CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No.: **500-11-038474-108**

S U P E R I O R   C O U R T
(Commercial Division)
The *Companies' Creditors Arrangement Act*

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

WHITE BIRCH PAPER HOLDING COMPANY

-and-

WHITE BIRCH PAPER COMPANY

-and-

STADACONA GENERAL PARTNER INC.

-and-

BLACK SPRUCE PAPER INC.

-and-

F.F. SOUCY GENERAL PARTNER INC.

-and-

3120772 NOVA SCOTIA COMPANY

-and-

ARRIMAGE DE GROS CACOUNA INC.

-and-

PAPIER MASSON LTÉE

Debtors

-and-

ERNST & YOUNG INC.

Monitor

-and-

STADACONA LIMITED PARTNERSHIP

-and-

F.F. SOUCY LIMITED PARTNERSHIP

-and-

F.F. SOUCY, INC. & PARTNERS, LIMITED PARTNERSHIP

Mises-en-Cause

-and-

BD WHITE BIRCH INVESTMENT LLC

Intervening Party

INTERVENTION AND MEMORANDUM OF ARGUMENTS OF BD WHITE BIRCH INVESTMENT LLC

TO THE HONOURABLE JUSTICE ROBERT MONGEON, J.S.C., THE INTERVENING PARTY RESPECTFULLY SUBMITS THE FOLLOWING:

I. BACKGROUND

1. On February 24, 2010, this Honourable Court issued an order (the "**Initial Order**") extending the protection of the *Companies' Creditors Arrangement Act* ("**CCAA**") to the Debtors and the Mises-en-Cause (together with Bear Island (defined below), the "**WB Group**").

2. Pursuant to the Initial Order, Ernst & Young Inc. was appointed as monitor of the Debtors and the Mises-en-Cause (the "**Monitor**") and a stay of proceedings was granted. The stay of proceedings has been extended to October 15, 2010.

3. On February 24, 2010, Bear Island Paper Company, L.L.C. ("**Bear Island**") filed a voluntary petition for relief under chapter 11 ("**Chapter 11**") of title 11 of the United States Code (the "**Bankruptcy Code**") and commenced Chapter 11 proceedings before the United States Bankruptcy Court for the Eastern District of Virginia (the "**US Bankruptcy Court**").

4. On April 28, 2010, the US Bankruptcy Court issued an order approving a Sale and Investor Solicitation Process (the "**SISP**") for the sale of all or substantially all of the WB Group's assets (the "**Assets**").

5. On April 29, 2010, this Honourable Court issued an order approving the SISP (together with the US Order, the "**SISP Orders**"). A copy of this Honourable Court's SISP Order is appended hereto as **Exhibit I-1**.

6. Pursuant to the SISP, on August 10, 2010, the Sellers entered into that certain Asset Sale Agreement (the "**Sale Agreement**") by and between the Sellers and BD White Birch Investment LLC ("**BDWB**").[1] Under the Sale Agreement, BDWB would acquire the Assets and would (a) assume from the Sellers and become obligated to pay, perform and discharge the Assumed Liabilities, (b) pay to the Sellers $90 million in cash, (c) pay the Reserve Payment Amount, (d) pay all requisite filing fees with respect to any filing or application of obtaining Regulatory Approvals and (e) deliver the Wind-Down Amount.

7. Pursuant to the SISP, the WB Group then filed motions with the US Bankruptcy Court and this Honourable Court for orders approving, *inter alia*:

   i) the Sale Agreement;

   ii) BDWB as the Stalking Horse Bidder; and

   iii) the Bidding Procedures.

8. On September 1, 2010, the US Bankruptcy Court issued an order approving the Bidding Procedures and approving BDWB as the Stalking Horse Bidder pursuant to the Sale Agreement.

9. On September 10, 2010, this Honourable Court issued an order approving the Bidding Procedures (with certain modifications that were accepted by BDWB) (the "**Amended Bidding Procedures**") and approving BDWB as the Stalking Horse Bidder pursuant to the Sale Agreement (with certain modifications that were accepted by BDWB) (together with the US Order, the "**Bidding Procedures Orders**"). A copy of the Amended Bidding Procedures approved by this Honourable Court is appended hereto as **Exhibit I-2**.

10. Pursuant to the Amended Bidding Procedures, all Phase 1 Qualified Bidders (as defined therein) had until September 17, 2010 to submit a qualified bid. If qualified bids were received, the WB Group would hold an auction for the Assets on September 21, 2010 at 10:00 A.M. in New York (the "**Auction**").

11. On September 17, 2010, Sixth Ave Investment Co., LLC ("**Sixth Avenue**") an entity the investors of which were 5 holders of debt under the First Lien Credit Agreement (as herein defined), (collectively the "**Sixth Avenue Minority Lenders**") submitted a bid that was deemed to be a qualified bid (the "**Sixth Avenue Bid**"). A copy of the Sixth Avenue Bid is appended hereto as **Exhibit I-3**. The Sixth Avenue Bid was the only competing bid received prior to the September 17, 2010 bid deadline established by the Amended Bidding Procedures.

[1] Capitalized terms used herein but not defined have the meanings set forth in the Sale Agreement.

12. On September 21, 2010, the Sellers and the Monitor commenced the Auction for the sale of the Assets. At the conclusion of the Auction, the Sellers and the Monitor selected a $172.5 million bid from BDWB as the highest and best bid for the Assets (the "**Winning Bid**").

13. BDWB's Winning Bid consists of (i) $90 million of cash allocated to the current assets of the Sellers, (ii) $4.5 million of cash allocated to the Sellers' fixed assets and (iii) a $78 million credit bid under the First Lien Credit Agreement allocated to the Sellers' Canadian fixed assets, which are collateral for the First Lien Debt (as discussed and defined below).

14. At the Auction, counsel for Sixth Avenue Minority Lenders recorded certain objections to BDWB's ability to credit bid in respect of the Fixed Assets under the First Lien Credit Agreement as part of its Winning Bid. This *Intervention and Memorandum of Arguments* responds to those objections.

II. CREDIT BACKGROUND

15. On April 8, 2005, certain entities of the WB Group entered into a credit agreement with, *inter alia*, Credit Suisse AG, Cayman Islands Branch and Credit Suisse AG, Toronto Branch (collectively, the "**Agents**"), which was amended and restated on January 27, 2006 and on May 8, 2007 (the "**First Lien Credit Agreement**"). A copy of the First Lien Credit Agreement is attached hereto as **Exhibit I-4**.

16. As at the date of commencement of these CCAA proceedings, the Sellers were indebted to the First Lien Lenders under the First Lien Credit Agreement in the principal amount of approximately $428 million, plus approximately $9.8 million in interest (the "**First Lien Debt**"). The Sellers' obligations under the First Lien Debt are secured by perfected first priority liens on all of the Sellers' fixed assets (the "**Fixed Assets**" or the "**Collateral**"). Certain of the Sellers' other assets are unencumbered (the "**Current Assets**"). *Petition for the Issuance of an Initial Order*, dated February 24, 2010 at para. 78, and *Affidavit* of Jay A. Epstein, Vice President – Finance, Treasurer and Secretary of White Birch Paper Company, dated February 23, 2010, filed in support thereof. The sale involves both the Sellers' Fixed Assets and Current Assets.

17. BDWB is comprised of Black Diamond Capital Management, LLC and its affiliates ("**Black Diamond**"), Credit Suisse Loan Funding LLC and its affiliates ("**Credit Suisse**") and Caspian Capital Advisors, LLC and its affiliates ("**Caspian**"). Black Diamond, Credit Suisse and Caspian are all First Lien Lenders under the First Lien Credit Agreement (collectively, the **"Majority First Lien Lenders**") that hold, in the aggregate, approximately 65.5% of the First Lien Debt. *Report of the Monitor dated August 10, 2010* at para. 23.

18. Accordingly, the Majority First Lien Lenders constitute "**Majority Lenders**" as that term is defined in Section 1.1 of the First Lien Credit Agreement. *First Lien Credit Agreement*, Exhibit I-4, § 1.1 at 21.

19. Sixth Avenue Minority Lenders is part of a group of First Lien Lenders under the First Lien Credit Agreement that hold a minority position in the First Lien Debt. The Sixth Avenue Bid suggested that they hold approximately 10% of the First Lien Debt.

III. BACKGROUND TO CREDIT BIDDING

a) The Right to Credit Bid under the SISP and the Amended Bidding Procedures:

20. The right to credit bid at the Auction was explicitly recognized and authorized under the SISP, as approved by both the US Bankruptcy Court and this Honourable Court in the SISP Orders:

> "*24. Notwithstanding anything herein to the contrary, including without limitation, the bidding requirements herein, the agent under the White Birch DIP Facility (the "DIP Agent") and the agent to the WB Group's first lien term loan lenders (the "First lien Term Agent"), on behalf of the lenders under White Birch DIP Facility and WB Group's first lien term loan lenders, respectively, shall be deemed Qualified Bidders and any bid submitted by such agents on behalf of the respective lenders in respect of all or a portion of the Assets shall be deemed both Phase 1 Qualified Bids and Phase 2 Qualified Bids. The DIP Agent and First Lien Term Agent, on behalf of the lenders under the White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be permitted, in their sole discretion, to credit bid up to the full amount of any allowed secured claims under the White Birch DIP Facility and the first lien term loan agreement, respectively, to the extent permitted under section 363(k) of the Bankruptcy Code and other applicable law.*"

SISP, Exhibit I-1, para. 24 at page 10 (our emphasis).

21. The right to credit bid at the Auction was again explicitly recognized and authorized under the Amended Bidding Procedures, as approved by both the US Bankruptcy Court and this Honourable Court in the Bidding Procedures Orders:

> "*Credit Bidding*
>
> *Notwithstanding anything herein to the contrary, the applicable agent under the Credit Agreement and the applicable agent under the first lien Credit Agreement shall each be entitled to credit bid pursuant to section 363(k) of the Bankruptcy Code and other applicable law.*"

Amended Bidding Procedures, Exhibit I-1, at page 8 (our emphasis).

22. Sixth Avenue Minority Lenders did not appeal any of the SISP Orders or the Bidding Procedures Orders.

23. To the contrary, at page 2 of the Sixth Avenue Bid, Sixth Avenue Minority Lenders specifically reserved for itself the ability to credit bid under, *inter alia*, the First Lien Credit Agreement:

> "*In addition, the Buyer maintains the right to alter such formulation by including a credit bid under the First Lien Credit Agreement or on the DIP Credit Agreement (as defined in the Assets Sale Agreement).*"
>
> *Sixth Avenue Bid*, Exhibit I-3, at page 2.

24. The SISP, the Amended Bidding Procedures, the SISP Orders and the Bidding Procedures Orders clearly recognize and authorize the right to credit bid at the Auction.

25. By not appealing the SISP Orders or the Bidding Procedures Orders, and by reserving for itself the right to credit bid, Sixth Avenue Minority Lenders has acknowledged that parties had the right to credit bid at the Auction, and has waived any right to object to any such form of bidding by any other party.

26. Moreover, it is clear that Sixth Avenue Minority Lenders makes these objections at this time only in its capacity as a losing bidder and, as such, has no standing to do so. As described by Mr. Justice Gascon in a recent decision in the *Abitibi-Bowater* matter (2010 Q.C.C.S. 1742), "*there is a strong line of cases confirming that a "disgruntled bidder" has no standing to contest or oppose the approval of a sale*".

b) **<u>The Right to Credit Bid in a Sale Process under the CCAA</u>**

27. The ability to credit bid at the Auction under the terms of the Court-approved SISP and the Amended Bidding Procedures is consistent with CCAA precedent.

28. The ability to credit bid at an auction was recognized in the Quebec CCAA proceedings of *Maax Corporation* (S.C. Montreal, No. 500-11-033561-081, July 10, 2008, justice Buffoni) wherein the Quebec Superior Court (Commercial Division) approved the stalking horse bid, which was a secured credit bid. (See *Motion for Approval of the Sale of Assets and Vesting Order*, dated June 11, 2008 at para. 49(c), and *Sale and Vesting Order* dated July 10, 2008).

29. In a recent decision rendered in the matter of *Brainhunter* ((January 22, 2010), Ontario 09-8482-00CL (ON S.C. Commercial List)) the Ontario Superior Court of Justice (Commercial List) likewise recognized the ability of secured noteholders to credit bid at an auction, and confirmed that the amount of the credit bid was equal to the full face value of their notes:

> "*THIS COURT ORDERS that the secured subordinated promissory notes issued by Brainhunter Inc. (each a "Note" and together, the "Notes") which are subject to the Lock Up Agreement (as defined in the Horn Affidavit) shall be considered to represent "all indebtedness held by a particular class of creditors" for the purpose of the Auction Rules and in*

particular paragraph 9 thereof. Accordingly, the Monitor shall accept the tender of a Note and collectively the notes as the equivalent of tendering the like amount of cash and ascribe the full face value to any Note tendered by Zylog in partial satisfaction of the purchase price under any offer it may make at the Auction." (our emphasis)

30. The ability to credit bid at an auction was also recognized in the Bidding Procedures approved by the Ontario Superior Court of Justice (Commercial List) and the United States Bankruptcy Court for the District of Delaware in the cross-border CCAA and Chapter 11 proceedings of *Eddie Bauer* ((June 29, 2009), Ontario 09-8240-CL (ON S.C. Commercial List)).

c) Quebec Law Recognizes the Right to Credit Bid

31. Although this is a CCAA matter, the concept of credit bidding is also not foreign to Quebec law generally.

32. For example, and in addition to the *Maax* proceedings and to the SISP Orders and the Bidding Procedures Orders issued in this case by this Honourable Court, articles 689 and 730 of the *Code of Civil Procedure* dealing with the forced sale of immovables provide:

689. *The purchase price must be paid within five days, at the expiry of which time interest begins to run.*

Nevertheless, when the immovable is adjudged to the seizing creditor or any hypothecary creditor who has filed an opposition or whose claim is mentioned in the statement certified by the registrar, he may retain the purchase-money to the extent of his claim until the judgment of distribution is served upon him.

730. *A purchaser who has not paid the purchase price must, within 10 days after the judgment of homologation is transmitted to him, pay to the sheriff the amounts necessary to satisfy the claims which have priority over his own; if he fail to do so any interested party may demand the resale of the immovable upon him for false bidding.*

When the purchaser has fulfilled his obligation, the sheriff must give him a certificate that the purchase price has been paid in full."

(our emphasis)

689. *Le prix d'adjudication doit être payé dans les cinq jours, à l'expiration desquels les intérêts commencent à courir.*

Néanmoins, lorsque l'immeuble est adjugé au saisissant ou à un créancier hypothécaire qui a fait opposition, ou dont la créance est portée à l'état certifié par l'officier de la publicité des droits, l'adjudicataire peut retenir le prix jusqu'à concurrence de sa créance, et tant que ne lui a pas été signifié le jugement de distribution.

730. *L'acheteur qui n'a pas payé le prix d'adjudication doit, dans les 10 jours après que le jugement d'homologation lui a été transmis, verser au shérif les deniers nécessaires pour satisfaire aux créances préférées à la sienne; sur son défaut, une partie intéressée peut demander que l'immeuble soit revendu à sa folle enchère.*

Lorsque l'adjudicataire a satisfait à son obligation, le shérif est tenu de lui délivrer un certificat attestant que le prix d'adjudication a été intégralement payé.

(nos soulignés)

33. The possibility for a hypothecary creditor who purchases the hypothecated property to retain the purchase price to the extent of his secured claim is the functional equivalent of credit bidding in Quebec and is applied on a regular basis in judicial sales.

34. In their *Précis de procédure civile* (Denis Ferland et Benoît Emery, 4e éd., vol. 2, Cowansville, Édition Yvon Blais, 2003), Emery and Ferland commented as follows the possibility of a secured creditor to retain the purchase price:

> "*La loi prévoit donc que, lorsque l'immeuble est adjugé au saisissant ou à un créancier hypothécaire qui a fait opposition, ou dont la créance est portée à l'état certifié par l'officier de la publicité des droits, l'adjudicataire peut retenir le prix, y compris le prix minimum annoncé dans l'avis de vente (art. 670, al. 1, e), 688.1 C.p.c.), jusqu'à concurrence de sa créance et tant que ne lui a pas été signifié le jugement de distribution prévu à l'article 730 C.p.c. (art. 689, al. 2 C.p.c.). Il n'aura alors à payer, dans les cinq jours suivant la signification de ce jugement, que la différence entre le prix d'adjudication et le montant de sa créance pour satisfaire aux créances préférées à la sienne (art. 730, al. 1 C.p.c.). La Cour d'appel a déclaré, à ce sujet, que puisque le deuxième alinéa de l'article 689 C.p.c. est une exception à la règle du paiement lors de la vente par l'adjudicataire du prix minimal d'adjudication (art. 688.1, al. 1 C.p.c.) et à celle du paiement du solde du prix d'adjudication dans les cinq jours suivants (art. 689, al. 1 C.p.c.), il doit être interprété de façon restrictive. Le sens du mot «créance», contenu dans cet article, ne permet alors à l'adjudicataire de retenir que la partie de sa créance qui est colloquée ou susceptible de l'être, tout en tenant compte des priorités établies par la loi.*"
>
> (our emphasis)

35. In *Compagnie Montreal Trust v. Jori Investment inc.* (J.E. 80-220 (C.S.)), the honorable Justice Andre G. Biron confirmed the right of a hypothecary creditor to retain the purchase price:

> *"L'intimée est un créancier, dont la créance hypothécaire est enregistrée sur cet immeuble.*
>
> *Elle invoque donc les articles 689 et 730 C.P. pour justifier de son droit de retenir le prix et demander le rejet de la requête.*
>
>> ***689.*** *Le prix d'adjudication doit être payé dans les cinq jours, à l'expiration desquels les intérêts commencent à courir.*
>>
>> *Néanmoins, lorsque l'immeuble est adjugé au saisissant ou à un créancier hypothécaire qui a fait opposition, ou dont la créance est portée à l'état certifié par l'officier de la publicité des droits, l'adjudicataire peut retenir le prix jusqu'à concurrence de sa créance, et tant que ne lui a pas été signifié le jugement de distribution."*
>>
>> ***730.*** *L'acheteur qui n'a pas payé le prix d'adjudication doit, dans les 10 jours après que le jugement d'homologation lui a été transmis, verser au shérif les deniers nécessaires pour satisfaire aux*

> *créances préférées à la sienne; sur son défaut, une partie intéressée peut demander que l'immeuble soit revendu à sa folle enchère.*
>
> *Lorsque l'adjudicataire a satisfait à son obligation, le shérif est tenu de lui délivrer un certificat attestant que le prix d'adjudication a été intégralement payé."*

La lecture combinée de ces deux articles entraîne la conclusion que le créancier hypothécaire jouit du privilège de retenir le paiement, même s'il y a des créances qui sont préférées à la sienne, en vertu de la loi.

(…)

Ce privilège prévu à l'article 689 C.P. du Code actuel, existe depuis au moins 1867, alors que l'article correspondant était l'article 688."

(our emphasis)

36. The Québec Court of Appeal also confirmed that principle in *Eugène Marcoux Inc.* v. *Côté (1990) R.J.Q. 1221 (C.A.):*

> "*Cet article 690 C.P. démontre, à mon avis, que la créance de l'adjudicataire est autorisée à retenir en vertu du deuxième alinéa de l'article 689 ne correspond pas nécessairement à la totalité de sa créance hypothécaire.*
>
> *Le sens restreint qu'il convient de donner au mot « créance » de l'article 689 ne permet à l'adjudicataire de retenir que cette partie de sa créance hypothécaire qui est colloquée ou qui est susceptible de l'être en tenant compte des priorités établies par la loi.* "

d) **The Right to Credit Bid under US law**

37. The right to credit bid under US law is well established and both the SISP and the Amended Bidding Procedures explicitly recognized the right of qualified bidders to credit bid under section 363(k) of the Bankruptcy Code or other applicable law.

38. Section 363(k) of the Bankruptcy Code, *11 U.S.C. §§ 101 et seq.*, explicitly recognizes the right of secured parties to credit bid at a sale of secured property:

> "*(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of the property.*"

39. The First Lien Credit Agreement is governed by New York law. *First Lien Credit Agreement*, Exhibit I-4, § 10.11 at page 119.

e) **<u>The Right to Credit Bid under the First Lien Credit Agreement</u>**

40. Aside from being a recognized right under the Courts' Orders, and a recognized right as a matter of CCAA and US bankruptcy law, the right to credit bid is also provided for under the applicable debt and security documents themselves, to which all First Lien Lenders, including those in the Sixth Avenue Bid are also bound.

i) **Under the First Lien Credit Agreement itself**

41. The First Lien Credit Agreement states:

> *"Each Lender hereby irrevocably designates and appoints the Agents as the agents under this Agreement and the other Loan Documents<u>, and each Lender irrevocably authorizes each Agent, in such capacity, to take such action on its behalf under the provisions of this Agreement and the other Loan Documents</u> . . . ."*
>
> *First Lien Credit Agreement*, Exhibit I-4, § 9.1(a) at page 104 (our emphasis).[2]

42. Specifically, each lender under the First Lien Credit Agreement agreed to authorize the Agents to credit bid at a sale of the Collateral as a remedy upon an event of default and agreed to be bound by the actions of the Agents, as directed by the Majority Lenders.

43. Specifically, the First Lien Credit Agreement states that it is an event of default if:

> *Any Company Group Member shall commence any case, proceeding or other action (A) under any existing or future law of any jurisdiction, domestic or foreign, relating to bankruptcy, insolvency, reorganization or relief of debtors, seeking to have an order for relief entered with respect to it, or seeking to adjudicate it a bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, winding-up, liquidation, dissolution, composition or other relief with respect to it or its debts.*
>
> *Id.,* § 8(f)(i) at page 101.

44. If the aforementioned event of default occurs, which it has on account of the commencement of these proceedings, "*automatically the Commitments shall immediately terminate and the Loans hereunder (with accrued interest thereon) and all other amounts owing under this Agreement and the other Loan Documents shall immediately become due and payable*." *Id.*, § 8 at page 103 (our emphasis).

45. Upon the occurrence of any such event of default, the First Lien Credit Agreement expressly provides under section 9.5 that "*<u>[t]he Agents shall take</u>*

[2] The "Loan Documents" are defined in the First Lien Credit Agreement to include, collectively and among other things, (i) the First Lien Credit Agreement itself; (ii) that certain First Lien Security Agreement, dated as of April 8, 2005 between Bear Island Paper Company L.L.C. as Grantor and Credit Suisse First Boston as US Collateral Agent (the "**US First Lien Security Agreement**") and (iii) all of the Canadian security agreements. See § 1.1 at page 29.

such actions with respect to such Default or Event of Default as shall be reasonably directed by the Majority Lenders *(or, if so specified by this Agreement, all Lenders or any other instructing group of Lenders specified by this Agreement*)." *Id.*, § 9.5 at 106 (our emphasis).

46. Section 10.1 of the First Lien Credit Agreement sets forth those circumstances where unanimity, or some consent different than the consent of Majority Lenders, is required. *Id.*, § 10.1 at pages 109-111. Directing the Agents to credit bid for the Collateral does not constitute an amendment, supplement, or modification of the First Lien Credit Agreement and is not among the actions set forth in section 10.1 that require unanimity or something other than the consent of the Majority Lenders. *See id*.

ii) **Under the US First Lien Security Agreement**

47. Various remedies available to the Agents upon an event of default are set out in the US First Lien Security Agreement. Among other remedies, the US First Lien Security Agreement expressly empowers the Agents to "*be the purchaser of any or all of the [Collateral] at any public or private . . . sale in accordance with the UCC* . . . ." A copy of the US First Lien Security Agreement is appended hereto as **Exhibit I-5**. See § 7.1(b) at page 24.

48. Moreover, under the US First Lien Security Agreement, the Agents "*shall be entitled, for the purposes of bidding and making settlement or payment of the purchase price for all or any portion of the [Collateral] sold at any such sale made in accordance with the UCC, to use and apply any of the Secured Obligations as a credit on account of the purchase price for any [Collateral] payment to the US Collateral Agent at such sale." Id.*

iii) **Under the Canadian Security Agreements**

49. Under the various Canadian security agreements (the "**Canadian First Lien Security Agreements**"), the Agents are likewise entitled to exercise any remedy available to them at law, once instructed by the Majority Lenders to do so under the terms of the First Lien Credit Agreement, as set out above.

50. For example, the General Security Agreements that were entered into in respect of the Canadian collateral for the First Lien Credit Agreement, a sample copy of which is attached hereto as **Exhibit I-6**, state that:

> *"Upon the happening of any event of default, the security granted herein shall become immediately enforceable and Secured Party may at its option declare this Security Agreement to be in default and may exercise any rights, powers or remedies available to Secured Party at law or in equity or under the Personal Property Security Act (Nova Scotia) (the " PPSA") or other applicable legislation*"
>
> See § 14 at page 6 (our emphasis).

51. Likewise, the deeds of hypothec that were entered into in respect of the Canadian collateral for the First Lien Credit Agreement, a sample copy of which

is attached hereto as **Exhibit I-7**, also provide for all of the foregoing by stating variously that:

> *"[t]he Agent may collect all Claims and may exercise all rights regarding Claims which are available to it."* § 4.1 at page 7 (emphasis ours)
>
> *"The Agent may further grant delays, take or abandon any Securities or any security, transact with debtors of the Claims, make compromises, grant releases and generally deal in its discretion with matters concerning all Claims, without the intervention or consent of the Grantor."* § 4.2 at page 7
>
> *"Upon the occurrence of an Event of Default, the Agent may request the immediate payment of all of the Secured Obligations, and may exercise all of the recourses to which it may be entitled in case of default under law or hereunder, including without limitation its hypothecary rights and those recourses set out in Article 11."* § 10 at page 11 (emphasis ours)
>
> *"In order to protect or to realize upon the Charged Property, the Agent shall be free, at the Grantor's expense, to do any or all of the following … (d) acquire the Charged Property."* § 11.3 at page 12 (emphasis ours)
>
> *"No Debentureholder may exercise individually any rights conferred on the Agent"* § 13.7 at page 18 (emphasis ours)
>
> *"The rights and remedies of the Agent pursuant to this Deed are cummulative and do not exclude any other rights and recourses which the Agent might have."* § 10 at page 7 (emphasis ours).

52. By the above-quoted language, the Loan Documents (being the First Lien Credit Agreement, the US First Lien Security Agreement and the Canadian First Lien Security Agreements) empower the Majority Lenders to direct the Agents to exercise any remedy available to them at law, including the right to credit bid for the Collateral as established under the applicable Orders in these proceedings, CCAA law, U.S. bankruptcy law and the debt documents themselves. This direction is binding upon all First Lien Lenders, including the minority, and the members of Sixth Avenue Minority Lenders as a part of that minority.

53. The entities that constitute BDWB are "Majority Lenders" under the First Lien Credit Agreement. It was therefore a proper exercise of their authority as Majority Lenders to direct the Agents (as they did in the manner more specifically detailed below) to credit bid for the Fixed Assets via their Direction Letter, and, by the terms of the First Lien Credit Agreement, the minority lenders, such as Sixth Avenue Minority Lenders, are bound by that result.

IV. THE BDWB CREDIT BID

54. As discussed above, the SISP and the Amended Bidding Procedures specifically recognized the Agents as "Qualified Bidders" and specifically recognized their right to credit bid.

55. As also discussed above, the terms of the First Lien Credit Agreement specifically authorize the Majority Lenders to direct the Agents to exercise any remedy available to them, including the right to credit bid. The terms of the First Lien Credit Agreement also provide that the Agent may appoint an agent or attorney-in-fact to carry out any of their duties. *First Lien Credit Agreement*, Exhibit I-4, § 9.2 at page 105.

56. On September 21, 2010, in advance of the Auction, the Majority First Lien Lenders sent a letter (the "**Direction Letter**") to the Agents (Credit Suisse AG, Cayman Islands Branch (f/k/a Credit Suisse, Cayman Islands Branch) and Credit Suisse AG, Toronto Branch (f/k/a Credit Suisse, Toronto Branch)), in their respective capacities as Administrative Agent, US Collateral Agent and Canadian Collateral Agent under the First Lien Credit Agreement and the other Loan Documents. A copy of the Direction Letter is appended hereto as **Exhibit I-8**. In the Direction Letter, the Majority First Lien Lenders directed the Agents in two ways.

57. First, the Majority First Lien Lenders directed the Agents to credit bid up to the full amount of the Sellers' outstanding debt under the First Lien Credit Agreement in order to acquire all or any portion of the Collateral at any sale thereof pursuant to the SISP Orders and the SISP procedures.

58. Second, the Majority First Lien Lenders directed the Agents to appoint BDWB as their agent and attorney-in-fact in order to make a credit bid at any sale of the Collateral.

59. The Agents countersigned the Direction Letter and thereby acknowledged that they were appointing BDWB as their agent with respect to the making of a credit bid. BDWB signed the Direction Letter and thereby accepted the appointment. Pursuant to the Direction Letter, the Majority First Lien Lenders directed the Agents to permit BDWB to credit bid without any further action on the part of the Agents. Thus, BDWB, in its capacity as an agent of the Agents, was authorized under the Loan Documents to credit bid the outstanding debt under the First Lien Credit Agreement in an effort to purchase the Collateral.

60. On September 21, 2010, the Sellers commenced the Auction for the sale of the Assets. The Assets being sold included both the Fixed Assets (the Collateral) and the Current Assets. At the conclusion of the Auction, the Sellers selected a $172.5 million bid from BDWB as the highest and best bid. BDWB's winning bid was comprised of a cash component for the Current Assets, a cash component intended to clear potential prior claims on the Fixed Assets, and a credit bid component for the Fixed Assets (the Collateral). Acting pursuant to the authority that the Agents conferred upon BDWB—at the direction of the Majority First Lien Lenders (that constitute "Majority Lenders" under the First Lien Credit Agreement)—BDWB credit bid $78 million of the First Lien Lenders' debt under the First Lien Credit Agreement for the Collateral.

61. At the auction, counsel to Sixth Avenue Minority Lenders recorded four objections with respect to BDWB's Winning Bid:

(i) the Agents lacked authority to credit bid under the Loan Documents;

(ii) the Agents lacked authority to credit bid under Quebec law; and

(iii) the Agents were not a "Qualified Bidder" as that term is defined the Bidding Procedures and thus were not permitted to participate or bid at the Auction; and

(iv) Sixth Avenue Minority Lenders, as a First Lien Lender, did not consent to the credit bid component of the BDWB Winning Bid.

62. For the reasons set forth above, and repeated and summarized below, none of these arguments have any merit and this Honourable Court should overrule these objections and approve the Sale and the Winning Bid, as selected by the Sellers and the Monitor.

V. SUMMARY OF RESPONSES TO SIXTH'S AVENUE'S OBJECTIONS

(i) the Agents lacked authority to credit bid under the Loan Documents:

63. The SISP and the Amended Bidding Procedures expressly recognized the Agents', and the lenders', right to credit bid.

64. Moreover, the Agents (and their sub-agent BDWB) were duly instructed to credit bid by the Majority Lenders under the terms of the First Lien Credit Agreement and the Direction Letter and have the right under the First Lien Debt documents and the Direction Letter to exercise any remedy available to them at law or otherwise, including to credit bid as permitted under the SISP and the Amended Bidding Procedures.

65. Accordingly, the Agents (and sub-agent BDWB) were fully authorized to credit bid under the Loan Documents.

(ii) the Agents lacked authority to credit bid under Quebec law:

66. The right to credit bid at the Auction convened in these CCAA proceedings is governed and granted by this Honourable Court's Orders which expressly recognized that right.

67. This recognition was consistent with the rights afforded in the debt documents themselves, CCAA precedent, including Quebec CCAA precedent, U.S. bankruptcy law and Quebec law generally, and nothing in Quebec law prohibits it.

68. Insofar as Sixth Avenue Minority Lenders argues that credit bidding is somehow impermissible under Quebec law, or the Agents somehow lacked authority to credit bid under Quebec law, Sixth Avenue Minority Lenders is implicitly saying that this Honourable Court has entered two illegal Orders – the SISP Order and

the Bidding Procedures Order – neither of which they appealed. Obviously, this Honourable Court has not entered any illegal Orders.

69. Furthermore, as discussed above, insofar as Sixth Avenue Minority Lenders itself attempted to credit bid at the Auction, Sixth Avenue Minority Lenders demonstrated that it does not believe that credit bidding is prohibited under Quebec law and should be estopped from arguing that credit bidding is impermissible.

(iii) The Agents were not a "Qualified Bidder" as that term is defined the Bidding Procedures and thus were not permitted to participate or bid at the Auction:

70. This objection, the Sixth Avenue Minority Lenders appear to be attempting to make the argument that the Agents were not "Qualified Bidders" and thus were not permitted to participate or bid at the auction in any capacity.

71. This objection has no merit. First, as set in paragraph 20 above, the Agents were expressly deemed to be Qualified Bidders under paragraph 24 of SISP.

72. Second, the Agents were clearly authorized by the SISP and the Amended Bidding Procedures to participate and credit bid at the Auction, and this was obviously on behalf of any DIP Lenders or First Lien Lenders who validly instructed them to do so, as BDWB, which was also expressly deemed to be a Qualified Bidder under the SISP, did.

73. Finally, the credit bid made at the Auction was in any event made by BDWD, who was (being the Purchaser) a recognized Qualified Bidder under the SISP, and was also the duly appointed sub-agent of the Agents, who were also Qualified Bidders and/or entitled to credit bid on behalf of the Purchaser, BDWB, at the Auction.

(iv) Sixth Avenue Minority Lenders, as a minority Lender, did not consent to the Credit Bid by BDWB and the Majority Lenders:

74. As discussed above, the rights and remedies of the Majority Lenders and any minority Lenders under the First Lien Debt are governed by the First Lien Credit Agreement, which provides that:

> "9.5 (…) The Agents shall take such action with respect to such Default or Event of Default as shall be reasonably directed by the Majority Lenders (…)"

75. The minority Lenders have therefore agreed to be bound by the instructions of the Majority Lenders to the Agents.

76. Any dispute which may arise between the Majority Lenders and the minority Lenders should not concern third parties or this Honourable Court. Moreover, the rights and remedies of the parties to the First Lien Credit Agreement are

governed by New York law (§ 10.11) and the parties have submitted to the non-exclusive general jurisdiction of the courts of the State of New York (§ 10.12).

77. New York case law has clearly confirmed in any event what the contract plainly states – that the minority agreed to be bound by the majority. See, for example, *In re GWLS Holdings, Inc.*, No. 08-12430, 2009 WL 453110 (Bankr. D. Del. Feb. 23, 2009), in which Judge Walsh held that a majority of lenders could direct the agent to credit bid for all first lien lenders, even absent unanimous consent. *GWLS*, No. 08-12430, 2009 WL 453110 at *6. Judge Walsh found that language in the collateral agreement that empowered the agent there to "dispose of or deliver the Collateral or any part thereof" allowed the agent to credit bid. *Id.* at 5. Judge Walsh further found that the agent was able to credit bid the dissenting lender's claim. *Id*. at 6.

78. Like the agreement in *GWLS*, the Loan Documents here empower the Majority Lenders to direct the Agents to exercise remedies upon an event of default. Specifically, the Loan Documents empowered the Majority First Lien Lenders, as Majority Lenders, to direct the Agents to credit bid. Just as Judge Walsh of the United Stated Bankruptcy Court for the District of Delaware rejected the objection of the dissenting creditor in *GWLS*, so too should this Court reject any such objection by Sixth Avenue Minority Lenders or others.

79. See also *In re Chrysler, LLC*, 576 F.3d 108, 119 (2d Cir. 2009) (agreeing with the bankruptcy court's ruling that "although the [objecting parties] did not themselves consent to the release, consent was validly provided by the collateral trustee, who had authority to act on behalf of all first lien credit holders"); and *In re Metaldyne Corp.*, 409 B.R. 671, 679 (Bankr. S.D.N.Y. 2009) ("[N]othing in the the agreements prohibits the Agent from exercising rights that are consistent with § 363(k) of the Bankruptcy Code.").

80. In any event, Sixth Avenue Minority Lenders has no proper cause to object. The First Lien Credit Agreement is a multi-lender, syndicated loan facility. The participants thereunder are sophisticated economic actors that joined the syndicate knowing that the Loan Documents empower Majority Lenders (subject to certain limited exceptions that are not relevant here) to administer the loan and the Loan Documents. The Loan Documents require unanimity for certain things, but directing the agent to credit bid at a sale of the Collateral upon an event of default is not one them. Quite simply, there is no basis for a minority First Lien Lender to complain when the Majority Lenders exercise the authority that the Loan Documents expressly grant them and direct the Agents to credit bid for the collateral in a sale in an auction where the Courts have long recognized the right of parties to credit bid.

81. Sixth Avenue Minority Lenders makes these objections as a disgruntled bidder. The objections have no merit and Sixth Avenue Minority Lenders has no standing to make them in any event.

CONCLUSION

82. By the present Intervention and Memorandum of Argument, BDWB supports the *Motion to Approve the Sale of Substantially all the WB Group's Assets.*

83. BDWB, as the Stalking Horse Bidder and as the bidder who submitted the Winning Bid at the Auction, has the legal interest to formally intervene in the present proceedings in response to these objections and related matters.

84. BDWB's Winning Bid was submitted in accordance with all of the requirements of the SISP and the Amended Bidding Procedures and was duly selected by the Sellers and the Monitor as the "highest and best bid" submitted at the Auction.

WHEREFORE, MAY IT PLEASE THE COURT TO:

GRANT the present Intervention and Memorandum of Arguments;

GRANT the Motion to Approve the Sale of Substantially all the WB Group's Assets;

DISMISS any contestation of said Motion;

THE WHOLE with costs against any contesting party.

Toronto, September 23, 2010

Goodmans

GOODMANS LLP
Co-Counsel for BD White Birch Investment LLC

Montréal, September ~~23,~~ 2010

Lavery de Billy

LAVERY, DE BILLY
LIMITED LIABILITY PARTNERSHIP
Co-Counsel for BD White Birch Investment LLC

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No.: **500-11-038474-108**

S U P E R I O R C O U R T
(Commercial Division)
The *Companies' Creditors Arrangement Act*

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

WHITE BIRCH PAPER HOLDING COMPANY

-and-

WHITE BIRCH PAPER COMPANY

-and-

STADACONA GENERAL PARTNER INC.

-and-

BLACK SPRUCE PAPER INC.

-and-

F.F. SOUCY GENERAL PARTNER INC.

-and-

3120772 NOVA SCOTIA COMPANY

-and-

ARRIMAGE DE GROS CACOUNA INC.

-and-

PAPIER MASSON LTÉE

Debtors

-and-

ERNST & YOUNG INC.

Monitor

-and-

STADACONA LIMITED PARTNERSHIP

-and-

F.F. SOUCY LIMITED PARTNERSHIP

-and-

F.F. SOUCY, INC. & PARTNERS, LIMITED PARTNERSHIP

Mises-en-Cause

-and-

BD WHITE BIRCH INVESTMENT LLC

Intervening Party

LIST OF EXHIBITS

EXHIBIT I-1:	Order dated April 29, 2010 by Justice Robert Mongeon approving the SISP;
EXHIBIT I-2:	Order dated September 10, 2010, by Justice Robert Mongeon and Amended Bidding Procedures;
EXHIBIT I-3:	Qualified bid submitted on September 17, 2010 by Sixth Ave Investment Co. LLC ;
EXHIBIT I-4:	Credit Agreement dated April 8, 2005, between certain entities of the WB Group with, inter alia, Credit Suisse AG, Cayman Islands Branch and Credit Suisse AG, Toronto Branch, which was amended and restated on January 27, 2006 and on May 8, 2007;
EXHIBIT I-5:	First Lien Security Agreement dated April 8, 2005 between Bear Island Paper Company L.L.C. and Crédit Suisse First Boston;

EXHIBIT I-6:	Sample General Security Agreement entered into in respect of the Canadian collateral for the First Lien Credit Agreement;
EXHIBIT I-7:	Sample deed of hypothec entered into in respect of the Canadian collateral for the First Lien Credit Agreement;
EXHIBIT I-8:	Direction Letter dated September 21, 2010, sent by the Majority First Lien Lenders to the Agents (Credit Suisse AG, Cayman Islands Branch (f/k/a Credit Suisse, Cayman Islands Branch) and Credit. se AG, Toronto Branch (f/k/a Credit Suisse, Toronto Branch).

Toronto, September 23, 2010

Goodmans

GOODMANS LLP
Co-Counsel for BD White Birch Investment LLC

Montreal, September 23, 2010

Lavery de Billy

LAVERY, DE BILLY
LIMITED LIABILITY PARTNERSHIP
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