

**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 ORIGINAL TRADERS ENERGY LTD.  
AND 2496750 ONTARIO INC. (each, an "Applicant" and  
collectively, the "Applicants")**

**FACTUM OF THE MONITOR  
(AVO and Ancillary Order)**

January 26, 2024

**BENNETT JONES LLP**  
3400 One First Canadian Place  
P.O. Box 130  
Toronto ON M5X 1A4

**Richard Swan** (#32076A)  
Email: [swanr@bennettjones.com](mailto:swanr@bennettjones.com)

**Raj Sahni** (#42942U)  
Email: [sahnir@bennettjones.com](mailto:sahnir@bennettjones.com)

**Shaan P. Tolani** (#80323C)  
Email: [tolanis@bennettjones.com](mailto:tolanis@bennettjones.com)

**Thomas Gray** (#82473H)  
Email: [grayt@bennettjones.com](mailto:grayt@bennettjones.com)

Tel: 416.863.1200  
Fax: 416.863.1716

*Lawyers for the Monitor*

**TO: THE SERVICE LIST**

## **PART I: OVERVIEW**

1. KPMG Inc., in its capacity as the Court-appointed monitor of the OTE Group (as defined below) in these proceedings under the CCAA (in such capacity, the “**Monitor**”), seeks the following relief:

- (a) an Order (the “**Approval and Vesting Order**”), among other things:
  - (i) authorizing the Monitor, on behalf of the OTE Group, to execute the agreement of purchase and sale (the “**Purchase Agreement**”) dated January 11, 2024 with Allstar Auctions Inc. (“**Allstar**”);
  - (ii) approving the sale of the Vehicles (as defined below) pursuant to the Purchase Agreement; and
  - (iii) vesting the OTE Group’s right, title and interest in the Vehicles in Allstar, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims; and
  
- (b) an Order (the “**Ancillary Order**”), among other things:
  - (i) approving, *nunc pro tunc*, the key employee retention plan for certain OTE Group employees (the “**KERP**”); and
  - (ii) sealing the Confidential Appendices to the Seventh Report of the Monitor dated January 22, 2024.

2. The Monitor is of the view that the Vehicle Transaction achieves a better net recovery than liquidation and represents the best transaction available following the Court-approved Bid Process (as

defined below). Moreover, the Monitor believes that the KERP was and is necessary to ensure the continued involvement of certain employees that have been and continue to be key to assisting the OTE Group and the Monitor with respect to the wind-up of the OTE Group's business. Finally, the Monitor believes that the sealing of the Confidential Appendices is necessary and appropriately limited in the circumstances. The Monitor believes that the relief sought is in the best interests of the OTE Group and its stakeholders. The Monitor therefore respectfully requests that this Court grant the Approval and Vesting Order and the Ancillary Order.

## **PART II:           FACTS**

3.       The facts underlying this motion are more fully set out in the Seventh Report of the Monitor dated January 22, 2024 (the "**Seventh Report**"). Capitalized terms used but not otherwise defined herein have the meanings ascribed in the Seventh Report.<sup>1</sup>

### **A.       Background on CCAA Proceedings**

4.       On January 30, 2023, Original Traders Energy Ltd. and 2496750 Ontario Inc. (together, the "**Applicants**") were granted relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") by Order (the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**Court**").<sup>2</sup> While not Applicants in this proceeding, OTE Logistics LP and Original Traders Energy LP (together, the "**Limited Partnerships**", and with the Applicants, the "**OTE Group**"), were extended the same protections as the Applicants on the basis that the Limited Partnerships are related to and carry on operations that are integral to the business of the Applicants.<sup>3</sup> At the time of its filing, the OTE Group was engaged in the business of purchasing, blending, supplying and transporting fuel to petroleum stations and First Nations communities across Ontario.

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<sup>1</sup> The Seventh Report and other materials filed in these CCAA Proceedings can be found on the Monitor's website: <http://home.kpmg/ca/OTEGroup>.

<sup>2</sup> Seventh Report of the Monitor dated January 22, 2024 ("**Seventh Report**"), para 1, Motion Record of the Monitor dated January 22, 2024 ("**Motion Record**") at Tab 2.

<sup>3</sup> *Ibid* at para 1, Motion Record at Tab 2.

5. Pursuant to the Initial Order, KPMG Inc. was appointed by the Court as the Monitor of the OTE Group. The protections provided to the OTE Group in the Initial Order were extended pursuant to an Amended and Restated Initial Order dated February 9, 2023, and have been extended from time to time by this Court throughout these proceedings.

6. On September 28, 2023, the Monitor filed a Report with this Court (the “**Fifth Report**”) in support of a motion brought by the OTE Group for the approval of, among other things, a bid process for the sale of the assets of the OTE Group.<sup>4</sup> The motion to approve that bid process was ultimately adjourned. On October 6, 2023, following discussions with stakeholders, the Monitor filed a supplement to the Fifth Report seeking an Order approving an amended bid process (the “**Bid Process**”) and providing the Monitor with enhanced powers in connection with the business and property of the OTE Group.<sup>5</sup> That Order was granted by the Court on October 12, 2023, and was consented to or unopposed by all OTE Group stakeholders.<sup>6</sup>

## **B. Bid Process**

7. As noted in both the Fifth Report and the supplement to the Fifth Report, due to the loss of key customers, the OTE Group, with the assistance and oversight of the Monitor, implemented a reduced operations plan to reduce operating costs, overhead costs, and conserve liquidity as the OTE Group winds up its business.<sup>7</sup>

8. In connection with the OTE Group’s wind-up, the Monitor and the OTE Group developed the Bid Process as a means of gauging interest in the OTE Group and/or its assets and determining whether a transaction that could achieve better value than a liquidation is available for the property, assets and

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<sup>4</sup> *Ibid* at para 8, Motion Record at Tab 2.

<sup>5</sup> *Ibid* at para 8, Motion Record at Tab 2.

<sup>6</sup> *Ibid* at para 10, Motion Record at Tab 2.

<sup>7</sup> *Ibid* at paras 9, 33, Motion Record at Tab 2.

undertakings of the OTE Group.<sup>8</sup> The property of the OTE Group for sale pursuant to the Bid Process consisted of the right, title and interests of the OTE Group in certain chattels identified at Schedule 1 thereto (the “**Property**”). The Property is primarily vehicles in the possession of the OTE Group, most of which are encumbered pursuant to loan and security agreements or held pursuant to capital leases (the “**Vehicles**”), as well as office furniture and IT equipment.<sup>9</sup>

9. The OTE Group’s three blending locations in Tyendinaga, Whitefish and Six Nations, and the blending equipment located thereon (the “**Blending Equipment**”), were excluded from the Property for sale. However, the Bid Process did not preclude interested parties from expressing interest in the leasehold interests or Blending Equipment. It provided that the Monitor would use its best reasonable efforts to arrange for discussions between interested parties and landlords, though the Monitor could make no assurances as to the assignability of any interests of the OTE Group to the leased premises or equipment thereon.<sup>10</sup> The Monitor ultimately arranged for site visits or discussions with five interested parties, and received four expressions of interest in connection with the equipment located on the blending location.<sup>11</sup> The Orders sought by the Monitor on this motion do not purport to approve any transaction in connection with these discussions or expressions of interest.

10. The Monitor was fully involved in all aspects of the Bid Process to ensure that the marketing of the Property was fair and reasonable, and that all prospective interested parties were given the ability to make an offer. In connection therewith, the Monitor caused a notice of the Bid Process to be published in the Globe and Mail and provided a teaser letter and form of non-disclosure letter (the “**NDA**”) to 41 parties, 12 of which ultimately executed the NDA to receive access to an electronic data room.<sup>12</sup> Through the course of the Bid Process, the Monitor (among other things) facilitated due diligence efforts, arranged

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<sup>8</sup> *Ibid* at para 12, Motion Record at Tab 2.

<sup>9</sup> *Ibid* at para 13, Motion Record at Tab 2.

<sup>10</sup> *Ibid* at para 16, Motion Record at Tab 2.

<sup>11</sup> *Ibid* at paras 16-17, Motion Record at Tab 2.

<sup>12</sup> *Ibid* at para 17, Motion Record at Tab 2.

for the inspection of the Property, updated the data room as required, and remained engaged with the interested parties.<sup>13</sup>

11. The Bid Process ultimately resulted in the receipt of four Binding Offers (as defined therein) for the OTE Group's Property, as well as one letter of intent (the "**LOI**") and four expressions of interest in the Blending Equipment (for which, as noted above, no relief is sought at this time).<sup>14</sup> The Monitor believes that the Bid Process was fair and reasonable.<sup>15</sup>

12. Of the four Binding Offers for the Property, two pertained to the Vehicles, and two pertained to the other Property. The LOI also expressed interest in both the Property. The Binding Offers received for the other Property, much of which is office equipment that is still in use by the OTE Group, were for *de minimis* value. The Monitor has decided not to pursue a sale in connection therewith at this time.<sup>16</sup>

13. The Monitor ultimately determined that the Binding Offer received by Allstar for the Vehicles was the best offer received for the Vehicles pursuant to the Bid Process, as it provided for the highest purchase price and the greatest certainty of payment.<sup>17</sup> Further, Allstar's Binding Offer provided for a greater value to be achieved than the net orderly liquidation value of the Vehicles according to an appraisal completed by Gordon Brothers (the "**Vehicle Appraisal**").<sup>18</sup> As such, the Monitor decided that it was appropriate in the circumstances to select Allstar's Binding Offer as a "Successful Bid" and to proceed to negotiate the Purchase Agreement for the sale of the Vehicles to Allstar (the "**Vehicle Transaction**"), subject to Court approval. The Vehicle Transaction is supported by the OTE Group and by the OTE Group's secured lender, the Royal Bank of Canada ("**RBC**").<sup>19</sup>

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<sup>13</sup> *Ibid* at para 17, Motion Record at Tab 2.

<sup>14</sup> *Ibid* at para 17, Motion Record at Tab 2.

<sup>15</sup> *Ibid* at para 27, Motion Record at Tab 2.

<sup>16</sup> *Ibid* at para 28, Motion Record at Tab 2.

<sup>17</sup> *Ibid* at para 24, Motion Record at Tab 2.

<sup>18</sup> *Ibid* at para 22, Motion Record at Tab 2.

<sup>19</sup> *Ibid* at para 27, Motion Record at Tab 2.

**C. Purchase Agreement and Vehicle Transaction**

14. The Purchase Agreement is a straightforward agreement of purchase and sale through which Allstar will purchase the OTE Group's right, title and interest in the Vehicles. It was executed by Allstar on January 11, 2024, and has not yet been executed by the Monitor, pending Court approval.

15. The Purchase Agreement provides that Allstar shall purchase the OTE Group's right, title and interest in all of the Vehicles for a purchase price that the Monitor is seeking to seal. Allstar has paid the Monitor, on behalf of the OTE Group, a deposit in the amount of 10% of the purchase price.<sup>20</sup> The Purchase Agreement provides that the Monitor shall seek the Approval and Vesting Order vesting, effective as of the time of closing, all of the OTE Groups' right, title and interest in and to the Purchased Assets in Allstar free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims.<sup>21</sup> The Purchase Agreement is immediately binding upon Allstar's execution, but the Monitor is not required to execute the Purchase Agreement on behalf of the OTE Group and the Purchase Agreement shall not be binding on the Monitor or the OTE Group unless and until the Court issues the Approval and Vesting Order.<sup>22</sup> The closing of the Purchase Agreement shall occur after the issuance of the Approval and Vesting Order and upon the Monitor's receipt of the balance of the purchase price from Allstar.<sup>23</sup>

16. The Monitor is not seeking to make a distribution from the proceeds of the Vehicle Transaction at this time. The Monitor's counsel has not yet completed a security review in respect of security registered against the Vehicles pursuant to the Ontario *Personal Property Security Act*, R.S.O. 1990, c.

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<sup>20</sup> *Ibid* at para 24, Motion Record at Tab 2.

<sup>21</sup> *Ibid* at para 24, Motion Record at Tab 2.

<sup>22</sup> *Ibid* at para 24, Motion Record at Tab 2.

<sup>23</sup> *Ibid* at para 24, Motion Record at Tab 2.



P.10 and as such, the Monitor will hold the proceeds of the Vehicle Transaction in trust pending that review.<sup>24</sup>

**D. KERP**

17. The wind-up of the OTE Group is nearly complete. As of December 31, 2023, certain time limited gas licenses and fuel licenses have expired, and the OTE Group no longer distributes any fuel.<sup>25</sup> Only nine employees remain with the OTE Group as of January 1, 2024.<sup>26</sup>

18. The Monitor and the OTE Group considered five key employees (the “**KERP Employees**”) of the OTE Group to be critical to completing the wind-up, much of which has already been completed.<sup>27</sup> As such, in November 2023, to incentivize the KERP Employees to remain with the OTE Group and assist with the wind-up, the Monitor on behalf of the OTE Group offered a total of \$51,585 to KERP Employees to be paid within ten business days of the Target Date, defined as:

- (a) January 12, 2024; and
- (b) the date on which the earliest of the following events occurs in respect of the OTE Group:
  - (i) the implementation of a plan of compromise or arrangement in the CCAA Proceedings;
  - (ii) the completion of the sale of all or substantially all of the assets of the OTE Group or other restructuring transactions;
  - (iii) assignment of the OTE Group into bankruptcy;

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<sup>24</sup> *Ibid* at para 26, Motion Record at Tab 2.

<sup>25</sup> *Ibid* at para 35, Motion Record at Tab 2.

<sup>26</sup> *Ibid* at para 35, Motion Record at Tab 2.

<sup>27</sup> *Ibid* at para 37, Motion Record at Tab 2.

- (iv) the appointment of a receiver over the assets of the OTE Group; and
- (v) the termination of the CCAA Proceedings.<sup>28</sup>

19. The KERP payments were made on January 19, 2024.<sup>29</sup>

20. The KERP Employees have been and will be integral to completing the residual administrative duties of the OTE Group, including the collection of any outstanding accounts receivable and the filing of necessary tax returns and providing other needed assistance to the OTE Group and the Monitor in these CCAA Proceedings.<sup>30</sup>

### **PART III: ISSUES**

21. The issues to be considered on this motion are whether:

- (a) the Approval and Vesting Order should be granted;
- (b) the KERP should be approved *nunc pro tunc*; and
- (c) the Confidential Appendices should be sealed.

#### **A. The Approval and Vesting Order Should be Granted**

22. The Monitor is seeking the proposed Approval and Vesting Order, which will authorize it to execute the Vehicle Transaction and, upon closing of the Vehicle Transaction, vest the OTE Group's right, title and interest in and to the Vehicles in Allstar.<sup>31</sup> The Vehicle Transaction was the result of the Court-approved Bid Process, which was conducted by the Monitor, and provides the best price and most certainty of recovery for the Vehicles in the circumstances.<sup>32</sup>

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<sup>28</sup> *Ibid* at para 38, Motion Record at Tab 2.

<sup>29</sup> *Ibid* at para 39, Motion Record at Tab 2.

<sup>30</sup> *Ibid* at para 37, Motion Record at Tab 2.

<sup>31</sup> *Ibid* at para 4, Motion Record at Tab 2.

<sup>32</sup> *Ibid* at paras 10 and 24, Motion Record at Tab 2.

23. It is well established that this Court has jurisdiction to approve the sale of the assets of a debtor company in a CCAA proceeding where such sale is in the best interests of stakeholders generally.<sup>33</sup>

Furthermore, section 36 of the CCAA explicitly authorizes a debtor to sell its assets outside of the ordinary course of business with the consent of the Court, without the need for a plan of arrangement.<sup>34</sup>

24. Pursuant to subsection 36(6) of the CCAA, Courts may order a sale or disposition free and clear of any security charge or other restriction if it also orders 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 that is to be affected by the order.<sup>35</sup> In this case, the claims of the equipment financiers and capital lessors will stand against the proceeds of the Vehicle Transaction. Courts have granted vesting orders in insolvency proceedings on these terms, including over objections from creditors or financing lessors when such transactions benefit creditors as a whole.<sup>36</sup>

25. In considering whether to exercise its powers to approve the Vehicle Transaction, the Court must review the Vehicle Transaction as a whole and determine if it is appropriate, fair and reasonable. Section 36(3) of the CCAA sets out the factors the Court must consider when making this determination:

- (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;

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<sup>33</sup> *Nortel Networks Corporation (Re)*, [2009 CanLII 39492 \(Ont SCJ JCommercial List\)](#) at [paras 35-40](#) and [48](#) [*Nortel*]; *PCAS Patient Care Automation Services Inc. (Re)*, [2012 ONSC 3367](#) at [para 35](#).

<sup>34</sup> *Brainhunter Inc. (Re)*, [2009 CanLII 67659 \(ON SC\)](#), at [paras 12-16](#); *Companies' Creditors Arrangement Act*, [RSC 1985, c C-36, s.36](#) [CCAA].

<sup>35</sup> [CCAA](#), *ibid*, [s 36\(6\)](#); *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, [2022 ONSC 6354](#) at [para 27](#).

<sup>36</sup> *Southern Star Developments Ltd v Quest University Canada*, [2020 BCCA 364](#) at [para 10](#); *A Plan of Compromise or Arrangement of Cow Harbour Construction Ltd.*, [2010 ABQB 637](#) at [paras 1-14; 40-42](#).

- (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.<sup>37</sup>

26. The s.36(3) factors are non-exhaustive and the principles articulated by the Ontario Court of Appeal in *Royal Bank of Canada v Soundair Corp.* remain relevant. Namely, courts are urged to consider (i) whether the party made a sufficient effort to obtain the best price and to not act improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which the party obtained offers; and (iv) whether the working out of the process was unfair.<sup>38</sup>

27. The proposed Vehicle Transaction satisfies the *Soundair* principles and s.36(3) given that:

- (a) **The process leading to the proposed sale was reasonable in the circumstances, and was approved by the Monitor:** The Bid Process was developed by the OTE Group and the Monitor and the Monitor was involved in all aspects of the Bid Process to ensure that it was fair and reasonable.<sup>39</sup> As set out above, the Bid Process was conducted in

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<sup>37</sup> [CCAA](#) *supra* note 34 at [s 36](#).

<sup>38</sup> *Royal Bank v Soundair Corp.*, 1991 CanLII 2727 (ON CA) at [para 16](#); *Re Canwest Global Communications Corp.*, 2010 ONSC 2870 at [para 13](#); *Nordstrom Canada Retail, Inc.*, 2023 ONSC 4199 at [paras 16-17](#).

<sup>39</sup> Seventh Report *supra* note 2, paras 12, 14, Motion Record at Tab 2.

accordance with Court-approved terms and involved an in-depth marketing process led by the Monitor.<sup>40</sup>

- (b) **The Monitor has provided its opinion that the proposed sale is more beneficial than a liquidation:** The Vehicle Transaction achieves a better recovery than the net orderly liquidation value of the Vehicles provided in the Vehicle Appraisal, especially when taking into account the additional work that would be required on the part of the Monitor and the time delay that would ensue in a liquidation scenario.<sup>41</sup>
- (c) **Creditors were consulted and are not prejudiced:** The OTE Group's secured creditor RBC was consulted throughout the Bid Process and supports the approval of the Vehicle Transaction.<sup>42</sup> Further, the equipment financiers and capital lessors with interests in the vehicles were served with materials in respect of both the Bid Process through which these assets were identified and marketed, and the motion record of the Monitor seeking the Approval and Vesting Order.<sup>43</sup> Any interests that the equipment financiers and capital lessors have will stand against the proceeds of the Vehicle Transaction.
- (d) **The consideration to be received is fair and reasonable:** The purchase price to be paid pursuant to the Vehicle Transaction is the highest price available in the circumstances following the Court-approved Bid Process, and provides a better net recovery than liquidation value. Following a survey of the other bids, the Monitor determined that the Successful Bid provided for the best purchase price and provided for the most certainty of recovery.<sup>44</sup>

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<sup>40</sup> *Ibid*, paras 10 and 17, Motion Record at Tab 2.

<sup>41</sup> *Ibid*, para 22, Motion Record at Tab 2.

<sup>42</sup> *Ibid*, para 27, Motion Record at Tab 2.

<sup>43</sup> *Ibid*, para 13, Motion Record at Tab 2.

<sup>44</sup> *Ibid*, paras 22-23, Motion Record at Tab 2.

28. The Monitor believes that the Vehicle Transaction is fair and reasonable and achieves better net recovery for the Vehicles than what would be achieved in a liquidation. The Successful Bid was chosen following an in-depth marketing process wherein several parties were contacted, is higher than the price contemplated by competing offers and is also higher than the price quoted by the Vehicle Appraisal. It is supported by the OTE Group and RBC, and the Monitor does not believe any stakeholder is prejudiced. As a result, the Monitor believes that the Court should exercise its authority to grant the proposed Approval and Vesting Order.

**B. The KERP Should be Approved, *Nunc Pro Tunc***

29. The Monitor is also seeking the approval of the KERP and the payments made thereunder, *nunc pro tunc*. The KERP was developed by the Monitor in consultation with the OTE Group, both of which consider it critical to the completion of residual administrative duties necessary for the wind-up of the OTE Group.<sup>45</sup>

30. This Court may approve the KERP pursuant to its jurisdiction under section 11 of the CCAA to grant “any order it considers appropriate in the circumstances”.<sup>46</sup> Courts have frequently exercised their discretion to approve key employee retention plans where the retention of certain key employees has been deemed critical to a successful restructuring.<sup>47</sup>

31. While typically such orders are sought prior to the disbursement of relevant payments, this Court has the jurisdiction to grant orders *nunc pro tunc*, including the ability to authorize applicants to enter into agreements *nunc pro tunc*.<sup>48</sup> Given the Monitor’s focus on fraud investigations and asset

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<sup>45</sup> *Ibid*, para 37, Motion Record at Tab 2.

<sup>46</sup> [CCAA](#) *supra* note 34 at [s.11](#).

<sup>47</sup> *Timminco Limited (Re)*, 2012 ONSC 506 at [para 72](#); *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 at [para 57](#) [Walter]; *In The Matter Of A Plan Of Compromise Or Arrangement Of Mastermind Gp Inc.* (November 30, 2023), Toronto, CV-23-00710259-00CL (Endorsement) (ONSC) at para 24 [Mastermind].

<sup>48</sup> See, for example: *Field Trip Health & Wellness et al.*, (June 15, 2023), Toronto, CV-23-00696599-00CL (Endorsement) (Ont SCJ [Commercial List]); *In the Matter of a Plan or Compromise of Arrangement of LoyaltyOne Co.*, (March 10, 2023), Toronto, CV-23-00696017-00CL (Amended and Restated Initial Order) (Ont SCJ [Commercial List]), at para 15.

preservation, including pursuit of the *Mareva* Order the Mareva Respondents in November and December and other urgent matters, it was not practical for the Monitor to seek KERP approval at the time the KERP letters were issued.<sup>49</sup> Owing to the relatively small amount of such payments, and their non-prejudicial nature, the Monitor submits that the Court should exercise its ability to authorize the KERP *nunc pro tunc* in the present circumstances.

32. The factors to be considered by the Court in granting a KERP vary from case to case. However, some factors are generally held to be present, including: (i) the importance of an employee to the restructuring process; (ii) whether the employee has specialized knowledge that cannot be easily replaced; (iii) whether the employee will consider other employment; (iv) whether the KERP was developed in consultation with the Monitor or other professionals; and (v) whether the Monitor supports the KERP.<sup>50</sup>

33. The Court in *Aralez Pharmaceuticals Inc. (Re)* reflected on these established factors, setting out three additional considerations for courts to use when evaluating the business judgement underlying a KERP. These include: (i) arm's length input of the Monitor into the scope and design of the KERP; (ii) the necessity on a case-by-case basis of the retention program; and (iii) whether the program's design reasonably relates to the goals pursued, which goals must be of demonstrable benefit to the objectives of the restructuring process.<sup>51</sup>

34. The Monitor submits that the KERP complies with the factors set out above and is consistent with KERP arrangements that are approved by CCAA courts. In particular:

- (a) the KERP was developed by the Monitor in consultation with OTE Group;

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<sup>49</sup> The endorsement in respect of the Mareva Order is attached as Appendix "C" to the Seventh Report.

<sup>50</sup> *Walter*, supra note 47 at [para 57-59](#); *US Steel Canada Inc (Re)*, [2014 ONSC 6145](#) at [paras 27-33](#); *Nordstrom Canada Retail, Inc.*, [2023 ONSC 1631](#) at [para 9](#).

<sup>51</sup> *Aralez Pharmaceuticals Inc. (Re)*, [2018 ONSC 6980](#) at [para 30](#); *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 1586](#) at [para 69](#).

- (b) the KERP employees have been and will be integral to the completion of remaining tasks and assisting the OTE Group and the Monitor in these CCAA Proceedings, and perform important administrative functions that include the collection of any outstanding accounts receivable and the filing of necessary tax returns;
- (c) the payments received were designed to incentivize the employees to remain with the OTE Group and to assist with its wind-up; and
- (d) the Monitor believes that the KERP is fair and reasonable in the circumstances and that no stakeholder is prejudiced by the KERP.<sup>52</sup>

35. Pursuant to the KERP, the OTE Group paid the KERP amounts to the KERP Employees on January 19, 2024, at which time the Monitor and the OTE Group had expected the bulk of the work related to the wind-up to be complete. The KERP has not been opposed by any stakeholder. In light of the foregoing, the Monitor submits that the KERP should be approved by this Court.

### **C. The Confidential Appendices Should be Sealed**

36. The *Courts of Justice Act*, R.S.O. 1990, c. C. 43 provides that a court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.<sup>53</sup>

37. The Monitor seeks to seal the following Confidential Appendices pursuant to the Ancillary Order:

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<sup>52</sup> Seventh Report *supra* note 2, para 37, Motion Record at Tab 2.

<sup>53</sup> *Courts of Justice Act*, [RSO 1990](#), c C 43, [s 137\(2\)](#).



- (a) Confidential Appendix 1 – summary of offers and expressions of interest received in the Property and the Blending Equipment;
- (b) Confidential Appendix 2 – Vehicle Appraisal;
- (c) Confidential Appendix 3 – unredacted Purchase Agreement (showing the purchase price);  
and
- (d) Confidential Appendix 4 – copies of the KERP letters.

38. In each case, the Ancillary Order provides that the Confidential Appendices are to be sealed until further order of this Court. The Ancillary Order also provides that, following the closing of the Vehicle Transaction, the Monitor shall file with the Court a revised report including Confidential Appendices 2 and 3, and shall publish that version of the Report on its website. The Monitor is of the view that it would be appropriate for Confidential Appendix 1 to be unsealed once the treatment of the Blending Equipment and the leases has been determined.<sup>54</sup>

39. In *Sherman Estate v. Donovan*, the Supreme Court of Canada recast the test to be used by a court in considering whether a sealing order should be granted.<sup>55</sup> The Supreme Court held that the party asking a court to exercise its discretion to grant a sealing order must establish that: (a) court openness poses a serious risk to an important public interest; (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.<sup>56</sup>

40. All factors favour the sealing request in this case.

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<sup>54</sup> Seventh Report *supra* note 2, para 42, Motion Record at Tab 2.

<sup>55</sup> [2021 SCC 25](#).

<sup>56</sup> *Ibid* at [para 38](#).

41. First, the sealing of the Confidential Appendices is in the public interest. Courts have recognized the important public interests that CCAA proceedings serve<sup>57</sup>, and that the maximization of recoveries in an insolvency proceeding is an important public interest.<sup>58</sup> Confidential Appendices 1-3 contain detailed and competitively sensitive information regarding the Property and the Blending Equipment, the disclosure of which could prejudice the Monitor’s ability to maximize value for stakeholders by hindering its ability to pursue alternate transactions.<sup>59</sup>

42. Courts have also found it is in the public interest to seal KERPs on the basis that KERPs involve “matters of a private, personal nature”, as is the case here.<sup>60</sup> Courts have also sealed KERPs that could reveal individually identifiable information and compensation information on the basis that the protection of that information the disclosure of which would cause harm to the individuals and to the debtor company is an important commercial interest that should be protected.<sup>61</sup> The KERP letters in this case contain identifiable individual information and compensation information.<sup>62</sup>

43. Moreover, there is no reasonable alternative to granting the sealing relief requested in the Ancillary Order. Courts have found that no reasonable alternative to a sealing order exists where declining to grant the proposed order would materially impair the maximization of asset value for the benefit of stakeholders.<sup>63</sup> In this case, failing to seal Confidential Appendices 2 and 3 until closing could hinder the ability to maximize the value of the Vehicles if the Vehicle Transaction does not close. Confidential Appendix 1 contains similarly sensitive information regarding the Vehicles (and the other offers made in respect thereof), as well as sensitive information regarding the Blending Equipment, the treatment of which has not yet been determined. There is also no reasonable alternative to sealing the

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<sup>57</sup> *Nortel*, *supra* note 33 at [para 29](#).

<sup>58</sup> *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#) at [para 84](#) [*Danier*].

<sup>59</sup> Seventh Report *supra* note 2, para 42, Motion Record at Tab 2.

<sup>60</sup> *Danier*, *supra* note 58 at [para 83](#).

<sup>61</sup> *Canwest Global Communications Corp (Re)*, [2009 CanLII 55114 \(Ont SCJ \[Commercial List\]\)](#) at [para 52](#).

<sup>62</sup> Seventh Report *supra* note 2, para 43, Motion Record at Tab 2.

<sup>63</sup> *In the Matter of a Plan of Compromise or Arrangement of Original Traders Energy Ltd. and 2496750 Ontario Inc.*, (January 30, 2023), Toronto, CV-23-00693758-00CL (Endorsement) (Ont SCJ [Commercial List]) at para 62.

KERP, as declining to grant relief sought would result in the disclosure of personally sensitive information in which the KERP Employees have a reasonable expectation of privacy.

44. Finally, the benefits of the sealing request outlined above outweigh any deleterious effects. In these CCAA proceedings, this Court previously approved a sealing order where the information sought to be sealed was “discrete, proportional and limited”.<sup>64</sup> The sealing request is appropriately limited in the circumstances. The information contained in Confidential Appendices 2 and 3 is the Vehicle Appraisal and the purchase price to be paid in connection with the Vehicle Transaction. This information will no longer be deemed sensitive or confidential after the closing of the Vehicle Transaction – as such, both appendices will be made publicly available at that time. The Monitor has also indicated that Confidential Appendix 1 should only be sealed until there is a determination made on the treatment of the leases and Blending Equipment – at that time, the disclosure of the Blending Equipment expressions of interest will not be prejudicial to the OTE Group, and Confidential Appendix 1 can be unsealed.

45. Finally, the Seventh Report provided the number of employees receiving the KERP payment, noted the total amount paid, and provided the Monitor’s rationale as to why the KERP was offered. The Monitor seeks only to seal the KERP letters. Courts have granted the sealing of KERPs on the basis that the sealing was limited in scope to the KERP itself, the information contained therein would not assist stakeholders, and the disclosure of information would harm the employees and breach their privacy interests.<sup>65</sup> There is no benefit to the stakeholders of the OTE Group to having the KERP letters made public, while the disclosure of this information would harm the KERP Employees and breach their privacy interests.

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<sup>64</sup> *Ibid* at [para 63](#).

<sup>65</sup> *Mastermind supra* note 47 at [para 37](#).

46. The Monitor is of the view that the sealing request is therefore necessary and appropriate in the circumstances, and does not prejudice any of the stakeholders of the OTE Group.

**PART IV: RELIEF REQUESTED**

47. The Monitor submits that all of the qualifications required to obtain the requested relief are met and respectfully requests that this Court grant the proposed forms of Approval and Vesting Order and Ancillary Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26TH DAY OF JANUARY 2024**

*Bennett Jones LLP*

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Bennett Jones LLP

January 26, 2024

## SCHEDULE A – LIST OF AUTHORITIES

### *Cases Cited*

1. *A Plan of Compromise or Arrangement of Cow Harbour Construction Ltd.*, [2010 ABQB 637](#).
2. *Aralez Pharmaceuticals Inc. (Re)*, [2018 ONSC 6980](#).
3. *Brainhunter Inc. (Re)*, [2009 CanLII 67659 \(ON SC\)](#).
4. *Canwest Global Communications Corp (Re)*, [2009 CanLII 55114 \(Ont SCJ \[Commercial List\]\)](#).
5. *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#).
6. *Field Trip Health & Wellness et al.* (June 15, 2023), Toronto, CV-23-00696599-00CL (Endorsement) (Ont SCJ [Commercial List]).
7. *In the Matter of a Plan or Compromise of Arrangement of LoyaltyOne Co.* (March 10, 2023), Toronto, CV-23-00696017-00CL (Amended and Restated Initial Order) (Ont SCJ [Commercial List]).
8. *In The Matter Of A Plan Of Compromise Or Arrangement Of Mastermind Gp Inc.* (November 30, 2023), Toronto, CV-23-00710259-00CL (Endorsement) (ONSC).
9. *In the Matter of a Plan of Compromise or Arrangement of Original Traders Energy Ltd. and 2496750 Ontario Inc.* (January 30, 2023), Toronto, CV-23-00693758-00CL (Endorsement) (Ont SCJ [Commercial List]).
10. *Just Energy Group Inc et. al. v Morgan Stanley Capital Group Inc et al.*, [2022 ONSC 6354](#).
11. *Mountain Equipment Co-Operative (Re)*, [2020 BCSC 1586](#).
12. *Nordstrom Canada Retail, Inc.*, [2023 ONSC 1631](#).
13. *Nordstrom Canada Retail, Inc.*, [2023 ONSC 4199](#).
14. *Nortel Networks Corporation (Re)*, [2009 CanLII 39492 \(Ont SCJ \[Commercial List\]\)](#).
15. *PCAS Patient Care Automation Services Inc. (Re)*, [2012 ONSC 3367](#).
16. *Re Canwest Global Communications Corp.*, [2010 ONSC 2870](#).
17. *Royal Bank v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#).

18. *Sherman Estate v. Donovan*, [2021 SCC 25](#).
19. *Southern Star Developments Ltd v Quest University Canada*, [2020 BCCA 364](#).
20. *Timminco Limited (Re)*, [2012 ONSC 506](#).
21. *U.S. Steel Canada Inc. (Re)*, [2014 ONSC 6145](#).
22. *Walter Energy Canada Holdings, Inc. (Re)*, [2016 BCSC 107](#).

## SCHEDULE B – STATUTES RELIED ON

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

#### Section 11

##### **General power of court**

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.

R.S., 1985, c. C-36, s. 111992, c. 27, s. 901996, c. 6, s. 1671997, c. 12, s. 1242005, c. 47, s. 128

#### Section 36

##### **Restriction on disposition of business assets**

(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.



**Courts of Justice Act, RSO 1990, c C 43**

**Section 137**

**Documents public**

(1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

**Sealing documents**

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

**Court lists public**

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

**Copies**

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

R.S.O. 1990, c. C.43, s. 137.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED  
AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ORIGINAL TRADERS ENERGY LTD. AND 2496750  
ONTARIO INC.

Court File No. CV-23-00693758-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**  
Proceedings commenced in Toronto

**Factum of the Monitor  
(AVO and Ancillary Order)**

**BENNETT JONES LLP**

3400 One First Canadian Place  
P.O. Box 130  
Toronto ON M5X 1A4

**Richard Swan** (#32076A)

Email: [swanr@bennettjones.com](mailto:swanr@bennettjones.com)

**Raj Sahni** (#42942U)

Email: [sahnir@bennettjones.com](mailto:sahnir@bennettjones.com)

**Shaan P. Tolani** (#80323C)

Email: [tolanis@bennettjones.com](mailto:tolanis@bennettjones.com)

**Thomas Gray** (#82473H)

Email: [grayt@bennettjones.com](mailto:grayt@bennettjones.com)

Tel: 416.863.1200

Fax: 416.863.1716

*Lawyers for the Monitor*