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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF 667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD., 1919209 ALBERTA LTD. AND CANADA NORTH GROUP LP HOLDINGS LTD.

DOCUMENT **BRIEF OF THE MONITOR FOR COST ALLOCATION APPROVAL AND INCIDENTAL RELIEF**

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I. INTRODUCTION

1. These *Companies' Creditors Arrangement Act* ("*CCAA*") proceedings have been long, at times difficult, and certainly time consuming. As a result, it has been an expensive process, but it is now nearing its conclusion. These proceedings started as a hopeful restructuring for the first 10 months, but after a sales transaction of certain portions of the Applicants' going concern business, it has turned into a liquidation proceeding pursuant to Orders granting the Monitor enhanced powers to liquidate the Applicants' remaining assets.

2. The liquidation process was more complicated and involved than anticipated at the time the Monitor was granted its enhanced powers in 2018. The process involved serious disputes and litigation over asset entitlement and included an appeal to the Supreme Court of Canada most recently heard (the costs of that appeal hearing not being visited upon the estate). , These issues and disputes were not anticipated by any stakeholder at the outset of the liquidation process.

3. These proceedings are now at the stage, in accordance with directions contained in the Initial Order, where the cost of the proceedings, the Administration Charge, the Interim Lender's Charge and the Director's Charge are to be allocated amongst the proceeds from the sale of the assets formerly comprising the property of the "Applicants" within these proceedings. As part of that process, the professional costs, charges and expenses of the Monitor and its legal counsel should be affirmed and passed by this Honourable Court.

4. The Monitor has filed an Application seeking approval of its activities in the 31st Report and Confidential Supplement thereto, along with:

    a. approval of the Monitor's fees and disbursements and those of its legal counsel;
    b. approval of the "February 2021 Allocation" (as defined in the Monitor's 31st Report);
    c. approval of all ancillary orders and directions respecting distribution of proceeds to creditors, release of certain assets to stakeholders and directions respecting payment by creditors of contributions to those costs as a result of having received prior distributions of sale proceeds.

II. FACTS

5. The Initial Order in these proceedings was granted on July 5, 2017. The Order contained the usual template provisions and allowed the Applicants to continue operating, but also included the appointment of a Chief Restructuring Officer ("CRO") and the granting of an Administration Charge, an Interim Lender's Charge and a Director's Charge over all of the assets of the Applicants.

Initial Order granted by Justice K.G. Nielsen on July 5, 2017, filed July 6, 2017 ("Initial Order") **[TAB 1]**

6. On July 27, 2017, the initial stay of proceedings was extended, the amount of the Interim Lender's Charge was increased. 1919209 Alberta Ltd. ("191") was added as an Applicant company to the proceedings.

First Stay Extension Order granted by Justice S.D. Hillier on July 27, 2017, filed August 8, 2017 **[TAB 2]**

7. On July 27, 2017 and December 12, 2017, this Honourable Court increased the amount of debtor in possession financing that was approved, and as a result, the amount of the Interim Lender's Charge was accordingly increased.

Order Increasing DIP granted by Justice S.D. Hillier on July 27, 2017, filed July 28, 2017 **[TAB 3];** Order Increasing DIP granted by Justice K.G. Nielsen on December 12, 2017, filed December 12, 2017 **[TAB 4]**

8. While the Applicants remained in possession of their property and in control of the operation of the business, there were certain transactions completed and/or Orders granted allowing certain creditors to proceed with specific recovery efforts.

9. On September 26, 2017, the Court approved a sale of the Applicants' head office premises in Edmonton, Alberta. By that Order, the Court also authorized the Applicant owner to disburse amounts from the sale proceeds for payment of applicable property taxes owing to the City of Edmonton, real estate commissions, transaction closing costs, and an amount to Business Development Bank of Canada ("BDC") to retire in full a loan which was secured by first mortgage charge against the property. By paragraph 4 of that Order, any payment to BDC was specifically directed to be without prejudice to subsequent Orders allocating the Administration Charge, the Interim Lender's Charge, the Director's Charge (as defined in the Initial Order) and other costs amongst the various assets comprising the property of the Applicants, including the head office.

Order Approving Sale and Other Relief granted by Justice S.D. Hillier on September 26, 2017, filed September 27, 2017 **[TAB 5]**

10. By an Order dated October 4, 2017, the CRO was discharged approximately 3 months after its appointment, and the Monitor was granted some further powers beyond those set out in the Initial Order.

Order granted by Justice K. G. Nielsen on October 4, 2017, filed October 4, 2017 **[TAB 6]**

11. On March 28, 2018, the Court granted an Order approving the sale of certain camp assets to XALTA Capital Partners Ltd. ("XALTA") and TEC Investment Properties Inc. ("TEC"), amongst other relief. By the terms of that Order, upon closing, the Monitor was authorized and directed to make distributions and payments from the sale proceeds to:

   a. BDC in an amount sufficient to retire the full outstanding obligations secured by the Interim Lender's Charge;

   b. The beneficiaries of the Administration Charge in amounts as necessary to retire any outstanding accounts for professional fees; and

   c. Her Majesty the Queen in Right of Canada in the sum of $685,542.93 representing deemed trust source deduction claims owing in respect of two of the Applicants.

Amended Order Increasing the Administration Charge and Other Relief granted by Justice S. D. Hillier on March 20, 2018, filed March 28, 2018 **[TAB 7]**

12. No other distributions were authorized at that time.

13. On April 6, 2018, First Island Financial Services Ltd. ("First Island") obtained authorization from the Court to proceed with foreclosure proceedings against certain farmlands, north of the City of St. Albert (the "Farm"); however, the Farm was to remain subject to the priority charges granted by the Initial Order.

Order Lifting Stay in Favour of First Island Financial Services Ltd. and Zenex Capital Corporation granted by Justice Nielsen on April 6, 2018, filed April 20, 2018 **[TAB 8]**

14. By an Order dated April 20, 2018, this Honourable Court authorized the sale of the Winterburn property without any distribution of proceeds. At that time, this Court granted the Monitor expanded powers to be effective upon the filing of the Monitor's Certificate in relation to the closing of the Winterburn sale. That Monitor's Certificate was signed on or about May 3, 2020. From and after that date, the Monitor essentially took control of, and power over, the Applicants' assets for the purposes of proceeding with liquidation of the remaining assets of the Applicants. Paul and Shayne McCracken resigned as directors of certain of the Applicant Companies.

15. It should be noted that up to May 3, 2018, the business and affairs of the Applicants continued to be run by the Applicants themselves.

16. Prior to the Monitor's expanded powers becoming effective, the Applicants paid all professional fees, other than significant portions of the professional fees of the Monitor and its counsel. The amounts paid by the Applicants included the costs and charges of the CRO. The Affidavit of Shayne McCracken, dated October 2, 2017, indicates that the fees and disbursements of the CRO as of September 27, 2017 were $726,738.33, not including the $60,000.00 retainer held by the CRO. The Monitor is unaware of any return of the retainer. As a result, the Monitor understands the CRO's total fees were approximately $786,738.33.

17. After the Monitor's powers were expanded, it completed several sales of individual assets, two larger auction sales, and was engaged in several disputes involving the ownership of, security interests in, and/or priority to certain assets. It also took steps to recover available accounts receivable and entered settlements with various stakeholders that resulted in recoveries for the estate. Such events or transactions are too numerous to reference exhaustively in this brief; however, they are detailed in the Monitor's Reports and the Orders previously granted in these proceedings. The recoveries obtained by the Monitor following the granting of its expanded powers are also accounted for and included in the February 2021 Allocation.

18. A few interim distributions have been made to creditors since the Monitor's powers were expanded, and such interim distributions are also accounted for and included in the February 2021 Allocation.

19. On September 21, 2018, Staheli Construction Co. Ltd. ("Staheli"), the first mortgage holder on the Winterburn property, applied to this Honourable Court for distribution asking the Court to pay out its loans in full. Concurrently, Northland Mortgage & Investment Corp. ("Northland") also applied to the Court for relief allowing it to receive a certain portion of the proceeds of the Winterburn sale. On that application, the Monitor recommended, and the Court agreed to, a holdback of $700,000.00 from Staheli, which received $4,157,132.75 as a result of that interim distribution. The total funds held back from that sale were $1,300,000.00, and the Court again declared that the Order was without prejudice to subsequent Orders allocating the costs of these proceedings. Northland's concurrent application was dismissed.

Order granted by Justice S. D Hillier on September 21, 2018, filed October 17, 2018 **[TAB 9]**

20. First Island completed a sale of the Farm through the foreclosure process. At the time of the foreclosure, First Island was owed $4,785,702.00. The sale authorized by the Court saw the Farm sold for $4,050,000.00 with a credit to the purchaser for mortgage loan proceeds received from First Island in the amount of $3,200,000.00. After adjustments, payments of commissions, and other matters, the sum of $465,962.79 was paid over to the Monitor to be held in trust as security for the Court-ordered charges under the Initial Order.

Order Confirming Sale and Vesting Title granted by Justice S. D Hillier on September 21, 2018 **[TAB 10]**

21. No other creditors have received distributions of proceeds from the sale of assets other than the applicable municipalities for property taxes pursuant to two property tax settlements which were

approved by this Honourable Court. Some of the amounts paid to the applicable municipalities by the Monitor, from proceeds it was then holding, were considered deemed advances on behalf of certain secured creditors in accordance with settlements and terms of the applicable Orders.

Orders granted by Justice S. D Hillier on August 22, 2019, filed respectively on August 22, 2019 and August 28, 2019 **[collectively TAB 11]**

22. At the February 27, 2018 hearing in these proceedings, this Honourable Court directed the Monitor to provide a preliminary proposed cost allocation methodology, which the Monitor completed in its Eleventh Report and the Confidential Supplement thereto. That preliminary proposed allocation methodology was subject to a final allocation proposal once all realizations were achieved and the *CCAA* proceedings were ready to be completed.

23. Over the course of these proceedings, the Monitor has periodically provided this Honourable Court and stakeholders with revised and updated versions of the proposed cost allocation. Such updates were provided in the Confidential Supplements to the Monitor's 17^{th}, 22^{nd} and 29^{th} Reports. Such updated and revised proposed allocations were subject to a final allocation proposal once all realizations have been achieved and the *CCAA* proceedings are ready to be completed.

24. The February 2021 Allocation is the Monitor's latest and final proposed cost allocation for these *CCAA* proceedings. The Monitor is seeking this Honourable Court's approval of the February 2021 Allocation. If approved, or once finalized with any revisions directed by this Honourable Court, it is anticipated that final distributions to creditors can be made within a relatively short period thereafter.

25. The total amounts of the Monitor and its legal counsel sought to be approved by this Honourable Court are as at January 29, 2021:

    a. Ernest & Young Inc.: $2,275,455.20, inclusive of disbursements and GST;

    b. Duncan Craig LLP: $975,372.53, inclusive of disbursements and GST.

26. There have been and will continue to be further professional fees and disbursements incurred from and after January 29, 2021 to the close of these proceedings. An estimated amount of such professional fees to the end of these proceedings has been included in the February 20201 Allocation.

27. To the extent that there are any specific facts material to any issues or positions raised by any of the stakeholders in their materials to be filed after this brief, the Monitor intends to recite such applicable facts in its reply brief.

III. <u>LAW AND ARGUMENT</u>

A. General Principles of Cost Allocations

28. The allocation of priority charges and costs arising in insolvency proceedings is done on a case-by-case basis, and is a task involving a monitor's and this Honourable Court's discretion. In any given case, there may be more than one legitimate method of cost allocation, as it is unlikely that one specific method can objectively point to absolute fairness to all parties.

Medican Holdings Ltd., Re, 2013 ABQB 224 at paras. 25 and 35 (*Medican Holdings*) **[TAB 12]**; *Respec Oilfield Services*, 2010 ABQB 277 at para. 22 (*Respec Oilfield Services*) **[TAB 13]**; *Winnipeg Motor Express Inc., Re*, 2009 MBCA 110 at paras. 8, 28 and 34 (*Winnipeg Motor Express*) **[TAB 14]**; *Hunjan International Inc., Re*, 2006 CarswellOnt 2718 at paras. 4 and 71 (*Hunjan*) **[TAB 15]**; *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094 at para. 15 (*Hunters Marine*) **[TAB 16]**

29. In *Royal Bank of Canada v. Atlas Block Co*., the Court reviewed the authorities and summarized the above principles as follows:

> 43. As to the allocation of the fees, the general principles governing the allocation of receiver's costs can be briefly stated:
>
> (i) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
>
> (ii) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;
>
> (iii) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;
>
> (iv) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;
>
> (v) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a pro rata basis;
>
> (vi) Where an allocation appears prima facie as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.

Royal Bank of Canada v. Atlas Block Co., 2014 ONSC 1531 ("*Atlas Block*") at para. 43 **[TAB 17];** also see *Atlantic Diversified Transportation Systems (Re)*, 2018 NSSC 77 at paras. 25 and 28 **[TAB 18]**

30. As noted in *Atlas Block*, Courts have consistently recognized that a strict accounting of costs is neither necessary nor desirable, and that a creditor need not benefit directly before the costs of an insolvency proceeding may be allocated against that creditor's share of the recovery. Any means of calculating appropriate allocation percentages will be arbitrary to some degree.

Medican Holdings at paras. 25, 32 and 44 **[TAB 12]**; *Hunjan* at para. 4 **[TAB 15]**; *Respec Oilfield Services* at paras. 29 and 32 [**TAB 13]**; *Winnipeg Motor Express* at paras. 8 and 28 **[TAB 14];** *Hunters Marine* at paras. 20 and 26 **[TAB 16]**

31. It is well established that the basic and guiding principle is that costs should be allocated in an equitable manner, which does not adjust the priorities between creditors. However, an equal allocation amongst creditors is not necessary in order to be equitable. The Court is permitted to consider the different nature of the security held by creditors and the potential benefit to creditors when considering whether the proposed allocation is equitable.

Medican Holdings at paras. 25, 39 and 44 **[TAB 12]**; *Respec Oilfield Services* at para. 22 [**TAB 13]**; *Winnipeg Motor Express* at paras. 8-11, 28 and 32 **[TAB 14];** *Hunjan* at paras. 5 and 57-58 **[TAB 15]**; *Hunters Marine* at paras. 15, 20-21 **[TAB 16]**

32. For example, and as is discussed in further detail below, it has been held that passive mortgage lenders may be allocated a lesser share of the costs in *CCAA* proceedings because of the different nature of their security held and the potential benefit to them.

Hunters Marine at paras. 5-7, 20 **[TAB 16]**

33. However, the Court need not conclusively determine which creditors benefitted more than others. A meaningful answer to that issue would require a careful accounting and cost benefit analysis of each party's circumstances. This is exactly what Courts have repeatedly said should not be done, since it "is economically self-defeating and the cost and the time involved in finding such an answer would only serve to benefit the professionals hired to assist in the process. It is antithetical to [the] objectives of the *CCAA*."

Winnipeg Motor Express at para. 31 **[TAB 14]**

34. As noted in *Atlas Block*, where a proposed cost allocation is *prima facie* equitable and reasonable, the onus is on an opposing creditor to satisfy this Honourable Court that the allocation put forward by the monitor is unfair or prejudicial. Exceptions to a monitor's proposed allocation are not to be lightly granted and should only be made where the necessity of departure is reasonably articulable.

Medican Holdings at paras. 39 and 44-45 **[TAB 12];** *Winnipeg Motor Express* at paras. 9-10 **[TAB 14];** *Hunjan* at paras. 58 and 72-73 **[TAB 15]**

B. The Monitor's Proposed Basic Allocation Framework

35. The Monitor respectfully submits that it has taken the above principles into account in arriving at its February 2021 Allocation, which it considers to be *prima facie* equitable.

36. First, the Monitor calculated the value of the assets attributable to each of the Applicants to determine the total asset values in each individual Applicant company, based on actual realizations or collections. This is required given the number of Applicants and the difference in their assets and creditors. The realization values reflected in the February 2021 Allocation are the actual amounts received (as applicable) by the Monitor, with the exception of the anticipated realizations in relation to the Applicants' remaining real properties, where the Monitor has used a net zero approach (for reasons discussed in the Confidential Supplement to the Monitor's 29th and 31stth Reports and below) as the anticipated future realization figures for such properties.

37. The Monitor then determined which sums recovered within each Applicant belonged to which secured creditor. Amounts were allocated to each creditor based on which creditor had the first priority charge as against the asset or property sold and/or recovered.

38. Once the total recoveries were properly attributed to the applicable secured creditors, the Monitor added in, where applicable, any expected future realizations, which were very limited.

39. Once the asset values were segregated, the applicable percentage of the total value (or where applicable, expected value) of the assets was then calculated for each Applicant company. This allowed the Monitor to arrive at some gross estimated realizations per creditor within each of the Applicant companies, and the *pro rata* percentage of total realizations on a per creditor by Applicant basis, based on the total realizations within the specific Applicant.

40. Thereafter, the Monitor calculated, on an individual Applicant basis, any costs or expenses that were traceable or identifiable to a specific Applicant or asset held by the Applicant. Such costs or expenses were then applied to each applicable secured creditor, within each Applicant, in the same *pro rata* percentage as their realizations. For example, if CWB had 83% of the total realizations for

a specific Applicant, it was at first instance allocated 83% of the specific charges or costs related to that Applicant.

41. This allowed the Monitor to arrive at the proposed net distributions for each creditor in relation to each specific Applicant, prior to applying General Costs (as defined below).

42. The Monitor then took the net estimated recovery (before General Costs) for each creditor per Applicant and summed them on a consolidated analysis or allocation.

43. That consolidated analysis sets out the total estimated realizations per creditor in these proceedings after considering all Applicants' specific costs or expenses. This allowed the Monitor to arrive at the *pro rata* percentage of total (pre-General Costs) realizations on a per creditor basis in these proceedings generally (the "Pre-General Costs Pro Rata Recovery Share").

44. Thereafter, the Monitor calculated and deducted the cumulative total (across all Applicants) of the expected professional fees, the DIP financing costs and other costs not directly attributable to any specific Applicant or asset incurred in connection with these *CCAA* proceedings (the "General Costs").

45. Professional fees and the outstanding DIP financing amounts are considered General Costs in insolvency proceedings.

Medican Holdings at para. 27 **[TAB 12]**; *Hunters Marine* at para. 23 **[TAB 16]**

46. The starting point for the allocation of the General Costs amongst the applicable creditors was equivalent to their respective Pre-General Costs Pro Rata Recovery Share. For example, if CWB had 41% of the total realizations across all Applicants, it was at first instance allocated 41% of the General Costs.

47. However, adjustments to the percentage of General Costs proposed to be visited on each applicable creditor were then made by the Monitor to account for creditors holding valid mortgages against real property (which was sold during the course of these *CCAA* proceedings), which is discussed in more detail below. The Monitor has proposed creditors holding valid mortgages against real property sold during these *CCAA* proceedings only share in half of what would otherwise be their applicable percentage of the total General Costs. The Monitor does not believe that mortgage lenders should pay the same percentage of General Costs as the other secured creditors given the nature of the assets involved in these *CCAA* proceedings.

48. As a result, this Honourable Court and the stakeholders will notice in the February 2021 Allocation that certain creditors proposed share of the General Costs is only 50% of what would otherwise be their respective share of the General Costs on a percentage basis. Correspondingly, the share of General Costs being allocated to other secured creditors has increased on a *pro rata* basis beyond what would have otherwise been their percentage share of the General Costs.

49. Thus, from a strict accounting perspective, variance in the specific percentages of the General Costs being applied to each creditor in the February 2021 Allocation is to account for certain creditors only holding valid mortgages against real property.

50. Once the applicable General Costs were applied and deducted from each creditor's estimated recoveries, the Monitor was able to arrive at a net estimated total recovery on a per creditor basis.

51. Finally, after a few adjustments to account for prior interim distributions to creditors, potential GST refunds, settlements with creditors, proposed claw backs and further expected professional fees, the Monitor was finally able to arrive at the "Potential Net Distribution at the Conclusion of the Administration" figures shown in the February 2021 Allocation.

52. In summary, each secured creditor that can generally expect a further distribution in these *CCAA* proceedings will obtain the sums that are:

a. the actual realization values of its collateral;

b. less its *pro rata* share (based on realization values) of any specific charges or costs incurred that were applicable to such specific Applicant holding the collateral; and

c. less a proposed percentage of the General Costs, varied to account for what the Monitor believes are differences obtained by creditors based on the nature of the collateral held.

53. As is set out above, the Monitor has attempted to craft a proposed allocation methodology that is fair and equitable in all of the circumstances, and generally treats all non-super priority secured creditors equally in relation to the security which they held. , As noted the level of benefit received by mortgage lenders necessitated, in the Monitor's opinion, an equitable variance in their favour, which is now discussed below.

C. Real Property Mortgagees

54. There are two significant aspects to the Monitor's treatment of the mortgagees with interests in real property in its February 2021 Allocation. This treatment is differentiated as between real properties that sold in the course of these proceedings and those that did not.

55. For the purposes of General Costs, the Monitor has proposed that creditors holding valid mortgages against real property sold during the course of these *CCAA* proceedings only share in half of what would otherwise be their applicable percentage of the total General Costs, as set out above.

56. The Monitor does not believe that mortgage lenders should pay the same percentage of General Costs as the other secured creditors given the nature of the assets involved in these *CCAA* proceedings. Mortgage lenders and their security are generally more passive in nature. And generally, the maintenance and dealing with such property are less expensive or time consuming than dealing with the other assets in these proceedings.

57. This is consistent with the applicable authorities.

Medican Holdings at para. 25 **[TAB 12];** *Winnipeg Motor Express* at paras. 8, 10, 28, and 32 **[TAB 14];** *Hunjan* at paras. 5 and 57 **[TAB 15]**; *Hunters Marine* at paras. 5-7, 15 20 **[TAB 16]**

58. In these proceedings, except for the head office and the stick-built premises at Wabasca, there were only moveable assets - dorms, kitchen units, recreation units and other personal property - located on the lands. Such assets belonged to the personal property secured creditors, and not the mortgage lenders. The insurance, security and other holdings and sale costs were generally, but not exclusively, for the benefit of such personal property creditors, as compared to the mortgage holders.

59. Further, in this case, the head office was sold early in these proceedings, while the Winterburn property and the Farm were sold mid-way through these proceedings. Further, First Island sold the Farm through their own foreclosure proceedings after the Monitor consented to lifting of the stay in favour of First Island.

60. Such circumstances necessitate an equitable adjustment in favour of such mortgage lenders in the Monitor's respectful submission.

61. That said, such mortgage lenders did obtain significant recoveries from these real properties, and did obtain the benefits of the Monitor's efforts to assist in the sales and in securing, maintaining and eventually clearing of the equipment and assets from the lands.

62. As a result, the Monitor is of the opinion that it is equitable that these mortgage lenders be responsible for some costs of these proceedings, but that their respective share of the General Costs be lower than would otherwise be the case from a strict accounting perspective, even though it causes the remaining portion of the General Costs borne by other creditors to be higher.

63. In respect of mortgage lenders of real property that did not sell during the course of these *CCAA* proceedings, the Monitor proposes that they are not visited with any costs of these proceedings. Simply put, such mortgage lenders are not expected to obtain any distributions from these proceedings, and therefore, obtained little to no value or benefit from these proceedings. Whether they are able to realize value from their security will be in their discretion once the proceedings are concluded or if they elect to take steps with respect to the property if the Monitor is allowed to abandon them as sought on this application and discussed further below. This is something that the authorities require a Monitor to consider in crafting a fair and equitable cost allocation.

64. The most that could be said is that the Monitor, with the funds generated in these proceedings, paid certain holding costs, or some portion of the general holding costs, in relation to these unsold real properties over the course of these proceedings, and that such mortgage lenders obtained benefit in that respect. Notwithstanding such indirect benefit or value, it is the Monitor's view that it is just and appropriate in the circumstances not to allocate any costs to such mortgage lenders which would require them to pay money either to the Monitor or other creditors. The additional cost resulting from not allocating any amounts to these mortgage lenders will be borne by CWB, which has indicated it is prepared to accept the February 2021 Allocation, but reserves the right to raise questions or issues in the event that other creditors object to the February 2021 Allocation.

65. The use of these values and the other relevant information and cost figures in the February 2021 Allocation is the Monitor's best attempt to demonstrate what it believes is the fairest proposed allocation of costs and creditor distributions available as of December 31, 2020.

D. Release of Remaining Unsold Real Properties

66. In addition, but related to, the above, the Monitor is seeking this Honourable Court's approval to turn over the remaining unsold real properties to the applicable stakeholders, being the affected mortgage lenders and/or the tax authorities.

67. The Monitor is utilizing a net zero approach in relation to the Applicants' remaining real properties. The Monitor considers that the value of these remaining properties will likely not be sufficient to cover all the respective outstanding mortgages and property taxes.

68. There has unfortunately been little to no interest in respect of such remaining lands. No sales are expected soon.

69. Further, in respect of the Wabasca lands, the Monitor continues to incur some holdings costs such as security, utilities and insurance. The cost of the Monitor's staff continuing to coordinate payments and safeguard the properties, as well as continued cost of on-site security, utilities and maintenance of these properties, now appear to simply be a cash burn to the estate generally, with no clear indication that such further costs will be recovered through an eventual sale.

70. As a result, the Monitor recommends that these properties be turned back to the affected mortgage lender and/or the related tax authority, such that these properties can be realized on by the directly affected creditors outside of these proceedings. Both the tax authority and mortgagees have legal avenues (i.e. powers of sale and foreclosure) to deal with the remaining real properties if the Stay

of Proceedings is lifted for their benefit, or the Monitor is discharged and the Stay in its entirety is brought to an end.

71. The Monitor further recommends that it provide any interested creditors with a 30-day notice period of the Monitor's intention to turn over the lands (and presumably lift the Stay of proceedings in respect of the lands). This 30-day period is to allow interested creditors a period to put security, utilities and alike safeguards in place.

72. If after this proposed 30-day notice period no such creditors have advised the Monitor of their intention to take over the applicable properties, and confirmed to the Monitor that they will cover any further costs until the applicable properties have transitioned, the Monitor will be at liberty to abandon all remaining properties immediately thereafter. The Monitor seeks approval from this Court for such proposed future steps.

E. Post Initial Order Trade Creditors

73. Section 11.01 of the *CCAA* does not create a general priority for all post-filing obligations. It constitutes a regime to enable a party affected by a stay contained in an initial *CCAA* order to protect itself by requiring an immediate payment against provision of the consideration or by refusing to advance further funds or credit during the post-filing period.

74. A provision in an initial order under the C*CAA* permitting the insolvent debtor to pay for goods and services supplied after the date of the initial order is permissive in nature and does not give an unpaid creditor priority to the proceeds from the sale of the goods supplied.

75. This Court has the discretionary authority granted under the *CCAA* to grant a priority charge in favour of creditors who supply goods and services to the debtor after the commencement of the *CCAA* proceedings.

76. However, that did not occur in this case. Paragraph 6 of the Initial Order granted in these proceedings stipulates that the Applicants shall be entitled, but not required, to pay expenses incurred in carrying on business in the ordinary course. Paragraphs 17 and 18 of the Initial Order states that no creditor is prevented from requiring immediate payment, nor is any creditor required to advance or re-advance any monies or extend any credit to the Applicants.

77. At the time the Original Allocation Analysis in the Monitor's 11th Report was prepared, the Monitor was advised by the Applicants that accounts receivable as at March 3, 2018 had increased since July 15, 2017 by $1.165 million and that there was an additional $669,776.00 of work in progress to be billed to customers. On the basis of such representations, the Monitor was then of the view that post-Initial Order trade creditors ought to be paid from the funds generated in these *CCAA* proceedings on the basis that without the continued support of the post-*CCAA* trade suppliers and creditors continued operations would not have been possible and there would not have been any potential to increase accounts receivable.

78. However, upon a deeper financial review and after collection efforts were undertaken by the Monitor after its powers were expanded in these proceedings, it became evident that many of the accounts receivable noted by the Applicants were either not legitimate or were otherwise not collectable. Only $10,916.89 of additional real accounts receivable over the balance determined as of July 15, 2017 were ultimately collectable (and therefore collected) by the Monitor.

79. Thus, the Monitor's comments in its 11th report in relation to the increase in accounts receivable appear to now only relate to the $10,916.89, which is a much smaller amount than was expected at the time the Original Allocation Analysis was prepared.

80. In addition, had a receivership occurred on July 15, 2017, CWB would have been the sole beneficiary of the accounts receivable at that time, and it appears that there would have only been $10,916.89 less collected in a receivership over what was collected by the Monitor.

81. CWB has not waived its priority entitlement to the Applicants' accounts receivable as at the date of this brief.

82. As a result, the Monitor no longer recommends that post-Initial Order trade creditors be paid in priority to secured creditors.

83. The February 2021 Allocation contemplates payments only to secured creditors in these *CCAA* proceedings, all of which will suffer shortfalls, and in several cases, significant shortfalls from what they are owed by the Applicants.

84. The Monitor respectfully submits that this decision is just, equitable and reasonable in all the circumstances.

F. Approval of the Professional Fees of the Monitor and its Legal Counsel

85. Pursuant to paragraphs 28 and 29 of the Initial Order, the Court directed that the Monitor and its counsel shall be paid their reasonable fees and disbursements ("Accounts"), in each case at their standard rates and charges.

86. The rates and charges applied by the Monitor and its legal counsel are the standard rates and charges of personnel of the Monitor and its legal counsel.

87. In considering the professional fees of the Monitor and its legal counsel, the overriding principle is that the costs ought to be fair and reasonable in all of the circumstances, recognizing that professionals ought not to be put under the "microscope" either.

Winalta Inc., Re, 2011 ABQB 399 at paras. 25, 27 and 30 **[TAB 19]**

88. The factors to be considered when assessing the reasonableness or otherwise of the charges of a monitor are:

a. the nature, extent and value of the assets being handled;

b. the complications and difficulties encountered;

c. the degree of assistance provided by the company, its officers or its employees;

d. the time spent;

e. the monitor's knowledge, experience and skill;

f. the diligence and thoroughness displayed;

g. the responsibilities assumed;

h. the results of the monitor's efforts; and

i. the cost of comparable services when performed in a prudent and economical manner

Agristar Inc., Re, 2005 ABQB 43 at para. 3 and 5 **[TAB 20]**

89. In this case, the nature of the assets has been varied (real property, dorms and alike units, rolling stock, other equipment and alike) and there were a very significant number of individual assets. The value of those assets was also quite significant, as shown by the total recoveries set out in the February 2021 Allocation and the value appraisals that have been included in Affidavits and Reports that are subject to sealing orders. The Monitor is respectfully of the view that the results of the Monitor's efforts have resulted in significant recoveries (as set out in the February 2021 Allocation), notwithstanding that the assets were being marketed and sold in a generally depressed Alberta economy, which has recently been exacerbated by the COVID-19 pandemic.

90. There were a litany of complications and difficulties encountered in these proceedings by the Monitor and its legal counsel. Far too many to list or specifically identify herein. However, they are set out in the 31 Reports and confidential supplements submitted to date by the Monitor. Such difficulties include, without limitation, multiple contested ownership, validity, priority, costs and distribution disputes, including one issue being recently litigated at the Supreme Court of Canada. This Honourable Court is familiar with such difficulties and complexities as a result of this matter being case managed by the Honourable Associate Chief Justice Nielsen and Justice Hillier.

91. The company and its officers and directors provided some assistance before the Monitor's powers were expanded in late April 2018. However, it is important to note that the former officers and directors also created significant difficulties, that the Monitor had to thereafter deal with and resolve (which it did completely in favour and to the benefit of the estate), by incorrectly identifying a significant number of assets as belonging to the Applicants when there were owned or at least strongly claimed by 726 Remote Accommodations Ltd. and related parties. After the Monitor's powers were expanded, little assistance was received from the former officers and directors despite the Monitor essentially assuming complete responsibilities for the Applicants and their respective property.

92. It is respectfully submitted that the Monitor and its legal counsel are knowledgeable, experienced, skilled, diligent and thorough, and displayed an appropriate amount of such skill, experience, diligence and thoroughness throughout these proceedings. Indeed, it is important to note that all contested disputes that the Monitor entered with other stakeholders have to date been resolved in favour of the position advanced by the Monitor.

93. The time spent by the Monitor and its legal counsel is significant, but all time incurred was reasonable and appropriate, if not absolutely necessary, given the steps that had to be taken to complete and resolve all matters pertaining to this estate. Additionally, certain time spent by the Monitor and its legal counsel were not billed to the estate or were otherwise discounted for the benefit of stakeholders. It is respectfully submitted that time spent by the Monitor and its legal counsel was prudent and economical given the numerous difficulties faced and the sheer number of tasks that had to be completed over the course of these proceedings.

94. The Monitor and its legal counsel respectfully submit that their Accounts are fair and reasonable in the circumstances, and ought to be approved by this Honourable Court.

V. <u>CONCLUSION AND RELIEF SOUGHT</u>

95. The Monitor respectfully requests an Order or Orders:

  a. approving the Accounts of the Monitor and those of its legal counsel without further need for the passing of Accounts;

  b. approving the February 2021 Allocation;

c. approving a distribution of net proceeds presently held by the Monitor in trust to the creditors in accordance with the recommendations outlined in the February 2021 Allocation;

d. directing creditors to make payment to others as this Honourable Court may direct;

e. authorizing the Monitor to provide 30 days written notice to municipalities and secured parties claiming an interest in the remaining real property assets of the Applicants of the Monitor's intention to abandon the real property and further authorizing the Monitor to abandon the real properties without recourse against the Monitor after the expiry of the 30 day notice period;

f. approving the activities of the Monitor as set out in the Monitor's 31st Report and the Confidential Supplement to the Monitor's 31st Report;

g. temporarily sealing the Confidential Supplement to the Monitor's 31st Report by way of Sealing Order or Order Restricting Access.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of February, 2021.

DUNCAN CRAIG LLP

Per: ______________________________

DARREN R. BIEGANEK, Q.C./RYAN F.T. QUINLAN
Counsel for Ernst & Young Inc., in its capacity as Monitor of 667402 Alberta Ltd., 18512398 Alberta Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd.,1919209 Alberta Ltd., and Canada North Group LP Holdings Ltd., and not in its personal or corporate capacity

LIST OF DOCUMENTS AND AUTHORITIES

Tab

1. Initial Order granted by Justice K.G. Nielsen on July 5, 2017, filed July 6, 2017
2. First Stay Extension Order granted by Justice S.D. Hillier on July 27, 2017, filed August 8, 2017
3. Order Increasing DIP granted by Justice S.D. Hillier on July 27, 2017, filed July 28, 2017
4. Order Increasing DIP granted by Justice K. G. Nielsen on December 12, 2017, filed December 12, 2017
5. Order Approving Sale and Other Relief granted by Justice S.D. Hillier on September 26, 2017, filed September 27, 2017
6. Order granted by Justice K. G. Nielsen on October 4, 2017, filed October 4, 2017
7. Amended Order Increasing the Administration Charge and Other Relief granted by Justice S. D. Hillier on March 20, 2018, filed March 28, 2018
8. Order Lifting Stay in Favour of First Island Financial Services Ltd. and Zenex Capital Corporation granted by Justice Nielsen on April 6, 2018, filed April 20, 2018
9. Order granted by Justice S. D Hillier on September 21, 2018, filed October 17, 2018
10. Order Confirming Sale and Vesting Title granted by Justice S. D Hillier on September 21, 2018
11. Orders granted by Justice S. D Hillier on August 22, 2019, filed respectively on August 22, 2019 and August 28, 2019
12. *Medican Holdings Ltd., Re*, 2013 ABQB 224
13. *Respec Oilfield Services Ltd., Re*, 2010 ABQB 277
14. *Winnipeg Motor Express Inc., Re*, 2009 MBCA 110
15. *Hunjan International Inc., Re*, 2006 CarswellOnt 2718
16. *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094
17. *Royal Bank of Canada v. Atlas Block Co*., 2014 ONSC 1531
18. *Atlantic Diversified Transportation Systems (Re)*, 2018 NSSC 77
19. *Winalta Inc., Re*, 2011 ABQB 399
20. *Agristar Inc., Re*, 2005 ABQB 43