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APPLICANT	THIRD EYE CAPITAL CORPORATION
RESPONDENTS	OPSMOBIL INC., RANCH ENERGY CORPORATION, 1734163 ALBERTA INC., 1859821 ALBERTA INC., AIR DALLAIRE LTD., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.
DOCUMENT	**BRIEF OF LAW AND ARGUMENT**
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BRIEF OF LAW AND ARGUMENT IN RESPONSE TO THE APPLICATION BY AIRBORNE ENERGY SOLUTIONS INC. FOR A CONSTRUCTIVE TRUST, SPECIFIC PERFORMANCE, AND AN APPROVAL AND VESTING ORDER

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PART I - INTRODUCTION

1. This Brief is submitted by the first secured creditor, Third Eye Capital Corporation ("**TEC**"), in connection with its contestation of the *Application by Airborne Energy Solutions Inc. for a Constructive Trust, Specific Performance, and an Approval and Vesting Order* (the "**AES Application**") filed by Airborne Energy Solutions Inc. ("**AES**") on August 3, 2018, in which AES seeks, *inter alia*, the issuance by this Court of an order:

   (a) declaring that AES is entitled to a constructive trust over certain assets of OpsMobil Group Inc. ("**OGI**"), OpsMobil Inc. and OpsMobil Energy Services Ltd. (collectively, "**OpsMobil**") related to its aerial surveillance and scanning, chemical spraying and local charter business (the "**Business**");

   (b) directing OpsMobil, the Receiver and TEC to specifically perform their obligations under the *Purchase and Sale Agreement* entered into between OpsMobil and AES on December 14, 2017 (the "**PSA**");

   (c) vesting the Business in AES free and clear of any claims against OpsMobil and free and clear of any encumbrances against the Business, including the first-ranking security registered by TEC on the Business; and

   (d) ordering the transfer of all present and future funds deposited into the OpsMobil Account No. 760-00182687579 (the "**Segregated Account**").

2. In this Brief, TEC respectfully submits, that:

   (a) this Court cannot order the Receiver and TEC to specifically perform their respective obligations under the PSA, since, *inter alia*, (i) TEC never provided its requisite written consent to the closing of the PSA; (ii) the closing of the PSA has not taken place; and (iii) ordering the specific performance of the PSA after the OpsMobil insolvency filing would run contrary to principles of insolvency law;

   (b) the remedies requested in the AES application, including declaring that AES is entitled to a constructive trust on the basis of unjust enrichment, are made without sufficient evidentiary basis, and the Receiver should be directed to (i) perform an accounting of the monies held in the Segregated Account, (ii) ascertain, quantify and reconcile the amounts allegedly disbursed by OpsMobil, AES and Rilpa Enterprises Ltd. ("**Rilpa**"), in order to operate the Business since November 1, 2017, and (iii) trace and account for any accounts receivables relating to the Business that may have been assigned out of the OpsMobil estate in the weeks prior to the issuance of the Order for Interim Stay on July 4, 2018.

3. All capitalized terms used but not defined in this brief shall have the meanings given to them in the Third Horrox Affidavit dated July 26, 2018 (the "**Third Horrox Affidavit**").

PART II - FACTS

4. The factual background and basis for the relief is set out in detail in the Third Horrox Affidavit and the Fourth Horrox Affidavit dated August 8, 2018 (the "**Fourth Horrox Affidavit**"). The salient facts will not be repeated but can be summarized as follows:

(a) in order to close the transaction reflected in the PSA, all parties, including AES, Rilpa and OpsMobil, were acutely aware of the need to obtain the written consent of TEC, as first secured lender on the assets of the Business, on definitive transaction documents;

(b) on November 21, 2017, TEC acknowledged a non-binding term sheet in respect of the transaction (the "**Term Sheet**"), which by its very terms, confirmed that nothing in the term sheet or in the parties' course of conduct would be construed to create any binding obligation until the execution of definitive agreements;

(c) given that AES and Rilpa were owed significant accounts receivables by OpsMobil, the PSA was deliberately structured with a view to allow AES and Rilpa to recover those amounts, by setting-off $1,748,642.23 against the total purchase price of $3,275,000;

(d) AES decided to enter into the *Transition Services Agreement* (the "**TSA**") with OpsMobil and to take possession of the Business assets before the closing of the transaction reflected in the PSA;

(e) TEC was advised after-the-fact, on December 19, 2017, that the PSA and the TSA had been signed by OpsMobil and AES on December 14, 2017, at which point TEC became concerned that the comments it had previously provided to OpsMobil on the transaction documents had been largely ignored;

(f) the closing of the PSA, initially scheduled to take place on December 20, 2017 in the Term Sheet, was plagued with numerous delays and complications, despite the fact that it was essential to close the transaction quickly in light of OpsMobil's deteriorating financial condition;

(g) on April 19, 2018, AES's counsel proposed what amounted to a new transaction that was unacceptable for TEC, pursuant to which the cash portion of the purchase price payable on closing would be reduced by over 30%;

(h) on May 10, 2018, TEC engaged in direct discussions with AES with respect to revised transaction terms that included an environmental holdback of $250,000, on the condition that the transaction would close as soon as possible, it being understood that no definitive transaction documents had been provided to TEC at the time and the latter had not issued its requisite written consent;

(i) revised drafts of only a small portion of the over 80 closing documents in respect of the transaction were not sent to TEC until May 28 and 29, 2018, by which time TEC had independently reached the conclusion that the best way to protect its broader interests as secured lender of OpsMobil and Ranch's assets would be to seek the appointment of a receiver to the assets of OpsMobil and Ranch and their affiliates under the BIA;

(j) on June 6, 2018, TEC served its notices on the Debtors under section 244 of the BIA;

(k) on June 11, 2018, OpsMobil assigned certain receivables owed to it by Alberta Agriculture and Forestry (the "**AAF Receivables**") to a Scotiabank account controlled by AES, without the knowledge or consent of TEC, and this fact was only uncovered after AES sought to contact the Receiver to have the funds transferred to it;

(l) on June 14, 2018, AES obtained the issuance of a Preservation Order in Court file 1801-08383 (the "**Preservation Order**"), which TEC consented to, pursuant to which, *inter alia*, the parties were enjoined from dealing in any manner whatsoever with the monies held in the Segregated Account;

(m) on July 4, 2018, this Court issued an Interim Stay Order in respect of the Debtors, including OpsMobil, and on July 19, 2018, the Receiver was appointed to the assets of the Debtors.

5. AES alleges, at paragraphs 16 to 19 of the *Statement of Claim* communicated as Exhibit "A" to the Affidavit of Kenneth Mizera dated June 29, 2018, that TEC at all times acted as a "lender in possession" of the Business and that it controlled, directed and was the "mind" of all major financial decisions of OpsMobil.

6. The emails produced into evidence directly contradict this assertion however, by illustrating that OpsMobil was represented by its own counsel and that OpsMobil's management acted on its own initiative, dealing with AES independently and seeking the requisite approval of its secured lender pursuant to the Credit Agreement only after-the-fact (or not at all, as the case of the assignment of the AAF Receivable clearly illustrates).

7. AES further alleges that TEC obstructed the closing of the PSA and acted in bad faith, when in reality, for several months, TEC diligently sought to work on the consummation of the transaction reflected in the PSA, until it reached the point where in light of evolving circumstances surrounding the broader insolvency of OpsMobil and Ranch, the closing of the PSA was no longer viable.

PART III - ISSUES

8. The following issues are to be resolved in light of AES's Application:

(a) Should this Court order specific performance of the PSA?

(b) Should this Court impose a constructive trust over the Business?

(c) Should this Court find that AES's conduct precludes the granting of equitable relief pursuant to the clean hands doctrine?

PART IV – THE LAW

A) The Requisite Criteria for Specific Performance are Not Satisfied

a) The Soundair Criteria

9. OpsMobil is insolvent and any sale of its assets by the Receiver outside of the ordinary course of business, including the closing of the PSA, requires the approval of this Court.

10. By asking this Court to order the specific performance of the PSA, AES is effectively suggesting that a transaction negotiated before OpsMobil's insolvency filing can be approved and implemented after the filing, as is sometimes the case with the approval of "pre-packaged transactions" by insolvency courts.

11. Although there is no doubt that a court-appointed receiver can seek the approval of a pre-packaged transaction, it must, when doing so, demonstrate to the Court that the proposed sale meets the criteria established and enumerated in *Royal Bank of Canada* v. *Soundair Corp.* ("***Soundair***"):

> *"1. [The court] should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.*
>
> *2. [The court] should consider the interests of all parties.*
>
> *3. [The court] should consider the efficacy and integrity of the process by which offers are obtained.*
>
> *4. [The court] should consider whether there has been unfairness in the working out of the process."*
>
> *Royal Bank of Canada* v. *Soundair Corp.*, [1991] O.J. No. 1137 at p.9 [Book of Authorities, Tab 1]

12. Although initially developed in a CCAA context, the Courts have confirmed that the *Soundair* criteria are applicable in the context of a receivership under the BIA.

See, for example, *Bank of Montreal* v. *Calgary West Hospitality Inc.*, 2011 ABQB 293 (CanLII) at paras.33-34 [Book of Authorities, Tab 2]

13. In particular, the analysis to be performed requires the Court to scrutinize the adequacy of the sales and marketing process in pre-packaged transactions in order to ensure that such a transaction represents the best possible commercial alternative for the debtor company and its various stakeholders.

> *"[10] "Quick flip" or "pre-pack" transactions are becoming more common in the Ontario distress marketplace. In certain circumstances, a "quick flip" involving the appointment of a receiver and then immediately seeking court approval of a "pre-packaged" sale transaction may well represent the best, or only, commercial alternative to a liquidation. In such situations the court still will assess the need for a receiver and the reasonableness of the proposed sale against the standard criteria set out in decisions such as Bank of Nova Scotia v. Freure Village on Clair Creek and Royal Bank v. Soundair Corp., respectively. However, courts will scrutinize with especial care the adequacy and the fairness of the sales and marketing process in "quick flip" transactions."*

Montrose Mortgage Corp. v. *Kingsway Arms Ottawa Inc.*, 2013 ONSC 6905 at para.10 [Book of Authorities, Tab 3]

14. To that end, the Courts will consider whether the positions of various parties - such as OpsMobil's secured and unsecured creditors - would differ in the event of an extended sales process, as compared to the approval of the pre-packaged transaction.

> *"[15] A 'quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a 'quick flip' transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed."*

Tool-Plas Systems Inc. (Re), 2008 CanLII 54791 (ON SC) at para.15 [Book of Authorities, Tab 4]

15. In the case at hand, when assessing the *Soundair* criteria, this Court is faced with a peculiar set of facts in which a third party purchaser (as opposed to a receiver) seeks the approval of a pre-filing transaction, in circumstances where the Receiver does not support the consummation of said transaction, and cannot, at this stage, confirm (a) whether there has been sufficient effort to get the best price, (b) whether the interests of all parties have been considered, and (c) the details regarding the process by which AES' offer was obtained.

16. AES, unable to show this Court that any sort of sale process was actually undertaken, instead submits, without providing any details or documentation, that OpsMobil *"actively pursued such aviation divestiture options with other parties including, Great Slave Helicopters and Big Rock Helicopters"*. There is no evidence however regarding the nature and extent of these negotiations, nor can AES provide any sort of comfort to this Court regarding the integrity of any such process, if one did in fact occur.

Second Affidavit of Kenneth Mizera filed on August 3, 2018, at para.9.

17. The evidence before this Court suggests rather that the transaction was initially negotiated quickly, in November 2017, in order to solve critical business issues for Rilpa, who had not been paid by OpsMobil for months and for OpsMobil, whose financial condition was continually deteriorating.

Third Affidavit of Mark Horrox filed on July 26, 2018, at para.26.

18. The lack of information surrounding the pursuit of any other potential sales transactions makes it impossible to assert at this stage that the transaction sought by AES via the specific performance of the PSA is the best possible alternative, relative to the sales process which would be undertaken by the Receiver going forward.

19. AES agreed with OpsMobil that it would operate the Business before the transaction contemplated in the PSA actually closed. In so doing, AES, although it came into possession of the assets, also knowingly took on a significant commercial risk, which has now materialized, leading AES to try to force the closing of the transaction contemplated in the PSA, in contravention of insolvency legislation, by arguing that the steps taken <u>by it</u> are irreversible, thus putting the parties before a *fait accompli*.

Fourth Horrox Affidavit, at paras. 21 and 22.

20. Determined to impress upon the Court a doomsday scenario, AES, in the Second Mizera Affidavit, argues that (i) it has entered into long term leases, (ii) "[…] *OpsMobil cannot fly or maintain aircraft and therefore cannot operate the Business*", and (iii) "[…] *in the event the PSA does not close and the Business reverts to OpsMobil the receiver will likely liquidate the assets*".

Second Mizera Affidavit, at paras. 113 and 115; Fourth Horrox Affidavit, at paras. 21 and 22.

21. This scenario is misleading however, since TEC remains committed to funding the transition of the Business from AES to the Receiver, so that the Receiver can proceed with marketing the Business and running a sale process that will allow the Business to be sold as a going concern, which will ensure that most, if not all employees currently employed by the Business will maintain their employment. Moreover, an open and competitive sale process will allow the Receiver to maximize the value obtained for the Business, thus resulting in greater recovery for OpsMobil's creditors.

Fourth Horrox Affidavit, at paras. 24 and 26.

22. Moreover, TEC respectfully submits that the Receiver can still explore potential transactions with AES, provided ultimately, that the outcome results in a sale of the Business for fair market value, at which point, the Receiver would be able to seek the approval of the transaction by this Court. If no such solution can be implemented, the Business should be turned over to the Receiver and AES should be solicited, along with other participants, to present an offer to purchase the Business in a competitive and open sale process.

b) *<u>Specific Performance is an Inappropriate Remedy at Common Law</u>*

23. Specific performance of the PSA in the present circumstances would be inappropriate at common law, given the extensive costs of enforcement and the nature of the Business and proposed transaction.

24. The costs of enforcement should be considered in the awarding of a specific performance remedy.

> *"24 Despite their flexibility and specificity, Canadian relief orders are fashioned following general guidelines. <u>The terms of the order must be clear and specific. The party needs to know exactly what has to be done to comply with the order. Also, the courts do not usually watch over or supervise performance.</u> While the specificity requirement is linked to the claimant's ability to follow up non-performance with contempt of court proceedings, supervision by the courts often means relitigation and the expenditure of judicial resources. This factor is discussed by R. J. Sharpe, in Injunctions and Specific Performance (2nd ed. (loose-leaf)), at para. 7.480:*
>
> > *From this perspective, the supervision concern differs from other criteria determining the availability of specific relief. It is based not upon the weighing of relative advantage and disadvantage to the*

> *parties but rather on the weighing of the advantage of doing justice by granting specific relief against the general cost to society of having justice administered. By way of contrast to specific relief, damage awards do hold certain advantages. A money judgment is final and enforcement is left to the administrative rather than the judicial machinery of the court. The cost of enforcement is largely borne by the parties. A decree for specific performance does involve a substantially higher risk that further judicial resources will be required. The more complex or extended the performance, the more likely further proceedings will be needed to ascertain whether the defendant has complied with his or her obligations. This fear of extended and complex litigation and the need for repeated requests for judicial intervention may be seen as a legitimate concern. The cost to society of providing the resources necessary to implement specific performance decrees is properly considered by the court when weighing the advantages the specific relief might otherwise offer."*

Pro Swing Inc. v. *Elta Golf Inc.*, 2006 SCC 52 at para.24 [Book of Authorities, Tab 5]

25. By way of example, insolvency transactions are typically implemented on an "as is where is" basis and it would be impracticable and prohibitively costly for the Receiver to oversee the implementation of the 37 representations and warranties of the Vendor (as defined in the PSA) at section 4.1 of the PSA, all of which are conditions to closing pursuant to section 3.1 of the PSA.

Second Affidavit of Kenneth Mizera filed on August 3, 2018, at paras.108-112.

26. Similarly, in the manner in which the transaction reflected in the PSA is currently structured, there are approximately 85 documents to be executed and exchanged with the Vendor on closing from multiple parties (including third parties not involved in this matter such as the landlord of the Whitecourt Facility), including a Software Agreement, Sublease Agreement, Non-Competition Agreement, Mutual Releases, Right of First Refusal and Assignments. It is unclear whether any of these documents have been finalized as between the parties involved or how an order of specific performance would be interpreted as requiring such third parties to provide consent to the transaction.

Second Affidavit of Kenneth Mizera filed on August 3, 2018, at paras.108-112.

27. In light of the intervening insolvency of OpsMobil, it is unclear as to whether all of these agreements would even be required, and there is no basis, in law or in fact, on which AES can justify forcing the Receiver to specifically perform OpsMobil's obligations under the PSA or forcing TEC to provide the consent and releases required with respect to its security in the assets.

c) *Specific Performance Would be Improper as the Proposed Transaction May Constitute a Preference Pursuant to s.95(1)(a) BIA*

28. The evidence confirms that AES and Rilpa were well aware of OpsMobil's financial difficulties and that the PSA was deliberately structured with a view to offset a significant portion of the purchase price in an amount of $1,748,642.23 against accounts receivables owed by OpsMobil.

29. In fact, on June 29, 2018, AES went so far as to admit that "[t]*he purchase of the Business by AES was agreed to by the parties as a mechanism for AES to recover this debt*", a statement that it then corrected on August 3, 2018, to state that "[t]*he purchase of the Business by AES was agreed to by the parties as a mechanism for Rilpa and Classic to recover such secured indebtedness from AES and allow OpsMobil to be released from such indebtedness*", on the basis that the debt owed to Rilpa and Classic by OpsMobil may allegedly be secured.

> First Affidavit of Kenneth Mizera filed on June 29, 2018 at paragraph 24 and Second Affidavit of Kenneth Mizera filed on August 3, 2018, at para.5

30. No conclusive evidence has been provided by AES with respect to the nature of the alleged security referred to above, the assets to which it would attach, or its ranking, but in any event, it appears that the security in question would have been held not by AES, but by its affiliates, Classic and Rilpa. TEC's position remains that any such security would necessarily rank, in any event, after the security registered by TEC.

31. In light of the above facts and intervening insolvency of OpsMobil, the specific performance of the PSA raises the issue of determining whether it would be appropriate, for this Court, to order the Receiver to implement a transaction that is susceptible of constituting a preference under section 95 of the BIA, which reads as follows:

> "*Preferences*
>
> *95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person*
>
> > *(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made,*

> *incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and*
>
> *(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against – or, in Quebec, may not be set up against – the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.*

> *Preference presumed*
>
> *(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference – even if it was made, incurred, taken or suffered, as the case may be, under pressure – and evidence of pressure is not admissible to support the transaction."*

32. A preference occurs when an insolvent debtor pays one or more creditors at the expense of other creditors. A transfer of property in favour of a creditor at arm's length qualifies as a fraudulent preference pursuant to s.95(1)(a) of the BIA if the payment was made within three months of bankruptcy, the debtor was insolvent at the date of payment and the creditor received a preference over other creditors.

> *Logistec Stevedoring (Atlantic) Inc. v. A.C. Poirier & Associates Inc.*, 2005 NBCA 55 at paras.4-6, [Book of Authorities, Tab 6]

33. The purpose of preventing preference in an insolvency context is to ensure *pari passu* treatment among unsecured creditors.

> *"[138] The s. 95 cause of action remedy is designed to ensure that there is pari passu treatment as between unsecured creditors. <u>The recipient of a preferential transfer is not entitled to keep the preferential proceeds if the elements of s. 95 are proven</u>. The subject of the preference is returned to the estate but subject to the rights of secured creditors. In the words of Lee Eng Beng at [95] above, "...if a secured creditor has the right to recover the assets transferred away in breach of his security rights and the liquidator or trustee in bankruptcy recovers the assets pursuant to the statutory provisions, any recovery by the latter must be held for the benefit of the former in so far as they would have been recoverable by the secured creditor.""*
>
> *Tucker v. Aero Inventory (UK) Limited*, 2011 ONSC 4223 (CanLII) at para.138 [Book of Authorities, Tab 7]

34. In the case at hand, AES seeks to have a transaction specifically-performed post-filing, pursuant to which it would obtain the reimbursement of certain allegedly secured (but in any event subordinated) pre-filing claims owed to its affiliates, Classic and Rilpa. In doing so, AES is asking this Court to approve and sanction what can only be characterized as a voidable preference pursuant to s. 95 of the BIA.

B) The Requisite Criteria for the Imposition of a Constructive Trust based on Unjust Enrichment are Not Fulfilled

35. In order to establish a constructive trust based on unjust enrichment, the plaintiff must demonstrate that the defendant has been enriched, the plaintiff has been deprived and the absence of a juristic reason for such enrichment.

> *"20 Canadian courts have never abandoned the principles of constructive trust developed in England. They have, however, modified them. Most notably, Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment. It is now established that a constructive trust may be imposed in the absence of wrongful conduct like breach of fiduciary duty, where three elements are present: <u>(1) the enrichment of the defendant; (2) the corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment</u>: Pettkus v. Becker, supra."*

> *Soulos* v. *Korkontzilas*, [1997] 2 SCR 217 at para.20 [Book of Authorities, Tab 8]

36. In addition, in an insolvency context, the court should consider the impact which a constructive trust based on unjust enrichment may have on third parties, including creditors.

> *[33] Professor Waters also states (citations omitted) at 479:*
>
> > *A great deal has been written about constructive trusts in insolvency situations. ... If [the constructive trust] arises only when judgment is given, it is clear that the judge created it. <u>The creation of such a trust, promoting the plaintiff from unsecured creditor to trust beneficiary, would seem clearly inconsistent with the Bankruptcy and Insolvency Act</u>.*
> >
> > *Whether it is inconsistent or not, we save for another day. The point is that constructive trusts cannot be declared without careful regard for their effect on the interests of third parties.*
>
> *[35] The constructive trust sought by Scott cannot be said to have arisen when the bargain was made. Had it, there might have been a different outcome. Scott was content to receive money from Finavera for his efforts. It is only now, when*

> *seeking judgment, that Scott is concerned that a constructive trust might be the only remedial response that would ensure a judgment is enforceable. Without overstating the point, if a constructive trust can be justified in commercial circumstances such as these, when the enforceability of a judgment for damages is alleged by the claimant to be an issue and the claimant initially agreed to receive a monetary payment, this could impact well-established solvency schemes."*

> *Scott & Associates Engineering Ltd* v. *Finavera Renewables Inc*, 2015 ABCA 51 (CanLII) at paras. 1, 32-33, 35 [Book of Authorities, Tab 9]

> *Hoard (Re)*, 2014 ABQB 426 (CanLII) at paras.31-32 [Book of Authorities, Tab 10]

37. Given the fact that property held in trust is excluded from the property of a bankrupt pursuant to s. 67(1)(a) of the BIA, the required standard of proof to establish a constructive trust is high, with Courts going so far as saying that the legislated rights of creditors should only be defeated when it would be unconscionable not to so recognize the existence of a constructive trust.

> *"Property of Bankrupt*
>
> > *67 (1) The property of a bankrupt divisible among his creditors shall not comprise*
> >
> > > *(a) property held by the bankrupt in trust for any other person"*

> *"Imposition of constructive trust*
>
> *[23] The onus of proving a constructive trust falls upon the claimant and, in a bankruptcy setting, is not lightly undertaken. The evidence must be clear and the standard of proof is high. Given that the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 provides a code by which legislators have balanced the interests of those adversely affected by the bankruptcy, the legal rights of creditors should not be defeated unless it would be unconscionable not to recognize a constructive trust: Re McKinnon, 2006 NBQB 108 (CanLII).*
>
> *[24] The remedy is discretionary and the authorities have expressed reservations as to the availability of a constructive trust where creditors and third party interests are affected: see for example, Re McKinnon; Melchior v. Cable Estate, 2007 BCSC 136 (CanLII)."*

> *Hoard (Re)*, 2014 ABQB 426 (CanLII) at paras.23-24 [Book of Authorities, Tab 10]

> *"[19] In the bankruptcy context, there are additional considerations that may be relevant when dealing with equitable remedies, as was noted in Houlden, GB Morawetz and J Sarra, Bankruptcy and Insolvency Law of Canada (4th Ed (loose-leaf)), Vol 2, at 3-41:*

> *In proving the existence of a constructive trust in a bankruptcy setting, the standard of proof is high; and given that the BIA provides a code by which legislators have balanced the interest of those adversely affected by the bankruptcy, the legal rights of creditors should not be defeated unless it would be unconscionable not to recognize a constructive trust...*"

Wurth v. *1135096 Alberta Ltd.*, 2014 ABQB 520 (CanLII) at para.19 [Book of Authorities, Tab 11]

38. In this regard, the Courts have expressed clear reluctance as to the appropriateness of awarding a constructive trust altogether in situations of bankruptcy.

> *"[28] In Grant v. Ste Marie (Estate of), 2005 ABQB 35 (CanLII), 2005 ABQB 35 (Grant) Slatter J (as he then was) explains the premise for this high threshold (at para 17):*
>
> > *A constructive trust in a bankruptcy may give one claimant a priority over others. The importance of a trust is obviously that it gives the claimant a proprietary remedy, which is especially of importance when the defendant is insolvent: D.M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors" (1989), 68 Can. Bar Rev. 315, at pg. 321. In many cases a plaintiff with a merely personal claim will recover nothing, whereas a plaintiff with a proprietary claim will be able to recover specific identifiable assets. As Paciocco states at pg. 322:*
> >
> > *Concern has been expressed by a number of authors that this result is not always justified. It violates the basic policy that "insolvency should create equality in creditors", that "property . . . in liquidation should be applied in satisfaction of its liabilities pari passu". This policy has such appeal that it has been speculated that, had statutory regimes not been created to implement it, equity would have developed rules relating to the equal distribution of assets. It seems that the force of this policy focuses the burden of persuasion squarely on those who would give priority to remedial constructive trust beneficiaries. (Footnotes Omitted)"*

Transtrue Vehicle Safety Inc v. *Werenka*, 2015 ABQB 197 (CanLII) at para.28 [Book of Authorities, Tab 12]

39. As described above, the fact that OpsMobil is subject to insolvency proceedings pursuant to the BIA, constitutes in and of itself, a standalone reason for the Court to reject the creation of a constructive trust as remedy.

40. Moreover, in the case at hand, the Court has no evidence before it that any such unjust enrichment on the part of OpsMobil and TEC actually occurred, other than a handful of

general and confusing allegations in AES' affidavits to the effect that it and its affiliates expended amounts to run the Business since November 1, 2017.

41. In that regard, in order for this Court to properly consider an appropriate remedy or allocation with respect to the Segregated Account, a comprehensive accounting and reconciliation would be required with respect to the following:

(a) the sums held in the Segregated Account, which are presently in excess of $900,000;

(b) the amounts spent by each of OpsMobil, AES and Rilpa, to operate the Business since November 1, 2017; and

(c) the amounts of any receivables wrongfully diverted from OpsMobil's estate, to the extent any such receivables were diverted.

42. In light of the foregoing, TEC respectfully submits that it would be appropriate for this Court to direct the Receiver to provide a comprehensive report with respect to items (a) through (c) within forty-five (45) days of the order to be issued, including the Receiver's recommendation as to how the funds in the Segregated Account should be allocated.

C) The Applicant AES is Precluded from Seeking Equitable Relief as it Does Not Come to this Court with Clean Hands

43. The clean hands doctrine requires that a plaintiff seek equitable remedies without having engaged in any wrongdoing with respect to the remedies sought.

> *"As commentators and judges have noted, the metaphor that a claimant for equitable relief must have clean hands must be put into context. Judges of the courts of equity do not deny relief because the claimant is a villain or wrongdoer; rather, the judges deny relief when the claimant's wrongdoing taints the appropriateness of the remedy being sought from the court. In Argyll v. Argyll, [1967] Ch. 302, Ungoed-Thomas, J. described the principle nicely at pp. 331-2, when he said: "A person coming to Equity for relief ... must come with clean hands; but the cleanliness required is to be judged in relation to the relief sought.""*

> *Beidas* v. *Pichler*, [2008] O.J No. 2135 (Ont. S.C.J. (Gen. Div.)) at para.17 [Book of Authorities, Tab 13]

KGH v. *SLV*, 2013 ABQB 326 (CanLII) at paras.48-49 [Book of Authorities, Tab 14]

44. On multiple occasions, courts have denied equitable relief sought in insolvency and bankruptcy contexts due to a breach of the clean hands doctrine.

> "[23] *Finally, the appointment of an interim receiver is a form of equitable relief. The Applicant should come to court with clean hands when seeking this relief. The late service of the motion materials, the lack of cooperation to provide a copy of those materials to Atsana's counsel, and most importantly the sneaky efforts of the Applicants' principals to obtain information about the proposed sale from Atsana's employees, when its principals and the corporate lawyer had already refused to provide that information, means that I cannot conclude that the Applicant is coming to court with clean hands. What also concerns me is the undenied fact that the Applicant has indicated to Atsana that it might be interested in making its own offer to purchase Atsana's assets or undertaking. Consequently, the Applicant might be a competitor to the purchaser in the proposed transaction. This naturally brings into question whether there was more than one motive at play when the Applicant brought its motion seeking to get more information as to the nature of the proposed sale transaction. I must keep in mind that the goal of the court should be to fairly protect the rights of all creditors, and not to do anything that places the interests of one creditor ahead of those of the others.*
>
> *[24] For these reasons, the Applicant's motion is denied.*"
>
> *Atsana Semiconductor Corp. (Bankruptcy), Re*, 2005 CanLII 26595 (ON SC) at paras.23-24 [Book of Authorities, Tab 15]
>
> *Hood (Re)*, 2008 CanLII 65768 (ON SC) at para.5 [Book of Authorities, Tab 16]
>
> *Engels* v. *Richard Killen & Associates Ltd.*, 2002 CanLII 49496 (ON SC) at paras.4-5, 142 [Book of Authorities, Tab 17]

45. In the case at hand, the assignment of the AAF Receivables took place without TEC's knowledge or consent in the weeks leading up to the insolvency proceedings.

Fourth Horrox Affidavit, at paras.11-19.

46. AES was clearly aware of such actions given that the Direction to Pay was in the possession of, and provided to the Receiver by, an AES employee. AES knew or should have known that the issuance of this Direction to Pay was performed unlawfully, with a view to diverting resources from OpsMobil's estate, namely accounts receivables on which TEC held first-ranking security.

47. Notwithstanding the fact that AES had a duty to provide the Court with a full and frank disclosure when it applied for the Preservation Order, it did not reveal to the Court the

material fact that certain accounts receivables that would have otherwise been paid to the Segregated Account had been directed to be paid to its own bank account.

48. The Direction to Pay also runs contrary to the business transition provisions contemplated in the very agreements which AES purports to enforce in its application for specific performance.

49. As a result of the foregoing, AES does not come to this Court with clean hands and cannot seek the equitable remedies of specific performance nor the imposition of a constructive trust. Instead, TEC respectfully submits that the Receiver must be directed to perform a full investigation of any unauthorized assignment of OpsMobil receivables performed with AES's knowledge and consent.

PART V - CONCLUSION

50. For the reasons set forth above, TEC respectfully submits that the *Application by Airborne Energy Solutions Inc. for a Constructive Trust, Specific Performance, and an Approval and Vesting Order* filed on August 3, 2018 be dismissed.

Respectfully submitted in Calgary this 10th day of August, 2018,

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