

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE NOTICES OF INTENTION TO
MAKE A PROPOSAL OF ORBCARE INC. AND
PARISCRIBE INC., CORPORATIONS INCORPORATED
UNDER THE *CANADA BUSINESS CORPORATIONS ACT*,
AND ORBCARE US, INC., A CORPORATION
INCORPORATED UNDER THE LAWS OF THE STATE OF
DELAWARE IN THE UNITED STATES OF AMERICA**

**FACTUM OF THE MOVING PARTIES
(Approval of Sale Process)
(Motion Returnable August 14, 2019)**

August 12, 2019

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FACTUM OF THE MOVING PARTIES

PART I – NATURE OF THIS MOTION

1. This factum is filed in support of a motion (the “**Motion**”) made by OrbCare Inc. (“**OrbCare**”), Pariscribe Inc. (“**Pariscribe**”) and OrbCare US, Inc. (“**OrbCare US**”, and together with OrbCare and Pariscribe, the “**Companies**”) for orders (i) approving a “stalking horse” sale process (the “**Sale Process**”) substantially on the terms set out in the draft sale process order, filed¹ (the “**Draft Sale Process Order**”), and authorizing the Companies and MNP Ltd., in its capacity as proposal trustee to the Companies (the “**Proposal Trustee**”), to carry out the Sale Process, (ii) approving the “stalking horse” asset purchase agreement² (the “**Stalking Horse APA**”) entered into on August 8, 2019 among the Companies and iGan Partners Inc. (“**iGan**”), in trust for a company to be incorporated, for the purpose of constituting a stalking horse bid under the Sale Process, and (iii) approving the break fee (the “**Break Fee**”) set out in Section 6.4 of the Stalking Horse APA.

¹ Motion Record of the Companies returnable August 14, 2019 (the “**MR of the Companies**”), Tab 3.

² A copy of the Stalking Horse APA is provided as Exhibit K to the Proposal Trustee’s Third Report dated August 9, 2019 (the “**Third Report**”).

PART II – FACTS

A. Background

2. OrbCare is the parent company of Pariscribe and OrbCare US,³ and the Companies together operate a collective and intertwined business (the “**Business**”), sharing from time to time, among other things, clients, opportunities, employees and other assets.⁴
3. The Business consists primarily in providing a range of software information technology (IT) solutions to clients operating in the healthcare sector in Canada and the United States, including specialty clinics such as radiology clinics, fertility clinics and mental health clinics.⁵
4. The Companies employ approximately 25 employees and 2 contractors.⁶
5. The Companies have each filed a notice of intention to make a proposal (“**NOI**”) under the *Bankruptcy and Insolvency Act*⁷ (the “**BIA**”) and the Proposal Trustee was appointed as proposal trustee in each of the proceedings.⁸ The proceedings have been procedurally consolidated pursuant to an Order of this Court made on August 1, 2019.⁹ The current deadline for the Companies to file proposals in their NOI proceedings is September 26, 2019.¹⁰
6. In order to provide funding for working capital and funding the NOI proceedings, the Companies have obtained debtor-in-possession financing (the “**DIP Facility**”) from iGan pursuant to an amended and restated DIP term sheet dated July 31, 2019 (the “**Amended and Restated DIP Term Sheet**”) which was approved by this Court on August 1, 2019.¹¹

³ Affidavit of Olivier Giner sworn August 3, 2019 (the “**August 3 Affidavit**”), Tab 2 of the MR of the Companies, para. 1.

⁴ Affidavit of Olivier Giner sworn July 29, 2019 (the “**July 29 Affidavit**”), Exhibit B to the August 3 Affidavit, Tab 2B of the MR of the Companies, para. 6.

⁵ July 29 Affidavit, Exhibit B to the August 3 Affidavit, Tab 2B of the MR of the Companies, para. 6.

⁶ July 29 Affidavit, Exhibit B to the August 3 Affidavit, Tab 2B of the MR of the Companies, para. 9.

⁷ R.S.C., 1985, c. B-3.

⁸ Third Report, paras. 1 and 6.

⁹ Third Report, para. 9(c).

¹⁰ Third Report, para. 9(a).

¹¹ Third Report, para. 9(b).

The Amended and Restated DIP Term Sheet provides for a \$1.2 million DIP Facility.¹² Among other things, the Companies are required to obtain a sale process on terms satisfactory to iGan no later than August 15, 2019, failing which the Companies will be in default under the DIP Facility.¹³

B. The Stalking Horse APA

7. iGan (on behalf of a company to be incorporated) has now submitted an offer to purchase substantially all of the assets of the Companies, including the Business, on terms set out in the Stalking Horse APA.¹⁴ iGan leads a group of investors who invested \$2 million by way of preferred shares in 2018.¹⁵ Briefly, certain of the material terms of the Stalking Horse APA are as follows:¹⁶
- (a) **Purchased Assets** – all of the rights, titles and interests of the Companies in and to all of their properties, assets and undertakings (the “**Purchased Assets**”), on an “as is, where is” basis;¹⁷
 - (b) **Assumed Contracts** – iGan will notify the Proposal Trustee which contracts, if any, it wishes to be assigned in connection with the transaction on or before August 31, 2019;¹⁸
 - (c) **Assumed Obligations** – iGan will notify the Proposal Trustee which obligations, if any, it is agreeing to assume on or before August 31, 2019;¹⁹
 - (d) **Conditions** – the only condition of substance is approval of the Court;²⁰

¹² Third Report, paras. 4(b) and 9(b).

¹³ July 29 Affidavit, Exhibit B to the August 3 Affidavit, Tab 2B of the MR of the Companies, para. 45; the Third Report, para. 9(b).

¹⁴ Third Report, para. 32.

¹⁵ Affidavit of Olivier Giner sworn June 23, 2019 (the “**June 23 Affidavit**”), Exhibit A to the August 3 Affidavit, Tab 2A of the MR of the Companies, para. 9.

¹⁶ See the Stalking Horse APA, Exhibit K to the Third Report.

¹⁷ Third Report, paras. 32 and 34(a); the Stalking Horse APA, Exhibit K to the Third Report, sections 3.1 and 4.3.

¹⁸ Stalking Horse APA, Exhibit K to the Third Report, section 3.2.

¹⁹ Stalking Horse APA, Exhibit K to the Third Report, section 3.9.

²⁰ Third Report, para. 34(b); the Stalking Horse APA, Exhibit K to the Third Report, sections 5.1 and 6.3(a).

- (e) **Purchase Price** – the purchase price under the Stalking Horse APA is \$1,200,000 (the “**Purchase Price**”) payable as follows: (i) a credit bid of the amounts outstanding under the DIP Facility at closing; (ii) assumption of the Assumed Liabilities (as that term is defined in the Stalking Horse APA) (if any); and (iii) cash consideration for the balance of the Purchase Price;²¹ and
- (f) **Break Fee** – a break fee of \$60,000 is to be paid by the Companies to iGan upon the closing of a sale and transfer, or a series of sales and transfers, of substantially all of the Purchased Assets to one or more parties other than iGan.²²

C. The Sale Process

- 8. In order to test the value provided for in the Stalking Horse APA and determine whether a superior offer exists for the Business, the Companies are seeking approval of the Sale Process, to be conducted and run by the Proposal Trustee, which will ensure the independence and integrity of the process.²³
- 9. The material terms of the proposed Sale Process are as follows:²⁴
 - (a) **Notice** – within five (5) business days of the granting of the Draft Sale Process Order, the Proposal Trustee will publish notice of the Sale Process in the *Globe and Mail* (National Edition) and distribute teaser letters to potentially interested parties;²⁵
 - (b) **Data Room** – within five (5) business days of the granting of the Draft Sale Process Order, the Proposal Trustee will begin making a confidential data room available to those parties who have signed confidentiality agreements;²⁶

²¹ Third Report, para. 32; the Stalking Horse APA, Exhibit K to the Third Report, section 3.3.

²² Third Report, para. 34(c); the Stalking Horse APA, Exhibit K to the Third Report, section 6.4.

²³ The Sale Process is summarized in the Third Report at para. 35.

²⁴ Third Report, para. 35.

²⁵ Third Report, para. 35.

²⁶ Third Report, para. 35.

- (c) **Bid Deadline** – bids must be submitted to the Proposal Trustee no later than 5pm (Toronto time) on September 27, 2019 (the “**Bid Deadline**”);²⁷
- (d) **Proposal Trustee to Determine Qualified Bids** – among other things, in order for a bid to qualify as a Qualified Bid (as that term is defined in the Draft Sale Process Order), it must be on terms no less favourable than and no more burdensome than the Stalking Horse APA, must not contain any provision for a break fee or expense reimbursement and must contain a purchase price that is at least \$1.2 million plus the \$60,000 Break Fee and an additional increment of \$50,000 (i.e. \$1.31 million). The Proposal Trustee retains sole discretion to determine whether a bid will be considered a Qualified Bid;²⁸
- (e) **Auction** – if one or more Qualified Bids are received, the Proposal Trustee will schedule and conduct an auction (the “**Auction**”) no more than five (5) business days after the Bid Deadline. The Proposal Trustee has sole discretion to set the terms of the Auction;²⁹ and
- (f) **Approval of Sale** – the Companies to seek Court approval of the successful bid within ten (10) business days following the Auction or, if no Qualified Bids are received other than the bid under the Stalking Horse APA, within ten (10) business days of the Bid Deadline.³⁰

PART III – ISSUES AND THE LAW

10. The issues are as follows:

- (a) should the Court approve the Sale Process;
- (b) should the Court approve the Stalking Horse APA for the purpose of constituting a stalking horse bid under the Sale Process; and

²⁷ Third Report, para. 35.

²⁸ Third Report, para. 35.

²⁹ Third Report, para. 35(a), (b), (e) and (f).

³⁰ Third Report, para. 35(c) and (d).

(c) should the Court approve the Break Fee;

(collectively, the “Relief Sought”).

A. The Court has the Jurisdiction to Grant the Relief Sought

11. This Court has authority and jurisdiction to grant the Relief Sought pursuant to, among other things, Section 65.13 of the BIA. Courts have routinely granted approval of sales processes including stalking horse sales processes both in the context of NOI proceedings and under the equivalent provision of the *Companies’ Creditors Arrangement Act*³¹ (“CCAA”).³²

B. The Sale Process Should Be approved by the Court

12. In *Nortel Networks Corporation (Re)*,³³ the Court identified a number of factors to be considered in determining whether to authorize a sale process in the context of the CCAA. Those factors include:

- (a) whether a sale is warranted at this time;
- (b) whether the sale is to benefit the whole “economic community”;
- (c) whether any of the debtors’ creditors have a *bona fide* reason to object to the sale of the business; and
- (d) whether there is a better viable alternative.³⁴

13. These factors have also been applied and considered by the Court when determining whether to approve a sale process in the context of NOI proceedings.³⁵

³¹ R.S.C., 1985, c. C-36, section 36.

³² *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169 (ON SC) [2009 CanLII 39492] (“*Nortel*”), Tab 1 of the Brief of Authorities of the Companies (the “**Brief**”), para. 49, *Colossus Minerals Inc. (Re)*, 2014 ONSC 514, Tab 2 of the Brief, paras. 22-25, *Mustang GP Ltd. (Re)*, 2015 ONSC 6562 (“*Mustang*”), Tab 3 of the Brief, paras. 36-40 and *Danier Leather Inc. (Re)*, 2016 ONSC 1044 (“*Danier Leather*”), Tab 4 of the Brief, paras. 20-35.

³³ *Nortel*, Tab 1 of the Brief.

³⁴ *Nortel*, Tab 1 of the Brief, para. 49.

³⁵ *Mustang*, Tab 3 of the Brief, para. 37.

14. The criteria as to whether to approve a sale set out in section 65.13(4) of the BIA are also indirectly relevant to the Court's consideration of approval of a sale process.³⁶ Those factors include:
- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the trustee approved the process leading to the proposed sale or disposition;
 - (c) whether the trustee filed with the Court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
15. All the criteria set out above are met here, *inter alia* for the following reasons:
- (a) the Business generates monthly recurring revenue, but fails to generate monthly cash flow, and may require a further injection of capital from an acquiror. A sale process is warranted at this time and will determine and mark the value of the Purchased Assets including, importantly, the growth prospects and intellectual property, which may contribute significantly to the value of the Purchased Assets and which currently make it difficult to value the Purchased Assets;³⁷

³⁶ *Danier Leather*, Tab 4 of the Brief, para. 34.

³⁷ August 3 Affidavit, Tab 2 of the MR of the Companies, para. 4; the June 23 Affidavit, Exhibit A to the August 3 Affidavit, Tab 2A of the MR of the Companies, paras. 28 and 39; the Third Report, paras. 36(a) and (c).

- (b) the Sale Process will be run exclusively by the Proposal Trustee to ensure fairness and impartiality in the process;³⁸
- (c) the Sale Process establishes a floor value for the Purchased Assets while providing an opportunity for superior realizations to the Purchase Price;³⁹
- (d) the Proposal Trustee is recommending approval of the Sale Process including for the following reasons:
 - (i) the Proposal Trustee believes that the Sale Process timeline appears to provide prospective purchasers with sufficient time to complete due diligence and submit competitive bids;⁴⁰
 - (ii) the Purchased Assets are largely comprised of intellectual property, which is difficult to value. Putting the Purchased Assets through a competitive sale process will result in the marketplace determining the value of the Companies' intellectual property. Also, the financial records of the Companies are both incomplete and unreliable, which further creates difficulty in providing any estimates as to the approximate value of the Purchased Assets;⁴¹
 - (iii) it is a commonly used method to sell distressed assets in Canadian insolvency proceedings;⁴²
 - (iv) the Stalking Horse APA, and the sale of the Business as a going concern, is expected to provide greater value than a forced liquidation and/or bankruptcy and, thus, a better and higher return than a forced liquidation bankruptcy sale process;⁴³

³⁸ Third Report, para. 35.

³⁹ Third Report, para. 36(a); the August 3 Affidavit, Tab 2 of the MR of the Companies, para. 4(c).

⁴⁰ Third Report, para. 36(b).

⁴¹ Third Report, para. 36(c).

⁴² Third Report, para. 36(d).

⁴³ Third Report, para. 36(e).

- (v) the availability of the Credit Facility provides stability to the Companies' cash flow and the sustainability of the businesses during the Sale Process;⁴⁴ and
- (vi) it will accelerate the realization of the Purchased Assets which, in the Proposal Trustee's view, is commercially reasonable in the circumstances.⁴⁵

C. The Stalking Horse APA Should Be Approved for the Purpose of Acting as a Stalking Horse under the Sale Process

16. Stalking horse agreements have become commonplace in Canadian sale processes including in the context of NOI proceeding sale processes.⁴⁶
17. In *Mustang GP Ltd. (Re)*,⁴⁷ referencing the Court in *CCM Master Qualified Fund v blutip Power Technologies*⁴⁸ (a receivership), the Ontario Superior Court approved a “stalking horse” sale process within the context of an NOI proceeding. In doing so, the Court took guidance from criteria specified in *Royal Bank of Canada v Soundair Corp.*⁴⁹ and took note of the following additional (related) criteria:
 - (a) the fairness, transparency and integrity of the proposed process;
 - (b) the commercial efficacy of the proposed process in light of the specific circumstances of the case; and
 - (c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.⁵⁰

⁴⁴ Third Report, para. 36(f).

⁴⁵ Third Report, para. 36(g).

⁴⁶ *Mustang*, Tab 3 of the Brief, para. 37; *Danier Leather*, Tab 4 of the Brief, para. 20; *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#) (“*CCM*”), Tab 5 of the Brief, para. 7.

⁴⁷ *Mustang*, Tab 3 of the Brief.

⁴⁸ *CCM*, Tab 5 of the Brief, paras. 6-7; *Danier Leather*, Tab 4 of the Brief, paras. 23-25.

⁴⁹ [1991] O.J. No. 1137 (ON CA) [[1991 CanLII 2727](#)].

⁵⁰ *Mustang*, Tab 3 of the Brief, para. 39.

18. As set out above, the Proposal Trustee is recommending approval of proceeding with the Stalking Horse APA as a means to test the market and establish value for the Companies.⁵¹

Further:

- (a) the entering into of the Stalking Horse APA provides recovery for creditors and will also demonstrate to other potential purchasers the value that iGan, who is familiar with the affairs of the Company, places on the Business;⁵²
- (b) the Stalking Horse APA assures that the Business will be purchased and assists with managing the Companies as a going concern,⁵³ and
- (c) for the reasons set out below the Break Fee is reasonable in these circumstances.⁵⁴

D. The Break Fee Should Be Approved by the Court

19. As set out above, the Stalking Horse APA contains a break fee of \$60,000 (5% of the Purchase Price) in the event that an Alternative Transaction (as that term is defined in the Stalking Horse APA) is consummated with one or more other buyers. The Break Fee would be payable out of the proceeds of such transactions.⁵⁵

20. Break Fees are commonplace in stalking horse sale transactions and have been permitted by the Court provided that they are not so large as to be penal or chill the process. A break fee with additional expense reimbursement of up to 4-5% has been approved.⁵⁶ Further the overall quantum given the size of this transaction is still relatively low to other dollar amounts approved in other stalking horse transactions.⁵⁷

21. The Proposal Trustee has considered the quantum of the Break Fee in these circumstances and is recommending approval of the Break Fee on the basis that it is within the range of

⁵¹ Third Report, paras. 36 and 37.

⁵² August 3 Affidavit, Tab 2 of the MR of the Companies, para. 4(d).

⁵³ August 3 Affidavit, Tab 2 of the MR of the Companies, para. 4(e).

⁵⁴ Third Report, para. 36(h).

⁵⁵ Third Report, para. 34(c); Stalking Horse APA, Exhibit K to the Third Report, section 6.4.

⁵⁶ See *Danier Leather*, Tab 4 of the Brief, para. 42 (provides references to precedents approving 4% of stalking bid amount break fees and cumulative break fee/expense reimbursements amounts of 5%).

⁵⁷ Third Report, para. 36(h).

break fees in similar sized transactions for proceedings under the BIA and that it offers a reasonable balance between its potential adverse effect as a sale deterrent and the offer under the Stalking Horse APA as a sale stimulator.⁵⁸

PART IV – NATURE OF THE ORDER SOUGHT

22. The Companies therefore request that the Draft Sale Process Order be approved substantially in the form filed with the motion record for the Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of August 2019.

Goldman Sachs & Co. LLC

⁵⁸ Third Report, para. 36(h).

SCHEDULE A – LIST OF AUTHORITIES

1. *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169 (ON SC), [2009 CanLII 39492](#)
2. *Colossus Minerals Inc. (Re)*, [2014 ONSC 514](#)
3. *Mustang GP Ltd. (Re)*, [2015 ONSC 6562](#)
4. *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#)
5. *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#)
6. *Royal Bank of Canada v Soundair Corp.*, [1991] O.J. No. 1137 (ON CA) [[1991 CanLII 2727](#)]

SCHEDULE B – RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s. 65.13:

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(4) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(6) For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, s. 36:

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

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