Court File No. CV-20-00645116-00CL

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 A PLAN OF COMPROMISE OR ARRANGEMENT OF **TRIBALSCALE INC.**

Applicant

FACTUM OF THE APPLICANT
(Re Sanction Order)

January 7, 2021

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PART I – OVERVIEW

1. TribalScale Inc. ("**TribalScale**" or the "**Applicant**") is seeking an Order (the **"Sanction Order"),** among other things:

(a) sanctioning the plan of compromise and arrangement of the Applicant dated November 22, 2020 (as amended on January 4, 2021, the "**Plan**");

(b) approving the releases described in the Plan;

(c) adding 2800741 Ontario Inc. ("**Newco**"), a newly incorporated subsidiary of TribalScale, as "Debtor" and Applicant in this CCAA Proceeding; and

(d) vesting in Newco: (i) all of TribalScale's unsecured liabilities, and (ii) the receivable owing to TribalScale and all causes of action in respect to a professional services agreement between TribalScale and Sirius XM Connected Vehicle Services Inc. ("**SiriusXM**") dated April 26, 2019 as further particularized through individual statements of work including the statement of work effective November 23, 2019 (the "**SiriusXM Contract**").

2. This Court should grant the requested relief for the following reasons.

(a) The Plan should be sanctioned. The Transaction to be effected through the Plan: (i) represents the best and only path forward for the Applicant and its business to continue as a going concern; (ii) follows a thorough out-of-court sales process; (iii) is fair and reasonable; (iv) is supported by the Monitor; (v) is supported by 100% in number and value of affected creditors; and (vi) is not opposed (as of the date of this factum).

(b) The releases should be approved by this Court because: (i) the Released Parties

materially contributed to the Applicant's restructuring; (ii) the releases are rationally connected to the purpose of the Plan, which is to allow the Applicant emerge from CCAA protection and make a "fresh start"; (iii) without releases, it is unlikely that all of the Released Parties would have been prepared to support the Plan; (iv) the releases minimize the risk of depletion of the Applicant's assets as a result of third party claims; (v) no party has objected to the releases (as of the date of this factum); and (vi) the Monitor believes that the releases are fair and reasonable.

(c) Newco should be added as an Applicant. Newco satisfies the statutory requirements for a CCAA Applicant: as a wholly owned subsidiary of the Applicant, it is an "affiliated debtor company" pursuant to subsections 3(2) and (4) of the CCAA, and therefore meets the $5 million debt threshold on a consolidated basis; upon the granting of the Sanction Order, Newco will hold all of the claims of the Applicant's General Unsecured Creditors but have no assets and therefore be balance sheet insolvent.

(d) The reverse vesting provisions of the Sanction Order should be granted because: (i) they will facilitate the Applicant's expedient exit from CCAA protection; (ii) they will facilitate the unsecured creditors' only chance for recovery; (iii) they are a condition precedent to the Transaction contemplated by the Plan (and a condition precedent to Plan implementation); (iv) the Monitor supports the requested relief; and (v) they are unopposed (as of the date of this factum).

PART II – FACTS

3. A summary of relevant facts follows. Further facts are set out in the affidavit of Sheetal Jaitly affirmed January 6, 2021, which is included in the Motion Record at Tab 2.[1]

4. In early 2019, TribalScale began experiencing liquidity issues and breached its Scotiabank Credit Facility covenants.[2] In the late summer and autumn of 2019, following an informal restructuring of its operations, TribalScale, with the support of Scotiabank and the assistance of BDO Canada Limited ("**BDO Canada**"), undertook an comprehensive sale and investment solicitation process. BDO Canada contacted 68 potentially interested parties, 35 of which elected to receive a "teaser" document outlining the opportunity. Nine parties signed a non-disclosure agreement and received a confidential information memorandum and data room access. Following due diligence, three expressions of interest were received. However, none of these offers provided sufficient recovery for Scotiabank, and therefore none were accepted.[3]

5. Between January and April 2020, TribalScale received and negotiated an offer to purchase its going concern business from a Fortune 500 company, which offer would have paid out Scotiabank. Unfortunately, due to COVID-19's emergence in North America in the spring of 2020, the potential purchaser opted to not close the transaction and has expressed no further interest to date.[4]

6. On April 30, 2020, 1924191 Ontario Inc. ("**192**") assumed the Scotiabank debt pursuant to an assignment of the debt and security and became the largest secured creditor of TribalScale. Approximately $2,100,000 is owing to 192 at this time.[5]

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[1] Affidavit of Sheetal Jaitly sworn January 6, 2021, Motion Record Returnable January 11, 2021 [*Record*], Tab 2 [*January Jaitly Affidavit*].
[2] *January Jaitly Affidavit*, *ibid* at Record page 13 (PDF page 17) at para 8.
[3] *January Jaitly Affidavit*, *ibid* at Record pages 13-14 (PDF pages 17-18) at paras 11-12.
[4] *January Jaitly Affidavit*, *ibid* at Record pages 14 (PDF page 18) at para 13.
[5] Amended Plan of Compromise and Arrangement, at Record page 142 (PDF page 146), at Schedule "A" [*Plan*]; *January Jaitly Affidavit*, *ibid* at Record page 14 (PDF page 18) at para 14.

7. As a result of a dispute with its sub-landlord, TribalScale filed a Notice of Intention to file a Proposal on May 19, 2020.[6]

8. On May 26, 2020, TribalScale demanded payment of its remaining invoices under the SiriusXM Contract (which was entered into in April 2019 and memorialized a software development project that was completed in February 2020). These invoices are TribalScale's largest outstanding receivable (totalling US$504,182.77) and comprise the SiriusXM Receivable.[7]

9. On June 1, 2020, SiriusXM alleged that it was not required to pay these invoices as a result of purported deficiencies in TribalScale's deliverables under the SiriusXM Contract.[8] To date, SiriusXM has not particularized such alleged deficiencies: it has not communicated to TribalScale regarding the alleged problems with the software; nor has it described what aspect of the deliverables were unsatisfactory. TribalScale maintains the position that all amounts under the invoices are due and payable. SiriusXM did not raise any deficiencies during the contractual reporting cycle, and such failure was tantamount to acceptance of the delivered product.[9]

10. On July 31, 2020, TribalScale's NOI Proceeding was converted into this CCAA Proceeding under the *Companies' Creditors Arrangement Act*.[10]

11. Given the unsuccessful sale and investment process, thorough the summer of 2020, TribalScale negotiated a restructuring transaction with 192.

12. On October 30, 2020, the Honourable Madam Justice Conway granted an order authorizing

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[6] *January Jaitly Affidavit*, *ibid* at Record pages 11-14 (PDF pages 15, 18) at paras 3, 15.
[7] Affidavit of Sheetal Jaitly sworn July 24, 2020 at Record pages 54-55 (PDF pages 58-59) paras 61, 63 [*July Jaitly Affidavit*].
[8] *July Jaitly Affidavit*, *ibid* at Record page 55 (PDF page 59) at para 64.
[9] *July Jaitly Affidavit*, *ibid* at Record page 55 (PDF page 59) at paras 65-67.
[10] RSC, 1985, c C-36 [*CCAA*]; *January Jaitly Affidavit*, *supra* at Record page 11 (PDF page 15) at para 4.

the Applicant to enter into a restructuring support agreement (the "**RSA**") between itself and 192, and extended the stay of proceedings against the Applicant up to and including January 31, 2021.[11] The RSA was executed on November 3, 2020. Among other things, the RSA outlines a transaction (the "**Transaction**") whereby:

(a) 192 will convert 50 % of its debt (the "**Secured Debt**") into 85% of the equity in the capital of TribalScale on a fully diluted basis;

(b) the residual 50% of Secured Debt will remain on the balance sheet of TribalScale, with payment of interest accruing on the Secured Debt being deferred until the date that is one year from the closing of the Transaction. 192 will maintain its security over the assets, property and undertaking of TribalScale for all the obligations in respect to the remaining Secured Debt and for any obligations under the RSA or pursuant to the Transaction;

(c) Scotiabank will be issued 5% of the equity in the capital of TribalScale, on a fully diluted basis, in full and final satisfaction of the consideration owed to Scotiabank by TribalScale as a result of the assignment of the Secured Debt from Scotiabank to 192;

(d) The founder and CEO of TribalScale, Sheetal Jaitly, will be issued 10% of the equity in the capital of TribalScale on a fully diluted basis;

(e) TribalScale will make a cash payment in the amount of the secured indebtedness owing to its only other secured creditor, BDC, in full and final satisfaction of its indebtedness to BDC;

(f) TribalScale will seek approval an Order "vesting out" all unsecured liabilities of TribalScale to Newco;

[11] *January Jaitly Affidavit*, *ibid* at Record page 11 (PDF page 15) at para 5.

(g) TribalScale will continue payment of the following liabilities as approved by 192,:

(i) all trade obligations incurred by TribalScale towards its suppliers following the filing of the NOI; and

(ii) all obligations of TribalScale towards its employees.[12]

13. The RSA contemplates that all proceeds from the SiriusXM Receivable (if any) will be paid to unsecured creditors (less the costs incurred to collect the receivable).[13]

14. Following execution of the RSA, the Applicant prepared the Plan. The Plan was filed with the Court in connection with the Applicant's motion for the Meeting Order. The Meeting Order was granted on November 25, 2020, by the Honourable Mr. Justice Koehnen.[14]

15. The Plan was amended as of January 4, 2021. The amendments to the Plan do not materially change the Transaction contemplated by the RSA. The main amendments seek to (i) ensure all corporate approvals necessary to effect the Plan are in place; (ii) implement the issuance of preferred shares to 192 for tax purposes; (iii) conform the Plan to the terms of the RSA and other pre-existing documents; and (iv) facilitate TribalScale's exit from CCAA protection as soon as possible.[15]

16. The Creditors' Meeting was held at 4:00pm on January 5, 2021, via Zoom videoconference (the "**Creditors' Meeting**"). Quorum required by the Meeting Order was met and the Plan was approved by 100% in value and number of Affected Secured Creditors.[16]

17. If this Honourable Court sanctions the Plan, the only material matter will remain: the collection of the SiriusXM Receivable.

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[12] *January Jaitly Affidavit*, *ibid* at Record pages 15-16 (PDF page 19-20) at para 20.
[13] *January Jaitly Affidavit*, *ibid* at Record page 18 (PDF page 22) at para 24.
[14] *January Jaitly Affidavit*, *ibid* at Record pages 16, 26 (PDF page 20, 30) at para 24 and Exhibit "A".
[15] *January Jaitly Affidavit*, *ibid* at Record page 18 (PDF page 22) at para 24.
[16] *January Jaitly Affidavit*, *ibid* at Record page 19 (PDF page 23) at paras 27-28.

PART III – LAW AND ANALYSIS

18. There is one main issue on this motion, and three sub-issues:

(a) whether the Plan should be sanctioned;

(i) whether the releases provided for in the Plan and reflected in the Sanction Order should be granted;

(ii) whether the reverse vesting provisions of the Sanction Order should be granted; and

(iii) whether Newco should be added as an applicant in this CCAA Proceeding.

A. THE PLAN SHOULD BE SANCTIONED

19. Section 6(1) of the CCAA provides that the Court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite "double majority" vote.[17] The effect of the Court's approval is to bind the company and its creditors:

> 6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding
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> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
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> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in

[17] *CCAA*, *supra* at s 6(1).

bankruptcy or liquidator and contributories of the company.

20. The three criteria that a debtor company must satisfy in seeking the Court's approval for plan of compromise or arrangement under the CCAA are well established:

(a) There must be strict compliance with all statutory requirements;

(b) All material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

(c) The plan must be fair and reasonable.[18]

All statutory requirements have been complied with

21. Under this first branch of the test for sanctioning a CCAA plan, the Court typically considers factors such as whether:

(a) the applicant comes within the definition of "debtor company" under section 2 of the CCAA;

(b) the applicant or affiliate debtor companies have total claims in excess of $5 million;

(c) the notice of meeting was sent in accordance with the Court's Order;

(d) the creditors were properly classified;

(e) the creditors' meeting was properly constituted;

(f) the voting was properly carried out;

[18] *Re Target Canada Co*, 2016 ONSC 316 at para 70.

(g) the plan was approved by the requisite majority; and

(h) subsections 6(3), 6(5), 6(6), and 6(8) of the CCAA have been complied with (if applicable).[19]

22. In this case, the Applicant submits that it has satisfied all these requirements:

(a) the Applicant was insolvent at the time of its NOI filing and CCAA conversion;

(b) the Applicant, prior to Plan implementation, has total debt claims against it in excess of $5 million;

(c) the notice of meeting was sent in accordance with the Meeting Order;

(d) the Court, through the Meeting Order, approved the classification of creditors;

(e) the Creditors' Meeting was properly constituted;

(f) voting was properly carried out;

(g) the Plan was unanimously approved by all Affected Secured Creditors (being the only affected creditors);

(h) section 6(3) source deductions: all such amounts are remitted in the ordinary course and, to the best of the Applicant's knowledge, no such amounts are outstanding and in any event are not affected by the Plan;

(i) section 6(5) wages/employee amounts: all such amounts are paid in the ordinary course and, to the best of the Applicant's knowledge, no such amounts are outstanding and in any event are not affected by the Plan;

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[19] *Re Canadian Airlines Corp*, 2000 ABQB 442 at para 62, leave to appeal denied 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal to SCC refused [*Canadian Airlines*].

(j) Section 6(6) pension plan amounts: the Applicant does not participate in a prescribed pension plan; and

(k) Section 6(8) equity claims: the Plan does not provide any recovery for equity holders.

23. Further, the Monitor believes that the Plan complies with the requirements of the CCAA.

24. The Applicant therefore submits that the statutory prerequisites to the sanction of the Plan have been satisfied.

No unauthorized steps have been taken

25. This Court has stated that in making a determination as to whether any thing has been done – or is purported to have been done – that is not authorized by the CCAA, the Court should rely on the parties and their stakeholders and the reports of the Monitor.[20]

26. The Applicant submits that no unauthorized steps have been taken in this CCAA proceeding and that this Honourable Court has been kept apprised of all of the key developments throughout the restructuring. MNP Inc., first as proposal trustee and then as Monitor, has supervised the Applicant's post-filing activities and issued two reports as proposal trustee and three reports as Monitor.

27. The Applicant has acted in good faith and with due diligence in complying with all Court

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[20] *Canadian Airlines, ibid* at para 64; *Olympia & York Developments Ltd v Royal Trust Co*, 12 O.R. (3d) 500 (Gen Div), [1993] O.J. No. 545 [*Olympia & York*]; *Re Canwest Global Communications Corp*, 2010 ONSC 4209 at para 17 [*Canwest Global*]

Orders and ensuring that no unauthorized steps have been taken under the CCAA. This Court therefore has the jurisdiction to approve the Plan.

The Plan is fair and reasonable

28. Canadian courts have repeatedly emphasized that when considering whether a plan is fair and reasonable, the court will consider the relative degrees of prejudice that would flow from granting or refusing to grant relief sought under the CCAA and whether the plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available.[21] The meaning of "fairness" and "reasonableness" and "necessarily shaped by the unique circumstances of each case, within the context of the CCAA…".[22]

29. Generally speaking, a plan will be approved where it provides "equitable" treatment to creditors, viewed as a whole, and where it balances interests in a manner that represents an equitable sharing of the pain of insolvency. Where creditors have signalled their support of a plan by means of the vote, the court will be very reluctant to second-guess the business decisions made by the stakeholders as a body.[23] This principle should have even greater weight in this case where creditors unanimously voted to approve the Plan.

30. In assessing whether a proposed plan is fair and reasonable, the Court will consider the following:

(a) whether the claims were properly classified and whether the requisite majority

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[21] *Canadian Airlines, ibid* at para 3 citing *Canwest Global, supra* at para 19; *Re AbitibiBowater Inc*, 2010 QCCS 4450 at paras 29-43

[22] *Canadian Airlines, ibid* at para 94

[23] *Re Sammi Atlas Inc* (1998), 3 CBR 171 (Ont SCJ), at paras 4 -5 [*Sammi Atlas*], citing *Re Campeau Corp (1992)*, 10 CBR (3d) 104 (Ont Gen Div); *Canadian Airlines, supra*, at para 97, citing *Olympia & York, supra*.

of creditors approved the plan;

(b) what creditors would receive on a bankruptcy or liquidation as compared to the plan;

(c) alternatives available to the plan and bankruptcy;

(d) oppression of the rights of creditors;

(e) unfairness to shareholders; and

(f) the public interest.[24]

31. Each of these factors supports approval of the Plan by this Court:

(a) Classification and creditor approval: Justice Koehnen previously approved the classification of creditors through the Meeting Order, and that classification was followed at the Creditors' Meeting. As Paperny J. noted in *Canadian Airlines*, creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan.[25] The unanimous approval of the Plan reflects the fact that it is a product of dialogue, negotiation and communication among stakeholders and therefore a true compromise.[26]

(b) Recovery on bankruptcy: The Monitor has conducted a liquidation analysis that is outlined in the Third Report of the Monitor, and subject to the assumptions and caveats stated therein, provides that the liquidation value of the assets of TribalScale is less than

[24] *Canwest Global, supra*, at para 21; *Re Sino-Forest Corp*, 2012 ONSC 7050 at para 61 [*Sino-Forest*].
[25] *Canadian Airlines, supra*, at para 98.
[26] *Re Skylink Aviation*, 2013 ONSC 2519 at para 29 [*Skylink*].

the total value of the secured indebtedness of 192 and BDC.[27]

(c) Alternatives to the Plan: The Plan is the only alternative to a bankruptcy. It is the product of negotiation amongst stakeholders and follows a thorough but unsuccessful pre-filing sales process. The Plan represents the "best alternative for creditors in light of all relevant circumstances."[28]

(d) No oppression of creditors: the pre-insolvency rights and priorities of Affected Secured Creditors are respected under the Plan and there is no oppression of any creditor rights. Case law makes it clear that a plan can be fair and reasonable even if it does not provide exactly the same recoveries for all creditors, as long as there is a sufficient rationale for any differences in recovery for particular creditors or classes of creditors.[29] In this case one secured creditor – 192 – is exchanging half of its secured debt for an 85% equity interest; and the other – BDC – is being repaid in full. The claims of General Unsecured Creditors are unaffected and these creditors will have the benefit, if any, of any proceeds recovered from SiriusXM.

(e) No unfairness to shareholders: Given that the largest secured creditor is not being repaid in full, there is no unfairness to shareholders created by their lack of recovery under the Plan.

(f) Public interest: The Plan resolves the Proven Claims against the Applicant in a manner that is efficient and timely, and allows the Applicant to continue as a going concern. It is therefore in the public interest to approved the Plan to allow the Affected

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[27] *January Jaitly Affidavit*, *supra* at Record page 21 (PDF page 25) at para 38.
[28] *January Jaitly Affidavit*, *ibid* at Record page 14 (PDF page 18) at paras 12-13.
[29] See, for example, *Sino-Forest*, *supra* at para 65; *Canwest Global*, *supra* at paras 22-24, citing *Re Armbro Enterprises Inc*, 1993 CarswellOnt 241 (Gen Div) and *Re Uniforet Inc*, 2003 CarswellQue 3404 (CS).

Secured Creditors to benefit from the results of this process.[30]

The third party releases are fair and reasonable

32. The fact that the Plan contains third-party releases does not preclude this Court's approval. It is now well-accepted that Canadian courts have jurisdiction to sanction plans containing releases in favour of third parties. In *Metcalfe*, the Court of Appeal for Ontario stated that a CCAA court has the jurisdiction to approve a plan of compromise or arrangement that includes third-party releases, stating that a release in favour of a third party as part of the "compromise" or "arrangement" that reasonably relates to the proposed restructuring falls within the objectives and flexible framework of the CCAA.[31]

33. The Releases are contained in Article 10 of the Plan.[32]

34. When considering third-party releases in a plan, the courts have examined the following non-exhaustive list of factors, as recently articulated by Regional Senior Justice Morawetz in *ReLydian International Limited*:

(a) whether the parties to be released are necessary and essential to the restructuring;

(b) whether the claims to be released are rationally connected to the purpose of the plan;

(c) whether the plan can succeed without the releases;

(d) whether the parties being released were contributing to the plan;

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[30] *9354-9186 Quebec Inc v Callidus Capital Corp*, 2020 SCC 10 at paras 40-41 [*Callidus*].
[31] *Re Metcalfe & Mansfield Alternative Investments II Corp*, (2008), 92 O.R. (3d) 513 (CA) at para 61 [*Metcalfe*].
[32] Plan, *supra* at Record page 138 (PDF page 138), at Plan para 101.

(e) whether the releases benefit the debtors as well as the creditors generally;

(f) whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(g) whether the releases are fair, reasonable and not overly-broad.[33]

35. In determining whether to approve third-party releases, the Court will take into account the particular circumstance of the case and the objectives of the CCAA.[34] No single factor set out above will be determinative.[35]

36. The Applicant submits that the above factors militate in favour of granting the releases:

(a) The Released Parties have been essential and contributed in tangible and material ways to the Applicant's restructuring, whether through participating in the Transaction or operating the Applicant's business while the Applicant went through this CCAA Proceeding.

(b) The releases are rationally connected to the purpose of the Plan, which is to allow the Applicant to emerge from CCAA Protection and make a "fresh start". The Releases are connected to the consummation of the Transaction, the orderly and efficient conclusion of this CCAA Proceeding and maximizing the financial health of the new TribalScale. The third-party releases provide certainty that the Applicant will not be troubled by any pre-filing issues.

(c) Without the releases, it is unlikely that all of the Released Parties would have been prepared to support the Plan. The releases are a necessary element of the resolution of this

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[33] *Lydian International Limited (Re)*, 2020 ONSC 4006 at paras 53-64.
[34] *Skylink, supra* at para 30.
[35] *Re Kitchener Frame Ltd*, 2012 ONSC 234 at para 82.

CCAA Proceeding.

(d) All of the Released Parties contributed time and effort to the Applicant's CCAA Proceeding. Moreover, 192, as Plan sponsor, has contributed the equity necessary for the Plan to succeed.

(e) Further to the reasons described at "(d)" above, the releases provide the Applicant certainty that, among other things, it will not be subject to third party claims following its emergence from CCAA protection. The Releases will prevent the further depletion of the Applicant's assets that would occur if the Applicant, the Monitor and its counsel continued to incur costs to defend against certain claims, which costs are secured by either the Administration Charge or the Directors' Charge. The Releases similarly benefit the Applicant's creditors and other stakeholders by protecting the Applicant against potential contribution and indemnity claims by its current directors and officers, thus minimizing further claims against the Applicant and maximizing the Applicant's financial health upon CCAA exit.

(f) The creditors voting on the Plan have full knowledge of the releases; 192 was deeply involved in structuring the Transaction (as evidenced through its participation in the RSA), and both 192 and BDC (being all Affected Secured Creditors) were provided with motion materials and a Monitor's Report that described the releases in the Plan prior to the Meeting Order motion. No party has objected to the releases sought.

(g) The Applicant and the Monitor believe that the releases are fair and reasonable. The releases are sufficiently narrow, and expressly do not apply to any criminal, fraudulent or other wilful misconduct, or to other claims that are not permitted to be compromised or released under the CCAA.

The Newco transaction structure is fair and reasonable

37. The Plan contemplates that, in essence, one asset and one liability will be transferred to Newco through a "reverse" vesting structure.

38. Instead of this Court vesting all right, title and interest in assumed assets to a purchasing entity, exclusive of unwanted liabilities, the Applicant requests that this Court:

(a) assign to Newco all claims available to TribalScale regarding amounts claimed by TribalScale against SiriusXM under the SiriusXM Contract (as more particularly described at paragraph 32 of the Sanction Order); and

(b) vest in Newco all claims of General Unsecured Creditors.

39. Across Canada, courts have found that section 11 of the CCAA provides sufficient authority to issue reverse vesting orders.[36]

40. Recently, reverse vesting orders have been issued in the context of sale approvals under section 36 of the CCAA.[37]

41. The Applicant submits that section 11 is the relevant authority, but especially so because the reverse vesting provision is being sought in the context of a plan of compromise or arrangement. In *Plasco*, Wilton-Siegel J. stated:

> [t]he Global Settlement contemplates the implementation of a corporate reorganization by which the shares of Plasco will be

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[36] *Quest University Canada (Re)*, 2020 BCSC 1883 [*Quest*]; *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00C (Ont SCJ [Comm List]) [*Plasco*]; *Arrangement relatif à Nemaska Lithium inc*, 2020 QCCS 3218 [*Nemaska*] affirmed in 2020 QCCA 1488.

[37] *Plasco*, *supra*; *Quest*, *supra*; *Nemaska*, *supra*; *Re Stornoway Diamond Corporation* (October 9, 2019), Montreal 500-11-057094-191 (QBSC) [*Stornaway*]; *Re Wayland Group Corp* (April 21, 2020), Toronto CV-19-00632079-00CL (Ont SCJ [Comm List]) [*Wayland*]; *Re Comark Holdings Inc* (July 13, 2020), Toronto CV-20-00642013-00CL (Ont SCJ [Comm List]); *Re Beleave Inc* (September 18, 2020), Toronto, CV-20-00642097-00CL (Ont SCJ [Comm List]), *Re Green Relief (November 9, 2020), Toronto CV-20-00639217-00CL* (Ont SCJ [Comm List]).

> transferred to an acquisition corporation owned by [the purchasers] and the remaining assets of the applicants will be held by a new corporation, referred to as "New Plasco", which will assume all of the liabilities and obligations of Plasco. **I am satisfied that the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under section 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise**.[38] [Emphasis added.]

42. Recently, a reverse vesting order similar to the within reverse vesting provisions was granted in *Quest*. There, a section 36 transaction, the reverse vesting order would transfer unsecured claims and minor assets to a subsidiary of the debtor. Justice Fitzpatrick conducted an analysis under both section 11 and section 36 of the CCAA and granted the order as sought by the debtor.[39]

43. The Applicant submits that in this case both the section 11 and section 36 tests can be met.

44. Section 11 of the CCAA states:

> Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.[40]

45. The Supreme Court of Canada recently described the test for an order under section 11: (a) the order sought is appropriate in the circumstances; (b) the Applicant has been acting in good faith and with due diligence; and (c) the order sought is not prohibited by another provision of the CCAA.[41]

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[38] *Plasco, supra* cited in *Quest, supra* at para 131.
[39] *Quest, supra* at paras 150-173.
[40] *CCAA*, *supra* at s 11.
[41] *Callidus Capital Corp, supra* at paras 49-50, 67.

46. This test is met in the case at hand.

47. The reverse vesting provisions are appropriate in the circumstances. According to the Supreme Court of Canada, appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA". The purpose of the CCAA is remedial: "to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[42]

48. The within reverse vesting provisions will further the purpose of the CCAA. Following the implementation of the Plan, pursuit of the SiriusXM Receivable will be the sole outstanding material issue in this CCAA Proceeding. As such, the reverse vesting provisions will allow TribalScale to rapidly exit CCAA after the implementation date – shedding itself of the stigma associated with being a CCAA debtor – because Newco will be able to pursue the receivable for the exclusive benefit of the General Unsecured Creditors.

49. The Sanction Order transfers the claims of General Unsecured Creditors to Newco. As a result of the failed sale and investment process, and the fact that the liquidation value is lower than the value of the secured debt, the vesting out of unsecured claims is reasonable in the circumstances. A rigorous sale and investment process was pursued, with 68 parties contacted.[43] A subsequent offer to purchase TribalScale was withdrawn due to the emergence of COVID-19.[44] TribalScale has acted with good faith and with due diligence throughout this CCAA Proceeding. As such, the Transaction, including the reverse vesting structure, is unquestionably the fairest and

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[42] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 15.
[43] *January Jaitly Affidavit*, *supra* at Record pages 14, 21 (PDF pages 18, 25) at paras 12-13, 38.
[44] *January Jaitly Affidavit*, *ibid* at Record page 14 (PDF page 18) at paras 12-13.

most reasonable outcome for this CCAA Proceeding.[45]

50. The Applicant acknowledges that the SiriusXM Contract requires counterparty consent for assignment. In this instance, the contract is completed and no further work is outstanding. The only item left outstanding is for SiriusXM to make payment under the contract. The Applicant submits that it is only seeking to transfer the Claims related to the unpaid receivable as the contract is completed, and therefore the assignment provisions are not engaged.

51. In any event, it is appropriate to vest TribalScale's Claims against SiriusXM in Newco because:

(a) SiriusXM has not objected to Sanction Order, despite being properly served with motion materials (in fact, SiriusXM has been aware since July 2020 that TribalScale intends to address the SiriusXM Receivable in this CCAA Proceeding,[46] but has not filed a Notice of Appearance);

(b) the vesting of TribalScale's Claims against SiriusXM in Newco is a condition precedent to Plan implementation, as such it can be inferred that 192 is not willing to allow TribalScale to remain in this CCAA Proceeding simply to pursue the SiriusXM Receivable while TribalScale is otherwise a financially healthy going concern;

(c) there is no prejudice to SiriusXM if the SiriusXM Receivable is pursued by Newco as Newco;

(d) there is prejudice to TribalScale and its stakeholders if the reverse vesting provisions are not granted, because the Transaction is the only alternative to bankruptcy; and

(e) no performance obligations remain under the SiriusXM Contract, however

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[45] *Quest, supra* at paras 140-143, 172 citing *Re JMB Crushing Systems Inc* (October 16, 2020), Calgary 2001-05482 (ABQB)

[46] *July Jaitly Affidavit*, *ibid* at Record page 55 (PDF page 59) at paras 64-65.

TribalScale remains willing and able to perform if it is found there are any performance obligations outstanding.

52. The Monitor has found that Applicant has acted in good faith and with due diligence throughout this CCAA Proceeding.

53. In *Quest*, Fitzpatrick J. found that "there is no provision in the CCAA that prohibits a RVO [reverse vesting order] structure."[47]

54. The Applicant therefore submits that it is appropriate to approve the reverse vesting provisions of the Sanction Order on the sole authority of section 11. In any event, the section 36 test is also met.

55. Section 36(1) of the CCAA states:

> 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.[3]

56. It is well-established that section 36 of the CCAA permits the sale of substantially all of the debtor company's assets.[48]

57. Section 36(3) of the CCAA sets out the following non-exhaustive factors to be considered by the Court in determining whether to grant authorization for a disposition under section 36(1):

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

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[47] *Quest, supra* at para 157.
[48] *CCAA*, *supra* at s 36.

in the circumstances;

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

(c) whether the monitor filed with the court a report stating that in its 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 creditors were consulted;

(e) the effects of the proposed sale or distribution 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.

58. The foregoing factors largely overlap the principles outlined by the Court of Appeal for Ontario in *Royal Bank v. Soundair Corp.* for determining whether a sale transaction ought to be approved, which have been routinely applied by this Court in considering whether to approve a sale in a CCAA proceeding.[49]

59. The Transaction effected by the Plan satisfies the factors set out in section 36(3) of the CCAA and the *Soundair* principles for the following reasons:

(a) The Transaction is commercially reasonable in the circumstances and results negotiations between the Applicant and the Purchaser at both the business and advisor levels, which followed the comprehensive but unsuccessful pre-filing sales process.

[49] *Royal Bank v Soundair Corp (1991)*, 1991 CanLII 2727 (ONCA), 4 OR (3d) 1.

(b) The Applicant believes that the pre-filing sales process was commercially reasonable as described in the January Jaitly Affidavit.[50] Additionally, the Applicant does not believe that that a second process will yield a superior transaction because, among other things, prevailing economic conditions created by the COVID-19 pandemic.

(c) The Monitor has conducted a liquidation analysis that is outlined in the Third Report of the Monitor, and subject to the assumptions and caveats stated therein, provides that the liquidation value of the assets of TribalScale is less than the total value of the secured indebtedness of 192 and BDC.[51]

(d) The Transaction was structured in consultation with 192 and formalized the RSA between the Applicant and 192; and the only other affected creditor, BDC, has been kept apprised of all material developments in this CCAA Proceeding. Moreover, given the public nature of the CCAA Proceeding, all creditors have had an opportunity to stay informed and participate as they deem appropriate.

(e) The two Affected Secured Creditors both receive fair treatment under the Transaction: 192 obtains 85% of the equity in TribalScale in exchange for the compromise of half of its debt and BDC is repaid in full; moreover, the General Unsecured Creditors, whose rights are unaffected by the Plan, will obtain the proceeds of the SiriusXM Receivable, if any, less the costs incurred to collect. The Transaction represents the best, and possibly the only, path forward for the Applicant and its business to continue as a going concern in the circumstances, preserving the Applicant's business and employment for the employees of the Applicant.

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[50] *January Jaitly Affidavit*, *supra* at Record page 22 (PDF page 26) at para 39.
[51] *January Jaitly Affidavit*, *supra* at Record page 21-22 (PDF pages 25-26) at para 38.

(f) The consideration to be received by the Applicant in connection with the Transaction exceeds the estimated liquidation value of the Applicant's business and assets, as set out in the Third Report of the Monitor.[52]

60. Courts may approve the transfer of assets and liabilities to a related company for an internal reorganization where such transfer is in the best interests of stakeholders and does not prejudice major creditors.[53] The transfer to Newco of TribalScale's Claims against SiriusXM and the claims of General Unsecured Creditors is required to carry out the Transaction, which is the only viable option to preserve the Applicant's business.

61. In each of the recent reverse vesting order cases – *Stornoway, Wayland* and *Nemaska* – the proposed transaction represented the sole available option to preserve the going concern value of the business while maximizing value for creditors, who would otherwise have received lesser recoveries in the context of a liquidation.[54] The Applicant faces the same situation and a cost-effective transaction will assist in the maximization the Applicant's financial health and therefore its ability to success post-CCAA.

62. No creditors of the Applicant will be prejudiced by the reverse vesting provisions of the Sanction Order, for the reasons described above.

It is fair and reasonable to add newco as an Applicant

63. The Applicant seeks to add Newco as an Applicant in this CCAA proceeding as part of the Sanction Order. This step is required under the Plan and must be approved in order to

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[52] *Re Beleave Inc, supra* cited in *Quest, supra* at para 138.
[53] *Quest, ibid* at para 135.
[54] *Nemaska, supra*; Second Report to the Court submitted by Deloitte Restructuring Inc. in its Capacity as Monitor of Stornaway dated October 2, 2019 at paras 15-25; Sixth Report of PwC in its capacity as Monitor of Wayland dated April 16, 2020 at para 42.

consummate the proposed Transaction.

64. In order for Newco to be added as an applicant in this CCAA proceeding it must constitute a "debtor company" or " affiliated debtor company" for the purposes of section 3 of the CCAA. Newco is incorporated under the laws of Ontario as a wholly-owned subsidiary of the Applicant and therefore an "affiliated debtor company" pursuant to subsections 3(2) and (4) of the CCAA. As an affiliate of the Applicant, Newco satisfies the CCAA $5 million debt threshold. Upon implementation of the Plan, Newco will hold all of the claims of the Applicant's General Unsecured Creditors but have no assets and therefore be balance sheet insolvent.

PART IV – RELIEF SOUGHT

65. For all of the foregoing reasons, the Applicant requests that this Honourable Court grant an Order substantially in the form of the draft Order located at Tab 3 of its Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7th DAY OF JANUARY, 2021

WEISZ FELL KOUR LLP

SCHEDULE "A"

List of Authorities

Case Law

1. *Re Target Canada Co*, 2016 ONSC 316;
2. *Re Canadian Airlines Corp*, 2000 ABQB 442;
3. *Olympia & York Developments Ltd v Royal Trust Co*, 12 O.R. (3d) 500 (Gen Div), [1993] O.J. No. 545;
4. *Re Canwest Global Communications Corp*, 2010 ONSC 4209;
5. *Re AbitibiBowater Inc*, 2010 QCCS 4450 at paras 29-43;
6. *Re Sammi Atlas Inc* (1998), 3 CBR 171 (Ont SCJ);
7. *Re Campeau Corp* (1992), 10 CBR (3d) 104 (Ont Gen Div);
8. *Re Sino-Forest Corp*, 2012 ONSC 7050;
9. *Re Skylink Aviation*, 2013 ONSC 2519;
10. *Re Armbro Enterprises Inc*, 1993 CarswellOnt 241;
11. *Re Uniforet Inc*, 2003 CarswellQue 3404 (CS);
12. *9354-9186 Quebec Inc v Callidus Capital Corp*, 2020 SCC 10;
13. *Re Metcalfe & Mansfield Alternative Investments II Corp*, (2008), 92 O.R. (3d) 513 (CA);
14. *Re Lydian International Limited*, 2020 ONSC 4006;
15. *Re Kitchener Frame Ltd*, 2012 ONSC 234;
16. *Re Quest University Canada*, 2020 BCSC 1883;
17. *Arrangement relatif à Nemaska Lithium inc*, 2020 QCCS 3218;
18. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60; and
19. *Royal Bank v Soundair Corp* (1991), 1991 CanLII 2727, 4 OR (3d) 1 (ONCA).

Motion Materials and Court Orders

20. Order (Approval and Vesting) in the Matter of a Plan of Compromise or Arrangement of Plasco Energy Group Inc, et al., dated July 17, 2015, Toronto, Court File No. CV-15-10869-00CL (ONSC).
21. Order (Approval and Vesting) in the Matter of Stornoway Diamond Corporation et al., dated October 7, 2019, Montreal, Court File No. 500-11-057094-191 (QBSC).
22. Order (Approval and Vesting) in the Matter of a Plan of Compromise or Arrangement of Wayland Group Corp, et al., dated April 21, 2020, Toronto, Court File No. CV-19-00632079-00CL (ONSC).
23. Order (Approval and Vesting and CCAA Termination) in the Matter of a Plan of Compromise or Arrangement of Comark Holdings Inc. et al., dated July 13, 2020, Toronto, Court File No. CV-20-00642013-00CL (ONSC).

SCHEDULE "B"

Statutory Authorities

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

Compromises to be sanctioned by court

6(1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Court File No. CV-20-00645116-00CL

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 COMPROMISE OR ARRANGEMENT OF TRIBALSCALE INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

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(Re: Sanction Order)

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