Court File No. CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
- COMMERCIAL LIST -

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

FACTUM OF THE BANK OF NEW YORK MELLON in its capacity as administrative agent for the Second Lien Lenders under the second lien credit agreement made as of March 21, 2007, as amended

(Motion Returnable February 1, 2010)

February 1, 2010

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PART I - OVERVIEW

1. This factum is filed by The Bank of New York Mellon, in its capacity as Administrative Agent for the Second Lien Lenders under the Second Lien Credit Agreement dated as of March 21, 2007 (the "**Second Lien Lenders' Agent**") opposing the relief sought by Grant Alberta Inc. ("**Grant Alberta**"), Grant U.S. Holdings GP (the "**Grant Partnership**") (collectively, the "**Original Applicants**") and by Toronto-Dominion Bank, as Agent for the First Lien Lenders (the "**First Lien Lenders' Agent**"), in their motions returnable before this Court on February 1st, 2010.

2. In respect of the motions brought by the Original Applicants, the Second Lien Lenders' Agent submits that:

   (a) The motions for approval of a sale transaction and approval of certain employee retention payments ought to be adjourned pending disclosure to the Second Lien Lenders' Agent, and the Second Lien Lenders, who have signed the required confidentiality agreements, of the purchase agreement dated January 8, 2010 (the "Agreement"), the confidential appendices to the Sixth Report of the Monitor dated January 15, 2010 ("Sixth Report") concerning the proposed sale transaction and Exhibit "B" to the Affidavit Peter Lynch sworn January 22, 2010 containing details of the proposed payments to employees (collectively the "Secret Documents").

(b) The Original Applicants and the Monitor have refused to disclose the Secret Documents to the Second Lien Lenders Agent and the Second Lien Lenders who have signed confidentiality agreements although the Secret Documents are being relied upon as evidence in legal proceedings in which the rights and legal interests of the Second Lien Lenders' Agent and the Second Lien Lenders are significantly affected. There is no basis in fact or in law to keep the evidence upon which relief is requested secret from persons affected by the proceeding;

(c) In addition, approval of the proposed sale transaction and the proposed employee payments ought to await the determination of whether the relief sought by the First Lien Lenders' Agent will be granted. If that relief is refused, the motions by the Original Applicants will be moot or at least premature pending the restructuring of the proposed transaction; and

(d) In any event, the relief sought is overbroad and inappropriate and would have this Honourable Court make mandatory Orders against US parties; extinguish US security over US realty and personalty that is not a Purchased Asset under the Agreement; absolve the First Lien Lenders' Agent of all forms of liability, here and abroad, when it is neither a CCAA debtor nor an officer of this Honourable Court; and the relief sought is otherwise coordinated with the relief sought by the First Lien Lenders' Agent to which exception is taken below.

3. In respect of the motion brought by the First Lien Lenders' Agent, the Second Lien Lenders' Agent submits that:

(a) There is no basis to add the First Lien Lenders' Agent or the Second Lien Lenders' Agent as parties to this CCAA proceeding. The First Lien Lenders' Agent is neither a CCAA debtor nor an officer of the Court. It has no basis to seek approval of this Honourable Court for its actions in respect of the Agreement or an unlimited judicial release for those actions, nor to add the Second Lien Lenders' Agent as a party to this proceeding;

(b) The First Lien Lenders' Agent is seeking to avoid prior scrutiny in the US Courts of the merits of its actions in respect of the US affiliates of the Original Applicants (the "US Affiliates") and the Second Lien Lenders' Agent. To that end, it seeks an Order of this Honourable Court conveying, vesting title in and to, and extinguishing claims against US realty and personalty owned by US entities that are not Purchased Assets under the Agreement without any prior US proceedings or even prior recognition of a sales process by a US Court;

(c) Moreover, the First Lien Lenders' Agent is asking this Honourable Court, in the guise of a motion in a CCAA proceeding concerning Canadian debtors, to effectively allow it, on behalf of US First Lien Lenders, to sue US defendants for a final declaration of right and a mandatory injunction under an intercreditor agreement between them (the "Intercreditor Agreement") that is governed by US law and US choice of forum, all without delivering any originating process, meeting tests for the exercise of jurisdiction of this Court over US plaintiffs and US defendants concerning US property and matters of US law and without providing any of the legal and procedural safeguards provided by the *Rules of Civil Procedure* to a foreign or any proposed defendant;

(d) The First Lien Lenders' Agent is seeking relief releasing and extinguishing the rights of the Second Lien Lenders' Agent and the Second Lien Lenders when it says that it does not need such relief because, it says, that certain events happen "automatically" under the Intercreditor Agreement. Moreover, it seeks to appoint a receiver "if necessary" without any proof of necessity to do so and without actually seeking the appointment of a receiver in its draft Order. These are transparent attempts to create a proceeding for the purpose of claiming to be enforcing rights against secured collateral under the Intercreditor Agreement so as to enable the First Lien Lenders' Agent to compel the release of the US security of the Second Lien Lenders' Agent and the Second Lien Lenders against US property of the US Affiliates;

(e) The Second Lien Lenders' Agent disputes the interpretation of the Intercreditor Agreement put forward by the First Lien Lenders' Agent and submits that the motion brought by the First Lien Lenders to commence Canadian debtor-in-possession restructuring proceedings against the US Affiliates and to seek unnecessary declarations and an unnecessary receivership do not provide the First Lien Lenders' Agent with the right to compel the release of the security of the Second Lien Lenders' Agent under the Intercreditor Agreement. Rather, where restructuring proceedings under Bankruptcy Law are utilized, as in this case, the Intercreditor Agreement specifically provides the First Lien Lenders' Agent with rights only upon a sale of assets under section 363 of the *US Bankruptcy Code*. A motion in a CCAA proceeding for the Original Applicants is not an appropriate forum for the resolution of the interpretation of a contract between US-non-parties that is to be decided under US law in a New York Court;

(f) The First Lien Lenders' Agent also seeks to engage this Honourable Court in a determination of the "center of main interest" of the US Affiliates. That is not a question that is properly before this Honourable Court as it has no relevancy to any issue before this Court under the CCAA. Rather, it is a transparent attempt to have this Honourable Court pre-empt a US Court from making a determination required under the *US Bankruptcy Code* which may affect the standard of review afforded by the US Court upon any recognition proceedings that the Original Applicants may choose to bring before the US Court in future. What the First Lien Lenders' Agent seeks is contrary to the principles of comity and the common law principle that a Court should decide only matters properly before it and necessary to its own decision;

(g) It is not just or reasonable for the First Lien Lenders and the Original Applicants to keep the Second Lien Lenders' Agent in the dark and deny it and the Second Lien Lenders the ability to review and assess the Agreement and the details of the employee payment plan. It is neither just nor reasonable to deal with US questions and the vesting of title of US debtors to US assets, including land, before this Honourable Court without prior involvement of a US Court in a proper cross-border proceeding. It is neither just nor reasonable to seek to usurp US jurisdiction over US parties, to deny basic procedural protection to the non-party Second Lien Lenders' Agent and Second Lien Lenders or generally to proceed in a unilateral manner without respecting the due interests of the Second Lien Lenders and the Second Lien Lenders' Agent and the jurisdiction of the US Courts;

PART II– OVERVIEW

4. All capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the Sixth Report of the Monitor.

5. Second Lien Lenders' Agent entered into a credit agreement dated as of March 21, 2007, as amended and assigned by an amendment and appointment and acceptance agreement dated as of April 30th, 2009, with the Grant Partnership, under which Grant Partnership remains liable for indebtedness of U.S. $150,000,000 (the "**Second Lien Credit Agreement**").

Second Lien Credit Agreement

6. The other Original Applicants and the US Affiliates are all guarantors under the Second Lien Credit Agreement.

Second Lien Credit Agreement

7. The Second Lien Credit Agreement grants general security interests and charges in favour of the Second Lien Lenders' Agent over the assets and undertakings of each of the Original Applicants and the US Affiliates which security ranks immediately behind the security interests of the First Lien Lenders' Agent.

10.01(a) of the Second Lien Credit Agreement - Security

Section.11.01(k) of the Second Lien Credit Agreement - Events of Default
Sixth Report of the Monitor, at paragraph 22

B. The Original Applicants Chose Not to bring US Bankruptcy Proceedings, but to Proceed in Canada in Respect of the Canadian Debtors Alone

8. At the outset of these proceedings, the Original Applicants determined not to seek insolvency proceedings for the US Affiliates under Chapter 11 of the *US Bankruptcy Code* or as part of these proceedings. Rather, as of June 22, 2009, the Original Applicants advised this Honourable Court and stakeholders that the US Affiliates would generate sufficient revenues during the restructuring period to allow the companies to pay their trade payables when due in the ordinary course.

> Affidavit of Peter Lynch dated June 22, 2009, attached to the Application Record, at para. 70

9. As a result of the foregoing determination by the Original Applicants, the creditors of the US Affiliates, including their trade creditors, have not been subject to a stay. That is, their unsecured creditors have been paid throughout. The Second Lien Lenders' Agent has had little involvement in these proceedings involving just the Original Applicants awaiting the enforcement of its rights in the US against the US Affiliates under its US Intercreditor Agreement.

10. The First Lien Lenders Agent now seeks to sell the US assets of the US Affiliates free of the US security of the US Second Lien Lenders' Agent without US proceedings by which to do. It has devised a mechanism to try to have this Honourable Court appear to be approving a Canadian sale of Canadian assets, when, in reality, it is a thinly veiled effort to sell US assets and vest out US security interests without prior US Court approval. The motions before this Honourable Court ask the Court to usurp the jurisdiction of the US Courts by implementing a complex mechanism by which to sell US assets while avoiding scrutiny of a US Court of the US aspects of the proposed sale on the merits under US law. It is a transparent effort to over-reach and is offensive to Canadian law including basic principles of common law, comity, the CCAA and extra-territoriality.

C. The Intercreditor Agreement

11. The Intercreditor Agreement is a contract that is subject to New York law and a choice of forum of New York City.

> Intercreditor Agreement, Sections 9.7and 9.10, Motion Record of the First Lien Lenders' Agent, at pages 64 and 66

12. One might readily question why the First Lien Lenders' Agent is the party moving to add the US Affiliates as parties to the CCAA proceedings instead of the motion being brought by the Original Applicants since they are debtors in possession who remain in control of their own proceedings. Similarly, one might question why the First Lien Lenders' Agent moves for the appointment of a receiver and manager "if necessary or appropriate" but proposes a draft Order that contains no receivership appointment at all. The answer is that under section 3.1(b) of the Intercreditor Agreement, the First Lien Lenders' Agent only has rights to proceed unilaterally to release the security of the Second Lien Lenders' Agent if it is acting to enforce rights or exercise secured creditors' remedies against secured collateral. The "automatic" release of the security of the Second Lien Lenders' Agent, under section 5.1(a) of the Intercreditor Agreement, occurs only if the First Lien Lenders' Agent is acting "...in connection with the exercise of rights...in respect of the Collateral provided for in Section 3.1". Therefore, the First Lien Lenders' Agent has sought to devise a mechanism to appear to be exercising security enforcement rights against collateral in order to meet these provisions when, in fact, their motions are not sufficient to invoke the "automatic" release provisions of the Intercreditor Agreement at all.

> Intercreditor Agreement, Sections 3.1(b) and 5.1(a), Motion Record of the First Lien Lenders' Agent, at pages 43 and 47

13. The Second Lien Lenders' Agent will argue before a New York Court that the Intercreditor Agreement does not apply in the manner proposed by the First Lien Lenders' Agent. Section 3.1(b) deals only with circumstances in which the First Lien Lenders or their Agent are positively exercising rights against collateral as secured

lenders and provides the specific examples of appointing an agent "to sell or otherwise dispose of Collateral upon foreclosure, to incur expenses in connection with such a sale or disposition, and to exercise all the rights and remedies of a secured creditor under the UCC and of a secured creditor under the Bankruptcy Laws of any applicable jurisdiction". Bringing a motion that could be brought by the debtor itself to commence proceedings that leave the debtors in possession of the collateral or to appoint a receiver "if necessary or appropriate" but with no such receiver appointed, is not a secured creditor enforcement of its rights against the collateral under the UCC or otherwise.

> Intercreditor Agreement, Section 3.1(b), Motion Record of the First Lien Lenders' Agent, at page 43

14. Moreover, Section 6 of the Intercreditor Agreement deals specifically with the rights of the secured lenders when insolvency proceedings are brought. Section 6.1(b) provides expressly that if the debtors are subject to insolvency proceedings and if "the First [Secured] Lien [Lenders'] Agent shall desire to permit the sale or other disposition of Collateral under Section 363 of the *US Bankruptcy Code*" then the Second Lien Lenders' Agent is bound to raise no objection upon certain conditions applying. It is significant that the term "Bankruptcy Law" as defined in the Intercreditor Agreement includes foreign bankruptcy laws, but in dealing with asset sales of the US Affiliates in insolvency proceedings, the Agents' agreement specifically contemplates only a sale of assets under section 363 of the *US Bankruptcy Code*. Nothing in the Intercreditor Agreement enables the First Lien Lenders' Agent to bind the Second Lien Lenders' Agent to release its US security over US realty and personalty in connection with a purported sale of Canadian assets in CCAA proceedings.

> Intercreditor Agreement, Sections 1.1 and 6.1(b), Motion Record of the First Lien Lenders' Agent, at pages33 and 54

D. These Motions Seek to Bootstrap the Original Applicants' Failure to Bring US Proceedings for the US Affiliates and Seek to Avoid US Scrutiny of the Sale Process

15. Knowing that its interpretation of the Intercreditor Agreement would not pass muster before a US Court, the First Lien Lenders' Agent has sought to obtain Orders from this Honourable Court to bootstrap its position and avoid scrutiny in the US. Although the sale transaction before this Honourable Court purports to sell only Canadian assets (including the partnership interests representing the ownership of the US Affiliates) they have sought Orders releasing the interests of the Second Lien Lenders' Agent to the US assets held by the US Affiliates which are not part of the Canadian sale and may be obtained only in a US section 363 sale. That is, while the First Lien Lenders' Agent submits that its rights flow automatically under the Intercreditor Agreement, the Original Applicants seek orders of this Honourable Court authorizing the First Lien Lenders' Agent to enter into the releases of the security of the Second Lien Lenders' Agent and absolving the First Lien Lenders' Agent from liability for doing so (although it is neither a CCAA debtor nor an officer of the Court). If that is not enough, they seek, in effect, a mandatory injunction requiring the Second Lien Lenders' Agent, a US non-party, to enter into a release of its US security over US assets of the US Affiliates that are not being sold at all (since only the Canadian ownership interests of those entities are part of the proposed sale).

> Draft Approval and Vesting Order of the Original Applicants, at paragraphs 4(d), 8, 12, 13 and 17(d)

16. Worse still is that the Original Applicants and the First Lien Lenders' Agent seek to have this Court make Orders with extra-territorial effect and then insulate the Orders from review on the merits in the US by seeking to have this Court usurp the jurisdiction of the US Court under Chapter 15 of the *US Bankruptcy Code*. In paragraph 17(d) of the draft Approval and Vesting Order proposed by the Original Applicants, this Honourable Court is asked to expunge US security over US assets that are not being sold in the Agreement. Similarly, in the stay provision of the Supplemental Initial Order proposed by the First Lien Lenders' Agent, this Honourable Court is asked to stay US creditors from enforcing

their rights in the US against the US affiliates without any reference to the US scope of stay orders or other US processes. In paragraph 23 of this draft Order, this Honourable Court is asked to deem the Monitor not to be in possession of US assets. In paragraph 24 of this draft Order, this Honourable Court is asked to make declarations concerning US environmental laws. None of these Orders are within the territorial jurisdiction of this Honourable Court and all would usurp the jurisdiction of US Courts

> Draft Supplemental Initial Order, paragraphs 12 to 15 and 24, Motion Record of the First Lien Lenders' Agent, at pages 14 and 18

17. Moreover, this Honourable Court is being asked by the First Lien Lenders' Agent at paragraph 2 of their proposed Supplemental Initial Order to rule upon the center of main interest ("COMI") of the US Affiliates. COMI is not a question that arises under the CCAA at all. Rather, COMI is a factor under the *US Bankruptcy Code* which determines if the US Court will recognize a foreign proceeding as a "main" proceeding or a "nonmain" proceeding. If the US Court determines that the COMI of the debtors is the foreign state, then it will recognize the foreign proceeding as a "main" proceeding and the *Bankruptcy Code* dictates that orders of the foreign court will be recognized with limited scrutiny. So not only are the Original Applicants and the First Lien Lenders' Agent asking this Honourable Court to make Orders of extraordinary breadth and scope to make up for their failure to bring proceedings in the US to convey US assets and vest out US security over US realty and personalty, they then ask the Court to help insulate its Orders from review by determining a question under the *US Bankruptcy Code* before the matter is presented to the US Court for the first time.

18. It is also apparent that the proposed CCAA proceedings for the US Affiliates are not proper CCAA proceedings at all but are merely proposed as a mechanism for Canadian vesting of US assets. In the elaborate provisions of section 8 of the proposed Supplemental Initial Order, the US Affiliates' rights to pay pre-filing debt and meet all pre-filing obligations are preserved. There is a provision imposing a stay only on the First Lien Lenders' Agent and the Second Lien Lenders Agent. But the proposed sale will pay the First Lien Lenders' Agent in full or nearly so – leaving the Second Lien Lenders' Agent effectively as the sole party stayed. Moreover, paragraph 33 of the

proposed Supplemental Initial Order provides that the proposed CCAA proceeding ends upon the closing of the proposed sale. There is no plan or vote contemplated. That is, there is no real CCAA proceeding contemplated for the US Affiliates, but just a mechanism to effectively sell their US assets from Canada. The Court is being asked to impose a CCAA proceeding on US debtors to invoke the minimal scrutiny of Chapter 15 of the *US Bankruptcy Code* in circumstances where the Agreement does not purport to sell the US assets of the US Affiliates, but the Canadian Court is being asked to vest out US security over those US assets by virtue of a strained interpretation of the rights of the First Lien lenders' Agent under the Intercreditor Agreement and by an improper use of the CCAA.

> Draft Supplemental Initial Order, at paragraphs 8 and 24, Motion Record of the First Lien Lenders' Agent, at pages 10 and 18

19. Furthermore, the process by which the First Lien Lenders' Agent seeks to obtain its interpretation of the Intercreditor Agreement is also offensive. The First Lien Lenders' Agent seeks a binding declaration of right under a contract and seeks mandatory orders requiring the Second Lien Lenders' Agent to release rights as a consequence. This is the stuff of a lawsuit. The First Lien Lenders' Agent has not commenced proceedings against the Second Lien Lenders' Agent. There is no Statement of Claim. A US plaintiff seeks to sue a US defendant under a contract governed by New York law, with a New York choice of forum, concerning the release of US security over US realty and personalty owned by US companies. Issues of jurisdiction, *forum conveniens*, service *ex juris*, production, discovery and trial are ignored. All that is brought is a motion in a CCAA proceeding.

20. Neither the First Lien Lenders' Agent nor the Second Lien Lenders' Agent is a necessary or property party to CCAA proceedings. Intercreditor agreements and relationships are outside the scope of the CCAA unless an approved plan of arrangement is agreed upon by creditors and made binding on them by Court sanction. Nothing in the CCAA authorizes or requires the addition of third parties to deal with an agreement establishing their rights *inter se*. Rather, the First Lien Lenders propose to bring a full proceeding for a final declaration and injunction under a foreign contract in the guise of a motion in a

CCAA proceeding in order to avoid US scrutiny of the failure of the Original Applicants and the First Lien Lenders' Agent to bring Chapter 11 proceedings to sell US assets of the US Affiliates.

> *Re Stelco Inc.* (2005), 78 O.R. (3d) 241 (C.A.) at paragraph 32

21. Finally, this is all being done without disclosure of the Agreement or the details of the proposed employee payments to the Second Lien Lenders' Agent or the Second Lien Lenders who have signed confidentiality agreements. Although the First Lien Lenders' Agent is effectively being paid in full by the proposed transaction, paragraph 11 of the draft Supplemental Initial Order continues to provide the First Lenders' Agent alone with information rights. The offer to provide the Secret Documents to counsel alone is insufficient. It is the clients who have both the legal and economic stake in the outcome of these proceedings and the financial sophistication to analyze and assess the proposed transaction and employee payments. Of particular significance, is the recognition in paragraph 30 of the proposed Approval and Vesting Order that documents for which Original Applicants seek sealing orders in these proceedings will have to be disclosed in any US recognition proceedings. By that time, they hope, it will be too late for the Second Lien Lenders' Agent to obtain a hearing on the merits in the US.

PART III –LAW

A. A Sealing Order Should Not Be Granted

22. There is a heavy burden on an applicant to prove that the Court should grant an Order sealing documents. Such an Order should only be granted in exceptional circumstances.

> *Lederer v. 372116 Ontario Ltd.*,50 O.R. (3d) 282, 48 C.P.C. (4th) 110, [2000] O.J. No. 3000 at paragraphs 25 and 33

23. In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada set out a two-step test through which this analysis is to be carried out. The Court required

that a party seeking to limit public access to documents filed must show that (the "**Sierra Club Test**"):

(a) Such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and,

(b) The salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522 (S.C.C.) ("Sierra") at paragraph 53

24. In order to qualify as an important commercial interest under the *Sierra Club* test, the Court has held that the following three elements must be present:

(a) The risk must be real and substantial, well-grounded in evidence, posing a serious threat to the commercial interest in question;

(b) The important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake; and

(c) The judge should consider not only whether reasonable alternatives are available, but also to restrict the Order as much as is reasonably possible while preserving the commercial interest in question.

Sierra, at paragraphs 55-57

25. None of these tests is met in the conclusory evidence of the Original Applicants. There is no evidence of any actual threat to any identified interest and no alternatives are proposed (such as providing the documents to interested parties under confidentiality agreements).

26. In paragraph 63 of the Sixth Report, the Monitor discloses that it is the *purchaser* who requests a sealing Order. Manifestly, a purchaser's desire for confidentiality, while understandable, is insufficient to meet the *Sierra Club* test. The purchaser is buying assets through a Court process in which other persons' rights and legal interest are being affected. *Sierra Club* provides that the rights of litigants to participate in transparent legal proceedings are not to be subordinated by commercial desires for secrecy.

27. In order to be involved in the restructuring process, Second Lien Lenders were required to sign confidentiality agreements. The Initial Order of this Honourable Court provided for the Original Applicants and the Monitor to provide period updates to "the Stakeholders which have executed confidentiality agreements including the First Lien Lenders and the Second Lien Lenders."

Initial Order, at page 25, paragraph 11 of the Investment Offering Protocol

28. These proceedings have evolved from being Canadian only, to now including a sale and vesting of US interests at a price which happens to almost exactly pay out the claims of the First Lien Lenders. As the parties next in line, the Second Lien Lenders have an obvious and vital interest in the issues which this Court is being asked to resolve and there is no basis in fact, law or policy to seal the evidence upon which this Honourable Court is being asked to make important pronouncements from the very persons most affected by those determinations. In fact, there is every reason to ensure that those who stand to be affected by the Court's decisions see the process as open, inclusive, transparent and accountable. The fact that the Original Applicants anticipate the evidence becoming public as part of the US recognition process, as is expressly contemplated in paragraph 30 of the draft Approval and Vesting Order, makes it clear that the *Sierra Club* test cannot be met.

29. It is submitted that the return of the motions ought to be adjourned pending delivery of the relevant evidence so to allow the persons directly affected by the Orders sought to have fair notice of, and the ability to fully participate in, these proceedings.

B. This Honourable Court Should Not Decide Questions that are Not Before it – such as COMI and Issues under the Intercreditor Agreement

30. Section 3(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") sets out the circumstances in which the CCAA applies:

> This Act applies in respect of a debtor company or affiliated debtor companies where the total of claims, within the meaning of section 12, against the debtor company or affiliated debtor companies exceeds five million dollars.
>
> CCAA, Section 3(1)

31. In order to qualify under the CCAA, the Applicants must:

(a) be debtor companies; and

(b) have a total of claims outstanding in excess of five million dollars.

32. The US Affiliates have opened bank accounts in Canada to attempt to qualify for CCAA protection. That too is an indication of the artificiality and transparency of the proposed proceedings. However, whether this Honourable Court looks at the *bona fides* of the application to add the US Affiliates', COMI, as defined in foreign laws, is not an issue under the CCAA for this proceeding.

33. The concept of COMI is not part of the qualification criteria under the CCAA. Rather, it was first introduced in the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law in 1997 (the "**UNCITRAL Model Law**") as a tool to assist a Court to determine whether to recognize a foreign order. COMI has been adopted by the *US Bankruptcy Code* in relation to the recognition of foreign proceedings, but it is not an issue under the CCAA when a company seeks to file plenary proceedings here.

34. Thus the issue of COMI is one for the US Court if and when an Order of this Honourable Court is taken to the US for recognition.

Chapter 15 of the *U.S. Bankruptcy Code*, s. 1517(b)(1)

35. Consistent with the UNCITRAL Model Law, Chapter 15 provides for the recognition of a "foreign main proceeding", being a plenary insolvency proceeding in a foreign jurisdiction. "Foreign main proceeding" is defined as a proceeding pending in a jurisdiction where the debtor in question has its COMI.

Chapter 15 of the *U.S. Bankruptcy Code*, s. 1515 and s. 1517

36. This Honourable Court cannot know whether the evidence submitted concerning COMI will be sufficient for a US Court. For example, European courts have held that there is a high threshold to rebut an assumption that the COMI of a subsidiary company is where its registered head office is located. In *Eurofood IFSC Ltd.* the European Court of Justice held that where a debtor's registered office is located in a state other than that of its parent, the registered office presumption can be rebutted only if factors that are both objective and ascertainable by third parties demonstrate that the COMI should be deemed to be in a location other than that of the registered office. The Court also stated that control over economic choices by a parent company located in a different state is, on its own, insufficient to rebut the registered office presumption. Although Mr. Stephen provides evidence to support an assertion that the "*de facto* head office" of the US Affiliates is in Canada, he did not indicate the location of the registered head offices of the US Affiliates. How the US Courts choose to deal with this issue and other issues related to the interpretation of their own statute are not matters for this Honourable Court.

Eurofood IFSC Ltd., [2006] All E.R. (EC) 1078, (E.C.J., Grand Chamber, 2 May 2006)

Affidavit of Hap Stephen, dated January 15, 2010 at paragraph 22

37. A Court should not resolve questions that are not before it. Not only is doing so disrespectful to the jurisdiction of the foreign Court, doing so exceeds the scope of the pleadings before this Honourable Court. As noted by the Court of Appeal:

> It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings. As Labrosse J.A. said in *460635 Ontario Limited v. 1002953 Ontario Inc.*, [1999] O.J. No. 4071 at para. 9 (C.A.) (QL):
>
> ...The parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings. A finding of liability and resulting damages against the defendant on a basis that was not pleaded in the statement of claim cannot stand. It deprives the defendant of the opportunity to address that issue in the evidence at trial...
>
> *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.) at paragraph 60

38. The First Lien Lenders' Agent have sought to put before this Honourable Court questions of US law for US parties and US proceedings by way of motion in an existing CCAA proceeding involving Canadian debtors. There are no pleadings and no appropriate process to provide for the resolution of these issues before this Court because they are properly issues for a US Court in US proceedings concerning the US Affiliates which have yet to be brought.

C. This Honourable Court Should Not Make an Order Vesting Title in US Assets

39. In its Sixth Report, the Monitor fairly characterizes the pith and substance of the sale which the Original Applicants and the First Lien Lenders seek to have approved as follows:

> This transaction has the effect of transferring the interests in and assets of the [US] Applicants, including the Allendale Mill and the Clarendon Mill to [the purchaser].
>
> Paragraph 60 of the Sixth Report of the Monitor

40. However the transaction has been carefully structured to attempt to shield its intended effect (the sale of US assets and the release of US security) from proper scrutiny. The "Purchased Assets" are defined as constituting only Canadian assets of the Canadian debtors including the partnership interests by which the US Affiliates are owned. The assets of the US Affiliates are not part of the sale under the Agreement. Yet the Orders sought – from the artificial, abbreviated CCAA proceeding, to the injunctions requiring the Second Lien Lenders' Agent to release its US security – deal expressly and

specifically with the vesting of title to the US assets of the US Affiliates. Paragraphs13(ii) and 17(d) of the draft Approval and Vesting Order would enjoin the Second Lien Lenders' Agent to release and also judicially release and expunge US registered security against the US realty and personalty of the US Affiliates. Only the US Court has the authority to do this. Moreover, the Intercreditor Agreement provided for such to be accomplished only as part of a section 363 sale in Chapter 11 proceedings.

41. The motions before the Court fail to respect the territorial limits to Canadian jurisdiction. They also represent a gross disrespect for the principles of comity. US Courts pay great respect to Canadian bankruptcy processes. They do so, it is submitted, partly at least, because of the corresponding respect shown by Canadian Courts for US jurisdiction. While cross-border joint hearings seem formalistic in many cases, they are a signal of the respect that both countries have for the fair application of the laws and jurisdiction of the other.

42. The Supreme Court of Canada. defines comity as follows:

> I adopt the definition of comity approved by La Forest J. *in Morguard Investments Ltd. v. De Savoye*, 1990 CanLII 29 (S.C.C.), [1990] 3 S.C.R. 1077, at p. 1096:
>
> "Comity" in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws . .
>
> *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897

43. It is essential for the continued growth of cooperation between the US Courts and Canadian Courts that we continue to show comity – due regard for the fair jurisdiction of the US Courts and that we exercise restraint when asked to trammel upon rights that properly reside elsewhere. Restraint from overbroad application of one's own laws into the jurisdiction of another state is a key aspect of comity to prevent "serious injustice". As noted by the Supreme Court of Canada in *Amchem*, *supra*,:

> In a world where comity was universally respected and the courts of countries which are the potential fora for litigation applied consistent principles with respect to the stay of proceedings, anti-suit injunctions would not be necessary. A court which qualified as the appropriate forum for the action would not find it necessary to enjoin similar proceedings in a foreign jurisdiction because it could count on the foreign court's staying those proceedings. In some cases, both jurisdictions would refuse to decline jurisdiction as, for example, where there is no one forum that is clearly more appropriate than another. The consequences would not be disastrous. If the parties chose to litigate in both places rather than settle on one jurisdiction, there would be parallel proceedings, but since it is unlikely that they could be tried concurrently, the judgment of the first court to resolve the matter would no doubt be accepted as binding by the other jurisdiction in most cases.
>
> While the above scenario is one we should strive to attain, it has not yet been achieved. Courts of other jurisdictions do occasionally accept jurisdiction over cases that do not satisfy the basic requirements of the *forum non conveniens* test. Comity is not universally respected. In some cases a serious injustice will be occasioned as a result of the failure of a foreign court to decline jurisdiction.

44. US Courts routinely enforce Canadian judgments in bankruptcy, respecting our similar common law traditions including our respect for comity and restraint. In enforcing the decision of this Honourable Court in *Metcalfe & Mansfield Alternative Investments et al.*, ("*ABCP*") the US Bankruptcy Court for the Southern District of New York, wrote:

> The U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings. *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 212 (S.D.N.Y. 2002) ("There is no question that bankruptcy proceedings in Canada—a sister common law jurisdiction with procedures akin to our own—are entitled to comity under appropriate circumstances.") (internal quotation marks and citations omitted); *Tradewell, Inc. v. American Sensors Elecs., Inc.*, No. 96 Civ. 2474(DAB), 1997 WL 423075, at *1 n.3 (S.D.N.Y. 1997) ("It is well-settled in actions commenced in New York that judgments of the Canadian courts are to be given effect under principles of comity.") (internal quotation marks and citation omitted); *Cornfeld v. Investors Overseas Servs.*, Ltd., 471 F. Supp. 1255, 1259 (S.D.N.Y. 1979) ("The fact that the foreign country involved is Canada is significant. It is well-settled in New York that the judgments of the Canadian courts are to be given effect under principles of comity. Trustees in bankruptcy appointed by Canadian courts have been recognized in actions commenced in the United States. More importantly, Canada is a sister common law jurisdiction with procedures akin to our own, and thus there need be no concern over the adequacy of the procedural safeguards of Canadian proceedings.") (internal quotation marks and citations omitted)
>
> *Re Metcalfe & Mansfield Alternative Investments, et al,* unreported, US Bankruptcy Court for the Southern District of New York, January 5, 2010, Martin Glenn J.

45. Proper restraint and respect for US jurisdiction is essential to maintain the growing relationship between Canadian and US Courts for our benefit and for mutual benefit. The

proposed Orders are a transparent invasion of US jurisdiction to try to sell US assets in a Canadian sale process in circumstances where no US proceedings have been commenced and no section 363 sale or other US approval of the Canadian sale process was obtained. Paragraph 29 of the draft Approval and Vesting Order seeks to tie the hands of the US Court from reviewing the merits of the transaction including the release of US security over US assets of the US Affiliates. In such circumstances, comity dictates that the US Court be approached with a practical proposal, as a friend, neighbor, and common law partner and not with Orders designed to usurp its jurisdiction and pre-determine a rubber stamped outcome. It is submitted that presentation of the Orders sought herein would put at risk the continuing applicability of the views expressed in *ABCP* above. Failing to respect foreign jurisdictions leads to injustice rather than respect in return.

D. Summary

46. The motions brought by the Original Applicants and the First Lien Lenders' Agent are misconceived. They want to sell the US realty and personalty of the US Affiliates free and clear of the secured interests of the Second Lien Lenders' Agent and the Second Lien Lenders. But they failed to commence timely Chapter 11 proceedings to allow either a section 363 sale or another sale process to be adopted in coordinated cross-border proceedings. Rather than involving the Second Lien Lenders' Agent in the process and coming to the US Court and to this Honourable Court with a fair and proper explanation of the situation, they compound the problems by asking this Honourable Court to make Orders that it ought not, and, it is submitted, cannot properly make. They seek to sell US assets including land and vest out US security in the guise of a sale of Canadian assets by means of transparently inappropriate motions to bring a CCAA proceeding where none is necessary, to add foreign parties and finally decide third party rights under US contracts by motion, to shield the substance of their arrangements from scrutiny by affected parties, and to tie the hands of the US Courts by an inappropriate use of Chapter 15 proceedings. This is not a process that should commend itself to this Honourable Court.

PART IV– RELIEF REQUESTED

47. The Second Lien Lenders' Agent submits that the motions be adjourned pending delivery to it and the Second Lien Lenders who have signed a confidentiality agreements of all of the evidence delivered in support of this motion

48. In the alternative, it is submitted that the motions of both the Original Applicants and the First Lien Lenders be dismissed..

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Fred Myers per: John Uhren

Joseph Pasquariello per: John Uhren

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Re Stelco Inc.* (2005), 78 O.R. (3d) 241 (O.N.C.A.)
2. *Lederer v. 372116 Ontario Ltd.*, 50 O.R. (3d) 282, 48 C.P.C. (4th) 110, [2000] O.J. No. 3000
3. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.)
4. *Re Stelco Inc.* [Sealing Order – re Taylor affidavit] (2006), 17 C.B.R. (5th) 95
5. *Eurofood IFSC Ltd.*, [2006] All E.R. (EC) 1078, (E.C.J., Grand Chamber, 2 May 2006)
6. *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.)
7. *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897
8. *Re Metcalfe & Mansfield Alternative Investments, et al*, unreported, US Bankruptcy Court for the Southern District of New York, January 5, 2010, Martin Glenn J.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

Court File No. CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF THE BANK OF NEW YORK MELLON in its capacity as administrative agent for the Second Lien Lenders
(Motion Returnable February 1, 2010)

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