CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No.: 500-11-038474-108

SUPERIOR COURT
(Commercial Division)
(sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended)

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

WHITE BIRCH PAPER HOLDING COMPANY *ET AL.*
Debtors

-and-

STADACONA LIMITED PARTNERSHIP *ET AL.*
Mises-en-cause

-and-

ERNST & YOUNG INC.
Monitor

-and-

UNIFOR and its local sections 11, 137, 200, 250, 299, 625, 627, 905 et 1104
Mis-en-cause

-and-

REGROUPEMENT DES EMPLOYÉS RETRAITÉS DE LA WHITE BIRCH – STADACONA
Mis-en-cause

-and-

NORMANDIN BEAUDRY, ACTUAIRES CONSEIL INC., in its capacity as provisional administrator of seven pension plans
Mis-en-cause

-and-

BD WHITE BIRCH INVESTMENT LLC
STADACONA WB LIMITED PARTNERSHIP
F.F. SOUCY WB LIMITED PARTNERSHIP
PAPIER MASSON WB LIMITED PARTNERSHIP

Petitioners

-and-

CREDIT SUISSE AG, TORONTO BRANCH, in its capacity as agent for the former first lien lenders

Intervener

DECLARATION OF INTERVENTION TO THE MOTION FOR DIRECTIONS AND FOR DECLARATORY JUDGMENT AND CONTESTATION OF THE RELATED CROSS-CLAIMS
(Relating to proceedings #241 and #245 of the *plumitif*)
(Articles 208 and following of the *Code of Civil Procedure*, CQLR, c C-25)

TO THE HONOURABLE JUSTICE ROBERT MONGEON OF THE SUPERIOR COURT, SITTING IN COMMERCIAL DIVISION, IN THE DISTRICT OF MONTRÉAL, THE INTERVENOR CREDIT SUISSE AG, TORONTO BRANCH RESPECTFULLY SUBMITS AS FOLLOWS:

I. INTRODUCTION

1. Credit Suisse AG, Toronto Branch ("**Credit Suisse**") is acting as agent for a group of creditors (formerly the first lien term loan lenders) of the Debtors;

2. Credit Suisse is filing this proceeding in support of the *Motion for directions and for declaratory judgment* ("**Motion for Declaratory Judgment**") of the Petitioners BD White Birch Investment LLC ("**BDWBI**"), Stadacona WB Limited Partnership, F.F. Soucy WB Limited Partnership and Papier Masson WB Limited Partnership, in the Court record, and in contestation of the related cross-claims (the "**Cross-Claims**") of the Mis-en-causes Normandin Beaudry, Actuaires Conseil Inc., in its capacity as provisional administrator of seven pension plans ("**Normandin Beaudry**") and the Regroupement des employés retraités de la White Birch – Stadacona (the "**RERWBS**" and, jointly with Normandin Beaudry, the "**Cross-Claimants**");

3. For the reasons given below, Credit Suisse hereby requests that this Honourable Court:

   a) Grant the Motion for Declaratory Judgment and dismiss the related contestations; and

   b) Dismiss the Cross-Claims.

II. BACKGROUND

4. On February 24, 2010, this Honourable Court issued an Initial Order pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, in respect of the Debtors (the "**Initial Order**"). This Order, *inter alia*, suspended special payments to the Debtors' pension plans. Further background appears from paragraphs 2 to 8 of the Motion for Declaratory Judgment, which are incorporated herein by reference;

5. In June 2010, Credit Suisse filed a proof of claim asserting a secured claim against the Debtors in the amount of approximately US$ 444 million. With Credit Suisse's consent, a portion of that debt was used by BDWBI to "credit bid" for the purchase of substantially all of the Debtors' assets (the "**Credit Bid**");

6. Credit Suisse remains among the largest creditors of the Debtors. If all known Canadian creditors were to rank *pari passu*, Credit Suisse believes that it stands to receive approximately 40% (without admission and without consideration of any outstanding allocation issues relating to the Canadian estates) of the sums available;

7. Credit Suisse's position is threatened by the Cross-Claims, which could result in the complete absence of recovery on its outstanding claim;

8. The Cross-Claims could also result in the creation of a situation giving rise to arguments pursuant to which the Credit Bid that Credit Suisse relied upon in the context of the transaction of sale of the Debtors' assets, as well as the allocation and payments resulting therefrom, could retroactively be put in jeopardy, to the prejudice of Credit Suisse and the lenders it represents;

9. In addition, the granting of the Cross-Claims could change the factual basis on which the parties have relied in the context of ongoing Estate Allocation (as defined below) negotiations, and derail such negotiations as well as the potential to reach agreement in connection therewith;

III. 2012 JUDGMENT

10. On April 20, 2012, Honourable Justice Mongeon rendered a judgment in the present matter, in the Court record, to the effect, *inter alia*, that certain claims of the union, pension committees and the RERWBS for special payments did not benefit from any priority (the "**April 2012 Judgment**"). Further details appear from paragraphs 9 to 12, 14 and 15 of the Motion for Declaratory Judgment, which are incorporated herein by reference;

11. Credit Suisse supports BDWBI's position that the April 2012 Judgment is *res judicata* on the issue of whether the deemed trust can apply to unpaid special payments and the issue of their ranking as unsecured claims against the Debtors;

12. The April 2012 Judgment is a judgment relating to proceedings to which all relevant parties where called, and to which all relevant parties participated and debated the issues being raised before the Court;

13. The April 2012 Judgment is a final judgment, which was only capable of being reviewed by the Court of Appeal if an appeal had been maintained or leave sought to do so. Although a motion for leave to appeal was initially filed by the RERWBS, it was later abandoned. As such, the April 2012 Judgment is not subject to being reviewed, rescinded, corrected, adapted or otherwise modified by this Court;

14. Today, approximately two years after the April 2012 Judgment was rendered, the Cross-Claimants, which were all parties to the proceedings and debates leading to the April 2012 Judgment, are collaterally attacking it through their contestations of the Motion for Declaratory Judgment and their Cross-Claims;

15. Credit Suisse draws the Court's attention to the following provisions of the April 2012 Judgment, which, amongst others, are in direct contradiction with the conclusions of the Cross-Claims:

> *"[246] En effet, nous avons vu que les cotisations d'équilibre ne font l'objet d'aucune fiducie réelle opposable à la Débitrice ou aux créanciers de cette dernière. Nous avons aussi vu que l'article 49 LRCR ne créait aucune charge particulière de la nature d'une charge flottante grevant les actifs de la compagnie. Somme toute, les cotisations d'équilibre ne sont ni des créances garanties, privilégiées ou autrement prioritaires et il n'y a aucune justification de les traiter différemment des autres dettes pré-ordonnance initiale de White Birch.*
>
> *[247] Agir autrement serait donner aux régimes de retraite un avantage indu sur les autres créanciers de White Birch dont les créances antérieures au 24 février 2010 sont gelées. (...) "*

16. In the Cross-Claims, the same parties are alleging the same body of law and seeking the same remedies with respect to the same issues which were debated before this Court and decided in the April 2012 Judgment;

17. Credit Suisse submits that this Honourable Court should dismiss the contestations and Cross-Claims on the basis of *res judicata* (chose jugée);

IV. RELIANCE ON THE INITIAL ORDER AND THE 2012 JUDGMENT

18. Under reserve of the preceding arguments relating to *res judicata*, at all relevant times, Credit Suisse has conducted itself on the basis that judgments of this Honourable Court that were not appealed, or in respect of which appeals were unsuccessful, were at least *chose décidée* ("decided issue") and could be relied upon. The consequences of this are well stated in the April 2012 Judgment, the relevant excerpt of which is quoted at paragraph 15 of the Motion for Declaratory Judgment, which is incorporated herein by reference. Changing such judgments now would be prejudicial to Credit Suisse;

19. More specifically, as a result of the Initial Order and the claims process that ensued, a portion of Credit Suisse's secured claim was used by BDWBI for the Credit Bid. This eventually resulted in BDWBI acquiring the said assets, notably through the Credit Bid, the sale only having closed after the April 2012 Judgment had been rendered;

20. Credit Suisse and BDWBI (as assignee of a portion of the secured claim) relied in good faith on the April 2012 Judgment for confirmation that the Credit Bid portion of the consideration for the Debtors' assets was valid. The transaction closed on this basis; it cannot practically be undone;

21. In general, a claim may be subject to credit bidding by a first ranking creditor where prior ranking creditors have been paid out. The Cross-Claims may indirectly be putting into question whether the Credit Bid, and the allocation resulting therefrom, was actually valid, creating detrimental uncertainty on a transaction which has been consummated;

22. Even though Credit Suisse makes no admission and reserves all of its rights with respect to such eventual arguments, it remains that an order of this Court which would grant the Cross-Demands would create a situation where different interested parties could retroactively call into question the validity of the Credit Bid and of the resulting allocation, including as a result of the retroactive determination that certain claims have priority over the secured claims of Credit Suisse which were subject to the Credit Bid;

23. Such a situation would be prejudicial, detrimental and could put Credit Suisse in a position where it would have to retroactively defend transactions and the resulting legal and factual effects thereof in light of a subsequent modification of the legal and factual landscape on which Credit Suisse relied to enter into those transactions. Credit Suisse will not have any control over of the effects of such modifications or the interpretation thereof by the various parties;

24. In addition to the Credit Bid issue, as a major creditor of the Debtors, Credit Suisse's main interest is the ultimate dividend it will receive from the estate;

25. Assets sold as part of the 2012 transaction were located in Canada and the United States. There have been extensive negotiations to arrive at an agreement on allocation between creditors in both countries (the "**Estate Allocation**"), the whole with a goal of avoiding protracted litigation. Further details appears from paragraphs 32 to 36 of the Motion for Declaratory Judgment, which are incorporated herein by reference;

26. Credit Suisse is concerned that, should the Cross-Claims be granted, there being no recovery for any unsecured creditor in Canada, all the benefits of over a year and a half of negotiation would be lost. At a minimum, this would result in a severe setback in the timing of any distribution. It is possible that this would lead to the absence of an agreement on Estate Allocation, the only other avenue being complex and costly litigation on allocation between Canada and the United States, and potentially between the estates of the different Canadian Debtors. The entire cost of this litigation would be borne by creditors, which is an undesirable outcome for all parties;

27. For the foregoing reasons, the April 2012 Judgment was a key element for both the Credit Bid and the Estate Allocation negotiations, on which Credit Suisse, and most or all other parties, relied in good faith;

28. In its Cross-Claim, Normandin Beaudry undertakes not to file amended proofs of claim for special payments in respect of unionized employees and retirees, and of non

unionized employees. It thus purports to limit what it alleges to be a claim subject to a deemed trust to approximately $16 million;

29. However, Credit Suisse is informed that the amount of the unpaid special payments relating to the pension plan (the "**Special Payments**") exceeds $80 million;

30. The request made in the Cross-Claims relate to all the Special Payments, and not a portion thereof, and may not limit the effect of an eventual declaration that the Special Payments have a preferred status to any specific portion of the Special Payments or to any specific groups or individuals to which they relate;

31. To wit, in its Cross-Claim, the RERWBS has adopted a contradictory position for the unionized retirees of the Stadacona plant, seeking to file an amended proof of claim for Special Payments on their behalf;

32. As a result of the above, Credit Suisse believes that any declaration by this Court that the Special Payments enjoy a preferred status may result in claims by various parties which would seek payment of the Special Payments to the exclusion and prejudice of the unsecured creditors, including Credit Suisse;

33. Again, Credit Suisse would not, following such a determination by the Court, control the effects thereof or the interpretations of the various parties affected, including, without limitation, as to arguments relating to the powers and capacity of any representative to validly renounce claims, priorities and distributions;

V. SUBSIDIARILY, THE 2012 JUDGMENT IS CORRECT

34. Should this Honourable Court conclude that the April 2012 Judgment is not *res judicata*, and that Credit Suisse's and other parties' reliance thereon and on the Initial Order does not give these orders the authority of *chose décidée*, Credit Suisse respectfully submits subsidiarily that the April 2012 Judgment, and specifically its conclusions, should stand;

35. On January 24, 2014, in the wholly separate matter of Timminco Limited and Bécancour Silicon Inc. (Superior Court, District of Montréal, no. 500-11-043844-121), this Court rendered a judgment (the "**Timminco Judgment**") bearing upon arguments similar to those raised in the debate which lead to the April 2012 Judgment. Further details appear from paragraphs 45 and 46 of the Motion for Declaratory Judgment, which are incorporated herein by reference;

36. The Cross-Claimants are now alleging that the judgment rendered by this Court in the Timminco Judgment should in essence replace the April 2012 Judgment. Credit Suisse submits that such a position is unfounded and that, to the extent that the two judgments decided the same issues, the April 2012 judgment is correct;

VI. CONCLUSION

37. Credit Suisse has a clear interest to bring forth this intervention and contestation because it stands to be the most adversely affected party should the Motion for Declaratory Judgment be dismissed and the Cross-Claims granted;

38. Given the foregoing reasons, Credit Suisse hereby requests that this Honourable Court receive its intervention, grant the Motion for Declaratory Judgment, dismiss the related contestations and dismiss the Cross-Claims.

WHEREFORE, MAY IT PLEASE THIS HONOURABLE COURT TO:

1. **RECEIVE** the present *Declaration of intervention to the Motion for directions and for declaratory judgment and contestation of the related cross-claims* (the "**Intervention and Contestation**");

2. **DECLARE** that all capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Intervention and Contestation;

3. **DECLARE** that the April 2012 Judgment is a final judgment and that the content thereof is *res judicata* (chose jugée);

4. **DECLARE** that, notwithstanding the judgment rendered by this Court on January 24, 2014 in the matter of Timminco Limited and Bécancour Silicon Limited (Superior Court, Commercial Division, District of Montréal, no. 500-11-043844-121) or any subsequent ruling in appeal thereof, the April 2012 Judgment and the provisions of the Initial Order, in particular paragraphs 20 and 21 thereof, remain in full force and effect;

5. **DISMISS** the contestations of Normandin Beaudry and of the RERWBS to the Motion for Declaratory Judgment;

6. **DISMISS** all Cross-Claims of Normandin Beaudry and of the RERWBS;

7. Subsidiarily, **DECLARE** that the Special Payments of the Debtors for the period commencing on February 24, 2010 and ending on September 12, 2012, are not subject to a deemed trust and are unsecured claims against the respective Debtors;

8. **THE WHOLE** with costs against Normandin Beaudry and the RERWBS.

Montréal, April 4, 2014.

Osler, Hoskin & Harcourt LLP

OSLER, HOSKIN & HARCOURT LLP
Attorneys for Credit Suisse AG, Toronto Branch

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