement**

44. Under the Settlement Agreement, the Trustees and HII agreed, *inter alia*, upon the following:

- (a) the recognition of the importance of enabling the Trustees to actively participate in the HII Group's restructuring process;
- (b) the appointment of an additional independent member to the HII Board of Directors nominated by the Trustees;
- (c) the withdrawal of the Motion to Lift the Stay, the Motion for Amendments and the Partnerships Motion;
- (d) amendments to the Funding Motion and the order sought therein; and
- (e) terms upon which the parties would co-operate and share information.

45. Section 7 of the Settlement Agreement illustrates that the execution of the AHOA and the Settlement Agreement were key to the closing of the transactions contemplated in the Purchase Agreement. Section 7 reads as follows:

"7. The Trustees hereby undertake, for themselves and on behalf of their advisors and representatives, as of the date hereof:

- (iv) *To consent to the termination of "Transaction 1 – transfer of the shares held by Homburg Canada Inc. in the capital of "Homburg Management" as described in the Heads of Agreement dated September 8, 2011 (Exhibit P-8 to the Trustees' Motion to Lift the Stay) and not to pursue, directly or indirectly, any other transaction or series of transactions of a similar nature and undertake not to contest the Motion for Approval of a Purchase Agreement and for Ancillary Orders on the basis that HII is seeking to gain control over the assets held, directly or indirectly, through the Partnerships, subject to the Trustees having the right to make such representations before the CCAA Court as they may deem appropriate with regards to any consequential material tax or other liabilities for the HII Group and the Partnerships; and*

- (v) *for the duration of the CCAA Proceedings not to institute any proceedings pursuant to 11.5 of the CCAA and not to take, seek,*

maintain or entertain any action or proceeding relating to, or based on, (i) the Voting Power of Attorney Agreement (as amended, restated or superseded) made on or about September 8, 2011 or any other agreement of similar nature; or (ii) the results of any votes taken or the events that occurred at the last annual general meeting of shareholders of HII."

G. Funding Motion

46. As mentioned above, on October 4, 2011, SHB filed the Funding Motion. The HII Group and the Monitor indicated their intention to oppose the Funding Motion, which, as a result, was postponed *sine die*. Throughout the fall of 2011, representatives of the Trustee, the Monitor and the HII Group engaged in discussions and negotiations with a view to resolving a number of outstanding issues.
47. On October 7, 2011, this Court issued its Case Management Order #3 in which it commented on the Funding Motion (before it was amended) in the following terms:

DECLARES that the Court may be prepared to consider a request by an interested person under Section 11.52(1) of the CCAA, subject to a favourable recommendation of the Monitor, the "conductor of orchestra" as referred to in CMO#1, and subject to such person playing in same orchestra, i.e. being an effective participant in the orchestra.

48. As stated in the Monitor's Fifth Report dated January 10, 2012 (p.14), on or about December 3, 2011, the HII Group and the Trustee settled their differences with respect to a number of outstanding issues, including the Funding Motion.
49. In this context, it was agreed, *inter alia*, that the Trustee would nominate an additional independent member of the Board of Directors of HII, an important element of the settlement given the disputes regarding governance matters, and would amend the Funding Motion (the "**Amended Funding Motion**"), resulting in this Court issuing, on February 15, 2012, an order (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.

50. What is contemplated in the Funding Order, is nothing more than a mechanism for the interim funding and reimbursement of the fees and expenses incurred for the necessary participation of the Trustee in the CCAA Proceedings.
51. The funding and repayment method must not be confused with the explicit contractual obligations of the parties pursuant to the Indentures. In fact, the Trustee's right to make a claim for its expenses is entirely separate from the means with which it financed (and will repay) these expenses. Such advances were provided by the HII Group and will be netted against amounts to be distributed under the Plans. Such funding could have been provided by any third party and would have been reimbursed upon plan implementation. The fact that advances must be reimbursed, has no incidence on the ability of SHB to include in its claims against the HII Group, the fees and expenses it is entitled to claim under the Indentures, and more generally, the rules and legal principles governing trusts in Canada.
52. Thus, the Funding Order does not in any way preclude the Trustee from including the expenses as part of its claims against HII, nor does it purport to do so directly or indirectly. In fact, the Settlement Agreement (s.5(i)), which led to the Funding Order, specifically states that the parties' agree to work and collaborate with each other "*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*".

H. The Proofs of Claim

53. On July 6, 2012, the Petitioner filed a *Proof of Claim of Stichting Homburg Bonds and Stichting Homburg Capital Securities Against Homburg Invest Inc. (Pre-December 3, 2011 Expenses)* (the "**Pre-December 3 POC**"), whereby it claimed from HII, as unsecured creditor, the aggregate amount of \$2.1 million for expenses in relation to the administration or execution of the Indentures for the period between August 20, 2011 and December 3, 2011. A copy of the Pre-December 3 POC is filed as **Exhibit R-8**.
54. On July 6, 2012, SHB also filed Proofs of Claim of SHB and 1028167 Alberta Ltd. (the "**Post-December 3 POCs**", together with the Pre-December 3 POC, the "**POCs**") in respect of each of Homburg Shareco Inc. ("**Shareco**"), HII, Homco Realty Fund (52) Limited Partnership, Homco Realty Fund (61) Limited Partnership, and Homco Realty Fund (88) Limited Partnership. Copies of the relevant extract of each POC are filed, *en liasse*, as **Exhibit R-9**.
55. On February 4, 2013, the Monitor issued a Notice of Revision or Disallowance (the "**Pre-December 3 NRD**") to the Petitioner, indicating that it had disallowed

in full the Pre-December POC for the reasons further stated in the NRD. A copy of the NRD is filed as **Exhibit R-10**.

56. On May 10, 2013, the Monitor, issued several *Notices of Revision or Disallowance* (the "**Post-December 3 NRDs**", collectively with the Pre-December 3 NRD, the "NRDs") to the Trustee, indicating that it had disallowed, in part or in full the Post-December 3 POCs, including the Trustee's claim for payment of the Expenses, for the reasons further stated in the NRDs. A copy of each NRD is filed, *en liasse*, as **Exhibit R-11**.
57. As stated above, SHB appealed the NRDs by filing the Pre-December 3 Appeal and the Post-December 3 Appeal.

I. The Dutch Proceedings

58. Despite SHB's ongoing best efforts, HCI intends to institute the Dutch Proceedings, alleging that the Trustee has failed to meet its obligations under the AHOA. These allegations will be vigorously contested by SHB, who at all times, including through the present Motion, has insisted that the Pre-December 3 Expenses be paid in full, in accordance with the CCAA practice.
59. The Trustee is confident that by filing the Pre-December POC, it has met its obligations under the AHOA, and that HCI will be unsuccessful in the context of these Dutch Proceedings. This being said, given the uncertainty inherent to any judicial proceeding, the risk of an adverse judgment in the context of the Dutch Proceedings cannot be ruled out. In such a scenario, given that SHB has very little, if any, assets of its own, it would be the directors and former directors which are being sued in the context of these proceedings who would have to pay the sum of \$2.1 million from their personal assets, without any ability to be indemnified by SHB or the HII Group for their loss.

III. GROUND FOR THIS MOTION/APPEAL

A. Payment of Fees by HII

i. Substantial Contribution

60. The Trustee is first and foremost entitled to the full payment of its costs and expenses on the basis of its substantial contribution to these CCAA proceedings, this right being entirely independent of the Trustee's contractual entitlement to reimbursement of its Expenses pursuant to the Indentures.
61. The Trustee's representation, involvement and other contributions have been constructive and pro-active, extending far beyond those limited functions which indenture trustees customarily engage in. Indeed, the services of SHB have meaningfully contributed to the successful approval of the Plans, and have ultimately benefited not only the Debtholders, but all creditors.

62. In fact, the particular structure of the Debtholders, as described in greater detail above, led this Court, HII and the Monitor, to each publicly recognize that any meaningful restructuring efforts by the HII Group under the CCAA would have to include the active participation of the Trustee.
63. For example, and as appears from paragraph 4 of the Case Management Order #1 dated September 26, 2011 (in the Court record), from the beginning, this Court noted, in the following way, that it was both necessary and in the interest of the HII Group, that the Trustee be involved in the CCAA Proceedings:

"CONSIDERING that it may be in the best interests of the Debtors and Mis-en-cause that a duly authorized representatives of the Trustees be involved, when considered advisable by the Monitor, in the enforcement of the Steps;"

64. Furthermore, in the Settlement Agreement (Exhibit R-7), HII explicitly recognized *"the importance of enabling the [Trustee] to actively participate in the Restructuring process"* and confirmed its willingness *"to assist in and to accommodate such participation"*.
65. The key role of SHB throughout the CCAA proceedings was also recognized by the Monitor and HII at the Creditors' Meetings held on May 30, 2013 in the Netherlands.
66. In light of these actual and demonstrable benefits to HII's estate, the CCAA proceedings, and the creditors, SHB respectfully submits that it is entitled to the full reimbursement by HII of the Expenses.

ii. Pre-December 3 Appeal and Post-December 3 Appeal

67. Subsidiarily, should this Court refuse to grant the above relief, SHB respectfully submits that the amount of the Expenses must be considered as validly forming a claim which must be treated in accordance with the Plans.
68. SHB incurred substantial costs and expenses in these CCAA proceedings, which as mentioned above, were reasonable and properly incurred.
69. 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 and AHOA.
70. In light of the foregoing, the Trustee respectfully submits that the Expenses, as claims incurred post-filing pursuant to a pre-filing obligation, were rightfully included in the POCs. To deny the Trustee the right to include the Expenses in the POCs would amount to effectively denying the Trustee any form of recovery for these claims, which are clearly payable by HII pursuant to the Indentures and were bargained for on behalf of Debtholders when the debt obligations were issued.

71. It should be noted that the Funding Order provides merely for an interim solution to SHB's lack of financial resources. The fees and expenses of SHB were advanced by HII and such advances will be reimbursed by way of set-off with the Debtholders' recovery under the Plans. The method by which SHB "financed its operations" has nothing to do with its ability to claim capital, interest, plus fees and expenses as against HII.
72. For all of the above mentioned reasons, the Pre-December 3 Appeal and the Post-December 3 Appeal should be granted by this Court.

B. Payment of Fees by Debtholders

i. Deduction from the Debtholders' Recovery

73. Subsidiarily, should this Court refuse to order the full payment of SHB's Expenses without compromise, the Trustee seeks the issuance of an order declaring that any portion of the Pre-December 3 Expenses, if any, which following the implementation of the Plans, remains unpaid, shall be deducted from the Debtholders' recovery under the Plans by the Monitor and remitted to SHB.
74. As they currently stand, the Plans unfairly prejudice the Trustee, who has the right in law to recover the fees and expenses that it has incurred in its capacity as indenture trustee from any distributions in respect of the Debtholders. In fact, pursuant to the Plans, the Trustee will be impermissibly forced to forfeit those materials and substantive rights that are expressly granted to the Trustee pursuant to Canadian law.
75. The Indentures themselves, as well as the rules and regulations governing the Indentures and actions of the Trustee are clear: (i) the Trustee is the party to which funds are to be paid following an event of default or the commencement of insolvency proceedings; and (ii) once those funds are paid to the Trustee, the Trustee is entitled to recover its costs prior to any distribution to the Debtholders.
76. In effect, therefore, it is the Debtholders that are required to pay for the Pre-December 3 Expenses incurred by the Trustee, subject only to the exclusion of any unreasonable or improperly incurred expenses.
77. In the case at hand, the Expenses were reasonable in the circumstances, particularly considering the composition of the Debtholders, and the complexity of the multiple issues that were addressed over the last two years in order to effect a successful restructuring of the HII Group. As mentioned above, the Trustee's representation, involvement and other contributions were constructive, extending far beyond those limited functions which indenture trustees customarily engage in. Moreover, SHB was very cost-conscious throughout this CCAA matter and is prepared to address the reasonableness of its claims for fees and expenses. In addition, SHB took a fair, practical and commercial view, with the benefit of advice from their Canadian and Dutch advisors, of how best to

represent the multiple series of Debtholders involved in this restructuring process. Any other approach would have resulted in fees and expenses for multiple trustees and advisors throughout the process, which would have been well in excess of the fees and expenses under review. A similar practical and efficient approach was taken in respect of the tax aspects of the CCAA restructurings.

78. In sum, considering the Expenses were reasonable and arose in connection with the scope of the trusteeship duties and power, HII should be required to reimburse from the trust property, the Expenses incurred by SHB in the context of these CCAA Proceedings. SHB will then transfer the reimbursement of the Pre-December 3 Expenses to HCI in full and final satisfaction of SHB's alleged obligations under the AHOA.

C. Expenses to be Remitted to HCI

79. In the event that this Court issues an order allowing for the payment of SHB's Expenses in full or in part, SHB requests an order declaring that SHB remit any amount so recovered to HCI up to an amount not exceeding \$2.1 million in satisfaction of SHB's alleged obligations under the AHOA, the whole in order to prevent any further litigation with HCI or Debtholders who may wish to challenge payments made to HCI, an entity related to Richard Homburg.

D. Establishment of a Reserve

80. Subsidiarily, if this Court refuses to grant orders resulting in the full payment of an amount of \$2.1 million to HCI, it should, for the grounds set forth in paragraphs 73 to 78 of this Motion, order the Monitor to set aside a reserve in an amount equal to any portion of the Pre-December 3 Expenses, if any, which, following the implementation of the Plans, remains unpaid (taking into consideration the value attributed by the Monitor to any equity issued under the Plans), from the distribution to be made to the Debtholders under the Plans pending adjudication of the Dutch Proceedings and/or further order of this CCAA Court.

WHEREFORE, MAY THIS COURT:

GRANT Stichting Homburg Bonds' ("SHB" or the "Trustee") *Motion for the Payment of the Fees and Expenses of Stichting Homburg Bonds and Other Relief* (the "**Motion**");

DECLARE that SHB's Pre-December 3 Expenses and Post-December 3 Expenses are expenses, which, as a result of the Trustee's "substantial contribution" to the CCAA Proceedings, must be supported and paid in full by HII on the Plan Implementation Date (as defined in the Plans) without being compromised; and

AUTHORIZE SHB to remit \$2.1 million to HCI as reimbursement for the Termination Amount.

SUBSIDIARILY,

DECLARE that the POCs are valid and that SHB's claims therein constitute proven claims;

ORDER the Monitor and HII to recognize, list and admit such claims for the payment of the Expenses as Proven Claims under and pursuant to the Plans in the name of and for the benefit of the Trustee, the whole under reserve of the Trustee's right to file a further proof of claim, or amend its POCs, in order to claim any further amounts;

DECLARE that any portion of the Pre-December 3 Expenses, if any, which following the adjudication of the Pre-December 3 Appeal and the Post-December 3 Appeal and the implementation of the Plans, remains unpaid (taking into consideration the value attributed by the Monitor to any equity issued under the Plans) shall be deducted from the Debtholders' recovery under the Plans by the Monitor and remitted to SHB; and

AUTHORIZE SHB to remit any amount recovered in respect of the Pre-December 3 Expenses, up to an amount not exceeding \$2.1 million, to HCI as reimbursement for the Termination Amount.


SUBSIDIARILY,

ORDER the Monitor to set aside a reserve in an amount equal to any portion of the Pre-December 3 Expenses, if any, which, following the adjudication of the Pre-December 3 Appeal and the Post-December 3 Appeal and the implementation of the Plans, remains unpaid (taking into consideration the value attributed by the Monitor to any equity issued under the Plans) from the distribution to be made to the Debtholders under the Plans pending adjudication of the Dutch Proceedings and/or further order of this CCAA Court; and

AUTHORIZE SHB to remit any amount recovered in respect of the Pre-December 3 Expenses, up to an amount not exceeding \$2.1 million, to HCI as reimbursement for the Termination Amount.

THE WHOLE WITH COSTS.

MONTRÉAL, October 9, 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
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)

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

Petitioner

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

I, the undersigned, Nathalie Nouvet, lawyer, practicing at 1155 René-Lévesque Blvd. West, 40th Floor, in city and District of Montréal, Province of Quebec, H3B 3V2, solemnly affirm as follows:

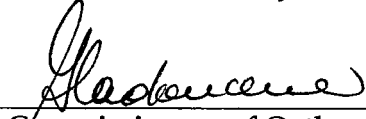
1. On October 9, 2013, at 4:38 A.M., I received an affidavit signed by Karel de Vries, Director of Stichting Homburg Bonds, in support of the *Motion for the Payment of the Fees and Expenses of Stichting Homburg Bonds and Other Relief*.
2. The above-mentioned affidavit was sent to Stikeman Elliott from France via email (email address: karelfjevries@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 October 9, 2013 from Karel de Vries.

Montréal, this 9th day of October, 2013



NATHALIE NOUVET
STIKEMAN ELLIOTT LLP
Attorneys for the Petitioner
Stichting Homburg Bonds

SOLEMNLY AFFIRMED before me in
Montréal, this 9th day of October 2013



Commissionner of Oaths



AFFIDAVIT

Je soussigné, Karel de Vries, homme d'affaires, exerçant ma profession à Prinsenhage 9, Vught 5263 CT, Pays-Bas, déclare solennellement ce qui suit:

1. Je suis un administrateur de Stichting Homburg Bonds.
2. Tous les faits allégués dans la requête intitulée *Motion for the Payment of the Fees and Expenses of Stichting Homburg Bonds and Other Relief* sont vrais.

EN FOI DE QUOI, J'AI SIGNÉ :


KAREL DE VRIES

Déclaré solennellement devant moi, à Grimaud (Var)
ce 9 jour d'octobre 2013

Vu pour la légalisation de la signature
de Karel de VRIES
apposée

ci dessus
GRIMAUD, le 9 octobre 2013

Le Maire

L'Agent délégué C. Faure



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

To: Jerry Hoff
HOFF ADVOCATEN N.V.
Florapark 4 2012 HK Haarlem
The Netherlands
Attorneys for Homburg Canada
Inc.

TAKE NOTICE that the *Motion for the Payment of the Fees and Expenses of Stichting Homburg Bonds and Other Relief* 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, on **November 27, 2013**, and at a time and a room to be determined by Mr. Justice Gouin.

DO GOVERN YOURSELVES ACCORDINGLY.

MONTRÉAL, October 9, 2013



STIKEMAN ELLIOTT LLP
Attorneys for the Petitioners

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

N° : 500-11-041305-117

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

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.
- and-
- NORTH CALGARY LAND LTD.

Debtors

-and-
THE ENTITIES LISTED ON ANNEX I

Mises-en-cause

-and-
SAMSON BELAIR/DELOITTE & TOUCHE INC.

Monitor

-and-
STICHTING HOMBURG BONDS

BS0350

Petitioner
File: 131425-1001

MOTION FOR THE PAYMENT OF THE FEES AND EXPENSES OF
STICHTING HOMBURG BONDS AND OTHER RELIEF

ORIGINAL

Mme Nathalie Nouvet (514) 397-3128
Fax: (514) 397-3583

STIKEMAN ELLIOTT
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