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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	THIRD EYE CAPITAL CORPORATION
DEFENDANTS	OPSMOBIL INC., RANCH ENERGY CORPORATION, 1734163 ALBERTA INC., 1859821 ALBERTA INC., AIR DELLAIRE LTD., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.
DOCUMENT	**BRIEF OF AIRBORNE ENERGY SOLUTIONS INC.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Burnet, Duckworth & Palmer LLP** 2400, 525 - 8 Avenue SW Calgary, Alberta T2P 1G1 Lawyer: David LeGeyt Phone Number: (403) 260-0210 Fax Number: (403) 260-0332 Email address: dlegeyt@bdplaw.com File no.: 75955-1

**Application before the Honourable Madam Justice Romaine,
on the Commercial List, in Chambers, on
August 10, 2018, commencing at 1:00 p.m.**

I. INTRODUCTION

1. This is the Brief of Airborne Energy Solutions Inc. ("**AES**") in support of its Amended Application originally filed in these proceedings on August 3, 2018 seeking specific performance, an express trust, a constructive trust, an Approval and Vesting Order, and the costs of this Application against Third Eye Capital Corporation ("**TEC**") (the "**Application**"). Capitalized terms used but not defined herein have the meaning given to them in Brief of AES filed in these proceedings on July 9, 2018 (the **"First AES Brief"**). AES will rely on the First AES Brief at the hearing of the Application, and adopts and repeats all of its contents herein.

2. More specifically, the Application seeks an order directing OpsMobil Inc., OpsMobil Group Inc., and OpsMobil Energy Services Inc. (collectively, "**OpsMobil**"), TEC, and Ernst & Young Inc. in its capacity as the court-appointed receiver and manager in these proceedings ("**Receiver**"), to specifically perform their obligations under the Purchase and Sale Agreement between AES and OpsMobil, and to close the transaction.

3. In addition and in the alternative, the Application seeks a declaration that AES is entitled to a constructive trust over the business and assets which are the subject matter of the Purchase and Sale Agreement (collectively, the "**Business**"), and the Application seeks both a constructive trust and an express trust over all revenues generated by the Business from and after November 1, 2017.

4. Finally, in accordance with the usual practice of this Honourable Court in receivership sales, and in accordance with the template Approval and Vesting Order prescribed by this Honourable Court for such occasions, the Application seeks the vesting of the Business and all revenues generated by it from and after November 1, 2017 in AES free and clear of any claims against OpsMobil, and free and clear of any encumbrances (except permitted encumbrances) against the Business.

5. This Brief will address the following issues:

   (a) whether AES is entitled to specific performance of the Purchase and Sale Agreement;

   (b) whether AES is entitled to a constructive trust over the Business and all revenues generated by it since November 1, 2017;

   (c) whether AES is entitled to an express trust over all the revenues generated by the Business since November 1, 2017;

   (d) whether the Purchase and Sale Agreement ought to be approved, and the Business and revenues from it vested in AES in accordance with the usual terms of the template Approval and Vesting Order;

   (e) whether set-off is an issue in this Application;

   (f) whether section 95 or 96 of the Bankruptcy and Insolvency Act ("**BIA**")[1] are at issue in this Application, and whether they have any application to the transaction embodied by the Purchase and Sale Agreement; and

   (g) costs.

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 **[*BIA*]** ss 95 & 96 **[TAB 1]**

6. This Brief will also address an unfortunate confusion in the evidence which has arisen concerning part of the purchase price under the Purchase and Sale Agreement, being the assumption by AES of secured indebtedness owing by OpsMobil. This aspect of the purchase price was initially erroneously referred to as a set-off of amounts owing by OpsMobil to AES, but was later corrected and clarified to describe this aspect of the purchase price being the assumption of secured indebtedness owing to equipment lessors. There is no set-off under the Purchase and Sale Agreement.

7. As is common in insolvency proceedings, the result of the Application will effect a large number of constituents, including a number of parties who are not before this Honourable Court. The determination of the Application will affect not only AES, the Receiver and TEC, but also (i) the 41 employees of AES who may lose their jobs, (ii) the many landlords of the premises occupied by the Business, (iii) the customers of the Business who require ongoing services, (iv) the creditors of AES and the Business, including Classic and Rilpa, and (v) parts of the population of Alberta who rely (unknowingly) on the Business to safeguard their health and safety. The Court must consider how its decision will impact these constituents.

8. Finally, one of the primary functions of the Court in commercial proceedings is to hold the parties to the bargains they have struck, and enforce the resulting contracts. This is the essence of what AES is seeking in the Application.

II. FACTS

Background

9. Pursuant to the Purchase and Sale Agreement, AES purchased the Business from OpsMobil effective November 1, 2017. The Business is described in the Purchase and Sale Agreement as:

> "Assets" means all assets of any nature and kind, real property and personal property, which the Vendor has an interest in related, directly or indirectly to the Business, including, without limitation, the Aircraft, Helicopter, Lands, Leases, Improvements, Equipment, Vehicles, Contracts, Licenses, Intellectual Property, Software, Books and Records, Goodwill and Miscellaneous Interests, excepting the Excluded Assets, free and clear of all Encumbrances.
>
> "Business" means the ongoing business, assets and undertakings of the Vendor, as a whole, as conducted as of the Effective Date, related to its aerial surveillance and scanning, chemical spraying and local charter businesses operated by the Vendor and/or its Affiliates in the Province of Alberta and elsewhere in Canada, excluding any such operations in the United States of America.

- Affidavit by Kenneth I. Mizera filed June 29, 2018 (the "**First Mizera Affidavit**") at Exhibit C of Exhibit C.

10. AES and OpsMobil are also parties to the Transition Services Agreement which is also effective November 1, 2017.

- First Mizera Affidavit at Exhibit B of Exhibit C.

11. There is an important health and safety aspect to the Business. In its operation of the Business, AES monitors pipelines for its customers to ensure their integrity and prevent leaks and blowouts. If the pipelines are not regularly monitored there is an immediate danger of environmental damage and contamination. Even worse, some of the pipelines are high risk pipelines which passes through towns and

other populated areas of Alberta. Should a leak or blowout occur in one of these areas, there is a very real chance of catastrophic impacts on the human population, including fatalities.

- Second Mizera Affidavit, paragraph 7.

12. AES has been in possession of the business and operating it effective November 1, 2017 (the "**Effective Date**").

- First Mizera Affidavit at paragraph 11 of Exhibit C and Second Mizera Affidavit (defined below) at paragraph 116.

13. Unfortunately there is an error in the First Mizera Affidavit which misstates a crucial part of the Purchase and Sale Agreement. This error is addressed and rectified in Affidavit No. 2 of Kenneth I. Mizera filed on August 3, 2018 (the "**Second Mizera Affidavit**"). The error is that the First Mizera Affidavit characterizes part of the purchase price as a "forgiveness of debt owing by OpsMobil to AES in the amount of $1,748,652.23." This statement is categorically incorrect, and it is corrected in the Second Mizera Affidavit which correctly characterizes this component of the purchase as "…the assumption of secured debt and payment obligation which OpsMobil then owed to Rilpa Enterprises Ltd. ("**Rilpa**") and Classic Helicopters Ltd. ("**Classic**") by AES in the total amount of $1,748.652.23." Therefore the correct characterization of this component of the purchase price is <u>assumption of secured debt, not set-off</u>.

14. So there can be doubt on this, the relevant parts of the Purchase and Sale Agreement are:

> 1.2 "Accounts Payable" means the total amount of $1,748,652.23 owed by the Vendor to the Affiliates of the Purchaser as of the Effective Date related to the Business.
>
> …
>
> "Affiliates of the Purchaser" means Classic Helicopters Ltd. and Rilpa Enterprises Ltd.
>
> …
>
> 2.2 The parties acknowledge that the Purchase Price shall be paid, in part, through the offset, assignment and assumption of the obligation to pay the Accounts Payable owed by the Vendor to the Affiliates of the Purchaser, by the Purchaser and, on Closing, such offset and assumption of indebtedness shall include a full and complete release of the Vendor by the Affiliates of the Purchaser in respect of the Accounts Payable owed as of the Effective Date.

- First Mizera Affidavit at Exhibit A of Exhibit C.

15. The Assignment and Assumption Agreement evidencing this is attached to the Second Mizera Affidavit as Exhibit 1.

16. AES was not a creditor of OpsMobil at the time of the transaction. In fact, AES was incorporated on November 23, 2017 for the purpose of completing the transaction and had no existence prior to that. Attached as Appendix 1 is a copy of an Alberta Registry Corporate search of AES showing it was incorporated on November 23, 2017.

17. Moreover, there is no evidence that AES is a creditor of OpsMobil.

18. Based on the foregoing there is no set-off here. Set-off is not an issue in the Application.

The Business is Unique

19. Paragraphs 108 – 112 of the Second Mizera Affidavit contain the following evidence:

(a) The business is a leader in the surveillance sector and has been in continuous operation since 1985 at its current strategic location in Whitecourt, Alberta. The business provides highly specialized services to its customers which involves flying specially modified aircraft with highly sensitive equipment over pipelines to detect changes and potential problems with the pipelines, and providing the resulting reports to customers. These reports are important to the customers who require them to satisfy governmental compliance, safety, and regulatory requirements;

(b) pipeline integrity is reliant upon the reports from the Business;

(c) the Business has few competitors, none of which utilize proprietary software owned by AES;

(d) this proprietary software cannot be obtained elsewhere;

(e) the customers themselves have integrated this software system into their own regulatory reporting systems, and therefore, the customers are reliant on AES to perform these services and are reliant on the reports generated by AES;

(f) the Business is strategically and uniquely located with hangers and bases of operation in Whitecourt, Rocky Mountain House and Villeneuve;

(g) AES has investigated the possibility of obtaining alternative locations to use as a base of operations and has determined that no such alternative opportunity exists; and

(h) it is impossible for AES to replicate the deal embodied in the Purchase and Sale Agreement by making another acquisition. The acquisition of the Business is an unique opportunity for AES.

Events Leading up to the Purchase and Sale Agreement

20. The Purchase and Sale Agreement is dated November 17, 2017, with an effective date of November 1, 2017. Prior to that Ryan Tobber of OpsMobil, with the knowledge and consent of TEC, had been actively seeking to divest OpsMobil of its aviation assets for at least 18 months. This marketing process involved the discussion of various proposals between OpsMobil and Mr. Mizera, and also between OpsMobil and other potentially interested parties, being Great Slave Helicopters and Big Rock Helicopters. From these lengthy and extensive marketing efforts the only potential transaction which materialized was the deal which was eventually struck between OpsMobil and AES, being the Purchase and Sale Agreement. On November 9, 2017 Ryan Tobber of OpsMobil emailed Mark Horrox of TEC stating in part as follows:

> I need to move forward with the deal proposed by Kim [AES] this morning. We are out of time.
>
> The company has explored all other options, namely GSH and Big Rock, and this deal is the only one which has materialized. Management believes this is the right solution for the company…

> We believe this is the most rational path forward and provides value for the company in both realizing value in selected assets and immediate cost reductions. This deal is also consistent with our restructuring plan presented to TEC mid-year 2017, a plan in which management has made material progress.

- Second Mizera Affidavit at paragraphs 8 and 9 and Exhibit 2.

21. On November 2, 2017 AES received a draft term sheet from OpsMobil outlining a proposed sale and purchase price for the Business. The total purchase price was $2,185,000.

- Second Mizera Affidavit at paragraph 13 and Exhibit 3.

22. Negotiations ensued and the terms of the deal were changed and finalized and on November 7, 2017 the parties agreed to a term sheet (the "**Initial Term Sheet**") embodying the deal as it then was. TEC is not a party to the Initial Term Sheet.

- Second Mizera Affidavit at paragraph 14 and Exhibit 4.

23. The Initial Term Sheet was reviewed by TEC and on November 13, 2017 Mark Horrox of TEC commenced direct negotiations with AES which resulted in several revisions to the Initial Term Sheet, including changes to the following deal points, as negotiated and required by TEC:

(a) purchase price increased from $1,500,000 to $2,300,000 for the Whitecourt Facility;

(b) a helicopter was added and the purchase price increased by $290,000;

(c) the assumption of secured debt owing by OpsMobil to Rilpa and Classic was agreed to and fixed at a total of $1,748,652.23; and

(d) the Villeneuve Facility was allocated no value in the purchase price.

- Second Mizera Affidavit at paragraphs 15, 16, and Exhibit 5.

24. Following all of this on November 21, 2017 the parties entered into a final term sheet (the "**Final Term Sheet**") which embodied all of the changes required by TEC. Importantly, TEC executed the Final Term Sheet.

- First Mizera Affidavit at Exhibit C of Exhibit C.

25. The Final Term Sheet states that "Until the execution of definitive agreements" the Final Term Sheet is not binding. The parties executed the definitive agreements (being the Purchase and Sale Agreement and Transition Services Agreement) in December 2017 and upon doing so the Final Term Sheet became binding upon the parties, including TEC.

- Second Mizera Affidavit at paragraphs 24, 25 and 26, and First Mizera Affidavit at Exhibit C of Exhibit C.

Involvement and Representations of TEC in Finalizing the Definitive Documents

26. Following the execution the Final Term Sheet the parties negotiated the definitive documents which were ultimately executed on December 17, 2017. During this time, and thereafter, Mark Horrox of TEC continuously assured AES that TEC:

(a) was committed to and consented to the purchase and sale at the price of $3,275,000;

(b) that part of the purchase price would be payable through AES assuming the secured debts owing to Rilpa and Classic in the amount of $1,748,652.23;

(c) the assets comprising the Business would be transferred to AES free and clear of all encumbrances of TEC;

(d) AES would be entitled to operate and be in possession of the Business as of November 1, 2017; and

(e) the accounts receivable from the Business on and after November 1, 2017 would belong to AES free and clear of all TEC's encumbrances.

- Second Mizera Affidavit at paragraph 27.

27. TEC was actively involved in the drafting and negotiation of the Purchase and Sale Agreement and the Transition Services Agreement.

- Second Mizera Affidavit at paragraph 30 and Exhibit 8.

28. Prior to the execution of the Purchase and Sale Agreement and Transition Services Agreement TEC confirmed to OpsMobil its assurances, commitments and representations, and consented to the Purchase and Sale Agreement and Transition Services Agreement before OpsMobil executed those agreements as directed and approved by TEC.

- Second Mizera Affidavit at paragraph 31.

29. AES relied upon the assurances, commitments and representations of TEC. The assurances, commitments and representations of TEC to AES were intended to, and did, induce AES to enter into the Purchase and Sale Agreement, the Transition Services Agreement, and assume operation of the Business.

- Second Mizera Affidavit at paragraph 28.

Closing Mechanics

30. The Purchase and Sale Agreement defines "Closing Date" as 8:00 a.m. Calgary time on December 20, 2017, or such earlier or later date as the parties may mutually agree upon in writing.

- First Mizera Affidavit at Exhibit A of Exhibit C.

31. As contemplated by the foregoing, the parties agreed to extend the closing of the Purchase and Sale Agreement on many occasions for a variety of reasons.

- Second Mizera Affidavit at paragraphs 32, 33 and 34.

32. One of the issues which delayed the closing was the obligation to deliver to AES the Business free and clear of any encumbrances, particularly the encumbrances of TEC. The first draft of the TEC no-interest letter was provided on January 17, 2018, well after the original contemplated closing date. This no-interest letter was redrafted 11 times before the parties reached agreement on it. The final form was agreed on February 5, 2018.

- Second Mizera Affidavit at paragraphs 35, 36 and 37, and First Mizera Affidavit at Exhibit P of Exhibit C.

33. Similarly the undertaking of counsel to TEC was redrafted a number of times and finalized on or about the same time as the no-interest letter.

- Second Mizera Affidavit at paragraph 38 and First Mizera Affidavit at Exhibit P of Exhibit C.

34. In addition, in this timeframe, TEC was required to discharge a number of legacy encumbrances relating to the purchased assets. As a result of the constant diligence of AES this process was largely completed by March 4, 2018.

- Second Mizera Affidavit at paragraph 42.

35. The closing of the Purchase and Sale Agreement required approximately 85 closing documents to be exchanged between the parties. These documents were negotiated and renegotiated numerous times and were continuously redraft by OpsMobil. The last of the closing documents were finalized in May of 2018. All of the closing documents are now finalized and settled.

- Second Mizera Affidavit at paragraphs 43 and 44.

36. Similarly the trust conditions set forth in a trust letter from OpsMobil's legal counsel were negotiated at length and revised prior to being confirmed among legal counsel for OpsMobil, AES and TEC. There were 15 drafts of this trust letter which was finally confirmed and settled on May 29, 2018.

- Second Mizera Affidavit at paragraphs 45 and 46 and First Mizera Affidavit at Exhibit P of Exhibit C.

37. TEC was heavily involved in the drafting of this trust letter.

- Second Mizera Affidavit at paragraph 47 and Exhibit 9.

Segregated Trust Funds

38. In accordance with the provisions of the Transition Services Agreement, AES has been in possession of the Business since the Effective Date November 1, 2017.

- First Mizera Affidavit at Exhibit C, paragraph 11.

39. AES continues to spend considerable time and money, now in excess of $2,500,000, enhancing and growing the Business, which since the Effective Date has included repairing and restoring the aircraft, implementing operational controls and procedures to comply the legal and regulatory requirements,

restoring confidence in customers, correcting and bringing current the backlog of compliance reports, building credibility with suppliers, restoring relationships with landlords, and ensuring employees payment security, and future growth prospects. As a result of the foregoing, and because the operations of the Business are needed to support the ongoing businesses of OpsMobil, including Ranch Energy Corporation, AES and OpsMobil agreed to divide and proportionately share the expenses of certain employment and costs common to the operation of both businesses during the Transition Period (as defined in the Transition Services Agreement).

- First Mizera Affidavit at Exhibit C, paragraph 14.

40. The accounts receivable of the Business after the Effective Date are governed in accordance with Clause 2.3(a) of the Transition Services Agreement which reads, with emphasis added:

> 2.3(a) . . . OpsMobil and Airborne agree that OpsMobil shall act on behalf of **[AES]** in the capacities set forth below, until no longer needed or the end of the Transition Period, which ever comes first:
>
> (i) as of the Effective Date, OpsMobil shall forthwith irrevocably assign any and all receivables and work in progress accruing after the Effective Date to **[AES]**, free and clear of all Encumbrances;
>
> (ii) OpsMobil shall forthwith establish upon execution hereof and operate a segregated bank account (the "**Segregated Trust Account**") with Alberta Treasury Branch in the City of Calgary, and shall:
>
> > (A) <u>hold the Segregated Trust Account and any and all revenues OpsMobil receives relating to the Business accruing on or after the Effective Date as bare trustee in trust for **[AES]**</u>;
> >
> > (B) forthwith deposit or have deposited upon receipt any and all revenues relating to the Business accruing on or after the Effective Date and received by OpsMobil into the Segregated Trust Account;
> >
> > (C) account to **[AES]** for all income and revenue which OpsMobil may at anytime or from time to time receive . . .
> >
> > (D) cause Airborne to have complete and unimpeded knowledge and access to the Segregated Trust Account . . .
> >
> > (E) forthwith irrevocably direct all customers of the Business to deposit all revenues relating to the Business accruing on or after the Effective Date into the Segregated Trust Account.
>
> (iii) from and after the Effective Date to Closing, OpsMobil on behalf of <u>and for the sole benefit of **[AES]** as beneficiary</u>, but in the name of OpsMobil, shall continue to forthwith issue statements of account, invoices and such other paperwork necessary to ensure timely receipt of payment for the services performed by the Business in respect of the Customer Service Contracts or otherwise as of such time.

- First Mizera Affidavit at Exhibit C, paragraph 16.

41. The First Mizera Affidavit describes the situation concerning the revenues generated by the Business after the Effective Date in great detail, including the following:

(a) in violation of the Transition Services Agreement an arrangement between OpsMobil and TEC whereby TEC would sweep all of the bank accounts of OpsMobil;

(b) in violation of the Transition Services Agreement some of the revenues generated by the Business were not spent on expenses relating to the Business but rather were taken by TEC;

(c) the ATB Bank Account in question was represented by OpsMobil to AES to be a trust account in accordance with the Transition Services Agreement, however, the account in question was not actually established as a trust account;

(d) Contrary to the Transition Services Agreement OpsMobil was not depositing all of the revenues generated by the Business into the Segregated Trust Account;

(e) on May 18, 2018 the sum of $516,619.84 was deposited into the Segregated Trust Account by OpsMobil on the instructions of TEC who had earlier improperly swept these funds from OpsMobil;

(f) on June 13, 2018 AES commenced the AES Action and on June 14, 2018 Justice K. Eidsvik of this Honorable Court granted the Preservation Order which:

(i) restrains and enjoins OpsMobil and TEC from removing, using, transferring or dealing in any manner whatsoever with the monies held in the Segregated Trust Account;

(ii) directs ATB to freeze the Segregated Trust Account (except for its normal charges);

(iii) directs OpsMobil to deposit any and all revenues received from the Business into the Segregated Trust Account; and

(iv) grants certain other related relief.

42. The Preservation Order remains binding upon all of the parties.

- First Mizera Affidavit, generally, and Exhibit B.

Whitecourt Leases and Environmental Reports

43. The Whitecourt Facility is the most significant asset in the Purchase and Sale Agreement representing approximately 70% of the purchase price. A new lease or transfer of the existing lease of the Whitecourt Facility is required for closing pursuant to clause 6.2(b) of the Purchase and Sale Agreement. AES has elected to enter into new leases with the landlord.

- Second Mizera Affidavit at paragraphs 68, 69 and 71, and Exhibit 9.

44. The form of the lease between AES and the landlord was agreed on March 22, 2018.

- Second Mizera Affidavit at paragraph 77 and Exhibit 33.

45. One the landlord's conditions for entering into a new lease with AES was the receipt of environmental reports confirming that OpsMobil's environmental obligations have been satisfied. OpsMobil retained Matrix Solutions Inc. ("**Matrix**") to satisfy this obligation.

- Second Mizera Affidavit at paragraphs 79 and 80 and Exhibits 25 and 26.

46. Matrix commenced its work and on or about March 27, 2018 the phase one environmental reports were provided. These indicated that phase two environmental reports were required.

- Second Mizera Affidavit at paragraphs 82 and 83.

47. Payment of Matrix by OpsMobil became an issue. At this time TEC was actively managing OpsMobil, particularly which payables OpsMobil was permitted to make. TEC would not authorize OpsMobil to pay Matrix, and as a result Matrix eventually refused to conduct the environmental work required by the landlord. Ryan Tobber of OpsMobil emailed Mark Horrox of TEC on April 11, 2018, April 17, 2018, May 7, 2018 and May 10, 2018, each time requesting from TEC permission to pay Matrix. There are no email responses to any of Ryan Tobber's emails. As a result, Matrix quit.

- Second Mizera Affidavit at paragraphs 86, 87, 88, 89 and 90 and Exhibits 28, 29, 30 and 31.

May 10, 2018 Email

48. The situation involving Matrix and the requirement for environmental reports was discussed by Mr. Mizera and Mr. Horrox in a telephone conversation of May 10, 2018. In that telephone conversation Mr. Mizera and Mr. Horrox resolved and agreed to the closing mechanics which would be necessary to close the transaction without having the environmental reports finalized. Following this telephone conversation Mr. Horrox emailed Ryan Tobber of OpsMobil confirming these mechanics:

1. Drop the encroachment holdback;
2. Drop the unpaid holdback, on a strict condition that ISOA and any unpaids within it are accurately reconciled…
3. The environmental holdback would stay the same at $250K;
4. On the basis of the ISOA I have seen and the unpaid I have seen, the net payable at closing is $1.07M;
5. Gowlings to hold the holdback in trust per terms of the letter;
6. Please get to work on the ISOA and unpaid portion to Rilpa ASAP and work with them to agree it so we can get this closed.

- First Mizera Affidavit at Exhibit O to Exhibit C.

Affidavit of Mark Horrox

49. TEC has filed numerous affidavits in these proceedings (and the related CCAA proceedings), however only one of those affidavits relates to the issues herein, being the third affidavit of Mark Horrox filed in these proceedings on July 26 ("**Third Horrox Affidavit**").

50. The Third Horrox Affidavit contains the following admissions:

(a) AES has operated the Business since December, 2017 (paragraph 8);

(b) TEC consented to the Preservation Order (paragraph 9);

(c) TEC acknowledged the parties were working towards closing and supported it (Exhibits M and N);

(d) TEC was willing to close the deal (paragraph 45);

(e) TEC negotiated directly with AES in respect of the deal (paragraph 53); and

(f) TEC played an active role in negotiations and demonstrated a willingness to close the sale (paragraph 66).

Specific Responses to Third Horrox Affidavit

51. The Second Mizera Affidavit contains the following responses to the Third Horrox Affidavit:

(a) It is a misnomer to try and characterize the transaction as anything but a single purchase and sale agreement. There is no series of transactions, rather only the Purchase and Sale Agreement and the Transition Services Agreement (paragraph 91);

(b) The purchase price was always $3,275,000, to be adjusted. The cash component of the purchase price exceeded the expectations of TEC (paragraph 92);

(c) No further "additional environmental diligence" is required (paragraph 93);

(d) The Third Horrox Affidavit is silent about TEC's refusal to fund Matrix to complete the environmental work. As a result, the evidence contained in the Second Mizera Affidavit on this topic is unchallenged. TEC obstructed the closing of the Purchase and Sale Agreement and acted in bad faith (paragraph 94);

(e) The $250,000 holdback agreed to by the parties is not a reduction in the purchase price, but rather is a practical closing mechanism to address the fact that the environmental reports required by the Whitecourt Facility landlord are not yet complete (paragraph 95);

(f) It is absolutely false for Mr. Horrox to testify that AES at any point in time delayed the closing, including for a monetary advantage. To the contrary, AES has been at all material times funding the Business and ready, willing, and able to close the transaction as soon as possible (paragraphs 96 and 97);

(g) Mark Horrox never expressed to Mr. Mizera during their conversation of May 10, 2018 that the May 10, 2018 closing arrangements and agreements were conditional on closing taking place as soon as possible. Indeed, following this conversation the parties worked diligently towards a closing and were ready by May 30, 2018 (paragraph 98);

(h) AES was not aware of the "perilous financial condition" of OpsMobil. To the contrary, AES was advised on many occasions that OpsMobil had many new opportunities and prospects of funding, including a replacement lender. TEC did not communicate the financial condition of OpsMobil to AES (paragraph 99);

(i) TEC has never objected to AES remaining in possession and operation of the Business and the Third Horrox Affidavit is silent in respect of this. At no time between November 2017 and June of 2018 did TEC state or imply that there was no deal in place between OpsMobil and AES, or that TEC did not support the deal. TEC's current position appears to have coincided with its decision to demand its loans and commence these proceedings (paragraphs 100 and 101).

Ready, Willing and Able to Close

52. AES remains ready, willing and able to close the Purchase and Sale Agreement. AES continues to elect to complete the Purchase and Sale Agreement. The entire cash to close money remains on deposit in the trust account of counsel for AES. The cash to close was tendered upon OpsMobil's counsel on June 27, 2018 but was returned on June 29, 2018.

- Second Mizera Affidavit at paragraphs 102 – 104.

53. Mr. Mizera has executed all of the closing documents and purchaser deliverables. The signature pages were also tendered upon counsel for OpsMobil on June 27, 2018 and were also returned on June 29, 2018.

- Second Mizera Affidavit at paragraphs 105 and 106.

Consequences of not Closing the Purchase and Sale Agreement

54. AES is fully capable of operating the Business. Conversely, the Receiver is not as a result of losing the OpsMobil Aircraft Operating Certificate and Aircraft Maintenance Organization accreditation from Transport Canada. As a result, the Receiver cannot legally fly or legally maintain the aircraft needed for the Business.

55. In the event the Purchase and Sale Agreement does not close and the Business reverts to OpsMobil the Receiver will likely liquidate the assets and the following will occur:

(a) the customers of the Business will not receive the services they have contracted for resulting in an immediate, and potentially catastrophic environmental and human health and safety risks;

(b) the customers will be in violation of their regulatory obligations; and

(c) there would be a nearly complete loss of value as the operating Business is considerably more valuable than the assets in liquidation.

- Second Mizera Affidavit at paragraphs 113 – 115.

56. Just as importantly, 41 people working for AES will lose their jobs and their families will lose their paycheques.

- Second Mizera Affidavit at paragraph 116.

Continuing Equities

57. Since November 1, 2017 AES has acted as a prudent owner of the Business and has preserved and improved its value. AES has invested in excess of $2.5 million in the Business (without a realizable return) and in doing so has rectified many of the business, regulatory and relationship issues facing the Business prior to November, 2017. This cannot be equitably compensated for with damages.

- Second Mizera Affidavit at paragraphs 117 – 119.

58. Since November 1, 2017 AES has also dramatically changed the Business through its action and investment, which changes include:

(a) repairing and making serviceable the aircraft and their engines;

(b) implementing operational controls and procedures for regulatory requirements;

(c) restoring the confidence of customers;

(d) bringing current the backlog of compliance reports;

(e) building credibility with suppliers;

(f) restoring relationships with landlords;

(g) ensuring payment to employees;

(h) renewing 12-15 contracts with existing customers and adding 13 new customers with contractual commitments varying from one to four years, without a right of cancellation;

(i) hiring the majority of OpsMobil's employees relating to the Business, thereby benefiting OpsMobil by removing any termination obligations in respect of such employees;

(j) spending considerable time and effort meeting regulatory requirements; and

(k) entering into a number of long term financial commitments including new leases for terms of up to 15 years.

- Second Mizera Affidavit at paragraphs 119 – 124.

59. All of this was done by AES in reliance that the Purchase and Sale Agreement would close, and all this has been to the detriment of AES.

- Second Mizera Affidavit at paragraph 125.

III. LAW AND ARGUMENT

60. For the reasons which follow AES respectfully submits that this Honourable Court should:

(a) Direct specific performance of the Purchase and Sale Agreement by OpsMobil, the Receiver, and TEC;

(b) Declare that AES is entitled to a constructive trust over the Business;

(c) Declare that AES is entitled to an express trust over the revenues generated by the Business from and after the Effective Date;

(d) Approve the Purchase and Sale Agreement between OpsMobil and AES;

(e) Vest in AES OpsMobil's right, title and interest in and to the Business; and

(f) Grant AES the costs of this Application as against TEC.

SPECIFIC PERFORMANCE AND APPROVAL OF TRANSACTIONS

61. AES is entitled to specific performance of the Purchase and Sale Agreement, and OpsMobil, TEC, and the Receiver ought to be directed to close the transaction.

62. Citing the Supreme Court of Canada in *Semelhago v Paramadevan*, the Alberta Court of Appeal in *Strategic Acquisition Corp. v Starke Capital Corp.* articulated the test for specific performance, stating that the pre-requisites for an award of specific performance are:

(a) The property is unique to the extent that its substitute would not be readily available;

(b) The remedy of damages is inadequate to do justice; and

(c) The plaintiff has established a fair, real and substantial justification for the claim of specific performance.[2]

63. In *1244034 Alberta Ltd. v Walton International Group Inc.*, Justice Berger noted that the purchaser bears the onus of establishing that damages would be an inadequate remedy.[3] A party seeking specific performance must also prove a readiness, willingness and ability to close.[4] Berger J. also stated that since specific performance is an equitable remedy, whether specific performance is available is a matter of discretion for the trial judge and that each situation is to be determined on its facts.[5]

64. An example where a court awarded specific performance is *Newton v Graham*, where the Saskatchewan Court of Queen's Bench awarded specific performance of a share purchase agreement where the transfer of shares was for a corporation which was "unique" as it was a small, closely held private corporation which operated a business in a small rural community.[6] As a result of that uniqueness, the Court

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[2] *Strategic Acquisition Corp. v Starke Capital Corp.*, 2017 ABCA 250 at para 7 [***Strategic***] **[TAB 2]**.
[3] 2007 ABCA 372 at para 5 [***Walton***] **[TAB 3].**
[4] *Norfolk v Aikens* (1989), 41 BCLR (2d) 145 [1989] BCJ No 2256 (BCCA) at paras 53 – 55 **[TAB 4].**
[5] *Walton* at paras 2 – 3.
[6] *Newton v Graham*, 2011 SKQB 423 at para 58 **[TAB 5].**

held that damages were not an appropriate remedy. The facts here are substantially similar and the same principles ought to guide the Court's decision.

65. Here, AES meets all of the requirements laid out in three-part test articulated by the Alberta Court of Appeal in *Strategic* in addition to the additional factors considered by Court in *Walton*.

66. First, the subject matter of the Purchase and Sale Agreement is an entire business, being the Business, which is unique. The Business has it own customers, contractual arrangements, employees, and goodwill. As such, a substitute is not available and AES cannot replicate the deal by going elsewhere. Second, damages for AES' losses are not an adequate remedy, particularly after AES has owned and operated the Business for 8 months. Third, AES now has an equitable interest in the Business, and is entitled to specific performance of the Purchase and Sale Agreement. Finally, damages are wholly inadequate given the insolvency of OpsMobil.

67. AES meets the foregoing requirements and passes the test for specific performance and remains ready, willing and able to close the transaction in the manner set out in the Purchase and Sale Agreement.

68. For these reasons, this Honourable Court should exercise its discretion to award specific performance of the Purchase and Sale Agreement.

The appointment of a receiver does not affect an order of specific performance

69. The fact that a receiver has been appointed over OpsMobil's assets should not impact the Court's reasoning with respect to an award of specific performance of the Purchase and Sale Agreement.

70. A case from the United Kingdom, *Freevale Ltd. v Metrostore (Holdings) Ltd.* has similar facts. In *Freevale*, the Court ordered specific performance of a contract for sale of land where the vendor company went into receivership before completion of the contract.[7] In *Freevale*, the Court held that but for the appointment of the receiver, the contract for sale of the purchaser's freehold property would have been subject to an order for specific performance.

71. The Court in *Freevale* stated that "[t]here is no doubt…that but for the receivership the contract in the present case would have been subject to an order for specific performance, and that prior to the receivership the plaintiff purchaser had an equitable interest in the property."[8] Importantly, the Court held that appointment of a receiver in respect of the vendor company's land did not destroy the purchaser's equitable interest nor did it substitute for that interest a mere right to damages.[9]

72. In another case, a court held that a pre-bankruptcy contract for purchase and sale was binding on a trustee in bankruptcy. In *Armadale Properties Ltd. v 700 King Street (1997) Ltd.*, the Ontario Superior Court of Justice ordered a trustee in bankruptcy to complete an agreement of purchase and sale even though there was no benefit to the estate.[10]

73. In *Armadale*, the vendor and purchaser entered into an Agreement of Purchase and Sale and the purchaser paid the entire purchase price by way of deposit and moved his business into the premises and

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[7] *Freevale Ltd. v Metrostore (Holdings) Ltd.* [1984] 1 Ch 199, [1984] 2 WLR 496 (Eng Ch Div) [***Freevale***] **[TAB 6].**
[8] *Freevale* at 492.
[9] *Freevale* at para 493.
[10] *Armadale Properties Ltd. v 700 King Street (1997) Ltd.*, 2001 CarswellOnt 1567, [2001] OJ No 1727 [***Armadale***] **[TAB 7].**

spent about $80,000 in improvements and moving costs.[11] The transfer date for the property was postponed on numerous occasions, but ultimately the receivership and bankruptcy took place before the transaction closed. When the Trustee was appointed, it reviewed the files and noticed that all of the purchase monies for the unit had been paid to a different company of the sole officer and director of the vendor company, and no funds had actually been received by the vendor company.[12] Therefore, concluded the Trustee, there would be no benefit to the creditors of the bankrupt company in completing the transaction.[13] The Trustee applied to the Court for advice and direction. In the result the Court directed the Trustee to convey clear title to the purchaser in accordance with the Agreement of Purchase and Sale and consistent with the Statement of Adjustments that was prepared in anticipation of the scheduled closing.[14] It is respectfully submitted the result should be the same here, and this Honourable Court should grant AES the same relief.

74. In *Armadale*, the Court also noted that an equitable interest in the property passed <u>prior</u> to the bankruptcy and the purchaser could have enforced the transfer of title by way of specific performance.[15] Additionally, the Court noted that as an officer of the court, the Trustee must act fairly to all parties with an interest in the estate and that it would be dishonourable for the Trustee to disclaim the contract.[16] Ultimately, the Court held that "the property was validly conveyed and all that remained was the delivery of a deed."[17] The Court held that the Trustee was bound by the contract in the same manner and to the same extent as the bankrupt was at the time of the bankruptcy and has no power to disclaim the contract.[18]

75. These cases demonstrate that the fact that the receivership of OpsMobil should not impact this Honourable Court's on decision whether to grant specific performance of the Purchase and Sale Agreement.

76. Finally, the receivership of OpsMobil should preserve the status quo, including whatever rights had accrued to the parties prior to the receivership. The receivership itself should not alter anyone's substantive rights. It is respectfully submitted the foregoing cases support this proposition.

CONSTRUCTIVE TRUST

77. AES is entitled to a constructive trust over and in respect of the Business and all revenues generated by the Business since November 1, 2017. A finding of unjust enrichment requires:

1) An enrichment;

2) A corresponding deprivation; and

3) An absence of a juristic reason.[19]

78. A straightforward economic approach governs the first two elements.[20] To demonstrate an enrichment, the plaintiff must show that he or she gave something to the defendant, and that the defendant

[11] *Armadale* at para 5.
[12] *Armadale* at para 7.
[13] *Armadale* at para 7.
[14] *Armadale* at para 9.
[15] *Armadale* at para 12.
[16] *Armadale* at para 15.
[17] *Armadale* at para 12.
[18] *Armadale* at para 15.
[19] *Kerr v Baranow* [2011] 1 SCR 269 at paras 36 - 45 [***Kerr***] **[TAB 8].**
[20] *Kerr* at para 37.

has retained it.[21] The benefit must be tangible, restorable to the plaintiff *in specie* or by money, and it need not be retained by the defendant permanently.[22] The second element requires the plaintiff to demonstrate that the defendant's gain corresponds to the plaintiff's loss.[23] The third element requires that the benefit and corresponding deprivation did not occur because of a valid juristic reason.[24]

79. If the plaintiff proves all three of the elements of unjust enrichment, the plaintiff will be entitled to a remedy: a monetary award or a constructive trust.[25] The court in *Peter v Beblow* recognized that a constructive trust may be an appropriate remedy for unjust enrichment "where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed."[26]

80. As a result of the failure to close the Business remains legally the property of OpsMobil and subject to the security interests of TEC. The enrichment of TEC and OpsMobil results from their failure to close the transaction, and the investment and effort of AES over the last 8 months to grow and improve the Business, to operate it, and generate revenue. The investments and efforts of AES have therefore enriched OpsMobil and TEC accordingly. AES has been correspondingly deprived of the benefits of these investments and efforts as a result of the failure to close. There is no juristic reason for the current state of affairs. Conversely, there is a juristic reason for the parties to close – the Purchase and Sale Agreement.

81. Because of the insolvency of OpsMobil, and also because of the uniqueness of the Business and the efforts made by AES to preserve and improve its value, a monetary award would not be an adequate remedy for the unjust enrichment which has occurred. In addition to its financial investments, AES' efforts have rectified the many business, regulatory and relationship issues facing the Business prior to November 2017. AES' efforts were made in reliance that the Purchase and Sale Agreement would close, and all of its efforts have been to its detriment. Given the insolvency of OpsMobil, a constructive trust is the only meaningful remedy in the circumstances (other than specific performance).

82. AES meets all three requirements for unjust enrichment, and is entitled to a constructive trust as opposed to a monetary remedy. As such, a constructive trust over the Business is the appropriate remedy.

EXPRESS TRUST

83. Pursuant to clause 2.3(a)(ii)(A) of the Transition Services Agreement, "all revenues OpsMobil receives relating to the Business accruing on or after the effective date" are held by OpsMobil as bare trustee in trust for AES. TEC has acknowledged this express bare trust by consenting and agreeing to the Transition Services Agreement, and just as importantly, by its conduct when, on May 18, 2018, TEC caused the sum of $516,619.84 to be returned to the Segregated Trust Account, which funds had previously been swept by TEC.

84. It is respectfully submitted that based on the foregoing there can be no doubt that AES is entitled to a finding of this Honorable Court that the funds contained in the Segregated Trust Account, and all revenue generated by the Business from and after the Effective Date, are specifically impressed with a trust in favour of AES.

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[21] *Kerr* at para 38.
[22] *Kerr* at para 38.
[23] *Kerr* at para 39.
[24] *Kerr* at para 40.
[25] *Kerr* at para 47.
[26] [1993] 1 SCR 980 at para 24 [***Peter***] **[TAB 9].**

85. The Court should also order the conveyance of these funds to AES for the reasons set out below under the heading "The beneficiary of a bare trust is entitled to have legal title conveyed on demand".

COURT APPROVAL AND VESTING OF PROPERTY

86. In considering whether to approve a proposed sale in the receivership context, the Court considers:

(a) Whether the Receiver made sufficient effort to obtain the best price and has not acted improvidently;

(b) The interests of all the parties;

(c) The efficacy and integrity of the process by which offers have been submitted; and

(d) Whether there has been any unfairness in the process.[27]

87. Given that the Purchase and Sale Agreement at issue here predates the Receivership, the foregoing test will need to be modified accordingly. Nonetheless, it describes the governing principles for the court to consider, and it is respectfully submitted all of the governing principles are satisfied.

88. The fact that the solicitation process occurred before these proceedings is not a barrier to this Honourable Court approving the transaction. In *Re Sanjel Corporation*,[28] this Honourable Court approved a transaction arising from a solicitation process which predated the insolvency filing where the sales process was conducted in a fair and effective manner.

89. The circumstances of the *Sanjel* case were very different than those before the Court today. *Sanjel* involved proceedings under the Companies' Creditors Arrangement Act ("**CCAA**"), however, it is noted and submitted that the relevant CCAA and BIA provisions governing sale approvals are virtually identical.[29]

90. In *Sanjel* the debtors sought orders approving asset sales generated by a sale and investor solicitation process ("**SISP**") conducted prior to the CCAA filing.

91. Sanjel and its US affiliate were borrowers under a secured credit agreement with a banking syndicate (the "**Syndicate**"). In the fall of 2015, Sanjel engaged Bank of America Merrill Lynch ("**BAML**") to raise additional capital for Sanjel and while BAML contacted 28 private equity firms, the process was not successful. By December 2015, Sanjel was in breach of certain covenants under the bank credit facility and an interest payment was also due on other bonds. Sanjel began negotiating with both the Syndicate and two bondholders (the "**Ad Hoc Bondholders**"), which held over 45% of the bonds.

92. The SISP process was disclosed to the Ad Hoc Bondholders in February 2016. On March 9, 2016, five second round bids under the SISP were received, and Sanjel identified the top three bidders to finalize Asset Purchase Agreements by March 24, 2016.

93. On April 3, 2016, Sanjel entered into final Asset Purchase Agreements with two entities, and on April 4, 2016, filed for CCAA protection. Sanjel also applied for an order approving the sales transactions

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[27] *Royal Bank of Canada v Soundair Corp.*, (1991), 4 OR (3d) 1 1991 CarswellOnt 7706 (CA) at para 14 **[*Soundair*] [TAB 10]**.
[28] 2016 ABQB 257 **[TAB 11]**
[29] See sections 36 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-30 **[*CCAA*] [TAB 12]** & 65.1 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 **[*BIA*] [TAB 13]**, respectively.

generated through the SISP. The Ad Hoc Bondholders objected to the proposed sales, *inter alia*, on the ground that they were the product of a defective SISP conducted outside of the CCAA.

94. Justice Romaine dismissed the objection. She wrote that "[a] pre-filing SISP is not of itself abusive of the CCAA."[30] Rather, a SISP is permissible so long as it satisfies "the principles and requirements of section 36 of the CCAA," and the *Soundair* principles:[31]

(a) Was there a sufficient effort made to get the price at issue? Did the debtor company act improvidently?

(b) Were the interests of all parties considered?

(c) Are there any questions about the efficacy and integrity of the process by which offers were obtained?

(d) Was there unfairness in the working out of the process?[32]

95. While Justice Romaine acknowledged in *Sanjel* that a SISP conducted prior to court proceedings did not have the comfort of a Monitor's review and the Court's advance approval of the process, "it is the specific details of the SISP as conducted that will be scrutinized."[33]

96. Based on the SISP process Justice Romaine concluded that it was "unlikely that extending the SISP time frames in the current market would have resulted in materially better offers."[34] Justice Romaine further concluded: "A sales process is only required to be reasonable, not perfect."[35]

97. It is respectfully submitted that with respect to the first criteria, the proper inquiry is whether OpsMobil made sufficient effort to get the best price. As described above in greater detail, OpsMobil implemented a sales process of approximately 18 months and canvassed the 3 market participants expected to be most interested in the assets. From this process, the AES transaction emerged as the highest and best offer for the assets. This was communicated to TEC who approved the deal by negotiating it and executing the Final Term Sheet.

98. Based on the foregoing it is respectfully submitted that sufficient effort was made to obtain the best price and there has been no improvidence. The approval of TEC is important and persuasive evidence in that regard, as TEC would not have approved the deal if the price was inadequate.

99. The second factor to consider is the interests of all parties. As indicated above, there is a broad constituency of numerous parties who will be impacted by the determination of whether or not AES continues in possession of the Business. Those parties and their positions are:

(a) AES who will benefit from the closing of the transaction it bargained for, and will preserve the enhanced value of the Business which it has created over the last 8 months;

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[30] *Sanjel* at para 70.
[31] *Sanjel* at para 70.
[32] *Soundair* at para. 20.
[33] *Sanjel* at para 71.
[34] *Sanjel* at para 78.
[35] *Sanjel* at para 80.

(b) The 41 employees of AES who will benefit by keeping their jobs and their paychecks;

(c) The landlords of the numerous facilities who will benefit by having the tenancies continue;

(d) The creditors of the Business who will continue to be paid;

(e) The customers of the Business who will continue to have their pipelines monitored and therefore remain in compliance with their regulatory obligations;

(f) The public in Alberta who benefit from the pipeline safety, and whose health and safety is dependant upon the Business continuing;

(g) Rilpa and Classic who can look to AES for satisfaction of the secured amounts owing to them by OpsMobil;

(h) The estate of OpsMobil and TEC who will benefit by receipt of the cash to close, and will benefit from the elimination of the secured debts owing to Rilpa and Classic;

100. If the Application is not granted the negative impacts on all of the foregoing parties will be a complete and total loss. As will be shown below in detail, even the estate of OpsMobil and TEC will be negatively impacted if the deal does not close. Based on the foregoing it is respectfully submitted that the interests of all the parties significantly weighs in favour of the Court granting the Application.

101. The third factor to consider is the efficacy and integrity of the process. There is little evidence as to how OpsMobil canvassed the marketplace, however, the Court should be satisfied by the fact that following the marketing process TEC was satisfied with the AES transaction and approved of it. It is respectfully submitted that the Court may infer from TEC's conduct that there were no problems with the solicitation process and that TEC was satisfied with the process and its results.

102. The final factor to consider is whether there has been any unfairness in the process. It is respectfully submitted that there is no evidence of any unfairness here. To the contrary, and as set out above, the acceptance of the AES transaction by TEC is significant and persuasive evidence that there were no concerns about or unfairness in the process.

103. The acceptance of the deal by TEC shows the integrity, efficacy, and commercial reasonableness of the solicitation process, and the results.

104. It is respectfully submitted that in this case, similar to the situation in *Sanjel*, the solicitation process implemented by OpsMobil has all the hallmarks of a comprehensive, fair and effective process, and was reasonable. OpsMobil contacted the 3 most likely purchasers for the highly regulated and specialized Business and ultimately found a transaction which was acceptable to its secured lender. The evidence demonstrates the process was reasonable. Just as importantly there is no evidence to the contrary.

105. Additionally, for the reasons set out below, it is respectfully submitted that the purchase price in the Purchase and Sale Agreement is much higher than anything which the Receiver could obtain in a receivership sale and therefore the Purchase and Sale Agreement represents the best deal available.

106. Therefore, it is respectfully submitted that the criteria described in *Soundair* and *Sanjel* are all satisfied and this Honourable Court ought to approve the transaction and grant the usual Approval and Vesting Order in accordance with the template in use in Alberta.

The beneficiary of a bare trust is entitled to have legal title conveyed on demand

107. This Honorable Court should find that AES is a beneficiary of a bare trust over the Business and revenues generated by the Business since the Effective Date. Indeed there can be no doubt the revenues of the Business from and after the Effective Date are subject to a bare trust in favour of AES.

108. The British Columbia Supreme Court in *Leggett & Platt Canada Co./Societe Leggett & Platt Canada v Brink Forest Products Ltd.* stated: "a bare trust is defined as one in which the trustee has no significant powers or responsibilities, other than to hold legal title to the property and the …beneficiary, can cause the property to revert to him or her at any time."[36]

109. The Tax Court of Canada in *De Mond v R.* confirmed that the beneficiary under a bare trust can compel conveyance of the legal title to the trust property upon its demand. In *De Mond*, the Court referred to the definition of "bare trust" given by Professor Waters in his textbook *Law of Trusts in Canada*. The Court cited Professor Waters' definition of a bare trust as:

> The usually accepted meaning of the term "bare," "naked" or simple trust where the trustee or trustees hold property without any further duty to perform except to convey it to the beneficiary or beneficiaries upon demand.[37]

110. AES submits that it is a beneficiary of a bare trust in respect of the Business and revenues obtained from it held as a bare trust by OpsMobil, and AES is entitled to the conveyance of this property. For this reason as well the Court ought to grant the Application and related Approval and Vesting Order.

Issues raised in the Third Horrox Affidavit

111. Paragraph 68 of the Third Horrox Affidavit argues that the transaction should not be approved by this Honourable Court on the following grounds: (1) the "Accounts Payable Offset", (2) sections 95 and 96 of the BIA; and (3) because Court approval is required. The last of these is discussed above, the first two are discussed below.

The "Accounts Payable Offset" Issue

112. As set out above set-off is not an issue here as the part of the purchase price which is the assumption of the secured indebtedness owing to Rilpa and Classic is not set-off. Rather, AES (not a creditor of OpsMobil) has agreed, as part of the purchase price, to assume the secured indebtedness owing to Ripla and Classic. This is not a set off of mutual debts or cross claims owing between the same parties, and as such, the law set off does not apply.

113. Moreover, the assumption by AES of the secured debts owing to Rilpa and Classic constitutes a direct dollar-for-dollar benefit to OpsMobil and its estate through the elimination of secured debt. This cannot be construed as a preference, and is not analogous to the type of harm which may result from a counterparty collecting its claim on a dollar for dollar basis from the <u>debtor</u> as a result of set-off. Here Classic and Rilpa collect their claims for AES, not the debtor.

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[36] *Legett & Platt Canada Co./Societe Leggett & Platt Canada v Brink Forest Products Ltd.*, 2008 BCSC 1783 at para 18 **[TAB 15]**.
[37] *De Mond v R*, [1999] 4 CTC 2007, 1999 CarswellNat 1397 [***De Mond***] at para 22 **[TAB 16]**, citing Waters, *Law of Trusts in Canada* (Toronto: Carswell, 1984) at 27.

114. Therefore the categorization of this scenario as "Accounts Payable Offset" by Mr. Horrox is incorrect and inapplicable herein, and should be ignored.

115. In addition, the amounts owing to Rilpa and Classic in respect of the aircraft leases are secured by a deemed purchased money security interest pursuant to section 1(1)(ii) and of the *Personal Property Security Act* and rank in super priority pursuant to section 34(2) of the PPSA.[38] As a result, even if preference concepts were applicable here, the arguments of Mr. Horrox would fail, as there has been no preference in fact given the priority positions of Rilpa and Classic.

The Section 95 and 96 Issues

116. Similarly, sections 95 and 96 of the BIA are simply not applicable here.

117. The essence of section 95 of the BIA is to allow <u>a trustee in bankruptcy</u> to review and challenge transactions <u>in favour of a creditor</u>.

118. Here, AES is not a creditor of OpsMobil. For this reason alone section 95 is not applicable.

119. More particularly, AES did not exist as an entity at the Effective Date, but rather was incorporated on November 23, 2017 to complete the Purchase and Sale Agreement. There were no prior dealings between AES and OpsMobil, and AES was not a creditor of OpsMobil at the time of the transaction. As a result, section 95 of BIA has no application whatsoever.

120. Additionally, the rights and remedies prescribed by section 95 of the BIA are only available to a trustee in bankruptcy. There is no bankruptcy here and there is no trustee to use section 95.

121. Finally, section 95 requires proof that the debtor intended to give a preference. There is no such evidence here.

122. Similarly, section 96 is not applicable, or even possible on the facts of this case. The essence of section 96 is that a <u>trustee in bankruptcy</u> may challenge <u>transactions at undervalue</u> where the debtor <u>intended to defeat or delay creditors</u>.

123. There is no trustee in bankruptcy and so section 96 of the BIA is not available.

124. In addition, there is plenty of evidence that prior to the transaction OpsMobil implemented a marketing process for the Business for some 18 months without success. The most probable other purchasers for the Business (Big Rock Helicopters and Great Slave Helicopters) were approached but those parties had no interest. Following this OpsMobil identified Mr. Mizera as the only capable and interested party to consummate a transaction, and recommended the same to TEC. TEC accepted this and agreed to the transaction.

125. All of this is evidence that the transaction achieved fair market value as (i) it followed a lengthy, competitive, and broad solicitation process targeting the most likely buyers, and, (ii) the Purchase and Sale Agreement was negotiated by arm's length third parties, which is the very definition of fair market value.

[38] *Personal Property Security Act*, RSA 2000 c P-7 **[PPSA]** s 34(2) **[TAB 14]**.

126. Moreover, there is an enormous amount of evidence which indicates TEC supported and agreed to the transaction, and negotiated an increase to the purchase price. The agreement by TEC is strongly persuasive evidence that the transaction is at fair market value, and not voidable as being undervalue.

127. If anything, the evidence before the Court is that AES has overpaid for the assets in question. Please recall that when the Purchase and Sale Agreement was negotiated the lease rate for the Whitecourt Facility was $1.00 per square meter. The parties negotiated and agreed to the purchase price based on this lease rate. The Whitecourt Facility is ascribed approximately 70% of the value ($2,300,000) in the Purchase and Sale Agreement. In reality, and notwithstanding the Whitecourt Facility Appraisal, the actual lease rate for the Whitecourt Facility is now $2.75 per square metre. Therefore it is respectfully submitted that the value of the Whitecourt Facility is actually dramatically less than the $2,300,000 ascribed to it and the Purchase and Sale Agreement.

128. It is respectfully submitted that by using the $1.00 rate AES has overpaid for the Whitecourt Facility. Should the Whitecourt Facility revert to the Receiver, the Receiver will not be able to obtain anywhere near $2,300,000 for the Whitecourt Facility as the Receiver will be required to market it at its current lease rate of $2.75/square meter.

129. Therefore, it is respectfully submitted that (i) since the Purchase and Sale Agreement represents the highest and best price for the Business, there can be no transfer at undervalue, and (ii) should the assets revert back to OpsMobil, the Receiver will obtain a significantly worse price for the Business than what AES has agreed to pay. Like in *Sanjel* above, the Court should not allow this to happen.

130. Finally, to succeed under section 96 of the BIA the trustee in bankruptcy must prove that OpsMobil intended to defraud, defeat or delay a creditor. It is respectfully submitted that it would be impossible to prove such facts given that TEC had notice of the transaction from the outset and consented to it. If anything, the evidence demonstrates that the intention of OpsMobil was to deliver the maximum value to TEC as a result of the transaction, who agreed.

131. For all of these reasons, it is respectfully submitted that sections 95 and 96 of the BIA are not relevant or applicable, and this Honourable Court should ignore them.

TEC is estopped from challenging the Purchase and Sale Agreement

132. TEC cannot now challenge the Purchase and Sale Agreement given it has acquiesced to AES being in possession of the Business since November 2017 and has made no effort to challenge or deny the Purchase and Sale Agreement.

133. In *Maurice Demers Transport Ltd. v Fountain Tire Distributors (Edmonton) Ltd.*, the Alberta Court of Appeal found that the doctrine or equitable rule as to acquiescence is sometimes described as "estoppel by acquiescence."[39]

134. *Canadian Superior Oil Ltd. v Paddon-Hughes Development Co.* involved the question of whether the lessor of a petroleum and natural gas lease was estopped from denying the existence of the lease (which by its terms had expired), by reason of his conduct. The Alberta Court of Appeal found that:

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[39] *Maurice Demers Transport Ltd. v Fountain Tire Distributors (Edmonton) Ltd*. [1973], 42 DLR (3d) 412 at para 33 (Alta CA) **[TAB 17]**.

> It is said that the respondent Hambly, because of his conduct, is estopped from denying the continued subsistence of the lease. The conduct complained of was alleged to be both passive and active — passive in standing by from 1958 to 1965 and allowing the appellants to believe that no advantage would be taken of the appellants' default in failing to pay the shut-in royalty before the extended term of the lease had expired, and active by positive acts that encouraged the appellants to continue in that belief. This is sometimes called equitable estoppel, but it would appear to be similar to a doctrine that had its origin in the common law. There are two types of conduct that could result in this kind of estoppel: (1) Acts or words which induce or encourage the plaintiff to act in a way detrimental to his interests; and (2) An estoppel by silence.[40]

135. The Alberta Court of Queen's Bench has stated that there are five requirements of estoppel by acquiescence which must be met:

1. Did the claimant make a mistake as to its legal rights?
2. Did the claimant expend some money or take some action on the basis of its mistaken belief?
3. Did the defendant know of the existence of its own right which is inconsistent with the right claimed by the plaintiff?
4. Did the defendant know of the plaintiff's mistaken belief?
5. Did the defendant encourage the plaintiff in his actions?[41]

136. The plaintiff must also establish as a fact that the defendant is taking advantage of him in a way that is unconscionable, inequitable or unjust.[42]

137. It is respectfully submitted that based on all of the evidence herein and the foregoing common law, TEC is estopped from opposing AES in the Application. This is because (i) AES mistakenly operated as though it held legal title to the Business, that the Purchase and Sale Agreement would close, and that the security interests of TEC would be discharged from the property, (ii) AES has expended considerable money, time and effort on the Business, (iii) TEC now asserts its legal security rights over the Business which is inconsistent with AES' understanding of that right, the Purchase and Sale Agreement and TEC's conduct and words, (iv) TEC was aware of AES' mistaken belief, as AES has been in possession of and operating the Business since November 2017, all with TEC's knowledge and consent, and (v) TEC encouraged AES in its actions and beliefs by negotiating the sale of the Business, negotiating the closing of the Purchase and Sale Agreement until the end of May, 2018, and allowing AES to invest significant capital in the Business to improve it without objection by TEC.

138. For these reasons it is respectfully submitted that AES is estopped from opposing the Application.

COSTS

139. AES ought to be awarded the costs of the Application against TEC on a solicitor and his own client full indemnity basis, or such other basis as this Honourable Court may award.

140. A court's authority to grant substantial indemnity costs is provided in the *Alberta Rules of Court* rule 10.31(1)(b):

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[40] *Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co.* (1969), 67 WWR 545 at para 21 (Alta CA) **[TAB 18]** aff'd in *Canadian Superior Oil Ltd. v Hambly* [1970] SCR 932 at para 19 **[*Hambly*] [TAB 19]**.
[41] *Desoto Resources Ltd. v. EnCana Corp.*, 2010 ABQB 448 at paras 53 to 63 [***Desoto***] **[TAB 20]**.
[42] *Desoto* at para 51.

10.31 Court-ordered costs award

(1) After considering the matters described in rule 10.33, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:

...

(b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,

(i) an indemnity to a party for that party's lawyer's charges, or

(ii) a lump sum instead of or in addition to assessed costs.

141. Rule 10.31(1)(b) was interpreted in *Alberta Treasury Branches v 1401057 Alberta Ltd.*: "The second costs principle is that a court has discretion to issue a costs order."[43]

142. The Alberta Court of Queen's Bench in *College of Physicians & Surgeons (Alberta) v H(J)* stated that solicitor and client costs are intended to discourage inappropriate conduct.[44]

143. The evidence herein clearly demonstrates that TEC has acted in a high-handed, commercially unreasonable, duplicitous, and unfair manner. The current position and conduct of TEC flies in the face of its position and conduct over the past 8 months. The Court ought to discourage and punish such behaviour, and as such AES ought to be awarded costs of the Application and these proceedings against TEC on a solicitor and his own client full indemnity basis.

144. In the alternative, AES seeks costs against TEC in any amount that this Honourable Court deems appropriate.

IV. CONCLUSION

145. For the foregoing reasons AES respectfully submits that this Honourable Court ought to grant the Application in full and grant the related Approval and Vesting Order.

All of which is respectfully submitted this 8th day of August, 2018.

BURNET, DUCKWORTH & PALMER LLP

Per:

David LeGeyt, solicitor for Airborne Energy Solutions Inc.

[43] *Alberta Treasury Branches v 1401057 Alberta Ltd.*, 2013 ABQB 748 at para 25 [footnotes omitted] **[TAB 21]**.
[44] *College of Physicians & Surgeons (Alberta) v H(J)*, 2009 ABQB 48 at para 39 **[TAB 22]**.

APPENDIX 1
AES CORPORATE SEARCH

Government of Alberta ■

Corporation/Non-Profit Search
Corporate Registration System

Date of Search: 2018/08/07
Time of Search: 08:21 AM
Search provided by: ELDOR-WAL REGISTRATIONS (1987) LTD

Service Request Number: 29444729
Customer Reference Number:

Corporate Access Number: 2020819534
Legal Entity Name: AIRBORNE ENERGY SOLUTIONS INC.

Legal Entity Status: Active
Alberta Corporation Type: Named Alberta Corporation
Registration Date: 2017/11/23 YYYY/MM/DD

Registered Office:
Street: 480 AVIATION WAY NE
City: CALGARY
Province: ALBERTA
Postal Code: T2P 2G5

Records Address:
Street: 480 AVIATION WAY NE
City: CALGARY
Province: ALBERTA
Postal Code: T2P 2G5

Directors:

Last Name: MIZERA
First Name: KENNETH
Middle Name: IAN
Street/Box Number: 480 AVIATION WAY NE
City: CALGARY

Province:	ALBERTA
Postal Code:	T2P 2G5

Details From Current Articles:

The information in this legal entity table supersedes equivalent electronic attachments

Share Structure:	SEE THE ATTACHED SCHEDULE "A"
Share Transfers Restrictions:	SHARES MAY ONLY BE TRANSFERRED UPON THE UNANIMOUS CONSENT OF THE DIRECTORS BY RESOLUTION PASSED AT A DULY CONSTITUTED MEETING OF THE DIRECTORS.
Min Number Of Directors:	1
Max Number Of Directors:	7
Business Restricted To:	NONE
Business Restricted From:	NONE
Other Provisions:	SEE THE ATTACHED SCHEDULE "B"

Other Information:

Filing History:

List Date (YYYY/MM/DD)	Type of Filing
2017/11/23	Incorporate Alberta Corporation

Attachments:

Attachment Type	Microfilm Bar Code	Date Recorded (YYYY/MM/DD)
Other Rules or Provisions	ELECTRONIC	2017/11/23
Share Structure	ELECTRONIC	2017/11/23

This is to certify that, as of this date, the above information is an accurate reproduction of data contained within the official records of the Corporate Registry.

REGISTRAR OF CORPORATIONS