SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-11-049737-154

DATE : **March 16, 2018**

IN THE PRESENCE OF: THE HONOURABLE JEAN-FRANÇOIS MICHAUD, J.S.C.

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

9354-9186 QUEBEC INC. (FORMERLY BLUBERI GAMING TECHNOLOGIES INC.)
-and-
9354-9178 QUEBEC INC. (FORMERLY BLUBERI GROUP INC.)
Debtors/Applicants
-and-
ERNST & **YOUNG INC.**
Monitor
-and-
CALLIDUS CAPITAL CORPORATION
Contesting party/Applicant
-and-
INTERNATIONAL GAME TECHNOLOGY
-and-
DELOITTE S.E.N.C.R.L.
-and-
LES AGENCES T.L.S. INC.
-and-
LUC CARIGNAN
-and-
FRANÇOIS VIGNEAULT
-and-
TOMMY HAMEL
-and-

JM 2497

PHILIPPE MILLETIE
-and-
FRANCIS PROULX
-and-
FRANÇOIS PELLETIER
Creditors' Group/Contesting parties/Applicants

IMF BENTHAM LIMITED
- and -
BENTHAM IMF CAPITAL LIMITED
Litigation Funder/Impleaded parties
-and-
SMT HAUTES TECHNOLOGIES
Impleaded party

JUDGMENT
(litigation funding and litigation financing charge - holding of a second creditors' meeting to submit a new plan of arrangement)

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[1] In a context in which the only remaining asset of the Debtors is a claim against its secured lender, Callidus Capital Corporation **(Callidus),** the Court is faced with the following issue: should it authorize the holding of a second creditors' meeting to allow Callidus to submit a new plan of arrangement **(New Plan)** and vote on it or, rather, should it grant the Debtors' Application for litigation funding and a litigation financing charge **(Debtors' Application)** in order to file a lawsuit against Callidus for damages in the range of $200 million?

[2] For the following reasons, the New Plan will not be submitted to the creditors' vote and the Debtors' Application will be granted.

1. CONTEXT[1]

[3] Bluberi Group Inc., Bluberi Gaming Technologies Inc. and Bluberi USA, Inc. (collectively **"Bluberi")** were technology companies specialized in the casino gaming business that operated as a full service manufacturer, distributor, installer and servicer of electronic gaming machines. Bluberi also conceptualized and developed games, gaming machines and management systems for gambling operations. The sole shareholder was Mr. Gérald Duhamel through a family trust.

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[1] For this section, many paragraphs from the Monitor's Fifteenth Report were reproduced with some adjustments having been made.

[4] On November 12, 2015, the Court issued a temporary and limited initial order which was subsequently amended and restated **(Initial Order).** Among other things, the Initial Order established that the Bluberi entities are debtor companies to which the *Companies' Creditors Arrangement Act*[2] **(CCAA)** applies, appointed Ernst & Young Inc. as monitor and granted certain relief to Bluberi, including certain measures of protection from its creditors. Bluberi's principal secured creditor was Callidus from which it had borrowed approximately $86 million.[3]

[5] After various incidents, a sale solicitation process was duly authorized in early February 2017, which led to the sale of Bluberi's assets to Callidus. The assets were sold through an asset purchase agreement **(APA)** entered into with Callidus, 2515443 Ontario Limited (BGT Ill Canada Inc.), and BGT Ill Inc. as purchasers **(Purchasers).** BGT Ill Canada Inc. and BGT Ill Inc. are companies under the control of Callidus. Upon the closing of the transaction, Bluberi's rights, security and interests in the purchased assets were transferred to the Purchasers, along with Bluberi's employees (save for Mr. Duhamel), thus allowing the continuation of Bluberi's commercial operations by the Purchasers.

[6] Almost the entire purchase price was paid by the Purchasers in the form of a credit bid. In other words, the purchase price was settled through a reduction of Callidus' secured claim against Bluberi, except for a portion of $3 million, which Callidus chose to retain. The purchase price is detailed as follows:[4]

> [...]
>
> | | |
> |---|---|
> | Callidus Debt | $135,732,434.00 |
> | Undischarged Portion of the Callidus Debt | ($3,000,000.00) |
> | Amount secured by the Administration Charge | $112,025.00 |
> | Amount secured by the Other Approved Charges | $0 |
> | Priority Claims ($393,480 + $31,999} | $425,479.00 |
> | Reserve | $795,598.00 |
> | Amount paid in respect of the U.S. Vendor Shares | $100.00 |
> | **TOTAL** | $134,065,636 |

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2 **R.S.C., 1985, c.C-36.**

3 Petition for the Issuance of an Initial Order dated November 11, 2015, at para. 12.

4 Statement of Purchase Price Adjustment dated February 6, 2017 (Exhibit P-2).

[7] At that time, Bluberi Group Inc. changed its name to 9354-9178 Québec Inc. **(Former BGI)** and Bluberi Gaming Technologies Inc. changed its name to 9354-9186 Québec Inc. **(Former BGTI)** (collectively **Former Bluberi** or the **Debtors).**

[8] ln light of the foregoing, the Purchasers now own and control Bluberi USA, Inc., further to a share purchase, but the entities that make up Former Bluberi remain intact and Mr. Duhamel still acts in his capacity of director and officer of these entities. He is still the sole shareholder of Former Bluberi through his family trust.

[9] A certain class of assets and rights, which were defined in the APA as "excluded assets", did not vest in the Purchasers. These include potential claims that the Debtors have indicated their intention to pursue. The primary claim is against Callidus, due to its alleged involvement in Bluberi's financial difficulties.[5] These claims are the Debtors' only remaining assets **(Retained Claims).**

[10) The lawsuit that the Debtors would like to initiate against Callidus is in the range of $200 million. The Debtors intend to use the proceeds that they recover from the Retained Claims to fund a plan of arrangement with their creditors.

[11] The Initial Order was extended several times to allow the Debtors to obtain and complete their financing arrangements. On September 11, 2017, they filed an application for the approval of an interim financing which was scheduled to be heard on September 19th. However, the day before, without any notice, Callidus filed a plan of arrangement, in which it offered a distribution to the unsecured creditors of the Debtors in exchange for broad releases, one of which would release Callidus itself from any claim by the Debtors. ln reaction to that unexpected development, the Debtors decided to file their own plan of arrangement.

[12] At a hearing held on October 5, 2017, the Court issued an order to establish a procedure by which Callidus and the Debtors were each required to remit certain funds to the Monitor in trust no later than November 3rd, in order to cover the costs associated with a claims process and the holding of a creditors' meeting. The party that did not remit the amounts would be barred from submitting its plan to a vote.

[13] Callidus provided the funding required while the Debtors elected not to spend their financial resources in pursuing the filing of their own plan of arrangement. As a result, only Callidus' plan was submitted to the creditors for a vote.

[14] On December 5th, Callidus filed an amended plan of arrangement, in which it increased the distribution to the creditors from $2 million to $2.5 million **(Callidus' Plan).**

[15] Following a claims process, that was put in place by the Monitor, the creditors were called upon to vote on Callidus' Plan on December 15th. The Callidus' Plan was

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[5] Petition for the Issuance of an Initial Order dated November 11, 2015, at paras. 149 ss.

not accepted by the voting creditors due to the tact that only 59.22% in value of the claims voted in favor which was below the 66 2/3% threshold required under the CCAA. However, 92 creditors out of 100 voted in favor of Callidus' Plan:[6]

	Voting creditors	
	Number of claims	**Amount of the claims**
Votes in favor	92	$3,450,882.00
Votes against	8	$2,375,913.00
Total votes	100	$5,826,795.00
Votes in favor	92.00%	59.22%

[16] The majority of two thirds in value was not attained since SMT Hautes Technologies **(SMT),** a creditor with a claim representing 36.7% in value of the voting claims, voted against Callidus Plan.

[17] Prior to the creditors' meeting, Callidus filed a proof of claim as a secured creditor, in an amount of $3 million. ln its capacity as a secured creditor, Callidus did not cast a vote, nor did it seek to amend its proof of claim in order to attempt to cast a vote at that meeting.

[18] No appeal was filed with respect to any of the decisions made by the Monitor during the creditors' meeting. Therefore, the results of the votes are final.

[19] On February 6, 2018, the Debtors' Application was filed seeking:

an extension of the Stay Period until February 15, 2019;

- the approval of a litigation funding arrangement **(LFA)** offered by IMF Bentham Limited or its Canadian subsidiary Bentham IMF Capital Limited **(Litigation Funder);**

- the approval of a retainer letter between the Debtors, Mr. Duhamel (sole shareholder of Debtors through his family trust) and Dentons Canada LLP **(Dentons);**

the creation of a super-priority charge of $20 million over the Retained Claims **(Litigation Financing Charge),** subject to the administration charge in the Initial Order in an amount of $250,000, to guarantee the obligations owed to the Litigation Funder and to Dentons. ln the latter case, the charge is

6 Exhibit P-1.

meant to guarantee a deferred and contingent portion of Dentons' fees in carrying out the contemplated litigation proceedings.

[20] The purpose of the LFA is to put in place the funding required by the Debtors to pursue the Retained Claims that were explicitly carved out of the APA. The Litigation Funder will only be entitled to a return on its investment to the extent that the litigation proceedings yield proceeds, either through a settlement or a judgment. The same applies to Dentons' fees since a portion of them will also be paid on a contingency basis.

[21] An un-redacted copy of the LFA was remitted to the Monitor by the Debtors and filed under confidential seal with the Court. Although the Monitor did not participate in the negotiation of the terms of the LFA, it was provided with an opportunity to review same and comment on it prior to its execution by the parties.

[22] On February 12th, Callidus filed a Motion for an Order for the Convening, Holding and Conduct of a Creditors' Meeting and Extension of the Stay Period **(Callidus' Application)** in order to submit the New Plan, the terms of which appear substantially similar to the Callidus Plan, save for an increase of $250,000. Callidus intends to amend its proof of claim in order to vote as an unsecured creditor, which would most likely mean that the New Plan would receive the two thirds support required under the CCAA and that Callidus would obtain a release from Debtors for their claim against it.

[23] A group of nine creditors including six ex-employees of the Debtors **(Creditors' Group)** supports the holding a second creditors' meeting in order to vote on the New Plan or any other alternative plan. They contested the Debtors' Application on the ground that this alternative should be submitted to the creditors' vote.

2. THE NEW PLAN

[24] The New Plan provides for a distribution of $2,880,000 to the creditors in the following manner:

(a) payment in full of each and every priority claims although no such priority claim exists;

(b) payment in full of the proven claims of the former employees of Bluberi (to the exclusion of any active employees with the Purchasers);

(c) payment of the first three thousand dollars ($3,000) of each proven claim, excluding the proven claims of the former employees of Bluberi (to the exclusion of any active employees with the Purchasers); and

(d) payment of the remainder of the settlement funds to the creditors, excluding those mentioned in sub-paragraph (a) and (b), on a *pro rata* basis among them.

[25] Based on the tabulation of the Monitor, Callidus estimated that the creditors would be paid of their proven claim as follows:

Creditors Description	Number	Claim Amount	Proposed Dividend	Recovery
Creditors above $200K (excl. Employees)	5	$4,944,742	$1,726,987	35%
Creditors between $3,001 and $200K (excl. Employees)	20	$384,500	$172,691	Between 39% and 99%
Creditors below $3K (excl. Employees)	22	$29,798	$29,798	100%
Former employees, active in New Bluberi	11	$107,891	$107,891	100%
Former employees, inactive in New Bluberi	80	$842,632	$842,632	100%
Total	138	$6,309,563	$2,880,000	46%

[26] Section 3.1 of the New Plan stipulates that all creditors shall constitute a single class and shall vote as a single class. It also provides for the reimbursement of the legal fees and costs to be incurred by the Creditors' Group in connection with the CCAA proceedings, up to a maximum amount of $50,000 plus applicable taxes, subject to the implementation of the New Plan.

2.1. CALLIDUS' RIGHT TO VOTE AT THE CREDITORS' MEETING

[27] The APA stipulates that Callidus would remain the holder of a claim in the amount of $3 million against the Debtors following the closing:

> **5.2 Purchase Price Adjustment**
>
> If for any reason whatsoever Callidus' Debt is reduced by final order of the Court, the Purchase Price will automatically be reduced by the amount of such Callidus Debt reduction without any reduction or effect on the Undischarged Portion of the Callidus Debt and without affecting the validity of the sale and purchase of the Purchased Assets envisaged hereby.
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> [...]
>
> **(xx) "Undischarged Portion of the Callidus Debt"** means an amount equal to $3,000,000[7].

[28] However, the Debtors argue that Callidus has no remaining claim and is no longer a creditor since it elected to include in its alleged claim for the purposes of the APA, expenses which it is not entitled to demand from the Debtors. These expenses

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7 Exhibit C-1.

represent legal fees and other costs associated with the transfer of Bluberi's gaming licenses. Therefore, the Undischarged Portion of the Callidus Debt, as defined in the APA, would have been extinguished and should not be considered.

[29] The Court does not accept the Debtors' argument.

[30] Article 5.2 of the APA specifically provides that the Undischarged Portion of the Callidus Debt cannot be reduced if there is a reduction of the purchase price "for any reason whatsoever". It is worth noting that the wording of the APA was approved by the Court further to a Vesting Order.[8] Therefore, Callidus is a creditor of the Debtors in an amount of $3 million.

[31] However, for the reasons that follow, Callidus should not be entitled to vote on its own plan, either as a secured or unsecured creditor.

[32] While it is true that creditors should be entitled to vote as they please,[9] subject to exceptions set out in the statutes,[10] it is also well established that a creditor's vote should not serve an improper purpose and give rise to a substantial injustice.

[33] In the matter of *Laserworks Computer Services,*[11] the Nova Scotia Court of Appeal confirmed, in the context of a proposal under the *Bankruptcy and Insolvency* Act[12] **(BIA),** that the Registrar had the discretion to disallow the vote of a creditor which had voted its claim for an improper purpose:

> [50] Motive or purpose is not relevant to objections to proofs of claim based on statutory exceptions under the BIA. These are established in several sections, including s. 109(1), persons who had not duly proved and lodged a claim; s. 54(3), a relative of the debtor (who may vote against but not for a proposal); 109(4), the debtor as proxy for a creditor; s.109(6), a creditor who did not deal with the debtor at arm's length (with exceptions); s. 110(1), a person with a claim acquired after the bankruptcy unless the entire claim is acquired; s. 111, a creditor with a claim on or secured by a current bill of exchange (subject to conditions); s. 112, a creditor holding security (subject to conditions); and s. 113(2), a trustee as proxy (subject to restrictions). See also s. 109, the trustee as creditor.

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8 Approval and Vesting Order and Order Extending the Stay of Proceedings dated June 23, 2016.

9 *Bédard Louis inc.* c. *Teac Canada Ltd.,* [1992] R.L. 640, 1991 CanIII 3533 (QC C.A.), at para. 9; *Meublerie André Viger inc.* c. *Groupe Cantrex inc.,* [1992] R.J.Q. 1462, 1992 CanIII 2899 (QC C.A.), at paras. 39 and 40; *Toitures JMD Toulouse inc. (Proposition de),* 2008 QCCS 3697, at para. 37.

10 As example, *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3, ss. 54(3), 109(4), 109(6), 110(1), 111, 112 and 113(2); CCAA, *supra* note 2, s. 22(3).

11 *Laserworks Computer Services Inc. (Bankruptcy), Re,* (1998). 165 N.S.R. (2d) 296, 1998 CanIII 2550 (NS C.A.) ***[Laserworks].***

12 R.S.C., 1985, c. B-3.

> [51] (It will be noted that many of these exceptions arise from circumstances that could give rise to conflict of interest. This will be considered further under the fourth ground of appeal.)
>
> [52] However the statutory exceptions are not a code exhausting the forms in which substantial injustice may manifest itself. Objections will be sustained under s. 108(3) if they result from a crime or a tort against the debtor or a creditor. In the present appeal, and in the authorities cited by the Registrar, the substantial injustice assumes the quise of tortious behavior, to which motive is relevant. In the s. 108(3) context the commonest torts, or instances of substantial injustice arising from tortious behavior, relate to abuse of process and fraud. However conspiracy to harm was also found in *Dimples Diapers.*
>
> [53] Tortious or tort-like behavior falling short of a fully developed tort susceptible of formal proof or definition can nevertheless result in substantial injustice,particularly for persons at a point so vulnerable they must resort to insolvency protection. (See *Shepard.)* In my view that is why Parliament chose the language it did in s. 187(9): to create a discretionary jurisdiction in courts that is not fettered, for example, by the high standards reguired for establishing such torts as abuse of process in other contexts. What remains to be considered is the threshold level of the substantial injustice which will result in remedial action by the court.
>
> (ii) The Authorities
>
> [54] The four cases cited by the Registrar establish that the threshold is crossed when the BIA is used for an improper purpose. An improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency leqislation was enacted by Parliament.
>
> (emphasis added)

[34] In that case, a competitor, which was not a creditor of the debtor, had acquired claims in order to vote against the debtor's proposal. The Nova Scotia Court of Appeal concluded that the competitor's behavior was contrary to the purpose of the BIA:

> [65] It is undeniable that the appellant caused injury to the debtor not negligently but deliberately. The debtor made its proposal to avoid bankruptcy; bankruptcy therefore must have been seen by Laserworks as a more injurious alternative than acceptance of the proposal by the creditors. Laserworks had the heavy burden of persuading its creditors that their best interests lay in approving the proposal; it did not have the impossible burden of dissuading a financially stronger competitor bent on using the provisions of the **BIA** to destroy it as a competitor. The appellant derailed the proposal procedure to force the debtor into bankruptcy. Using bankruptcy to cause injury, thereby eliminating the debtor as an entity capable of competing in the marketplace, is abusive of the purpose of the BIA. It does not qualify as "the orderly and fair distribution of (its) property." Annihilation of an individual business or a company may be an unfortunate consequence of a bankruptcy, an unavoidable side-effect, but it is not the

> purpose of the **BIA.** Use of the **Act** to accomplish such an objective is in my view so abusive of the purpose of the legislation as to engage the supervisory jurisdiction of the courts under s. 187(9). It is a substantial injustice to be remedied.[13]
>
> (emphasis added)

[35] These principles were applied in subsequent cases.[14]

[36] The parties submitted only one case where a Court was asked to disallow the vote of a creditor under the CCAA: *Blackburn Developments Ltd. (Re).*[15] In that matter, one party, Streetwise, which was interested in the restructuring of the debtor, Blackburn, acquired claims from creditors who had executed letters of intent in favour of Streetwise. Streetwise thus had sufficient claims to defeat the restructuring plan put forward by Pinnacle, another interested party. The Supreme Court of British Columbia followed the principles set forth in *Laserworks:*

> [44] As I have already stated, 1 think that the policy approach taken in *Laserworks* is preferable to that of the US authorities. As the above quoted passages make clear, the Court in *Laserworks* recognized that creditors are entitled to vote their claims in what they as creditors perceived to be their own economic interests as long as their actions are not unlawful or do not result in a substantial injustice.
>
> [45] 1 think this approach is preferable because it recognizes that the effect of such an order is to deprive the assignee of a statutory right and to subject it to having its contractual rights compromised against its will. In my view such a result would only be appropriate in the clearest of cases.[16]
>
> (emphasis added)

[37] However, the Court did not find that Streetwise had acted in bad faith but rather that there existed a difference of opinion as to the best course to follow in order to maximize recovery for the creditors:

> [50] After hearing the submissions of all parties and considering the extensive evidence before me I have concluded that in this case there was a genuine difference of opinion about the best course to follow ta maximize recovery for the unsecured creditors of Blackburn. The Monitor was clearly of the view that it was futile to proceed with a restructuring without the support of Landus, which effectively had a blocking position given the extent of unsecured debt that it held. 1 accept that Streetwise and the directors of Blackburn held the genuine belief

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13 *Laserworks, supra* note 11.

14 *West Coast Logistics Ltd. (Re),* 2017 BCSC 1503; aff'd 2017 BCSC 1970; *Triage T.R./.M. Ltée. (Syndic de)* (2003), 43 C.B.R. (4th) 236, 2003 Canlll 807 (QC C.S.).

15 2011 BCSC 1671.

16 *Ibid.*

> that the Pinnacle Plan unfairly favoured Landus and did not provide a fair dividend to unsecured creditors.
>
> [51] In this case I cannot find that the predominate purpose of Streetwise's negative vote was to acquire control of Blackburn and hence its tax attributes. Mr. Sethi has denied that that was the predominate purpose and the surrounding circumstances do not lead to that conclusion. In addition, the liquidation analysis prepared by the Monitor does not lead to the conclusion that creditors will be worse off under liquidation.[17]
>
> (emphasis added)

[38] Is Callidus using the CCAA proceedings for an improper purpose? The Court believes sa.

[39] When the CCAA proceedings were launched, Callidus vigorously contested the issuance of the Initial Order alleging, among other things, that Bluberi was not cash flow insolvent. This submission was in complete contradiction with the position taken by Callidus in previous communications:

> [17] In an email sent to Mr. Duhamel on October 26, 2015, in the context of negotiations between the parties, Mr. Craig Boyer wrote on behalf of Callidus:
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> > To be even more clear Bluberi is insolvent with judgments likely to be filed today which will result in the required reporting to the various licensing authorities. [Exhibit C-16, at page 2]
>
> [18] Also, in the November 7 letter, Callidus stated:
>
> > **3.** A Material Adverse Change has occurred in the financial condition of the Debtor in that it has not paid its day-to-day obligations as they become due which impair its ability to perform its obligations to Callidus (per Section 32(0) of the Credit Agreement); [Exhibit C-18, at page 2.] [18]

[40] It is obvious that Callidus contested the appropriateness of the CCAA proceedings only to prevent Bluberi from pursuing its claim in damages against it. At that time, it was already clear that Bluberi management strongly believed that Callidus had deliberately consumed the equity value of Bluberi with a view to ultimately owning the business.[19] For the same reasons, Callidus also opposed to the renewal of the Initial Order on December 15, 2015.[20]

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17 *Ibid.*

18 *Bluberi Gaming Technologies Inc./Bluberi jeux et technologies inc. (Arrangement relatif à),* 2015 QCCS 5373.

19 Petition for the Issuance of an Initial Order dated November 11, 2015, at paras. 149-178,

20 Minutes of the hearing of December 15, 2015.

[41] Moreover, the Court finds that Callidus' conduct, in the course of the CCAA proceedings, lacked transparency. In particular, Callidus allowed the Monitor and the Debtors to work on a valuation of the business and then the appointment of a chief restructuring officer, only to eventually adopt a different position before the Court.[21] It seems that Callidus' strategy was to exhaust Mr. Duhamel financially.

[42] Thereafter, on May 11, 2017, Callidus contested another extension of the Initial Order submitting that the CCAA process was not appropriate for the continuance of this matter since it concerned mainly a dispute between Mr. Duhamel and itself. Callidus' lawyers suggested that a proposal under the BIA would allow the creditors to vote and take position.[22] The Court then concluded that "Callidus' opposition to the Application [extension of the Initial Order] appears to be motivated more by its interest in delaying the process, especially since it will be the defendant party under the most important claim of the Bluberi Retained Claims."[23] Also, the BIA would probably generate nothing for the creditors.

[43] On September 11, 2017, the Debtors filed an Application for the issuance of an order extending the Stay of proceedings and authorizing an interim financing presentable on September 19th. This Application sought to allow the Debtors to pursue their claim against Callidus. At 3:00 p.m. on the day prior to the scheduled presentation, Callidus filed an Application to be authorized to submit its own plan of arrangement to the creditors. This was the very first time Callidus had informed the Debtors, the Monitor or the Court that it intended to file a plan. Callidus' Plan explicitly provided for unidirectional releases, meaning that Callidus would obtain a full release from the Debtors via the creditors vote but neither the Debtors nor the guarantor, Mr. Duhamel, would be released.

[44] Once again, it is clear that Callidus' actions were solely motivated by the litigation with the Debtors and Mr. Duhamel. Callidus owes nothing to the creditors and never before expressed any interest in their situation. Its offer to pay their claims, in total (ex-employees) or in part, serves only to allow it to obtain broad releases [24] which it would otherwise not be entitled to obtain from the Debtors.[25] In other words, Callidus is buying releases from creditors who have no interest in the awarding of such releases.

[45] Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.

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21 *Ibid.*

22 Representations of Mtre Denis St-Onge, May 11, 2017, at 12:19 p.m.

23 Judgment dated May 25, 2017, at para. 8.

24 Exhibit R-2, at clause 5.1.

25 *GE Canada Equipment Financing GP* c. *Tekdata Group Inc.,* 2014 QCCA 745, at para. 6.

[46] As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.

[47] It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. Under the present circumstances, this approach is both unfair and unreasonable.

[48] Callidus' behavior is contrary to the "requirements of appropriateness, good faith, and due diligence [that] are baseline considerations that a court should always bear in mind when exercising *CCAA* authority." [26] In short, the Court finds that Callidus intends to use its vote for an improper purpose and that it should not be allowed to do so.

[49] Callidus argued that a secured creditor can submit a plan[27] and that it is not uncommon that a plan contains broad releases for the benefit of a third party.[28] It relied on the matter of *Canadian Airlines Corp. (Re),*[29] in which Air Canada, a competitor of Canadian Airlines, was allowed to vote on its own plan. Some distinctions need to be made since the circumstances were totally different. Air Canada's plan did not solely seek to obtain releases. It aimed at preserving the business and maintaining 16,000 jobs as well as the relationship with trade creditors and suppliers.[30] The Court of Queen's Bench of Alberta did not find that Air Canada, which would have invested up to $3 billion to complete the restructuring, [31] was acting in bad faith.[32] The opposing parties represented less than 15% of the total affected unsecured creditor pool.[33] The Court concluded that Air Canada's plan was the last and only chance to save this national and international airline business.[34]

[50] The Monitor and Debtors argue as well that section 22(3) of the CCAA has been adopted since then and that this addition should prevent a creditor, like Callidus, from voting on its own plan:

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26 *Century Services Inc. v. Canada (Procureur général),* 2010 CSC 60, at para. 70; Janis P. SARRA, *Rescue! The Compagnies' Creditors Arrangement Act,* 2nd edition, Toronto, Thomson Reuters, 2013, at p. 15.

27 *HSBC Bank Canada* v. *Bear Mountain Master Partnership,* 2010 BCSC 957; *1078385 Ontario Ltd., Re,* (2004), 16 C.B.R. (5th) 152, 2004 Canlll 55041 (Ont. C.A.); *Anvi/ Range Mining Corp., (Re),* [2001] O.J. No. 1453 (S.C.}, 2001 Canlll 28449 (Ont S.C.).

28 *Metca/fe & Mansfield Alternative Investments JI Corp., (Re),* 2008 ONCA 587; *Boutiques* San *Francisco Inc. (Faillite), Re,* 2004 Canlll 4145 (QC C.S.); *Montréal, Maine & Atlantique Canada Cie (Montreal, Maine & Atlantic Canada Co.) (MMA) (Arrangement relatif à),* 2014 QCCS 737.

29 2000 ABQB 442.

30 *Ibid,* at para. 183.

31 *Ibid,* at para. 166.

32 *Ibid,* at para. 106.

33 *Ibid,* at para. 109.

34 *Ibid,* at para. 170.

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

[51] This modification to the CCAA was made further to the *Report of the Standing Senate Committee on Banking, Trade and Commerce* that noted that the CCAA provided very limited guidance as to how the Courts should exercise their discretion in approving a plan:

> **O. Plan Approvals**
>
> In general, reliance upon "majority rule" as a voting mechanism can be problematic, since this rule can be abused by related parties or by parties who derive collateral benefits from the decisions of the group. In recognition of this potential problem, the BIA and the CCAA give the Court discretion to refuse to approve a restructuring plan or proposal even if it has received approval by a majority of the creditors. The Acts, however, provide very limited guidance about the manner in which the Court is to exercise that discretion.
>
> While the BIA provides guidance on procedures to follow in order ta secure approval of a restructuring plan, virtually no guidance in this regard is provided in the CCAA.
>
> The Joint Task Force on Business lnsolvency Law Reform informed the Committee that the BIA's provision regarding the vote of a creditor who is related to the debtor should be extended to the CCAA, and that minority creditors should be protected through a requirement "under bath the BIA and the CCAA that... dissenting minority creditors will not be prejudiced by the reorganization plan as compared to a liquidation."
>
> As a matter of fairness and predictability, and recognizing the potential for abuse of majority voting mechanisms, the Committee believes that the Court should continue to have discretion, under bath the BIA and the CCM, to not approve a restructuring plan even where the plan has the support of the majority of voting creditors. To assist the Court in determining whether it should exercise this discretion, we feel it would be useful to require the trustee or monitor to provide his or her opinion about whether dissenting creditors are likely to receive less under the plan than they would receive in a liquidation. We also feel that, in some cases, the prospect of successful reorganization is enhanced where the equity of the organization is reorganized.
>
> **The *Bankruptcy and lnsolvency Act* and the *Companies' Creditors Arrangement Act* be amended to require a trustee/monitor to provide, in connection with a request for Court approval of a reorganization plan, an opinion that, as a group, each of secured creditors and unsecured creditors are likely to receive no less under the plan than it would receive in a liquidation. Moreover, Section 54(3) of the *Bankruptcv and /nsolvencv Act* regarding related parties should be incorporated in the *Companies' Creditors Arrangement Act.* Finally, the Acts should be amended to provide the Court approving a reorganization plan with the power to approve a**

> **restructuring of the equity of the debtor, with or without shareholder approval.** [35]
>
> (emphasis added)

[52] Section 54(3) of the BIA is similar to section 22(3) of the CCM:

> (3) **[Related creditor)** A creditor who is related to the debtor may vote against but not for the acceptance of the proposai.

[53] However, under the BIA, only the debtor company is allowed to make a proposal while under the **CCM,** any party can submit a plan. Was it the intent of the Legislator to prevent the vote of a creditor, not only in favour of a debtor's plan but also in favour of its own?

[54] The parties have found no precedent that addresses this question.

[55] Since the Court already determined that Callidus should not be entitled to vote, it is not necessary to establish such a rule. That said, the Court would not have been inclined to conclude that the legislator intended to prevent a creditor to vote on its own plan. If that was its intent, it could easily have drafted section 22 accordingly. The Court is rather of the view that the preclusion of a creditor to vote, on its own plan or someone else's, should be ordered only if that creditor is acting contrary to the purpose of the **CCAA.**

[56] For instance, to allow Callidus to vote on its own plan under the present circumstances would amount to a substantial injustice.

2.2. THE ADVISABILITY OF HOLDING A SECOND CREDITORS' MEETING

[57] If Callidus is not allowed to vote, should there still be a second creditors' meeting to hold a vote on the New Plan? Since the unsecured creditor, SMT, has unequivocally stated that it would vote against it, the answer is no. It seems that SMT considers Callidus to be in part responsible for its financial lasses. Since SMT holds 36.7% of the overall creditors' vote, the New Plan cannot meet the requirement of 66 2/3% of the **CCM.** Therefore, the holding of a second creditors meeting would be useless.

[58] The Court is well aware that 92 creditors (most of them are ex-employees who would receive 100% of their claim) out of 100 voted in favour of the Callidus' Plan in December 2017 and would likely vote in favour of the New Plan. However, since the requirement of 66 2/3% has no chance of being met, it would only be a waste of money to have the creditors meet again. The Court has discretion not to order a meeting of

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3 [5] *Debtors and creditors sharing the burden:* a *review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act: report of the Standing Senate Committee on Banking, Trade and Commerce* (November 2003).

creditors when the proposed plan has no reasonable chance of success[36] but it does not have the authority to impose a plan or sanction one that has not been accepted by the creditors in accordance with the requirements of the CCAA.

[59] Callidus' Application, supported by the Creditors' Group, will be dismissed in spite of their lawyers' best efforts.

3. DEBTORS' APPLICATION

[60] The lawsuit that the Debtors intend to file against Callidus does not appear to be frivolous as appears from the allegations set out in the Debtors' Application:

> 86. The *théorie de la cause,* which the Company intends to put forward as a cornerstone of its claims against Callidus, was reviewed diligently by the Litigation Funder and its advisors and counsel.
>
> 87. Applicants have a serious and substantial claim against Callidus and possibly others. The claim is predicated on a number of faulty actions and omissions under Quebec law, many of which have already been raised, evoked or indeed experienced in the context of the present proceedings, including in the context of the *Motion for the Issuance of an Initial Order* and in the Applicants' contestation of Callidus' failed attempts at appointing a receiver during the CCAA process. These include abuse of rights, bad faith, unlawful interference in contracts, fraudulent misrepresentation and concealment (failure to inform), breach of fiduciary duties and negligent conduct.
>
> 88. As a fund predicated principally on a "loan to own" strategy, purporting to provide asset based or bridge financing, the Applicants intend to allege that Callidus and others have committed numerous and faulty actions and omissions, including:
>
> (a) Misrepresenting to the Company and its principals the nature and extent of the role to be played by Callidus as a financier of Bluberi as a company embarking on a major transition from gaming content supplier to full service manufacturer. Callidus induced Bluberi by promising to support the businesses and work with the owners so that they could achieve the success they strive for. On Callidus' website, Callidus claims that unlike lending institutions who demand a long list of covenants and make credit decision based on cash flow and projections, Callidus credit facilities have few if any covenants and are based on the value of the borrower's assets, its enterprise value and borrowing needs.
>
> (b) Unilateral changes to deal terms: After having reeled-in the Company, having ensured that it was too heavily invested in Callidus or devoid of

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36 J. P. SARRA, *supra* note 26, at p. 524.

time or options to properly consider alternatives to Callidus' financing, after having initiated numerous preliminary and time consuming steps (including letters of intents, submitting deposits, due diligence on the part of Callidus, etc.}, Callidus imposed last minute changes to deal terms, including unexpected rate increases, fee increases, and demands on management. Often, when additional funds were required, or some form of delay was required, Callidus took advantage of the opportunity to request yet more concessions, ownership or control.

(c) Vendor management: Callidus deliberately allowed relationships between Bluberi and its vendors/suppliers to degenerate, including to the point of generating lawsuits against Bluberi. It used this state of complete depreciation of confidence to position itself as the only stakeholder in a position to save the company in the context of restructuring proceedings. Callidus refused to fund legal defences, to pay lawyers, brokers, suppliers in the supply chain, and instructed Bluberi to ignore claims from various suppliers.

(d) Removal of principals and appointment of new management Callidus imposed its strategy of imposing third party consultants and executives into Bluberi as a means of controlling the operations and planning for its eventual demise as part of a takeover strategy.

(e) Through the imposition and appointment of a COQ who took effective control of the Company, and of the reconstitution of the Board of directors of Bluberi, Callidus was able to exert undue control over the company and dictate which suppliers would get paid and which suppliers would be ignored during and prior to any restructuring or bankruptcy process.

(f) Valuations: Callidus ordered valuation form a third party to suit its own needs as it sought to purport to invoke defaults pertaining to borrowing base ratios.

(g) Provoking continuous defaults: Callidus would withhold at the most inopportune times (payroll deadlines, etc.), even when there was availability under the credit facility agreements. It would advance moneys and provoke overdrafts all the time, based on expected credit committee approval.

(h) Decision making in a Callidus credit committee: As this Court was able to experience first-hand, as a means of delaying decision making, shielding various individuals from pressure or negotiations with Bluberi, or as a pretext for justifying sudden about-faces, Callidus often invoked the existence of a so-called "credit committee" whenever a material decision needed to be made regarding the contractual relationship or any specific aspect of operations or management, which Callidus controlled through the blocked account. In reality, as will be demonstrated at the trial, it has become evident that there is no such

> thing as a credit committee, but rather Mr. Newton Glassman, virtually alone, controls all material decisions taken in respect of various Callidus' clients;
>
> 89. Through its strategy, Callidus consumed the equity value of the Company's business through debt and fees with a view to ultimately owning the company.
>
> 90. The position of Bluberi stands out as a unique exception among its peers in that it is, to the Applicants' knowledge, the only example of a company having been brought to its demises as a result of the alleged actions and omissions of Callidus, yet with its corporate structure remaining intact for the purposes of maintaining legal standing against Callidus in the context of judicial proceedings.

[61] Some of these allegations already formed part of the Debors' Petition for the Issuance of an Initial Order.[37]

[62] Obviously, at this stage, it is not possible to opine on the likelihood of success of the Debtors' claim. However, the steps that they have taken so far and the extent of the arguments they have submitted, appear to be serious.

[63] While it may not be common that the debtor's only substantial asset is a claim, it is not the first time either. In *Crystallex,*[38] the Ontario Court of Appeal confirmed the decision of the motions judge who had authorized the financing for the continuance of a litigation. Also, in *Strateco Ressources Inc.,*[39] the Quebec Superior Court approved a litigation funding under similar circumstances.

[64] The Monitor has confirmed that the Debtors have dedicated time, effort and resources towards the implementation of their realization strategy on the Retained Claims. In his report, the Monitor states that he believes that:

> 49. [...]
>
> (a) The LFA was negotiated at arm's length with the Litigation Funder;
>
> (b) The Litigation Funder is a reputable lender with a proven track-record in the emerging field of litigation funding; and
>
> (c) The budget to be funded by the LFA to carry out the contemplated litigation appears realistic in light of the nature of the case and anticipated appeals.[40]

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37 Petition for the Issuance of an Initial Order dated November 11, 2015, at paras. 149-178.

38 *Crystallex (Re),* 2012 ONCA 404 **[Crystallex].**

39 *Strateco Resources Inc./Ressources Strateco inc. (Arrangement relatif à)* (October 23, 2015), Montreal 500-11-048908-152, (S.C.), J. Danielle Turcotte **[Strateco].**

40 Fifteenth Report of the Monitor dated February 14, 2018.

[65] The Monitor supports the Debtors' Application on the basis that it is the only option that may result in recovery for the creditors:

> 53. The arrangement contemplated under the LFA appears comparable to these precedents. In addition, contrary to certain arrangements structured as financings (with the lender earning fees and an interest rate in addition to a portion of the litigation award), the Litigation Funder's return under the LFA is limited to the proceeds of the award.
>
> 54. In light of the foregoing, prior to the filing of the Funding Application, the Monitor confirmed to the Debtors and to the Litigation Funder that it would support the Funding Application.
>
> 55. The Monitor's support in that regard was premised, in part, on the fact that the implementation of the LFA and the prosecution of the Retained Claims remained the only prospect that could potentially allow any meaningful recovery for the creditors of Former Bluberi.[41]

3.1. SHOULD THE LITIGATION FINANCING BE ACCOMPANIED BY A PLAN?

[66] Callidus took the position that the Debtors' Application should be dismissed since it does not involve an arrangement or comprise with its creditors. In support of its position, it relies on the matter of *Cliff Over Mapple Bay,* where the Court of Appeal of British Columbia wrote:

> [37] The failure of the chambers judge to consider the fundamental purpose of the ***CCAA*** and his error in extending the stay also infects his exercise of discretion in authorizing the DIP financing. If a stay under the ***CCAA*** should not be extended because the debtor company is not proposing an arrangement or compromise with its creditors, it follows that DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors. It also follows that expanded powers should not have been given to the Monitor.
>
> [38] 1 wish to add that it was open, and continues to be open, to the Debtor Company to propose to its creditors an arrangement or compromise along the lines of the restructuring plan described in paragraph 47 of the petition, although it may be a challenge to make such a plan attractive to its creditors. The creditors could then vote on such an arrangement or compromise which would involve, on their part, the concession that their rights would remain frozen while the Debtor Company carried out its restructuring. What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The ***CCAA*** was not intended, in my view. to accommodate a non-consensual stay of creditors' rights while a debtor company

41 *Ibid.*

> attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote. [42]
>
> (emphasis added)

[67] That decision was distinguished in *Crystal/ex* in the following manner:

> [89] 1 agree with the supervising judge that this case can be distinguished from *Cliffs Over Maple Bay,* which turned on the court's finding that the debtor did not intend to negotiate a plan with its creditors.
>
> [90] While Mr. Fung initially indicated that Crystallex's plan was to stay creditors' claims until the arbitration was settled or realized, his more recent evidence was that approval of the Tenor DIP Loan does not preclude further discussions about a plan with the creditors. In submissions before the supervising judge, and again before this court, counsel for Crystallex reiterated that Crystallex intended to exit from CCAA protection as soon as a plan was negotiated with the creditors and approved, and that Crystallex intended to negotiate a plan by the expiry of the stay on July 30, 2012. The supervising judge found that Crystallex intended to negotiate a plan with its creditors. There is some basis in the record for such a conclusion.[43]
>
> (emphasis added)

[68] For similar reasons, the Court does not accept Callidus' argument. The Debtors intend to submit a plan:

> 99. The relief sought herein is essential in order to enable the Company to finalize the exploration, analysis and implementation of its plan, including the preparation and filing of legal proceedings, the whole with a view towards achieving maximum realization of its assets for the benefit of all stakeholders of the Company, which can only be to the advantage of its creditors.[44]

[69] While it is true that the Debtors did not pursue the option of filing a plan during the fall of 2017 due to limited financial resources, the fact remains that litigation funding is now the only avenue that can potentially allow for any meaningful recovery for the creditors. This result is in line with the purpose of the CCAA which is the protection of the creditors' interests.[45]

3.2. NECESSITY TO SUBMIT DEBTORS' APPLICATION TO THE CREDITORS' VOTE

(70] Callidus and the Creditors' Group pleaded that, in any event, the alternative proposed by the Debtors should be submitted to a vote of the creditors.

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42 *Cliffs Over Maple Bay Investments Ltd.* v. *Fisgard Capital Corp.,* 2008 BCCA 327. See also *Medical Intelligence Techno-logies inc. (Arrangement relatif à),* 2009 QCCS 2725, at para. 39; *Worldspan Marine Inc. (Re).* 2011 BCSC 1758, at para. 21.

43 *Crystal/ex, supra* note 38.

44 Debtors' Application.

45 *Lehndorff General Partner Ltd. (Re),* [1993] O.J. No. 14, 17 C.B.R. (3d) 24 (S.C.J.), at p. 11.

[71] The Ontario Court of Appeal also set aside that argument in *Crystallex:*

> [92] The supervising judge rejected the argument that the Tenor DIP Lean was a plan of arrangement or compromise and therefore required the approval of the creditors. He held, at para. 50 of the DIP Financing Reasons:
>
> > A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.
>
> [93] I agree. While the approval of the Tenor DIP Lean affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. In this case it was within the discretion of the supervising judge to approve the Tenor DIP Lean. [46]
>
> (emphasis added)

[72) Considering that the LFA does not constitute a plan and that the creditors are not losing any rights, the holding of a creditors meeting is not required. Taking into consideration that the costs associated with such a meeting are in excess of $200,000, it is certainly not appropriate to hold one. Moreover, the creditors will not be surprised by the financing of a litigation against Callidus since this avenue was discussed at the creditors' meeting and has been referred to many times in the Monitor's reports posted on his website.[47]

[73] As previously mentioned, without proceeding with the litigation funding, the creditors cannot expect to recover anything.

3.3. TERMS OF THE LFA

[74] In general, third party funding agreements are not illegal and should be approved, subject to the following principles:[48]

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46 *Crystal/ex, supra* note 38.

47 Exhibit P-1.

48 *Bayens* v. *Kinross Gold Corporation,* 2013 ONCS 4974 **[Sayens],** at para. 41; *Hayes* c. *The City of Saint John,* 2016 NBBR 125, at para. 4.

a) The third party funding agreement must be necessary to provide to a plaintiff access to justice;

b) Plaintiff's right to instruct and control the litigation should not be diminished by the third party funding agreement;

c) The third party funding agreement must not compromise or impair the lawyer and client relationship or the lawyer's duties of loyalty and confidentiality;

d) The compensation of the third party funder must be fair and reasonable; and

e) The third party funder undertakes to keep confidential any confidential or privileged information.

[75] It is important to underline that the concept of champerty does not apply in the Province of Quebec[49] where litigation funding by a third party has been accepted[50].

[76] The Debtors have filed a redacted version of the LFA[51] while the Monitor and the Court were provided with a non-redacted version.

[77] The funders, IMF Bentham Limited and its affiliate Bentham IMF Capital Limited (collectively **Bentham),** will only receive payment if the Debtors are successful at trial or the matter is settled by agreement. If the Debtors are unsuccessful, Bentham will lose the sums invested. As to Dentons, it will receive a hybrid form of compensation, namely payment of a reduced hourly rate on monthly billings to be paid out of the funds provided by Bentham, as well as a deferred payment and performance bonus, both of which are contingent on a successful outcome.

[78] The LFA provides that:

> 78. [...]
>
> (a) A sufficient amount is to be made available to the Company, to be used by the Company in furtherance of the prosecution of the Bluberi Retained Claims, and the budget accounts for the estimates and budget provided by the Monitor and its counsel in respect of their projected fees;
>
> (b) the Litigation Funder's expended amounts (in legal fees and disbursements) are to be reimbursed in full only from the proceeds of the Bluberi Retained Claims (the **"Litigation Proceeds").** These amounts are otherwise not reimbursable to the Litigation Funder. They also do not carry any rate of interest;

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49 *Montgrain* c. *Banque Nationale du Canada,* 2006 QCCA 557, at para. 63.

50 *Marcotte* c. *Banque de Montréal,* 2015 QCCS 1915, at paras. 42-49; *Strateco, supra* note 39.

51 Exhibit P-3.

(c) a success fee (the **"Bentham Return")** will be payable to the litigation Funder based on a percentage of the Litigation Proceeds;

(d) all obligations owed to the Litigation Funder under the Litigation Funder Agreement (including all expended amounts and Bentham Return) are to be secured by a super priority security charge of $20,000,000 over the Bluberi Retained Claims (the **"Litigation Financing Charge"),** subject only to existing the $250,000 Administration Charge already approved by this Court;

(e) the Litigation Funding Agreement provides that the deferred and contingency portions of Dentons' fees, in the nature of an administration charge, will also be covered by the Litigation Financing Charge, such that those fees will necessarily be paid in priority to the creditors but subordinate to the Litigation Funder's interest in the Litigation Financing Charge, in the priority outlined in the Litigation Funding Agreement; and

(f) thus, a single Litigation Financing Charge in the amount of $20,000,000 is sufficient to adequately and fully protect the Litigation Funder and Dentons, even if the Litigation Proceeds were to exceed $200,000,000[5].[2]

(79] After reviewing the LFA, the Court is satisfied that it meets the general principles mentioned above. The percentage of return for Bentham and Dentons is reasonable, considering their investment in the litigation and the associated risks.

(80] Callidus and Creditors' Group challenged the validity of certain termination clauses of the LFA on the ground that they give too much discretion to Bentham:

10.1.5 Bentham, acting reasonably, ceases to be satisfied in relation to the merits of the Litigation; or

10.1.6 Bentham, acting reasonably, believes the Litigation and the Claims (or either of them) are no longer commercially viable.[53]

(81] ln the matter of *Houle* v. *St. Jude Medical inc.,* the Ontario Superior Court refused to accept a funding agreement proposed by Bentham that had similar clauses to the ones at issue here, because they were too broad.[54] Leave to appeal that decision has recently been granted.[55] The *Houle* decision was rendered in the context of a class action where the motivation and ability of the plaintiff to pursue the litigation are important.

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52 Debtors' Application.

53 Exhibit P-3, at p. 30.

54 2017 ONSC 5129 ***[Houle],*** at paras. 96-99. See also *Metzler lnvestment GMBH* v. *Gildan Activewear Inc.,* 2009 Canlll 41540 (ON S.C.), at para. 60.

55 February 23, 2018.

[82] However, in the context of CCAA proceedings, where the objectives are different, the Ontario Superior Court approved similarly broad termination clauses in the matter of *Schenk* v. *Valeant Pharmaceuticals International Inc.:*

> [23] 1 will deal with these two issues collectively since the Valeant Defendants submit that the LFA gives Redress the ability to put extreme pressure upon Schenk and may therefore exert undue influence in the litigation. 1 do not agree. In the context of this case I do not find that allowing a funder an opportunity to exit the agreement in the circumstances specified in the LFA or when offers to settle are served is unreasonable. This is particularly true in this case where, as will be noted below, both Schenk and Redress do not oppose an order for security for costs, offering some protection to the Valeant Defendants. Overall, it is fair and reasonable to allow Redress to terminate funding in the circumstances proposed. [56]
>
> (emphasis added)

[83] Taking into consideration the amount of time and money Bentham has invested so far and given its financial commitments towards the contemplated litigation, it is obvious that Bentham has no intention of terminating the LFA unless it perceives that it would not gain from it. The LFA, as a whole, will not allow Bentham to exert undue influence in the litigation. The Court concludes that the termination clauses, 10.1.5 and 10.1.6, are not overly broad or unreasonable and do not preclude the approval of the LFA.

[84] As to the issue of confidentiality, it is not contested that the LFA does not constitute a privileged document.[57] However, certain sections regarding the potential return for Bentham and Dentons have been redacted since the Debtors believe they constitute highly sensitive information. Even though, this information is sometimes disclosed in the context of class action proceedings[58] or even under the CCAA,[59] the Court agrees that this information should remain confidential for the reasons given by the Federal Court in *Seedlings Lite Science Ventures, LLC* v. *Pfizer Canada Inc.:*

> As mentioned, this analysis does not apply in the circumstances of the present case. This is not a class proceeding and the motivation and ability of the Plaintiff to pursue the litigation to its conclusion on behalf of a class is irrelevant. Further, the basis on which I find that privilege arises in respect of the redacted portions of the LFA is not that it discloses counsel's opinion as to the merits of the action or a pre-established litigation plan, but that it discloses the details of the third-party funding commitment and of the temporal variables of the indemnity provisions. That conclusion is plain from reading the unredacted copy of the LFA that was provided tome pursuant to a confidentiality order.

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56 2015 **ONSC** 3215.

57 *Stanway* v. *Wyeth Canada Inc.,* 2013 BCSC 1585; *Bayens, supra* note 48.

5B *Houle, supra* note 54.

59 *Crystal/ex, supra* note 38.

> The privileged information here is the same type of information that Justice Perell considered would provide a defendant with a tactical advantage in how the litigation would be prosecuted or settled, and the very essence of what the litigation privilege is designed to protect.
>
> [...]
>
> I note that the British Columbia Supreme Court, in *Stanway v Wyeth Canada Inc.,* 2013 BCSC 1585 at para 43, recognized that portions of an LFA dealing with litigation budget, strategy and trial stamina are entitled, even in class proceedings, to be kept confidential. A similar result was reached in *Schneider v Royal Crown Gold Reserve Inc.,* 2016 SKQB 278 and in *Schenk v Valeant Pharmaceuticals International Inc.,* 2015 ONSC 3215, the only reported case brought to my attention where an LFA was considered in a private litigation.
>
> I am accordingly satisfied that privilege can and does attach to the redacted portions of the LFA. Privilege having been established, the burden shifts to the Defendant to show that it has been waived, by necessity or implication.[60]
>
> (emphasis added)

[85] Considering the litigation at issue here is similar in nature to an oppression dispute, Callidus should not know how much money Bentham is investing, what its percentage of return is or how any recovery would be apportioned.

[86] The Court will therefore file under seal, the non-redacted version of the LFA. However, Debtors and Bentham should disclose the wording of clauses 2.5 and 2.6 of the LFA and the definition of the word "appeal" as well clause 7.1.4 found in the Exhibit A attached to the LFA, that deal with an appeal or other conditions to the exercise of the LFA, which have no reasons to remain confidential.

3.4. VARIA

[87] Bentham asks for a super priority charge of $20,000,000 over the Retained Claims, subject only to the existing $250,000 Administration Charge already approved by the Court. This Litigation Funding Charge aims at securing the Debtors' obligations under the LFA and with Dentons. Since Bentham's return and a portion of Dentons' fees are deferred and contingency-based, the Litigation Funding Charge will have no impact until proceeds are recovered though the realization of the Retained Claims. The amount of $20,000,000 is significant but is in line with the amount that Bentham and Dentons may be entitled to, given the damages that will be claimed from Callidus.

[88] Furthermore, Bentham charges no fee or interest on the amounts funded. Therefore, its risks are greater and it is reasonable that it obtains certain guarantees in exchange.

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so (July 17, 2017), Ottawa T-608-17, (F.C.), at pp. 4 and 5.

[89] As to the extension of the Stay Period, the Debtors' suggestion of February 15, 2019, is acceptable considering the time required to launch the lawsuit and to see how the proceedings will evolve. There is nothing else happening in this file and no one will be prejudiced by a one year stay. It is expected that this litigation may run over several years but that is not a ground to dismiss the Debtors' Application. For example, in the matter of *JTI-MacDonald ,*[61] the CCAA proceedings lasted almost six years because JTI-MacDonald was facing a Notice of Assessment from the Minister of Revenue. In the interim, the Monitor will be dispensed from filing any reports unless required by the Court.

[90] Finally, there are no reasons that would justify that provisional execution of the present judgment be ordered notwithstanding appeal.

4. CONCLUSION

[91] From the outset, this matter has set the sole shareholder of the Debtors, Mr. Duhamel, against the secured creditor, Callidus. It is the equivalent of oppression litigation with the unsecured creditors caught in the middle. This Court has always managed the file with the interests of the creditors in mind and this is precisely why it accepted that Callidus and the Debtors submit plans of arrangement to the creditors. Considering the results of the vote at the creditors' meeting in December 2017, and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch.

FOR THESE REASONS, THE COURT:

[92] **GRANTS** the Debtors' Application for the Issuance of an Order Extending the Stay of Proceedings and for an Order Authorizing Litigation Funding and a Litigation Financing Charge **(Application);**

[93] **DISMISSES** Callidus and Creditors' Group's Motion for an Order for the Convening, Holding and Conduct of a Creditors' Meeting and Extension of the Stay Period;

[94] **ORDERS** that the fees and costs of the Monitor and its counsel be paid by the Debtors as of the date of the present Judgment;

General

[95] **DECLARES** that the notices given for the presentation of the Application are proper and sufficient;

[96] **DISPENSES** with any further requirements for service or notice of the Application;

---

6 1 *Re JTI-MacDonald Corp.,* 2010 ONSC 4212.

[97] **DECLARES** that ail capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Initial Order (granted by this Honourable Court in this matter on November 12, 2015), as amended on November 19, 2015 and January 28, 2016) or in the Application;

Stay Period

[98] **ORDERS** and **DECLARES** that the Stay Period (as defined in the Initial Order) is extended until February 15, 2019;

[99] **DISPENSES** the Monitor from filing any further reports, namely and without limitation, those required by section 23(1) d) ii) of the CCAA, until the expiry of the Stay Period ordered herein, provided however, that the Monitor shall file a report as it deems necessary or advisable to inform this Court and the creditors of the Applicants of any material development that takes place in the affairs of the Applicants prior to the expiry of the Stay Period;

Litigation Funding Agreement

[100] **AUTHORIZES** the Applicants to enter into a litigation funding arrangement with IMF Bentham limited **(IMF),** as agent, and/or its Canadian subsidiary Bentham IMF Canada Limited **(Bentham),** in its own capacity or as agent (collectively or individually, the **Litigation Funder)** on the terms and conditions set forth in the proposed litigation funding agreement between the Company, Mr. Duhamel, Dentons Canada LLP and the Litigation Funder **(Litigation Funding Agreement),** to fund the ongoing expenditures of Applicants and to pay such other amounts as are permitted by the terms of this Order and the Litigation Funding Agreement;

[101] **ORDERS** that the Applicants may validly redact the version of Exhibit P-3, as it was served upon the service list with the exception of clauses 2.5 and 2.6 of the Litigation Funding Agreement, the definition of the word "appeal" and clause 7.1.4 in Exhibit A attached to the Litigation Funding Agreement, which should not be redacted, and should be made available to the service list;

[102] **ORDERS** that the non-redacted version of Exhibit P-3 shall be kept by the court confidentially under seal and not released until a further order of this Court;

[103] **AUTHORIZES** the Applicants to execute and deliver the Litigation Funding Agreement and associated documents, including, without limitation, the retainer agreement with Dentons Canada LLP (Exhibit F to the Litigation Funding Agreement) and with experts, as may be required or permitted pursuant to the Litigation Funding Agreement. Applicants are hereby further authorized to perform all of their obligations under the Litigation Funding Agreement;

[104] **ORDERS** that Applicants shall pay to the Litigation Funder, when due, all amounts payable to the Litigation Funder pursuant to the terms of the Litigation Funding

Agreement and shall perform all of their obligations to the Litigation Funder pursuant to the Litigation Funding Agreement;

[105] **DECLARES** that all of the Bluberi Retained Claims of Applicants and Litigation Proceeds (as defined in the Litigation Funding Agreement) are hereby subject to a super priority charge and security in favour of the Litigation Funder and of Dentons Canda LLP, in an aggregate amount of $20,000,000 (such charge and security is referred to herein as the **Litigation Financing Charge)** in favour of: a) as a first priority, the Litigation Funder, as security for all obligations of the Applicants to the Litigation Funder with respect to all amounts owing under or in connection with the Litigation Funding Agreement; and b) as a second priority, Dentons Canada LLP, as security for all of the obligations of the Applicants to Dentons Canada LLP with respect to all amounts owing under or in connection with the Litigation Funding Agreement and the Retainer Letter. The Litigation Financing Charge shall have the priority established in this Order;

[106] **ORDERS** that the claims of the Litigation Funder pursuant to the Litigation Funding Agreement shall not be compromised or arranged pursuant to any plan of compromise or arrangement under the CCAA or these proceedings and the Litigation Funder, in that capacity, shall be treated as an unaffected creditor in these proceedings and in any plan of compromise or arrangement;

[107] **ORDERS** that the Litigation Funder may:

(a) notwithstanding any other provision of this Order, take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the Litigation Financing Charge and the Litigation Funding Agreement in all jurisdictions where it deems it is appropriate; and

(b) notwithstanding the terms of the paragraph to follow, refuse to make any funding advance to Applicants if the Applicants fail to comply with the provisions of the Litigation Funding Agreement;

[108] **ORDERS** that the Litigation Funder shall not take any enforcement steps under the Litigation Funding Agreement or the Litigation Financing Charge without providing at least five (5) business days' written notice **(Notice Period)** of a default thereunder to the Applicants and the Monitor. Upon expiry of such Notice Period, the Litigation Funder shall be entitled to take any and all steps under the Litigation Funding Agreement and the Litigation Financing Charge and otherwise permitted at law, but without having to send any demands under Section 244 of the BIA;

[109] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 100 to 108 hereof unless either (a) an application for such order is served on the Litigation Funder by the moving party

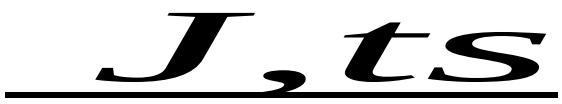
with a notice of at least seven (7) days before the application is presentable before the Court or (b) the Litigation Funder applies for or consents to such order;

Priorities and General Provisions Relating to CCAA Charges

[110] **ORDERS** and **DECLARES** that paragraph [51] of the Initial Order (as amended and restated on January 28, 2016) is amended so as to read as follows:

> **DECLARES** that the priorities of the Administration Charge and the Litigation Financing Charge (collectively, the **CCAA Charges),** as between them with respect to ail Property to which they apply, shall be as follows:
>
> (a) first, the Administration Charge;
>
> (b) second, with respect to the Litigation Proceeds, the Litigation Financing Charge.

[111] **WITH COSTS** infavor of the Debtors.



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Date of hearing: February 16, 2018