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COURT FILE NUMBER	1703-12327
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED
	AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF 667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD., 1919209 ALBERTA LTD. AND CANADA NORTH GROUP LP HOLDINGS LTD.
DOCUMENT	**BRIEF OF ARGUMENT OF THE APPLICANTS, 726 REMOTE ACCOMMODATIONS, LTD., 726 MODULAR FINANCE LTD., AND RELIANT ASSET MANAGEMENT, LLC**
	RE AN APPLICATION FOR A DECLARATION OF OWNERSHIP AND PRIORITY IN RESPECT OF CERTAIN EQUIPMENT
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**JENSEN SHAWA SOLOMON DUGUID HAWKES LLP** Barristers 800, 304 8th Avenue SW Calgary, Alberta T2P 1C2 Christa Nicholson Zao Han Phone: 403-571-1053 Fax: 403-571-1528 File: 11396-384

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I. INTRODUCTION AND SUMMARY OF ISSUES

1. Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to them in the Application filed November 28, 2018 and amended December 20, 2018 (the "**726 Application**") by 726 Remote Accommodations, Ltd., 726 Modular Finance Ltd., and Reliant Asset Management, LLC (collectively, the "**726 Group**" or "**726**").

2. A summary of the issues to be addressed at the hearing on January 10 and 11, 2019 (the "**Hearing**") is set out below in paragraphs 4 to 10 (collectively, the "**Issues**"). This Brief of Argument ("**Brief**") will then address each Issue in turn.

3. While the facts set out in the Monitor's Brief generally reflect the facts relative to the various Issues, they are sometimes one-sided and are not always complete. Facts specific to each of the Issues will be presented in subsequent sections in this Brief.

4. 726 submits that the first matter to be addressed at the Hearing relates to an adjournment request.

5. Specifically, there is a vital need to adjourn all Bonnyville Lodge camp equipment (the "**Bonnyville Assets**") ownership and security related issues (collectively, the "**Bonnyville Issues**"), as follows:

   (a) 726 submits that the Canadian Western Bank ("**CWB**")'s untimely Application just filed December 12, 2018 (the "**Late CWB Application**") after cross-examinations had already been held and made returnable on January 10, 2019 in which CWB, for the first time, sought declaratory relief that it had a security interest over unspecified assets which we understand from counsel to the Monitor and counsel for CWB include some or all of the Bonnyville Assets, be adjourned to a new date to be set by the Court;

   (b) Having regard to the shared factual underpinning of the Late CWB Application and that part of the 726 Application respecting the 726 ownership claim regarding the Bonnyville Assets, and the interrelationship between those Applications, 726 submits that the 726 Application respecting the Bonnyville Assets be adjourned to a new date to be set by the Court concurrent with that proposed to be set in subparagraph 5 (a) hereof; and

   (c) It is not clear on the face of the Late CWB Application against what assets CWB claims security and whether it purports to address any claims beyond those pertaining to the Bonnyville Issues; to the extent it does, those issues similarly need to be adjourned. Does CWB assert its security with respect to assets other than relating to Bonnyville? Aspects of this adjournment request will come as no surprise to the Monitor and CWB as they have previously and extensively been raised with the Monitor and CWB by 726's counsel[1].

6. As a result of this adjournment request, nothing in this Brief addresses the merits of the Bonnyville Issues (nor, obviously, the merits of any other potential aspect of the Late CWB Application which are unknown but hopefully will become clear when CWB files its Brief of Argument which is to occur concurrently with the filing of this Brief).

7. As will be argued in greater detail below, 726 submits that such an adjournment is necessary: (a) so that retainer arrangements regarding the Bonnyville Issues can be formalized by co-counsel (Jensen Shawa Solomon Duguid Hawkes LLP, "**JSS**") in respect of its clients (hereinafter, the "**726 and Related Interests**")[2]; (b) in order to properly address the issues raised in the Late CWB Application and their interrelationship with the 726 Application regarding the Bonnyville Assets; (c) to avoid "trial by ambush" and ensure basic fairness in matters which, depending upon how they are decided by this Court, have the potential to result in significant losses, and to ensure that 726 and Related Interests are not wrongly prejudiced.

8. The matters referenced in paragraphs 4 though 7 above are collectively hereinafter referred to as the "**Adjournment Issue**".

9. The matters referenced in this Brief to address the Adjournment Issue relate to the issues set out in subparagraph 90(a), (b), and (e) of the Monitor's Brief of Argument ("**Monitor's Brief**"), those parts of subparagraphs 90 (c) and (f) of the Monitor's Brief which pertain to the Bonnyville Issues, and the associated arguments.

10. Provided that none of the additional issues set out below are contemplated in the Late CWB Application and are thus previously addressed as part of the Adjournment Issue, 726 submits that the balance of the issues to be argued at the Hearing, as well as 726's position in brief respecting them, are as follows:

(a) <u>Re Wandering Lease, Peace Lease, Kilometer Lease (collectively, the "**Leases**")</u>:

(i) What assets were the subject of the Leases and who were the owners of the assets at the time the Leases were entered into? 726's position is that the Leased Assets which are the subject of the Leases included, firstly, all assets specifically listed in the Leases;

(ii) 726 further asserts that all of the Leased Assets were at that time (and continue to be) owned and leased by 726 as lessor, and also included the Small Wares (as hereinafter defined) and, in the case of the Peace Lease

[1] Affidavit of Gulnara Machitova, sworn December 20, 2018 (**Machitova Affidavit**)
[2] *Ibid*

and the Kilometer Lease, the Ancillary Equipment (as hereinafter defined), and also, in the case of the Kilometer Lease, the Swapped Assets(as hereinafter defined);

iii) alternatively, if the Leases did not include the Small Wares, Ancillary Equipment, and/or the Swapped Assets, were the LPs in possession of this equipment as bailee, from 726 who was a bailor? Regarding this alternative issue, 726's position is that if it is the owner of the Small Wares, the Ancillary Equipment, and/or the Swapped Assets but those assets do not form part of the Leases, then the LPs were bailees and 726 was a bailor in respect of it;

(iv) further, 726 appropriately registered at the personal property security registry ("**PPR**"), its interest in the Leased Assets (the "**726 PPR Registrations**") (and the prior registered CNC GSAs are invalid, which issue is addressed below).

(The foregoing issues are collectively hereinafter referred to as the "**Asset Issue**"). The matters referenced in this Brief to address the Asset Issue include 726's response to the issues set out in aspects of subparagraph 90(c), (d), and (f) of the Monitor's Brief and the associated arguments.

(b) Invalidity of the CNC GSAs - Whether the GSAs granted by the Wandering LP, Peace LP, and Kilometer LP (the "**LPs**") in favour of **CNC** (the "**CNC GSAs**") respecting the Leased Assets, and registered prior in time to the 726 PPR Registrations, are invalid, improper and/or unenforceable. 726's position is that the CNC GSAs are invalid, improper and/or unenforceable, with the result that 726's claim to the Leased Assets including through the 726 PPR Registrations, will take priority over the invalid CNC GSAs.

(The foregoing issue is hereinafter referred to as the "**Invalidity of the CNC GSAs Issue**"). The matters referenced in this Brief regarding the Invalidity of the CNC GSAs Issue include 726's response to the issues set out in aspects of subparagraphs 90(b), (c), (d), and (f) of the Monitor's Brief and the associated arguments.

(c) Alternative Arguments - In the alternative, if the CNC GSAs are otherwise valid, then:

A. Re Rectification - ought the CNC GSAs be rectified having regard to the evidence which indicates that they were not intended to grant CNC security in the Leased Assets? 726's position is that there was a meeting of the minds between CNC and the LPs that the CNC GSAs only encumbered the LPs' accounts receivable and not the Leased Assets and, as such, the

CNC GSAs ought to be rectified to reflect the parties' true agreement. (The foregoing issue is hereinafter referred to as the "**Rectification Issue**");

B. Re Fraud, Fraudulent Preferences / Conveyance – in the further alternative, ought the CNC GSAs be declared void because they were fraudulent, a fraudulent preference, or a fraudulent conveyance? 726's position is that as a result of McCracken's conduct, the LPs fraudulently conveyed their interest in the Leased Assets through the granting of the CNC GSAs, with the intent to defraud the LPs, or alternatively, with an intent to prefer other creditors, namely CNC (and McCracken as an indirect shareholder of CNC). (The foregoing issues are collectively hereinafter referred to as the "**Fraud Issues**");

C. Re Relief from Forfeiture – 726 may made oral Submissionwith respect to this issue, and therefore does not address it in this Brief.

D. Re Amount Secured by the CNC GSAs/the LPs Indebtedness- in the further alternative, if the CNC GSAs are valid and not declared to be void, what is the amount of the debt owed by the LPs to CNC which is secured by the CNC GSAs? 726 submits that currently the only information is that which comes from CNCs ledger and is as noted in paragraph 72 of the Monitor's Brief. The Monitor has access to the books and records of the LPs and the LPs indebtedness to CNC (the "**LPs Indebtedness**") should be verified from a review of the LPs books. This is important because 726 paid CNC an advance of $3 million as described in the cross examination of Roman and the Undertakings arising therefrom,[3] and the question is whether that $3 million was applied by the LPs to extinguish or reduce the LPs Indebtedness (The foregoing issue is hereinafter referred to as the "**LPs Indebtedness Issue**"). 726 anticipates that it would be making oral submissions on the Indebtedness Issue during the Hearing, and to the extent that the Indebtedness Issue is intertwined with the Bonnyville Issues, it is 726's position that such intertwined portion ought to be adjourned;

The evidence from CNC's books which has not been verified by a review of the books of the LPs is that each of the LPs apparently owes CNC amounts as follows, in respect of "costs incurred in relation to, at least in part, the initial set up/operational expenses of the camps that were paid for by [CNC] and never recovered":[4]

(1) Peace LP: $1,116,897.75 (as at April 18, 2018)

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[3] Cross Examination of Barry Roman, pp.18-20, 77 (**Roman Cross**)
[4] Monitor's 17th Report, at para 38

(2) Wandering LP: $159,123.46 (as at February 19, 2018)

(3) Kilometer LP: $1,236,788.24 (as at December 4, 2017);

E. Other Arguments - Re the Purported Guarantees (granted by Peace LP and Kilometer LP) – to the extent there are any arguments raised at the Hearing about the validity or effect of the Purported Guarantees by the LPs in favour of CWB it is 726's positon, for the record, that they are invalid, improper and/or unenforceable (The foregoing issue is hereinafter referred to as the "**Purported Guarantees Issue**");

(The issues referenced in subparagraph 10(c) above are collectively hereinafter referred to as the "**Alternative and Other Issues**").The Alternative and Other Issues are not addressed in the Monitor's Brief.[5]

11. In short, this Brief argues, in the main, that at the time the Leases were entered into: (a) 726 was the owner and lessor of the Leased Assets which included the Small Wares, the Ancillary Equipment, and the Swapped Assets, as the case may be; (b) 726 appropriately registered its interest in the same at the PPR and (c) the prior PPR registered CNC GSAs are invalid, void or unenforceable, with the result that 726's registered claims to the Leased Assets take priority over those registrations and related claims.

II. ADJOURNMENT ISSUE

A. Facts re the Adjournment Issue

12. The spirit of the Order made September 6, 2018 (the "**September 6 Order**") was for all parties with claims in respect of assets to bring them forward by dates specified so they could be adjudicated. It is submitted that it was implicit in the September 6 Order that if parties were intending on seeking relief with respect to their claims, appropriate applications seeking such relief would be filed.[6]

13. Notwithstanding the spirit of the September 6 Order, the Affidavit #6 of Jessie Taha filed October 3, 2018 states that CWB needed to see the affidavits filed by 726 and others before advising of its position. Further, at that time, no application by CWB seeking any relief was filed in connection with Affidavit #6 of Jessie Taha or otherwise.

14. On November 28, 2018, 726 filed the 726 Application, in which it sought, *inter alia*, a declaration that it is the owner of the Bonnyville Assets. The 726 Application does not seek relief to the effect that the Bonnyville Assets are free and clear of any CWB security interests.

[5] Please note that 726 takes no position with respect to the issue regarding the small wares claimed by Sand Tiger, as set out in paragraph 90(g) of the Monitor's Brief and it is therefore not addressed in this Brief.

[6] Alberta *Rules of Court*, R. 6.3 **[Tab 1]**

15. During the December 4 through 6, 2018 cross-examination of McCracken on his Affidavits sworn in these proceedings and of Barry Roman ("**Roman**"), the representative of 726, upon his Affidavits sworn October 2, 2018 and November 27, 2018, the Monitor and CWB hinted, for the first time, at the idea that CWB intended to argue that it holds a lingering security interest in the Bonnyville Assets which 726 claims to own.

16. The new issue raised by Monitor and CWB came as a surprise to 726. At this juncture, neither the Monitor nor CWB had applied for a declaration or other relief to the effect that CWB has valid security over the Bonnyville Assets and, as such, the issue of CWB's alleged security over 726's assets was not before the Court for the upcoming Hearing, nor was 726's co-counsel, Jensen Shawa Solomon Duguid Hawkes LLP ("**JSS**") retained regarding the Bonnyville Assets.

17. 726 was concerned that CWB and the Monitor were purporting to argue issues not before the Court, when there hadn't been an application setting out those issues and therefore no notice of those issues had been provided to 726. As a result, 726 had not been afforded an opportunity to cross-examine witnesses or supply supplemental evidence to support its position.

18. 726's co-counsel, JSS, immediately raised these concerns with the Monitor and CWB. While the Monitor has throughout been intransigent in its position, CWB has relented to a degree by filing the Late CWB Application and bringing CWB's Bonnyville security claim before the Court as had been requested on behalf of 726. It is 726's understanding that the Monitor has no extant application before the Court regarding the various issues it wishes to have advanced at the Hearing.

19. Both the Monitor and CWB now refuse to accede to the request of JSS on behalf of 726 and Related Interests for an adjournment of the Bonnyville Issues, notwithstanding the as yet unformalized status of JSS' retainer and the costs that are potentially being thrown away having to fight for basic procedural fairness. The specifics of the communications between counsel are referenced in the Affidavit of Gulnara Machitova, filed December 20, 2018, and are described below for ease of reference.

20. Specifically, on December 7, 2018, JSS wrote to counsel for the Monitor and counsel for CWB, advising them that, *inter alia,*[7] with respect to CWB's claim to a security interest in respect of the Bonnyville Assets:

    (a) that issue is for another day in other proceedings CWB may wish to advance;

    (b) that issue is not properly before the CCAA court and cannot be argued, and to the extent it is argued, 726 objects to the same, and will seek costs against the offending party if any effort is made to advance that argument;

[7] Machitova Affidavit, Exhibit A

(c) 726 reserves its rights to cross-examine McCracken on issues that were raised for the first time during cross-examinations on December 6, 2018;

(d) Certain Undertakings sought by the Monitor at Roman's cross examination were irrelevant to what was before the Court in these proceedings;

(e) JSS was not retained to address any direct claim by CWB in respect of the Bonnyville Assets.

21. On December 7, 2018, counsel for the Monitor wrote to JSS stating that the Monitor takes the position that, *inter alia*, the issue of whether CWB had security on the Bonnyville Assets is "on the table," and that it "fully intend to lay out all of those issues before the Court in [its Brief]."

22. On December 8, 2018, counsel for CWB wrote to JSS and counsel for CWB, stating that CWB "completely agree[d]" with counsel for the Monitor's points.

23. On December 9, 2018, JSS wrote to counsel for CWB and the Monitor asking counsel for the Monitor to advise whether the Monitor or CWB had filed an application respecting the relief being sought. The Monitor has never advised that it has brought an application. Further, on December 9, 2018, counsel for CWB responded to JSS, stating that until CWB received certain facts, it did not know "whether [it] will press this issue."

24. On December 9, 2018, JSS responded to counsel for CWB indicating that his correspondence confirmed that the issue of CWB's alleged security over the Bonnyville Assets was not currently and properly before the Court. JSS *inter alia*:

(a) Advised that CWB was on an "unfair fishing expedition on issues not before the court;"

(b) Requested that CWB and the Monitor stand down from pursuing this issue in the Hearing, and refrain from addressing it in their Briefs of Law;

(c) Again confirmed that JSS was not retained on the issue which was not before the Court;

25. Further, on December 10, 2018, JSS wrote to counsel for CWB, stating that:

(a) 726's position continues to be that any claims by CWB in respect of the Bonnyville Assets are not before the CCAA Court, and are not the proper subject matter of these proceedings;

(b) If CWB has claims against 726's property, then it has its rights in the normal course, and to the extent it takes steps in Court proceedings to pursue such rights and are unsuccessful, they would be liable to 726 for 726's costs.

26. On December 10, 2018, counsel for CWB wrote to JSS, stating that he was "reluctant to debate something that [he saw] as being without doubt. […] [CWB's alleged security interest in the Bonnyville Assets is] clearly in [his] mind that is something that is properly before this court."

27. On December 10, 2018, 726 refused certain Undertakings sought at Roman's cross-examination on the basis of privilege and/or relevance, including because those Undertakings were only possibly related to the issues that were not properly before the Court at the time.[8] The Monitor's request that an adverse inference be drawn against 726 in this regard is completely unfounded in the circumstances.

28. In light of the aforementioned exchange of correspondence, on December 11, 2018, 726 requested an urgent appearance before Mr. Justice Hillier to resolve the dispute between 726, the Monitor, and CWB as to whether the new issues raised by CWB were properly before the Court and were properly the subject of the Hearing.[9] The issue of Undertakings that had been refused (including on grounds of privilege) by Roman on behalf of 726 was also raised in the correspondence addressed to Mr. Justice Hillier. The parties did not hear back from the Court in respect of this request.

29. On December 12, 2018, CWB filed and served the Late CWB Application in which CWB, for the first time, sought declaratory relief that it had security interest over some or all of the Bonnyville Assets.

30. On December 13, 2018, JSS wrote to counsel for the Monitor and counsel for CWB:[10]

    (a) Confirming that by filing the Late CWB Application, CWB had done what 726 had requested previously, that CWB put before the Court the issues to be heard by the Court;

    (b) Requesting that the Late CWB Application be adjourned *sine die* to be heard on a date beyond the Hearing dates, along with the rest of the Bonnyville Issues, so that counsel may be properly retained, and so that 726 could cross-examine witnesses and potentially file its own evidence so a hearing may fairly occur.

31. In response, the Monitor refused 726's adjournment request.

32. For the reasons set forth below, 726 asserts that the Bonnyville Issues ought to be adjourned to a date other than the Hearing dates.

[8] Machitova Affidavit, Exhibit C
[9] Machitova Affidavit, Exhibit B
[10] Machitova Affidavit

B. Argument - Bonnyville Issues Ought to be Adjourned to Avoid Prejudice to 726

33. Much is at stake in connection with the Bonnyville Issues. 726 purchased the Bonnyville Assets for $21,000,000 in 2014.[11] 726 and Related Interests may face significant losses if they are unsuccessful in their claim regarding the Bonnyville Assets. It is imperative that the parties have every opportunity to formalize their retainer with JSS, put before the Court the relevant evidence, and do not find themselves in a "trial by ambush" situation. This is why the adjournment request is being made by 726 respecting the Bonnyville Issues, particulars of which are as set forth below:

(a) Now that the Late CWB Application is filed, the Bonnyville Issues, are finally properly before the Court;

(b) While the applicant, CWB, may be entitled to rely purely on prior filed evidence, the untimely filing of the Late CWB Application has essentially denied 726 the ability to cross examine any witnesses or file any evidence prior to the Hearing. To deny 726 and Related Interests of these opportunities would be a significant prejudice to its fundamental rights and would result in serious prejudice;

(c) In the Monitor's Brief at paragraphs 93 through 103, it suggests some of the law that is relevant to the Bonnyville Issues both in terms of the ownership and the security claims. The Monitor cites sections 30 and 33 of the *Personal Property Security Act* ("**PPSA**") and facts which it says bear on the applicability and effect of these provisions, including whether the sale relating to the Bonnnyville Assets was made in the ordinary course of business of the seller. 726 requires the opportunity to adduce evidence that the record currently lacks; and

(d) The portion of 726's Application relating to the Bonnyville Assets and their ownership by 726 ought not be bifurcated and separated from the subject of the Late CWB Application, and both applications ought to be adjourned and then heard concurrently.

34. In this regard, to date, 726 has led evidence regarding 726's purchase of the Bonnyville Assets in light of the 726 Application respecting ownership. However, now that CWB's alleged security is at issue per the Late CWB Application, that purchase and all of the surrounding circumstances and parties involved is now an essential element in both the 726 Application respecting ownership, as well as the Late CWB Application respecting security. It would be inefficient and might possibly give rise to inconsistent related findings if the same factual basis surrounding that purchase was dealt with at two different hearings with respect to the further evidence that the Court ought to have before it in order to fairly decide the Bonnyville Issues, 726 submits that it may include:

[11] Affidavit of Barry Roman, sworn October 2, 2018 (**October Affidavit**), Exhibit B

(a) relevant file material including, but not limited to, the release by CWB of its security interest, from CNC's prior counsel, Heather Barnhouse of Dentons which as part of McCracken's Undertakings 9, 10, and 17 apparently has been requested but which has not yet been provided. In this regard, an application may need to be made to the Court for an order to compel Dentons to produce relevant material, to the extent it is not privileged;

(b) oral and any other communications which we understand may have occurred concerning the Bonnyville Assets purchase transaction involving counsel for CWB or CWB employees themselves, and Dentons and any release of security, including potentially in respect, or in furtherance of, Undertaking numbers 2 and 14 requested of Roman on behalf of 726;

(c) cross- examination of Jessie Taha of CWB and McCracken as to, *inter alia*, whether CWB released its security interest in the Bonnyville Assets, including questioning as to the reference in the September 2014 and 2015 Financial Statements of CNC provided by McCracken in answer to his Undertaking number 1 referencing a release by CWB of its security and a related payout;

(d) cross-examination of McCracken, *inter alia*, as to whether it was part of CNC's ordinary course business to sell modular equipment such as the Bonnyville Assets, or whether CNC was in fact the actual seller or whether the seller was an affiliate of CNC;

(e) further evidence relating to CNC's and its affiliated companies' business in the context of the Late CWB Application; and

(f) evidence from Roman of 726 regarding the circumstances of the Bonnyville Asset transaction, including his understanding of what the financial statements of the LPs did and did not reveal to him and Roman's understanding of the business of CNC, as well as whether he drew a distinction between CNC and its related entities and their ordinary course business in the context of the Late CWB Application.

35. Additionally, it had always been the Monitor's position that it did not anticipate challenging 726's ownership claim over the Bonnyville Assets, as set out in para 23 of its 17th Report.[12] However, the Monitor's Brief seems to suggest that it now takes the position that Bonnyville LP, as opposed to 726, is the owner of the Bonnyville Assets.

36. All of the Bonnyville Issues, therefore, ought to be determined after all parties have had a chance to submit new evidence, or test existing evidence and 726 and Related Interests requests and requires the adjournment respecting the Bonnyville Issues.

[12] Monitor's 17th Report, dated September 10, 2018

III. LEASED ASSET ISSUE

37. 726 submits that at all relevant times, it was the owner of the Leased Assets, which include the Small Wares and the Ancillary Equipment, and the Swapped Assets, all of which were subsequently leased to the LPs pursuant to the Leases and were properly registered in the PPR per the 726 PPR Registrations.

B. Relevant Facts

(i) The 726 Group of companies

38. Reliant Asset Management ("**RAM**") is the parent of each of 726 Remote Accommodations, Ltd. ("**726 Remote**") and 726 Modular Finance Ltd. ("**726 Finance**").[13]

39. Each of RAM, 726 Finance and 726 Remote (collectively defined above as 726 or the 726 Group) from time to time purchase equipment.[14] RAM or 726 Finance engage 726 to lease the equipment to third parties or 726 does so itself.[15] In other words, the 726 Group is at all times the owner of equipment, which 726 is entitled to lease to third parties as lessor.[16]

(ii) 726 leased assets to Wandering LP, Peace LP and Kilometer LP

40. Pursuant to each of the LPAs, each of the partners was to provide certain commitments to the respective LPs.[17] As part of its commitment to Wandering LP and Kilometer LP, 726 was to provide:

    (a) "[s]uch equipment as further described in the equipment lease entered into between 726 and [Wandering LP or Kilometer LP]";[18]

    (b) "the equipment referenced on Schedule A...of the Master Equipment Lease Agreement...by and between 726 and [Peace LP]."[19]

41. In accordance with the LPAs, 726 entered into a lease agreement with each of Wandering LP, Peace LP, and Kilometer LP (the "**Wandering Lease**", "**Peace Lease**"

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[13] October Affidavit, paras 1-3
[14] Affidavit of B. Roman, sworn on November 27,2018 (the **November Affidavit**)
[15] November Affidavit, at para 3
[16] November Affidavit, at para 3
[17] Wandering LPA, at article 14 – October Affidavit, at Exhibit E; Peace LPA, at article 14 – October Affidavit, at Exhibit K; Kilometer LPA, at article 14 – October Affidavit, at Exhibit Q
[18] Wandering LPA, at section 14.3 – October Affidavit, at Exhibit E; Kilometer LPA, at section 14.2 – October Affidavit, at Exhibit Q
[19] Peace LPA, at section 14.2 – October Affidavit, at Exhibit K

"**Kilometer Lease**", collectively, the "**Leases**"),[20] on December 29, 2014, January 19, 2015, and January 12, 2015, respectively.

42. Each of the Leases includes the following provision, obligating the LPs to ensure that the equipment leased would remain free from security interests, (the "**No Encumbrances Lease Obligation**"):[21]

> **Lessee,** at its sole cost and expense, **agrees to keep the Equipment free and clear of any and all** claims, liens, **security interests**, encumbrances or attachments **not arising out of Lessor's acts** including, without limitation, mechanics' and materialman's liens. (emphasis added)

43. McCracken executed the Leases on behalf of each of the LPs.[22] As such McCracken was aware of the No Encumbrances Lease Obligation in each Lease.

44. Pursuant to the Leases, 726 leased certain equipment to the LPs:

    (a) the "**Wandering Equipment**", evidenced by equipment schedules (the "**Wandering Schedules**").[23] The Wandering Equipment is the subject of PPR registrations against Wandering LP.[24]

    (b) the "**Peace Equipment**", evidenced by equipment schedules (the "**Peace Schedules**"),[25] being Equipment Schedules 001 and 002.[26] The Peace Equipment is the subject of PPR registrations by 726 against Peace LP;[27]

    (c) pursuant to the Kilometer Lease, 726 leased certain equipment to Kilometer LP (the "**Kilometer Equipment**", and together with the Wandering Equipment and the Peace Equipment, collectively, the "**Equipment**").

        A. Though equipment schedules were provided to document the Kilometer Equipment (the "**Kilometer Schedules**", together with the Wandering

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[20] Wandering Lease – October Affidavit, at Exhibit F; Peace Lease – October Affidavit, at Exhibit L; Kilometer Lease – October Affidavit, at Exhibit R

[21] Wandering Lease, General Terms and Conditions, at section 8 – October Affidavit, at Exhibit F; Peace Lease, General Terms and Conditions, at section 8 – October Affidavit, at Exhibit L; Kilometer Lease, General Terms and Conditions, at section 8 – October Affidavit, at Exhibit E

[22] Wandering Lease– October Affidavit, at Exhibit F; McCracken Cross, 68:23-27; Peace Lease– October Affidavit, at Exhibit L; Kilometer Lease – October Affidavit, at Exhibit R; McCracken Cross, p.79:18-20

[23] October Affidavit, at Exhibit G; Exhibit D-9: Equipment Schedule 001

[24] November Affidavit, at Exhibit H

[25] October Affidavit, at Exhibit P; see also November Affidavit, at Exhibit I

[26] Cross Examination of Paul McCracken, Exhibit D-10, p.77:14-78:1 (**McCracken Cross**)

[27] November Affidavit, at Exhibit I

Schedules and the Peace Schedules, the "**Equipment Schedules**"),[28] those schedules incorrectly reflect the serial numbers corresponding to the Kilometer Equipment.

45. In addition to the serial numbered equipment listed in each of the Equipment Schedules, the Small Wares associated with the equipment also formed part of the subject matter of the Lease.[29]

46. Further to the Equipment Schedules:

(a) the minimum lease term for the Wandering Lease was 42 months, with no purchase option available[30] and the monthly payment was $296,835.44 for the first 12 months, and variable monthly rate thereafter; and[31]

(b) the minimum lease term for the Peace Lease and Kilometer Lease was 45 months, with a purchase option, provided that the respective LPs made all 45 lease payments in a timely fashion[32], where and the monthly payment was $296,835.44 for Peace Equipment Schedule 001, $64,138.19 for Peace Equipment Schedule 002, $332,210 for Kilometer Equipment Schedule 001, $54,568.45 for Kilometer Equipment Schedule 002, and $48,319.63 for Kilometer Equipment Schedule 003.[33]

47. Each of the LPs had defaulted on their payment under the Leases:

(a) Wandering LP has failed to pay to 726 its lease payment. To date, Wandering LP owes 726 $2,441,880;[34]

(b) To date, 726 has not received any lease payments from Peace LP.[35] Further, Peace LP has not sought to exercise its option to purchase;[36] and,

(c) To date, 726 has not received any lease payments from Kilometer LP.[37] Further, Kilometer LP has not sought to exercise its option to purchase.[38]

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[28] Note, not all Kilometer Schedules corresponded to the advancement of equipment. Listed here, are only those schedules that corresponded to the advancement of equipment. Schedule A to Equipment Schedule 001– October Affidavit, at Exhibit R; see also Affidavit # 2 of B. Roman – 726 registrations against Kilometer LP
[29] McCracken Cross, p.73:1-6
[30] Equipment Schedule 001, dated November 4, 2014 - October Affidavit, at Exhibit G; Exhibit D-9
[31] Equipment Schedule 001, dated November 4, 2014 - October Affidavit, at Exhibit G; Exhibit D-9
[32] October Affidavit, at Exhibit P; Equipment Schedule 001, dated January 14, 2015– October Affidavit, at Exhibit R
[33] Equipment Schedules at Exhibits D-10 and D-11
[34] November Affidavit, at para 9
[35] November Affidavit, at para 9
[36] November Affidavit, at para 9
[37] November Affidavit, at para 9
[38] November Affidavit, at para 9

(a) Kilometer Equipment Swap

48. At the time 726 received the equipment that was meant to correspond to that listed in the Kilometer Schedules, it instead received some units bearing different serial numbers. The Kilometer Equipment is therefore as detailed in the November Affidavit at paragraphs 16-30. The Kilometer Equipment is the subject of PPR registrations by 726 against Peace LP.[39] It is 726's position that the Swapped Assets, being the equipment actually delivered at the Kilometer Camp, is the result of a mutual mistake, and is subject to the Kilometer Lease and forms part of the Leased Assets. Such mutual mistake ought to be rectified.[40]

(iii) 726 purchased and owned equipment

49. At the time 726 entered into each of the LPAs, it was the owner of various equipment that would be used at the camps, being the Leased Assets described above. 726's ownership of the Leased Assets did not change throughout the relevant times.

50. Specifically, with respect to equipment purchased and owned at the Wandering, Peace, and Kilometer camps, 726 purchased and owned the following assets:

(a) Wandering:

A. Serial number goods, being the Wandering Equipment, which is various mobile dorms, kitchens, laundry and recreational units, as identified in the Sales Quotes, Contracts and Invoices dated October to November, 2014;[41] and

B. Small Wares, being various beds, mattresses, televisions, desks, chairs, fryers, ranges, mixers, fridges, microwaves, shelving, exercise equipment, pool and foosball tables, etc., attached to or provided with the serial number goods,[42] being the Wandering Equipment in this case;

(b) Peace:

A. Serial number goods, being the Peace Equipment, which is various mobile dorms, kitchens, and recreational units, as identified in the Invoices from various dates in 2014 and 2015;[43]

B. Small Wares, being various beds, mattresses, televisions, desks, chairs, fryers, ranges, mixers, fridges, microwaves, shelving, exercise equipment,

[39] November Affidavit, at Exhibit I
[40] *Wickstrom v Wetter*, 2008 ABQB 83 ("**Wickstrom**") at para 72. [**Tab 19**]
[41] October Affidavit, Exhibit G, Exhibit D-9
[42] October Affidavit, para 45
[43] October Affidavit, Exhibit L

pool and foosball tables, etc., attached to or provided with the serial number goods,[44] being the Peace Equipment in this case; and

C. Ancillary Equipment, being waste water systems, potable water systems, lights, lift stations, car plugs, etc.[45]

(c) Kilometer:

A. Serial number goods, being the Kilometer Equipment, which is various mobile dorms, kitchens, and recreational units, as identified in the Invoices and Purchase Orders dated 2014 to 2015;[46]

B. Small Wares being various beds, mattresses, televisions, desks, chairs, fryers, ranges, mixers, fridges, microwaves, shelving, exercise equipment, pool and foosball tables, etc., attached to or provided with the serial number goods,[47] being the Kilometer Equipment in this case; and

C. Ancillary Equipment, being a 6000 gallon water storage unit, waste storage tanks, steps, landings and walkways, 250 car plugs, potable water treatment plant and 21 lift stations.[48]

C. Law and Argument

51. 726's ownership with respect to the serial number goods, being the Wandering Equipment, the Peace Equipment, and Kilometer Equipment, at the time it entered into the Leases is clearly evidenced by its ownership and purchase of materials, and does not appear to be disputed by the parties.[49]

52. Notwithstanding CNC's incorrect and inadvertent inclusion of some of the equipment at the Wandering and Kilometer camps in its list of assets earlier in these proceedings, it had always been CNC's understanding that those items belonged to the 726 Group.[50] The parties do not appear to argue that any of that equipment belongs to CNC. The facts set out in paragraphs 81 to 84 of the Monitor's Brief are therefore irrelevant.

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[44] October Affidavit, para 45
[45] November Affidavit, para 14(a)
[46] October Affidavit, Exhibit R
[47] October Affidavit, para 45
[48] November Roman Affidavit, para 14(c)
[49] October Affidavit and November Affidavit
[50] McCracken Cross, p. 11:6-17; p.23:7-14

(i) 726 is the owner of the Small Wares and Ancillary Equipment

53. Further, 726's position is that the Small Wares and Ancillary Equipment at each of the camps belonged to 726.[51]

54. Small Wares associated with the operation of the camps were conveyed to 726 together with the serial numbered equipment, as they are naturally included as part of the camp equipment.[52]

55. As set out above, these Small Wares include items such as TVs, tables and chairs for the kitchen, dining and recreational units, and beds for the dorm units,[53] all of which are naturally included in the mobile dorms, kitchens and recreational units. At all material times, 726 was the owner of the Small Wares.

56. McCracken also confirmed in his evidence that all of the Leased Equipment, including the associated Small Wares, belonged to 726.[54]

57. The Ancillary Equipment, on the other hand, is described in detail as follows:[55]

    (a) Peace LP: waste water systems, potable water systems including all tanks, electrical, plumbing and HVAC, fire alarm systems, lift stations, pumps and control system and all access mats (collectively, the "**Peace Ancillary Equipment**");[56] and

    (b) Kilometer LP: 6000 gallon water storage unit, waste storage tanks, steps, landings and walkways, 250 car plugs, potable water treatment plant and 21 lift stations (collectively, the "**Kilometer Ancillary Equipment**").[57]

58. The following are details as to how each of Peace LP and Kilometer LP came into possession of the Ancillary Equipment, owned by 726 Group:[58]

    (a) Regarding the Peace Ancillary Equipment: 726 provided 13 schedules supported by individual invoices allegedly paid by CNC where 726 reimbursed CNC for all site work, setup and ancillary equipment necessary to operate a camp;[59] and

    (b) Regarding the Kilometer Ancillary Equipment: an amendment to Schedule B of Equipment Schedule Number 001 was made and included as one of the

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[51] November Affidavit, at para 14
[52] October Affidavit, paras 44-45
[53] McCracken Cross, pp.24-25
[54] McCracken Cross, p.78:2-9
[55] November Affidavit, at para 14
[56] November Affidavit, at para 14(b)
[57] November Affidavit, at para 14(c); McCracken Cross, p.21:4-14
[58] November Affidavit, at para 15
[59] November Affidavit, at para 15(b)

documents marked as Exhibit "R" to Roman's October Affidavit. It indicates that the Kilometer Ancillary equipment is owned 50% by CNC and 50% by 726.[60]

59. Similar to the Small Wares, the parties had always agreed that the Ancillary Equipment was also owned by 726.[61]

60. As confirmed by both McCracken and Roman's evidence, it was 726 and CNC's mutual understanding that the sale and lease of serial numbered equipment included the Small Wares and Ancillary Equipment. There had always been a meeting of the minds between the parties that 726 is the owner of the same.

61. In *Fleming v Crookes*, the Alberta Court of Queen's Bench considered a case where two businessmen entered into a written agreement, and then subsequently entered into two more oral agreements. The Court held that since the parties had a meeting of the minds, and agreed to the essential parts of the oral agreement, it was therefore possible to enforce the oral agreement:

> 40 The parties here were ad idem on the essential terms: the partners were identified; there was in fact a partnership; the business of each partnership, the Liquor Store and the VLT operation was clearly defined and the financial terms were clear, a 50/50 split of the profits. Even though as Slatter, J. said, the parties may not have turned their mind precisely to a key issue, the costs, nevertheless a determination can be made without writing an entire contract for the parties. Here I do not find there was a mistake of any kind. The parties agreed that expenses or costs would be paid before profit was shared. There was no mistake in this term. They simply did not put their minds to a clear definition which expenses were to be paid in an otherwise straightforward agreement...[62]

62. The Court in *Fleming* required only that the parties had a meeting of the minds on essential terms before it found that an oral agreement existed. Even where there was disagreement as to certain terms, the Court was still able to conclude that an oral agreement was entered into, and could be properly enforced.

63. Whereas in *Fleming*, the parties disagreed as to some of the terms in their oral agreement, that is not the case here. Both CNC and 726 fully agree that the Small Wares and Ancillary Equipment formed part of the agreements between them, and they further confirm that it is in fact industry practice to include such items without fully listing them out on a written document.

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[60] November Affidavit, at para 15(c)
[61] McCracken Cross, pp.15, 20, 23-25
[62] *Fleming v Crookes*, 2005 ABQB 181 at para 40. **[Tab 2]**

64. Such agreement between the parties further does not violate any written contracts between the parties, including the Bill of Sale and various documents proving sale, none of which contain an entire agreement clause, or a provision requiring amendments be made in writing.[63]

65. Further and in the alternative, the Small Wares and Ancillary Equipment were conveyed to 726 through an implied term of the contract. As summarized by the SCC in *M.J.B. Enterprises Ltd. v Defence Construction*:

> 27 The second argument of the appellant is that there is an implied term in Contract A such that the lowest compliant bid must be accepted. The general principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 (S.C.C.). Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" (p. 775). [...]
>
> 29 As mentioned, LeDain J. stated in *Canadian Pacific Hotels Ltd.*, supra, that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. <u>What is important in both formulations is a focus on the intentions of the *actual parties*. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of *reasonable parties*.</u> This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. [...]

66. In determining the intention of the parties, attention must be paid to the express terms of the contract to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.[64]

67. Again, Roman confims that the Small Wares and the Ancillary Equipment form a part of the assets that were purchased by to 726.[65] Both McCracken and Roman also appear to

[63] Bill of Sale, October Affidavit Exhibit G
[64] *M.J.B. Enterprises Ltd. V Defence Construction (1951) Ltd.*, [1999] 1 SCR 619 at paras 27 & 29. **[Tab 3]**
[65] October Affidavit, para 45

agree that the inclusion of Small Wares with equipment such as mobile dorms is normal industry practice.[66] This evidence does not conflict with the express terms of the contracts, and give the transaction business efficacy by avoiding the need to list every table and chair in the transaction.

68. In sum, 726 is the owner of the Small Wares and Ancillary Equipment at the Wandering, Peace and Kilometer camps, which 726 then leased to each respective LPs, in respect of which it registered its interests per the 726 PPR Registrations.

(ii) Further and alternatively, 726 was a bailor of the Small Wares and Ancillary Equipment

69. Further, and in the alternative, if the Small Wares and/or the Ancillary Equipment, or any part thereof did not form part of the Leases, 726 is the bailor of such and the LPs are the bailees of same.

70. Other than the ownership claims asserted by 726 in the 726 Application, no other party in these proceedings claims that they or any other party ought to be declared as the owner of the Small Wares and Ancillary Equipment. None of the sellers of the Wandering Equipment, the Peace Equipment or the Kilometer Equipment have brought an application in these proceedings to declare that they are the true owners of the Small Wares and/or Ancillary Equipment, and in fact, none of the sellers other than CNC is a party to these proceedings.

71. 726 is the only party to submit evidence to show its ownership of the Small Wares and Ancillary Equipment, and should accordingly be declared to be the owner of those assets.

72. In the event that this Court finds that 726 is the owner of the Small Wares and Ancillary Equipment, but that those assets were not the subject of the Leases, the only logical inference that may be drawn is that 726 was acting as a bailor of the Small Wares and Ancillary Equipment where the LPs were bailees. In *Visscher v Triple Broek Holdings Ltd*, 2006 ABQB 259, Marceau, J said:

> 27 Bailment was defined by Mr. Justice Cory in Punch v. Savoy's Jewellers Ltd. et al (1986), 1986 CanLII 2759 (ON CA), 54 O.R. (2d) 383, 26 D.L.R. (4th) 546 at 551 (C.A.) as:
>
> > ... the delivery of personal chattels on trust, usually on contract, express or implied, that the trust shall be executed and the chattels be delivered in either their original or an altered form as soon as a time for which they were bailed has elapsed. It is to be noted that the legal relationship of bailor and bailee can exist

[66] October Affidavit, para 45, McCracken Cross, pp.134, 137

> independently of a contract. It is created by the voluntary taking into custody of goods which are the property of another.[67]

73. Irrespective of whether there existed an implicit or explicit contract between 726 and the LPs, other than the Leases, the LPs voluntarily took into custody of "goods which are the property of another [(being 726)]", such that the Small Wares and Ancillary Equipment ought to be returned to 726 *simpliciter*.

IV. INVALIDITY OF GSA ISSUE

A. Relevant Facts

(i) The Relevant parties

(a) Paul McCracken

74. Paul McCracken ("**McCracken**") was intimately involved with respect to the entities and affairs as described in detail below.

75. With respect to CNC, at all relevant times, McCracken was a director, officer and the sole shareholder of CNC, which was the sole shareholder of CNC, at the material time.[68] McCracken continued to be a director of CNC until April 20, 2018, when by Order of Nielsen, J., McCracken's resignation from CNC was deemed to be accepted.[69]

76. CNC's business included supplying and catering of camps for oil and gas and other industries.[70]

(b) The limited partnerships and their general partners

77. On December 29, 2014, January 23, 2015, and December 10, 2014, respectively, 726 entered into limited partnership agreements (the "**Wandering LPA**", "**Peace LPA**", and "**Kilometer LPA**", collectively, the "**LPAs**") with each of the following:

    (a) Wandering LPA: Wandering River Lodge GP Ltd. ("**Wandering GP**"), Canada North Group LP Holdings Ltd. ("**CNG Holdings**"), Wandering River Properties Ltd. and Chief Morris Monias ("**Monias**");[71]

    (b) Peace LPA: Peace River Lodge GP Ltd. ("**Peace GP**") and CNG;[72]

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[67] *Dowcar Metals Inc v Arrow Reload Systems Inc*, 2018 ABQB 549, para 12 **[Tab 4]**
[68] Now, 1851239 Alberta Ltd. Cross examination of P. McCracken, December 4, 2018, ("**McCracken Cross**"); As of March 29, 2017: McCracken Cross, 29:20-26; Exhibit D-2, Exhibit D-3, D-4
[69] Order of Nielsen J., dated April 20, 2018, at Recital, para 15; McCracken Cross, 36:16-23
[70] McCracken Cross, 27:24-28:1
[71] Wandering LPA - Affidavit of B. Roman, sworn on October 2,2018, at Exhibit E (the "**October Affidavit**")
[72] Peace LPA - October Affidavit, at Exhibit K; Exhibit D-15

(c) Kilometer LPA: Kilometer 147 GP Ltd. ("**Kilometer GP**"), CNG, and Monias.[73]

78. The limited partnerships created under the LPAs are named Wandering River Lodge LP ("**Wandering LP**"), Peace River Lodge LP ("**Peace LP**"), and Kilometer 147 LP ("**Kilometer LP**", or together with Wandering LP and Peace LP, the "**LPs**")

79. Each of the LPs' general partner is Wandering GP, Peace GP, and Kilometer GP, respectively (collectively, the "**GPs**").[74] Pursuant to each of the LPAs, the GPs covenanted, represented and warranted that: "it shall act with the utmost fairness and good faith towards the other Partners in the conduct of the Partnership Business" (the "**GP Representation**").[75]

80. McCracken executed each of the LPAs on behalf of each of the GPs and, where applicable, CNG Holdings.[76] McCracken signed as both entities' officers and directors.[77] McCracken read and was familiar with the LPAs prior to signing it as officer and director of the GPs and CNG Holdings.[78]

81. Each of the GPs are governed by the following unanimous shareholders agreements:

(a) The "**Wandering USA**", dated December 29, 2014;[79]

(b) The "**Peace USA**", dated August 18, 2014;[80] and

(c) The "**Kilometer USA**", dated December 10, 2014;[81]

(collectively, the "**USAs**").

82. At the time the USAs were executed, the shareholders of each of the GPs were:

(a) Wandering GP: CNC, Wandering River Properties Ltd., 726 and Monias;[82]

(b) Peace GP: CNC, 726;[83]

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[73] Kilometer LPA - October Affidavit, at Exhibit Q

[74] Wandering LPA, at section 3.1(i) – October Affidavit, at Exhibit E; Peace LPA, at section 3.1(i) – October Affidavit, at Exhibit K, Exhibit D-15; Kilometer LPA, at section 3.1(i) – October Affidavit, at Exhibit Q

[75] Wandering LPA, at section 10.1(c) – October Affidavit, at Exhibit E; Peace LPA, at section 10.1(c) – October Affidavit, at Exhibit K, Exhibit D-15; Kilometer LPA, at section 10.1(c) – October Affidavit, at Exhibit Q

[76] Wandering LPA, at 26 - October Affidavit, at Exhibit E; McCracken Cross, 38:16-23; Peace LPA, at 26 - October Affidavit, at Exhibit L; Kilometer LPA, at 26 - October Affidavit, at Exhibit Q

[77] McCracken Cross, pp. 38:24-39:16; 46:15-23

[78] McCracken Cross, pp. 39:17-21, 108

[79] Wandering USA - October Affidavit, at Exhibit H

[80] November Affidavit, at para 5; Peace USA - October Affidavit, at Exhibit M

[81] Kilometer USA - October Affidavit, at Exhibit S; November Affidavit, at para 5

[82] Wandering USA, at Recital A - October Affidavit, at Exhibit H

[83] Peace USA, at Recital A – October Affidavit, at Exhibit M

(c) Kilometer GP: CNC, 726, and Monias[84]

83. McCracken read and executed each of the USAs on behalf of CNC and the Wandering and Peace GPs, in his capacity as CNC's officer and Wandering GP and Peace GP's director and officer.[85]

(ii) Each of the LPs purportedly granted a GSA to CNC

84. On March 29, 2017, after entering into their respective Leases with 726, each of the LPs purportedly granted a GSA in favour of CNC.[86]

85. The LPs were insolvent when they executed the CNC GSAs, as was CNC[87].

86. No consideration was provided to the LPs in connection with the granting of the GSAs by the LPs.[88]

87. The "Collateral", as defined in each of the GSAs charges only the personal property of each of the LPs[89]: therefore, the Leased Assets which are owned by 726 are not included. McCracken testified that the Leased Assets were the property of 726 and the CNC GSAs were signed with a view to having the GSAs only charge the receivables of the LPs.[90] McCracken executed the GSAs in his capacity as each GP's officer and director.[91]

88. CWB was involved in CNC obtaining the GSAs. Specifically, it was CWB which required that CNC obtain the GSAs, in association with certain past indebtedness owing by CNC to CWB, as well as to provide further security in the context of McCracken's personal guarantee to CWB which McCracken acknowledged having given and which was referenced in the Forbearance Agreement dated March 10, 2017 among McCracken, Shayne McCracken, CNC and others.[92]

89. The evidence is that CWB was aware of the partnership arrangement between the LPs and CNC, as well as the LPAs, through its agents/employees[93]

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[84] Kilometer USA, at Recital A - October Affidavit, at Exhibit S

[85] Wandering USA, at 23-24 – October Affidavit, at Exhibit H; McCracken Cross, 45: 18-46:14; 46:24-27; Peace USA, at 23– October Affidavit, at Exhibit M; Kilometer USA, at 21– October Affidavit, at Exhibit S

[86] General Security Agreement granted by Wandering LP in favour of CNC, dated March 29, 2017 (the "**Wandering GSA**") – October Affidavit, at Exhibit I; General Security Agreement granted by Peace LP in favour of CNC, dated March 29, 2017 (the "**Peace GSA**") – October Affidavit, at Exhibit N; General Security Agreement granted by Kilometer LP in favour of CNC, dated March 29, 2017 (the "**Kilometer GSA**") – October Affidavit, at Exhibit T

[87] McCracken Cross, p.185:21-24

[88] McCraken undertaking answers; November Affidavit, at para 59

[89] Section 2.1.1 of each of the GSAs - October Affidavit at Exhibits I, N, T

[90] McCracken Cross, pp.56-60, 64:10-14; 65:23-66:1

[91] McCracken Cross, p.; 61-62

[92] November Affidavit, at para 57; Affidavit of Shayne McCracken, sworn June 28, 2017, Exhibit C

[93] McCracken Cross, p.61-62

90. CWB also initially requested that the other partners of the LPs sign the GSAs[94].However McCracken refused this and executed the GSAs for each of the GPs on behalf of each of the LPs on his own, contrary to the terms of each LPA and USA as will be detailed below.[95]

91. Subsequently, on March 29, 2017, CNC registered its security interest against each of the LPs at the PPR.[96]

(iii) The LPs never resolved for the GPs to grant the GSAs to CNC

92. Pursuant to the LPAs, each of the GPs required an "Extraordinary Resolution" to borrow and grant security on behalf of the LPs. Indeed, the LPAs require as follows:[97]

> The General Partner may determine that the Partnership requires funds from time to time, and, subject to prior approval by an Extraordinary Resolution, may in such circumstances borrow funds from any Person, including one or more of the Limited Partners, and may mortgage, pledge, hypothecate or otherwise charge on the assets of the Partnership as security for such borrowing.

93. The LPAs define an Extraordinary Resolution as follows:[98]

> ...means a resolution unanimously passed at a meeting of the Limited Partners called for the purpose of considering such resolution, each Limited partner having one vote for each Unit held or, alternatively, a resolution unanimously signed by the Limited Partners entitled to vote on such resolution at a meeting;

94. Despite the LPAs' express requirement for an Extraordinary Resolution, no meeting of the limited partners was ever called in respect of the GSAs and no resolution was unanimously signed by the limited partners in respect of the GSAs as required.[99] Indeed, 726, a limited partner of each of the LPs, did not have knowledge of the GSAs and did not consent to their execution.[100] In short, McCracken, on behalf of the GPs, granted the GSAs in favour of CNC, a company in which he was a director and an indirect

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[94] McCracken Cross, p.61-62
[95] McCracken Cross, p.60- Wandering GSA, at 7 – October Affidavit, at Exhibit I; Peace GSA, at 7 – October Affidavit, at Exhibit N; Kilometer GSA, at 7 – October Affidavit, at Exhibit T
[96] November Affidavit, at Exhibits I, J, K
[97] Section 17.2 of each of the LPAS - October Affidavit at Exhibits E, K, Q; McCracken Cross confirms that McCracken is not aware of any other provisions dealing with borrowing or granting of securities: Undertaking 1, 41:4-8 (Wandering),
[98] Section 3.1(h) of each of the LPAs – October Affidavit at Exhibits E, K, Q
[99] November Affidavit, at para 55
[100] October Affidavit at para 11; November Affidavit, at para 56

shareholder absent the requisite Extraordinary Resolution of the limited partners and in breach of the LPAs.

(iv) The GPs never resolved to grant the GSAs to CNC on behalf of the LPs

95. Pursuant to the USAs, each of the GPs required a "Unanimous Resolution" to grant the GSAs to CNC behalf of the LPs.[101]

96. The USAs define a Unanimous Resolution as follows:[102]

> ...means a resolution passed by a majority of not less than 100% of the votes cast by the Shareholders or where appropriate, directors, who are entitled to vote in respect of that resolution.

97. Despite the USAs' express requirement for a Unanimous Resolution, no meeting of the shareholders was ever called in respect of the GSAs and no resolution was unanimously signed by the shareholders or the directors of each of the GPs in respect of the GSAs as required.[103] Indeed, 726, a shareholder of each of the GPs, did not have knowledge of the GSAs and did not consent to them being granted/ executed.[104] In short, McCracken, on behalf of the GPs, signed the GSAs in favour of CNC, a company in which he was a director and, effectively, an indirect shareholder absent a unanimous resolution of the directors of the GPs in breach of the USAs.

(v) CNC knew of the requirements of the LPAs and USAs

98. McCracken was director of CNC when, on behalf of the LPs, he executed the GSAs in favour of CNC by the GPs.[105]

99. As the GSAs were executed subsequent to the LPAs and the USAs, and as McCracken executed each of those in the capacities noted above:

(a) McCracken knew of the requirements of each of the LPAs[106] and the USAs at the time of execution of the GSAs; and

(b) McCracken knew that there had been non-compliance with those requirements.[107]

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[101] Section 4.1 of each of the USAs – October Affidavit at Exhibits H, M, S
[102] October Affidavit at Exhibits H, M, S
[103] November Affidavit, at para 54
[104] October Affidavit at para 11; November Affidavit, at para 56
[105] McCracken Cross,
[106] McCracken Cross, 43:13-18 (Wandering: McCracken read and understood the document, including s.17.2) and 108
[107] McCracken Cross, pp. 47-48, 155-156, 181-182

100. Through McCracken, CNC had knowledge of the requirements of the LPAs and USAs for an Extraordinary Resolution and a Unanimous Resolution and the fact that there had been no compliance with those requirements at the time of execution of the GSAs.

(vi) McCracken signed every document giving rise to the improper GSAs

101. In summary, with respect to the purported GSAs given by the LPs in favour of CNC, McCracken was the signatory for all parties on all relevant documents, including those documents that confirm his knowledge of the improper nature of his actions, namely:

(a) With respect to the GSAs, McCracken signed as director and officer of the GPs, as well as a director and officer of CNC;

(b) With respect to the LPAs, McCracken signed as director and officer of CNG Holdings and the GPs;

(c) With respect to the USAs, McCracken signed as director and officer of CNC.

(vii) PPR Registrations

102. The available evidence shows that alleged security interests, including the following, were registered in respect of each of the LPs:

(a) Wandering LP:

A. Regarding the CNC GSA relating to the Wandering LP, CNC's March 29, 2017 PPR registration in respect of general collateral (namely, all present and after acquired personal property and proceeds, "**AllPAAP**") and serial number goods, some of which correspond to the serial numbers of the Wandering Leased Assets;[108]

B. 726's November 27, 2018 PPR registration in respect of serial number goods, all of which correspond to the serial numbers of the Wandering Leased Assets;[109]and

C. It should be noted that CWB has made no PPR registration in respect of Wandering LP[110]. There would appear to be no evidence that CWB has made any serial number goods registrations respecting the Wandering Leased Assets.

[108] October Roman Affidavit, Exhibit J
[109] Octoberr Roman Affidavit, Exhibit G
[110] October Roman Affidavit, Exhibit J

(b) Peace LP:[111]

A. Regarding the CNC GSA relating to the Peace LP, CNC's March 29, 2017 PPR registration in respect of:

A. Serial number goods, some of which correspond to the serial numbers of the Peace Leased Assets; and General collateral, namely AllPAAP

B. 726's November 27, 2018 PPR registration in respect of:

A. Serial number goods, all of which correspond to the serial numbers of the Peace Leased Assets;

B. General collateral, namely, AllPAAP as follows: "all present and after acquired personal property leased to the debtor by the secured party from time to time pursuant to a master equipment lease dated January 19, 2015 (as the same may be amended, modified, extended, renewed, replaced, restated, supplemented or refinanced from time to time), including but not limited to workforce housing modules, trailers and/or relocatable, modular and/or pre-fabricated structures including various appurtenances, such as stairs, railings, furniture, kitchen equipment, security systems and the like", and proceeds from "goods, chattel paper, investment property, documents of title, instruments, money and intangibles."

C. It should be noted that CWB has made no PPR registration in respect of Peace LP[112]. There would appear to be no evidence that CWB has made any serial number goods registrations respecting the Peace Leased Assets.

(c) Kilometer LP:[113]

A. CWB's July 31, 2015 PPR registration in respect of general collateral, namely, all present and after acquired accounts, chattel paper etc. and proceeds (the "**Accounts**");

B. Regarding the CNC GSA relating to the Kilometer LP, CNC's March 29, 2017 PPR registration in respect of:

[111] Seventh Affidavit of Jessie Taha, sworn December 3, 2018 (Taha #7), Exhibit E
[112] *ibid*
[113] Taha #7, Exhibit I

A. Serial number goods, a portion of which correspond to the serial numbers of Kilometer Leased Assets;

B. General collateral, namely AllPAAP;

C. CWB's September 26, 2018 PPR registration against general collateral, namely, all accounts owed by CNC to Kilometer LP and Kilometer GP and proceeds;

D. 726's November 27, 2018 PPR registration in respect of:

A. Serial number goods, all of which correspond to the serial numbers of the Kilometer Leased Assets;

B. General collateral, namely, AllPAAP as follows: "all present and after acquired personal property leased to the debtor by the secured party from time to time pursuant to a master equipment lease dated January 12, 2015 (as the same ma be amended, modified, extended, renewed, replaced, restated, supplemented or refinanced from time to time), including but not limited to workforce housing modules, trailers and/or relocatable, modular and/or pre-fabricated structures including various appurtenances, such as stairs, railings, furniture, kitchen equipment, security systems and the like", and proceeds from "goods, chattel paper, investment property, documents of title, instruments, money and intangibles."

B. Law and Argument

103. There is no priority issue between CNC and 726. A priority dispute presupposes both of the competing interests are valid. Simply put, CNC does not have a valid security interest in the Leased Assets because:

(a) The GSAs were not properly authorized by the LPs and:

A. the so called "indoor management rule" cannot be invoked by CNC to uphold the CNC GSAs because McCracken and CNC are not third parties to McCracken's violation which caused the GP, in turn, to execute the GSAs on behalf of the LPs in violation the USA; and

B. pursuant to provisions under the *Partnership Act*,[114] the CNC GSAs do not bind the LPs because McCracken and CNC were aware of the GP's violation of the LPA through McCracken;

(b) Further, or in the alternative, McCracken and the GPs signed the GSAs by the GP on behalf of the LPs in breach of his and the GP's fiduciary duty to the limited partners, and

104. For any and all of the grounds listed above, the GSAs ought to be declared to be invalid, void or unenforceable.

105. Before analyzing those issues, it bears mention that although, through the affidavits filed on behalf of CWB in these proceedings, and in particular Affidavit #6 of Jessie Taha, sworn October 3, 2018, CWB asserts that it has a security interest in the assets charged by CNC's GSAs, CWB has no direct security interest and will effectively not have the benefit of any security it does not have if the GSAs are invalid.[115]

(i) The GSAs were not granted with authorization

106. Each of the USAs forbids the GPs to enter into security agreements without a Unanimous Resolution.[116] Each of the LPAs forbids the GPs to borrow money or charge the assets of the LPs as security for borrowing, unless there is an Extraordinary Resolution permitting same.[117]

107. Notwithstanding the provisions set out in each GPs USA and each LPs' LPA, McCracken caused CNC as the GP to improperly grant to CNC and register security over the LPs' interest in the Leased Assets, all of which McCracken on behalf of CNC and 726 agree is owned by 726. For each of the Wandering, Peace and Kilometer GSAs:

(a) There was no Unanimous Resolution to allow the GPs to enter into the GSAs with CNC;[118]

(b) There was no Extraordinary Resolution to allow the LPs to grant the GSAs to CNC.[119]

108. As previously noted, McCracken and CNC were well aware that neither the requirements under the USA nor the requirements under the LPA had been met in order for the GSAs to be valid.[120]

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[114] RSA 2000, c P-3 **[Tab 5]**
[115] Affidavit # 6 of Jessie Taha, sworn October 3, 2018 (the "**Taha Affidavit**")
[116] USA, s. 1.1 and 4.1.
[117] LPAs, s. 17.2
[118] McCracken Cross, pp. 47-48, 155-156, 181-182
[119] ibid

109. Under the *Alberta Business Corporations Act*, any security interest or promissory note must comply with the terms of the USA in order to be valid. The ABCA also explicitly provides remedies for acts that contravene the USA:

> **Compliance or restraining order**
>
> 248 If a corporation or any shareholder, director, officer, employee, agent, auditor, trustee, receiver, receiver-manager or liquidator of a corporation contravenes this Act, the regulations, the articles or bylaws or a unanimous shareholder agreement, a complainant or a creditor of the corporation may, in addition to any other right the complainant or creditor has, apply to the Court for an order directing that person to comply with, or restraining that person from contravening any of those things, and on the application the Court may so order and make any further order it thinks fit.[121]

110. An interest created or a promissory note given contrary to the USA ought to be declared null and void.[122]

(a) Indoor management rule does not operate in favour of CNC

111. In this case, contrary to the arguments in the Monitor's Brief starting at paragraph 110, the so called "indoor management rule" cannot be invoked by CNC to protect the CNC GSAs.

112. The indoor management rule is codified in s. 19 of the ABCA, which reads as follows where the parenthetical comments have been added as an explanatory aid:

> 19 A corporation [the GPs], a guarantor of an obligation of the corporation or a person claiming through the corporation [726] may not assert against a person dealing with the corporation [CNC] or dealing with any person who has acquired rights from the corporation
>
> (a) that the articles, bylaws or any unanimous shareholders agreement have not been complied with,
>
> [...]
>
> unless the person [CNC] has, or by virtue of the person's position with or relationship to the corporation [the GPs] ought to have, knowledge of those facts at the relevant time.[123]

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[120] ibid

[121] Alberta *Business Corporations Act*, RSA 2000, c B-9 ("**ABCA**")at s. 248. [emphasis added] **[Tab 6]**

[122] *Skrien v Waterloo Junction Rail Tours Ltd.*, 1998 CarswellOnt 3598 at para 4 **[Tab 7]**

113. The Monitor's Brief incorrectly and confusingly cites case law in which the indoor management rule operated to protect "affected third parties who contracted with the corporation in good faith believing the corporate act on which they relied on to be one that the corporation was legally authorized to undertake."[124]

114. While the indoor management rule typically allows a third party to disregard a corporation's internal deficiencies in reliance on the company's representations, this rule does not operate when the alleged "third party" is in fact someone who has or ought to have knowledge that a unanimous shareholders agreement was not followed. Case law further confirms this principle.[125]

115. In *Anderson*, not all directors and shareholders of the borrower received notice of a meeting to vote on the transaction in question, before the directing mind behind both the lender [Anderson Lumber] and borrower executed the transaction that gave rise to the dispute. The Court held that the indoor management rule could not be invoked by the directing mind of the lender to uphold the transaction in the face of the other shareholder of the borrower challenging it, because he had actual knowledge of the non-compliance. Moreover, the lender corporation also could not invoke the indoor management rule, because it had knowledge of the non-compliance through its directing mind's knowledge:

> Is William Anderson's knowledge Anderson Lumber's knowledge? In my view it is. In *H. L. Bolton (Enrg.) Co. Ltd. v. T. J. Graham & Sons Ltd.*, [1957] 1 Q.B. 159, [1956] 3 All E.R. 624, Denning L.J. stated at p. 172:
>
>> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company.
>
> That case and the cases referred to therein support the conclusion that William Anderson's knowledge was the knowledge of Anderson Lumber

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[123] Alberta *Business Corporations Act*, RSA 2000, c B-9 ("**ABCA**") at s. 19. **[Tab 6]**
[124] Monitor's Brief, para 113, citing *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160.
[125] *Anderson Lumber Co v Canadian Conifer Ltd*, [1977] 5 WWR 41, 77 DLR (3d) 126 (Alta CA) **(Anderson) [Tab 8]**

> where, as was the case, he was the "directing mind and will" of Anderson Lumber and acted for it in obtaining the debentures.

116. The situation before the Court in *Anderson* is precisely the situation before the Court in these proceedings.

117. McCracken, being the controlling mind of CNC at the relevant time, testified that he was aware of the requirements under the USAs,[126] including the need for a Unanimous Resolution, but nonetheless proceeded to sign the CNC GSAs in CNC's favour anyway.[127]

118. Not only was McCracken in a position to know about his own lack of authority to sign the GSAs, but he also does not dispute that he had actual knowledge of that fact.[128] CNC, through McCracken, was fully aware that the CNC GSAs were executed in violation of the USAs. Given the Court's findings in *Anderson*, the outdated and out-of-jurisdiction case law cited in paragraph 114 of the Monitor's Brief also do not apply in these circumstances.

119. CNC was therefore not and cannot be treated as a third party with respect to McCracken's lack of authority to grant and sign the GSAs under the USAs and cannot invoke the indoor management rule against another shareholder, 726, who challenges those GSAs. The Monitor's Brief ignores, or otherwise glosses over, the fact that the corporation in question is the applicable GP, and the alleged "third party" contracting with the LPs through the GPs is CNC. To cite the Monitor's own legal authority from paragraph 113 of the Monitor's Brief, CNC was not a "third party" who "contracted with the [GPs] in good faith believing" that the GPs were authorized to sign the CNC GSAs.

120. Similarly, while the Monitor's Brief discusses *Schaus v. Mountain Ridge Developments Inc.*,[129] at length, the Monitor again ignores the fact that McCracken and CNC are not true third parties to the GPs and McCracken's own lack of authority of the GPs to sign the CNC GSAs.

121. Specifically, it is immaterial how many directors or officers there were in the GPs, or whether any of their names appear on the CNC GSAs. *Schaus* dealt with an innocent third party who relied on the deficient contracts, which is simply not the case here. In fact, as cited by the Monitor at paragraph 115 of the Monitor's Brief, the Court in *Schaus* held that:

> Section 19(a) [of the ABCA] does not allow the defendant to raise noncompliance with articles or bylaws against the plaintiff who has acquired rights from the defendant <u>unless the plaintiff has knowledge of</u>

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126 McCracken Cross, 47:22-48:1
127 McCracken Cross, pp. 155-156, 181-182
128 McCracken Cross, pp. 117-118
129 2009 ABQB 94 (*Schaus*), Monitor's Brief, Tab 6

noncompliance at the relevant time or the plaintiff by virtue of its position with or relationship to the defendant ought to have known about the noncompliance.

122. CNC's knowledge of the improper nature of its own action through McCracken is sufficient to invalidate the product of that improper action, being the CNC GSAs, and the indoor management rule does not protect CNC from arguing that it must be protected against the GPs' lack of "indoor" compliance, when its director and officer McCracken was aware of, and in fact orchestrated, the GPs' lack of compliance with the USAs.

(b) CNC GSAs do not bind the LPs pursuant to Partnership Act

123. Similarly, the CNC GSAs were also granted in violation of the LPAs.

124. As set out above, pursuant to the LPAs, each of the GPs required an Extraordinary Resolution to grant security on behalf of the LPs. An Extraordinary Resolution was never obtained from the partners of each the LPs, as contemplated by each LPA.

125. Similar to the breach of the USAs, the breach of the LPAs is also a breach of the contract between the partners,[130] of which McCracken was aware when he executed the GSAs for the LPs in favour of CNC. Section 1.1 of each of the LPAs state that the GP and limited partners "hereby form and enter into [the LP] in accordance with the *Partnership Act* (Alberta) and the provisions of this Agreement."[131] The *Partnership Act*[132] therefore applies to all of the LPAs.

126. Specifically, as provided in s.56 of the *Partnership Act*, a general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership without limited partners, including as set out at s.10, which provides:

Notice that firm not bound by acts of partner

10 When the partners have agreed that a restriction is placed on the power of one or more of the partners to bind the firm, an act done in contravention of the agreement is not binding on the firm with respect to persons having notice of the agreement.[133]

127. Citing the similarly worded s.10 of the Saskatchewan *Partnership Act*,[134] the Saskatchewan Court of Appeal confirmed that a third party cannot be sheltered under

[130] *Gregory Yates Professional Corp v Gary S. Sankoff Professional Corp.*, [1995] A.J. No. 422 at para 75 **[Tab 9]**
[131] October Roman Affidavit, Exhibits E, K, Q
[132] RSA 2000, c P-3 **[Tab 5]**
[133] The Partnership Act, RSA 2000, c P-3, ss.10, 56 **[Tab 5]**
[134] RSS 1978, c P-3, "If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement." **[Tab 10]**

the doctrine of implied authority, when that third party had notice of the general partner's limited authority. The Court held:

> 142 Indeed, if the trial judge had held that SaskEnergy did not have notice, I would have been prepared to hold that such a finding represents a palpable and overriding error. SaskEnergy was formally alerted to the Limited Partnership's requirement of a two-thirds approval of the unit holders in the case of a sale on two occasions in writing:
>
> (a) ADAG's response to the RFP contained an option to purchase "at a price of $18.9 million, subject to the approval (at the time the option was exercised) of two-thirds of the unit holders in the Limited Partnership" (Trial Decision at para 12); and
>
> (b) in the April 11 Letter, where Mr. Bodon advised Mr. Elmer about Article 8 of the LP Agreement, "which we must adhere to" and offered two approaches with "both options being subject to approval of the limited partners" (exhibit T-36).
>
> [...]
>
> 144 This is clear evidence that SaskEnergy had notice. While ADAG did not give SaskEnergy a copy of the LP Agreement, the restriction in the LP Agreement was formally drawn to SaskEnergy's attention in writing twice, and in oral communications on successive occasions, which support a conclusion that SaskEnergy had notice, and knew, of the restriction.

128. As set out above, through McCracken, CNC (analogous to SaskEnergy above) was aware and had notice of the existence of the LPAs, as well as each LPA's requirements for an Extraordinary Resolution in order to grant security through the respective GPs. Therefore, the LPs cannot be bound by the CNC GSAs, because they were improperly executed by McCracken on behalf of the GPs, in contravention of the LPAs, with McCracken and CNC having notice and full knowledge of that contravention.

129. As such, the CNC GSAs are invalid, void or unenforceable and need to be declared as such.

(ii) McCracken signed the GSAs in breach of his and the GP's fiduciary duty

130. In addition to McCracken's lack of authority to sign the GSAs, the GSAs were also executed in breach of McCracken's and the GP's fiduciary duty to the LP's limited partners.

131. Article 10.1 of the LPA requires that the GP (CNC) act with the utmost fairness and good faith towards the other partners in the conduct of the partnership business:

> The General Partner hereby covenants, represents and warrants that:
>
> [...]
>
> (c) it shall act with the utmost fairness and good faith towards the other Partners in the conduct of the Partnership Business[135]

132. Article 10.1 of the LPA expressly contemplates a fiduciary duty between the GPs and the LPs. Under the LPA, as well as the common law, the fiduciary is required to act with absolute loyalty towards the beneficiary in managing its affairs.[136]

133. By improperly signing the GSAs, the GPs violated their fiduciary duty owed to the partners of the LPs by acting unfairly and to their detriment.

134. Further, in the context of this case, it is improper for a director (of the GP) such as McCracken to self-deal, regardless of whether the self-dealing was ultimately profitable for McCracken.

135. A director who self-deals is also required to disclose the transaction to the corporation at the earliest opportunity. According to the ABCA:

> **Disclosure by directors and officers in relation to contracts**
>
> **120(1)** A director or officer of a corporation who
>
> (a) is a party to a material contract or material transaction or proposed material contract or proposed material transaction with the corporation, or
>
> (b) is a director or an officer of or has a material interest in any person who is a party to a material contract or material transaction or proposed material contract or proposed material transaction with the corporation,
>
> shall disclose in writing to the corporation or request to have entered in the minutes of meetings of directors the nature and extent of the director's or officer's interest.[137]

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[135] LPAs at their respective Article 10.1
[136] *Western Larch Ltd. v Di Poce Management Ltd.*, 2012 ONSC 7014 at para 212 **[Tab 11]**
[137] *ABCA* at s. 120(1). **[Tab 6]**

136. Without disclosing the transaction and obtaining director and shareholder approval, a director may not self-deal, regardless of the profit to the corporation or fairness of the transaction:

> **120(8)** If a material contract or material transaction is made between a corporation and one or more of its directors or officers, or between a corporation and another person of which a director or officer of the corporation is a director or officer or in which the director or officer has a material interest,
>
> (a) the contract or transaction is neither void nor voidable by reason only of that relationship, or by reason only that a director with an interest in the contract or transaction is present at or is counted to determine the presence of a quorum at a meeting of directors or committee of directors that authorized the contract or transaction, and
>
> (b) a director or officer or former director or officer of the corporation to whom a profit accrues as a result of the making of the contract or transaction is not liable to account to the corporation for that profit by reason only of holding office as a director or officer,
>
> if the director or officer disclosed the director's or officer's interest in accordance with subsection (2), (3), (4), (5) or (7), as the case may be, and the contract or transaction was approved by the directors or the shareholders and it was reasonable and fair to the corporation at the time it was approved.[138]

137. Following timely disclosure of the transaction, the director is then required to recuse him or herself from voting in any resolution to approve the transaction.[139]

138. If a director fails to disclose the material contract or material transaction, a court may set aside the contract or transaction:

> **120(9)** If a director or an officer of a corporation fails to comply with this section, a Court may, on application of the corporation or any of its shareholders, set aside the material contract or material transaction on any terms that it thinks fit, or require the director or officer to account to the corporation for any profit or gain realized on it, or both.[140]

139. Similarly, a contract or transaction made in breach of a fiduciary duty may be set aside under the common law as well. As cited by the Alberta Court of Queen's Bench in *First*

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[138] *Ibid* at s. 120(8).
[139] *Ibid.*
[140] *Ibid* at s. 120(9).

Calgary Financial Savings & Credit Union Ltd. v. Meadows,[141] Canadian Courts have adopted the English Court of Appeal's decision in *Lloyds Bank Ltd. v. Bundy*, [1975] Q.B. 326, [1974] 3 W.L.R. 501, [1974] 3 All E.R. 757 (C.A.), in which a guarantee and mortgage had been set aside because the defendant bank owed and breached a fiduciary duty to the unsophisticated individual plaintiff.

140. In this case, the execution of the CNC GSAs was done without a Unanimous Resolution or Extraordinary Resolution as set out and required in the USAs and LPAs, and was also not a fair transaction as McCracken essentially executed documents for his own (albeit indirect) benefit, disregarding the rights of the other partners to the LPs. As such, the CNC GSAs were executed in breach of McCracken's and the GPs' fiduciary duty to the GPs and LPs, and ought to be set aside under s.120(9) of the ABCA or the common law.

V. ALTERNATIVE AND OTHER ISSUES

141. In the event this Court finds that the GSAs are otherwise validly granted notwithstanding 726's submissions above, 726 submits that the Court ought to declare them to be void for the reasons outlined below.

B. Rectification - The CNC GSAs ought to be rectified to reflect the true intention of the parties

142. Even if the CNC GSAs were valid and enforceable, they do not reflect the intention or true agreement between the parties (the LPs and CNC), and ought to be rectified accordingly.

143. During cross-examination, McCracken admitted that the CNC GSAs were not meant to secure the entirety of the LPs' assets. Rather, the purpose of the GSAs was to secure the LPs' accounts receivables.[142]

144. Again, McCracken executed the CNC GSAs on behalf of CNC and the LPs, who were the parties to the CNC GSAs. The common intention of the parties entering into the agreement is therefore that the CNC GSAs were to be registered against the accounts receivable alone, and not against the Leased Assets owned by 726, and there is no evidence to the contrary.

145. Rectification is an equitable remedy by which a court can vary the terms of a written agreement, when the document to be rectified, as it is written, does not reflect the common intention of the parties due to a mutual mistake.[143]

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[141] *First Calgary Financial Saving & Credit Union Ltd. v Meadows* (1989), 66 Alta LR (2d) 7 **[Tab 12]**
[142] McCracken Cross, pp.56-57
[143] *Wickstrom v Wetter*, 2008 ABQB 83 at para 72. **[Tab 19]**

146. To obtain rectification, courts will generally require "proof beyond a reasonable doubt" that the parties' common intention was not conveyed in the written agreement.[144] The Supreme Court of Canada has held that the court "should attempt to uphold the parties' bargain where the terms can be ascertained with a reasonable level of comfort, i.e., convincing proof."[145]

147. Further, in *Peter Pan Drive-In Ltd. v Flambro Realty Ltd.*, the Ontario High Court of Justice held that "it is not necessary to show that there was an expressed antecedent agreement in order to be found a successful claim for rectification. In the case at bar the evidence was that there was no discussion about the respective obligations to pay the mortgage payments. It seems obvious to me that the point was so clear, *i.e.*, that Peter Pan alone was responsible for the mortgage payments, that discussion was unnecessary."[146]

148. The Alberta Court of Queen's Bench in *Wickstrom* has also held that rectification is a remedy available to prevent a written document from being used for purposes of fraud.[147]

149. In the present case, the facts are unique in that McCracken signed the GSA on behalf of the LPs in favour of CNC. McCracken was, at all material times, a director and officer of CNC.[148] Therefore, wearing his CNC hat, McCracken was both an agent and representative for CNC. The intention of CNC can be derived from Mr. McCracken's admissions since he was the person who entered into the GSA on behalf of CNC.

150. Likewise, McCracken was also an agent and representative of the LPs when he entered into the CNC GSAs on the LPs' behalf, wearing his director and officer hat for each GP. Consequently, the intention of the LPs in entering to the GSA may also be derived from Mr. McCracken's admissions.

151. As held in *Peter Pan*, it does not matter that there was no previous or antecedent agreement between CNC and the LPs regarding the nature of the GSAs. It is clear that, in this case, when the same individual is entering into a contract on behalf of both parties to that contract as both parties' officer and director, that individual's intentions would become the respective parties' intentions for the contract. Based on the principle set out in *Peter Pan*, it is obvious that both CNC and the LPs only intended the GSA to secure receivables and nothing else. Consequently, rectification should be granted on that basis so that the GSA is interpreted to only grant security in respect of receivables, and not the Leased Assets.

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[144] *Wickstrom v Wetter*, 2008 ABQB 83 at para 65. **[Tab 19]**
[145] *Sylvan Lake Golf & Tennis Club Ltd. v Performance Industries Ltd.*, 2002 SCC 19 at para 47. **[Tab 20]**
[146] *Peter Pan Drive-In Ltd. v Flambro Realty Ltd.*, [1978] O.J. No. 2732 ("***Peter Pan***") at para 15. **[Tab 21]**
[147] *Wickstrom v Wetter*, 2008 ABQB 83 at para 73. **[Tab 19]**
[148] First Affidavit of Paul McCracken, filed February 23, 2018 at para 1.

C. The GSAs are void as a fraudulent preference and/or conveyance

(i) Fraudulent Preferences Act ("FPA")

152. Section 1 of the FPA[149] allows a transaction to be set aside when the transaction is made with intent to defeat, hinder, delay, or prejudice one's creditors:

> 1 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made
>
> (a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and
>
> (b) with intent to defeat, hinder, delay or prejudice the person's creditors or any one or more of them,
>
> is void as against any creditor or creditors injured, delayed or prejudiced.

153. Similarly, s.2 of the FPA states:

> 2 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made
>
> (a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and
>
> (b) to or for a creditor with intent to give that creditor preference over the other creditors of the debtor or over any one or more of them,
>
> is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

154. In this case, the improper granting of the GSAs by the LPs through McCracken to CNC would fall under the definition of a "fraudulent transfer" under the FPA, being the transactions contemplated in ss.1-2 of the FPA[150].

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[149] RSA 2000, c F-24 **[Tab 13]**

155. To satisfy the requirements under both sections 1 and 2 of the FPA, there must have been a gift, conveyance, assignment, transfer of goods, chattels, bills, bonds, notes or securities, where the execution of a promissory note and registration of a security interest constitutes a conveyance or transfer of property.[151] The GSAs constitute a conveyance or transfer of property by the LPs within the meaning of the FPA.

156. Further, the transferor must be in insolvent circumstances or know that it is on the eve of insolvency, specifically, that person is unable to pay its debts in full in the ordinary course of business.[152]

157. In this case, McCracken specifically testified that at the time he caused the GP to sign the GSAs on behalf of the LPs in favour of CNC, that the LPs were insolvent.[153]

158. Under s. 1 of the LPA, the security must have been granted with intent to defeat, hinder, delay or prejudice the person's creditors or any one or more of them such as 726. In this regard:

> ...intent is difficult to prove on the basis of direct evidence. It would be a rare occasion where a debtor would make a public admission of such an intent. Consequently, the intent must be implied from the circumstances surrounding the imputed transaction. [154]

159. In considering intent from the implied circumstances, Alberta courts import the "badges of fraud" analysis from the *Statute of Elizabeth*, which include:[155]

> There must be a conveyance of either real or personal property;
>
> The transaction must have been for no or nominal consideration;
>
> It must have been the intent of the settlor to defraud, hinder or delay his creditors;
>
> The intent of the settlor may be inferred from his circumstances and the circumstances of the settlement or may be the result of direct evidence;
>
> The fact that there was no consideration or voluntary consideration will in most cases justify the inference of the necessary intent absent evidence rebutting that inference;

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[150] FPA

[151] *Abalon Holdings Ltd. v Bank of Nova Scotia*, 2001 MBQB 136 at para 16, affirmed by MBCA in 2002 MBCA 76 **[Tab 14]**

[152] *Crestwood Kitchens Ltd. v Camco Inc.* (1982), 1982 CarswellBC 514 at paras 9 and 10. **[Tab 15]**

[153] McCracken Cross, p.185:21-24

[154] *Alberta (Attorney General) v Samuel Doz Professional Corp.*, 1993 CarswellAlta 338 at para 34 **[Tab 16]**

[155] *Alberta (Attorney General) v Samuel Doz Professional Corp.*, 1993 CarswellAlta 338 at para 35 **[Tab 16]**

Inference of intent will be strong if the settlor was insolvent at the time of settlement or the settlement effectively denuded him of assets sufficient to cover existing obligations;

The party challenging the conveyance must be a creditor or someone with a legal or equitable right to claim against the settlor;

The conveyance must have had the intended effect.[156]

160. In this case, many of the badges of fraud regarding intent exist and have been referenced above. The CNC GSAs were executed by the LPs in favour of CNC with the interests of CNC's downstream creditor (CWB) in mind, at its instance, and resulting to its potential preferential benefit in serving to convert CNC's an unsecured claim into a purportedly secured one.

161. Further, under s. 2 of the LPA, the security must have been granted with an intent to prefer:

Where an unsecured creditor executes a GSA to convert its unsecured claims to secured claim, a court will find that the conversion constitutes fraudulent preferences under s. 2 unless there is contemporaneity to an advance and the registration of the GSA;[157]

Circumstances that show intention to defeat creditors include:

No details relative to the calculation or accounting records for the claimed amounts;

Not testifying as to what arrangements were made for payment of the amounts, in whole or in part;

No evidence to demonstrate reasonableness of figures claimed to be owing;

Absence of third party decision-making in the operation of the creditor and debtor (i.e. debtor was controlling mind of creditor);

Evidence that individual was "at the very least an influential controlling factor for both companies was probably was the guiding mind of each".[158]

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[156] *1007374 Alberta Ltd. v Ruggieri*, 2013 ABQB 420 at para 29. **[Tab 17]**
[157] *1007374 Alberta Ltd. v Ruggieri*, 2013 ABQB 420 at paras 46 and 47. **[Tab 17]**
[158] *Abalon Holdings Ltd. v Bank of Nova Scotia*, 2001 MBQB 136 at paras 15 and 16. **[Tab 14]**

162. These circumstantial factors exist and have been met in this case. The reality is that no accounting information or record of the amount allegedly claimed to be owing to CNC from the LPs existed in evidence, until the Monitor presented Exhibits D-27-30 at the McCracken Cross.

163. Even considering the information contained in Exhibit D-, there is no additional evidence as to the terms of the alleged debt owing by the LPs to CNC.

164. In fact, the alleged debt owed by the LPs to CNC appears to pre-date the CNC GSAs, and the lack of fresh consideration received by the LPs in exchange for the granting of the CNC GSAs, is further evidence that the GSAs were a fraudulent preference. Notwithstanding what is argued in the Monitor's Brief, there is no evidence to indicate that the amount allegedly owed by the LPs to CNC[159] includes a fresh advance of consideration for the CNC GSAs. To the contrary, the alleged debt owed by the LPs to CNC appears to pre-date the CNC GSAs, and the lack of fresh consideration is further evidence that the GSAs were a fraudulent preference.

(ii) *Fraudulent Conveyances Act / Statute of Elizabeth*

165. Additionally, conveyances and other transactions may also be declared void under the *Fraudulent Conveyances Act / Statute of Elizabeth*,[160] if they were made with the intent to delay, hinder or defraud creditors or others, such as 726.[161]

166. Courts have summarized the indicia of a fraudulent conveyance as follows, each of which 726 submits has been met in this case as described above:

> 1. There must be a conveyance of either real or personal property;
>
> 2. The transaction must have been for no or nominal consideration;
>
> 3. It must have been the intent of the settlor to defraud, hinder or delay his creditors [or others;]
>
> 4. The intent of the settlor may be inferred from his circumstances and the circumstances of the settlement or may be the result of direct evidence;
>
> 5. The fact that there was no consideration or voluntary consideration will in most cases justify the inference of the necessary intent absent evidence rebutting that inference;

[160] *Fraudulent Conveyances Act*, 1571 (13 Eliz. 1), c 5 **[Tab 18]**
[160] *Fraudulent Conveyances Act*, 1571 (13 Eliz. 1), c 5 **[Tab 18]**
[161] *Alberta (Attorney General) v Samuel Doz Professional Corp.*, 1993 CarswellAlta 338 at para 46 **[Tab 16]**

6. Inference of intent will be strong if the settlor was insolvent at the time of settlement or the settlement effectively denuded him of assets sufficient to cover existing obligations;

7. The party challenging the conveyance must be a creditor or someone with a legal or equitable right to claim against the settlor;

8. The conveyance must have had the intended effect.[162]

D. The Purported Guarantees from the LPs in favour of CWB are not valid

167. While this issue appears to be immaterial based on the evidence given by the parties to date, to the extent that there are any arguments raised about the validity or effect of the Purported Guarantees, it is 726's positon, for the record, that similar to the invalidity and unenforceability of the CNC GSAs, the Purported Guarantees signed by McCracken for the Peace LP and Kilometer LP in respect of CNC's debt to CWB are invalid, improper and/or unenforceable.

168. Each of the Purported Guarantees in question were accompanied by certificates signed by McCracken, stating that each of the LPs and GPs passed resolutions approving the Purported Guarantees. No such resolutions were passed, and no meetings occurred. Limited partners including 726 were not made aware of these Purported Guarantees until they became involved in these proceedings. McCracken was aware of the lack of compliance with the LPAs and USAs in executing the Guarantees.[163]

169. The Purported Guarantees ought to be declared void or enforceable on the following basis:

(a) The Purported Guarantees were not granted with authorization;

A. the so called "indoor management rule" cannot be invoked by CNC to uphold the Purported Guarantees because McCracken and CNC are not third parties to McCracken's violation which caused the GP, in turn, to execute the Purported Guarantees on behalf of the LPs in violation the USA; and

B. the *Partnership Act*[164] does not validate the Purported Guarantees because McCracken and CNC cannot be understood to be third parties to McCracken's violation of the LPA;

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[162] *1007374 Alberta Ltd. v Ruggieri*, 2013 ABQB 420 at para 29. **[Tab 17]**
[163] McCracken Cross, pp. 47-48, 155-156, 181-182
[164] RSA 2000, c P-3 **[Tab 5]**

(b) Further or in the alternative, McCracken and the GPs signed the Purported Guarantees by the GP on behalf of the LPs in breach of his and the GP's fiduciary duty to the limited partners.

170. McCracken executed each of the CWB Guarantees on July 30, 2015, on behalf of each of the Peace LP, Kilometer LP, Peace GP and Kilometer GP (the "**Guarantors**").[165]

171. In September of 2018, McCracken admitted to Barry Roman ("**Roman**") of 726 that he knew that he could not honestly sign the certificates detailed above, as no meetings occurred and no resolutions were passed by any of Peace LP, Peace GP, Kilometer LP, and Kilometer GP in respect of the Purported Guarantees.[166] He further advised Roman that he signed the certificates at CWB's insistence. [167] This admission was again confirmed by McCracken in his Cross Examination on December 5, 2018.[168]

172. Despite the USAs' express requirement for a Unanimous Resolution, no meeting of the shareholders of each of Peace GP and Kilometer GP was ever called in respect of the Purported Full Indemnity Guarantees and no resolution was unanimously signed by the shareholders of each of Peace GP and Kilometer GP in respect of the Purported Full Indemnity Guarantees[169] Indeed, 726 is a shareholder of each of Peace GP and Kilometer GP, and 726 had no knowledge of the Purported Full Indemnity Guarantees except as a result of and through Taha Affidavit #6.[170] 726 did not consent to the Purported Full Indemnity Guarantees being granted or executed by any of Peace GP and Kilometer GP.[171]

173. Pursuant to the language of Bylaw No. 2 of each of Kilometer GP and Peace GP, it may have been acceptable for each of Kilometer GP and Peace GP to execute the Purported Full Indemnity Guarantees on behalf of themselves without a Unanimous Resolution.[172] However, given that Bylaw No. 2 does not contemplate the limited partnerships whereas the USAs do, in all cases the Purported Full Indemnity Guarantees could only be executed by each of Kilometer GP and Peace GP on behalf of each of Kilometer LP and Peace LP, respectively, pursuant to a Unanimous Resolution.[173]

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[165] Full Liability Guarantee granted by Peace LP in favour of CWB, dated July 30, 2015 – Taha Affidavit, at Exhibit Y; Full Liability Guarantee granted by Kilometer LP in favour of CWB, dated July 30, 2015 – Taha Affidavit, at Exhibit AA

[166] November Affidavit, at para 41

[167] November Affidavit, at para 41

[168] McCracken Cross

[169] November Affidavit, at para 45

[170] November Affidavit, at para 45

[171] November Affidavit, at para 45

[172] November Affidavit, at para 46

[173] November Affidavit, at para 46

174. Contrary to the Monitor's argument, the directors of the GPs only had the ability to enter into security and loan agreements on behalf of the GPs, and not the LPs.[174] There had been no changes to the authority given in the bylaws to allow otherwise.[175]

175. Moreover, Bylaw No.2 only contemplates who may enter into an agreement on behalf of the GPs, and not how that is done. The directors of the GPs must nonetheless follow corporate rules, including requirements under the USA.

176. Despite the LPAs' express requirement for an Extraordinary Resolution, no meeting of the Limited Partners of each of Peace LP and Kilometer LP was ever called in respect of the Purported Guarantees and no resolution was ever unanimously signed by the Limited Partners in respect of the Purported Guarantees.[176]

177. 726 is a limited partner of each of Peace LP and Kilometer LP, and 726 had no knowledge of the Purported Full Indemnity Guarantees, except as a result of and through Taha Affidavit #6.[177] 726 did not consent to the Purported Full Indemnity Guarantees being granted by Peace LP, and Kilometer LP, or executed by their respective general partners on their behalf.[178]

178. Again, McCracken had knowledge of the relevant LPA and USA requirements, but ignored them or purposefully contravened them in executing the CWB Guarantees.

179. In addition, McCracken advised Roman in March 2017 that he and his wife personally guaranteed CNC's debt to CWB,[179] which was confirmed by McCracken's evidence given in his cross-examination.[180]

180. On the same legal basis as the Validity of GSA Issue was argued as set out above, the Purported Full Indemnity Guarantees (and the GABDs in support thereof) ought to be declared void, invalid or unenforceable.

VI. CONCLUSION AND RELIEF REQUESTED

181. 726 seeks, *inter alia*, the following:

(a) With respect to the Bonnyville Issues, that the Late CWB Application and the 726 Application relating to the Bonnyville Issues be adjourned until such a time the parties have had an opportunity to submit further evidence and law on the new issues raised by CWB;

[174] Bylaw #2, McCracken Cross at Exhibits D-8
[175] McCracken Cross, 102:16-19
[176] November Affidavit, at para 50
[177] November Affidavit, at para 51
[178] November Affidavit, at para 51
[179] November Affidavit, at para 52
[180] McCracken Cross

(b) An Order declaring that the GSAs in favour of CNC are invalid, void, voidable, should be set aside, and / or are otherwise unenforceable;

(c) An Order declaring that the Leased Equipment (which is the subject of the Leases between 726 as lessor and each of the Lessee LPs) includes the Small Wares, the Ancillary Equipment and the Swapped Assets, or alternatively;

(d) An Order declaring that they are owned by 726;

(e) Such further and other relief as may be sought by the Applicants and this Court may grant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of December, 2018.

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: ______________________________

Christa Nicholson
Zao Han
Solicitors for 726 Modular Finance Ltd.,
726 Remote Accommodations, Ltd.,
Reliant Asset Management, LLC.

VII. LIST OF AUTHORITIES

1. Alberta *Rules of Court*, Alta. Reg. 124/2010, s. 6.3
2. *Fleming v Crookes*, 2005 ABQB 181
3. *M.J.B. Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 S.C.R. 619
4. *Dowcar Metals Inc v Arrow Reload Systems Inc*, 2018 ABQB 549
5. Alberta *Partnership Act*, RSA 2000, c P-3
6. Alberta *Business Corporations Act*, RSA 2000, c B-9
7. *Skrien v Waterloo Junction Rail Tours Ltd* (1998), 82 A.C.W.S. (3d) 896
8. *Anderson Lumber Company Ltd. v. Canadian Conifer Ltd.*, [1977] A.J. No. 179
9. *Gregory Yates Professional Corp v Gary S. Sankoff Professional Corp*, [1995] A.J. No. 422
10. Saskatchewan *Partnership Act*, RSS 1978, c P-3
11. *Western Larch Ltd. v Di Poce Management Ltd*, 2012 ONSC 7014
12. *First Calgary Financial Savings & Credit Union Ltd. v. Meadows* (1989), 66 Alta LR (2d) 7
13. *Fraudulent Preferences Act*, RSA 2000, c F-24
14. *Abalon Holdings Ltd v Bank of Nova Scotia*, 2001 MBQB 136
15. *Crestwood Kitchens Ltd v Camco Inc*, [1982] B.C.J. No. 1399
16. *Alberta (Attorney General) v Samuel Doz Professional Corp*, [1993] A.J. No. 257
17. *1007374 Alberta Ltd v Ruggieri*, 2013 ABQB 420
18. *Fraudulent Conveyances Act,* 1571 (13 Eliz. 1) c.5
19. *Wickstrom v Wetter,* 2008 ABQB 83
20. *Sylvan Lake Golf & Tennis Club Ltd. v Performance Industries Ltd.*, 2002 SCC 19
21. *Peter Pan Drive-In Ltd. v Flambro Realty Ltd.*, [1978] O.J. No. 2732