

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

B E T W E E N:

EXPORT DEVELOPMENT CANADA

Applicant

and

**AXIOS MOBILE ASSETS CORP.; AXIOS MOBILE ASSETS INC.; AXIOS MOBILE
ASSETS, INC.; AXIOS LOGISTICS SOLUTIONS INC.**

Respondents

**APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990,
C. C.43, AS AMENDED, AND SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY
ACT*, R.S.C. 1985, C. B-3 AS AMENDED**

**FACTUM OF THE RECEIVER
(re: Sale Approval and Vesting Order & Ancillary Administration Order)**

August 21, 2017

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as court-appointed Receiver

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FACTUM OF THE RECEIVER

PART I - OVERVIEW

1. On February 24, 2017, this Court granted an order (the “**Appointment Order**”) appointing A. Farber & Partners Inc. as receiver and manager (in such capacity, and not in its corporate or personal capacity, the “**Receiver**”) over the assets, undertakings, and properties of the Axios Mobile Assets Inc. (“**Axios Canada**”), Axios Mobile Assets Corp. (“**Axios Corp.**”), Axios Mobile Assets, Inc. (“**Axios USA**”), and Axios Logistics Solutions Inc. (“**Axios Logistics**”, and collectively, the “**Debtors**”).

2. As a significant portion of the Debtors' inventory is located in the United States, the Receiver, in its capacity as foreign representative of the Debtors, sought to have the these proceedings (the "**Receivership Proceedings**") recognized as a "foreign main proceeding" under Chapter 15 of Title 11 of the United States Code (the "**Chapter 15 Proceedings**") in the United States Bankruptcy Court for the District of Delaware (the "**US Court**"). Recognition of the Receivership Proceedings was granted on a final basis on March 28, 2017, and the Appointment Order was given full force and effect in the United States.

3. In accordance with the Appointment Order, the Receiver conducted a marketing process for the sale of the assets of the Debtors, which resulted in the acceptance of an offer from Leonite Holdings Inc. (the "**Purchaser**"). The proposed transaction (the "**APA Transaction**") is subject to approval by this Court and recognition of such approval order by the US Court.

4. Accordingly, the Receiver now brings this motion, seeking among other relief: (i) an order approving the asset purchase agreement dated July 12, 2017 (the "**APA**") between the Receiver and the Purchaser for the purchase and sale of the Purchased Assets (as defined in the APA) and vesting in the Purchaser the Debtors' right, title and interest in the Purchased Assets free and clear of all encumbrances (the "**Sale Approval and Vesting Order**"), and (ii) a related administrative order approving, among other things, the fees and disbursements of the Receiver and its counsel, authorizing the Receiver to make distributions to creditors of the Debtors, and approving a mechanism to allow for the wind down of the Receivership Proceedings (the "**Ancillary Administration Order**").

PART II – FACTS

5. The facts relevant to this motion are set out in detail in the First Report of the Receiver dated August 11, 2017 (the “**First Report**”). Below is a brief summary of those facts. Capitalized terms not defined herein shall have the meaning given to them in the First Report.

(a) Background

6. Prior to the appointment of the Receiver, the Debtors, together with related entities Axsense Inc., Axios Mobile Assets Inc. (Nevada), and Mobius Logistics Solutions Inc., produced and supplied an “environmentally friendly” structural and trackable technology enabled mobile asset platform (or pallet) made from composite material as an alternative to the traditional shipping options, such as wooden pallets.¹

7. EDC is a commercial lender owned by the Government of Canada and acts as the Government’s export credit agency. EDC is Axios Canada’s senior secured lender, and provided financing through two financing instruments in 2015 and 2016 totaling approximately \$5 million on which interest and costs continue to accrue (the “**EDC Indebtedness**”).² EDC is the primary economic stakeholder of the Debtors.

8. The Debtors had been experiencing financial difficulties for some time prior to the commencement of the Receivership Proceedings. Since the summer of 2016, the Debtors had been attempting to raise additional capital of at least \$20 million in order to fund their growth

¹ First Report at para 6.

² First Report at para 2.

plan. When the Debtors had exhausted all of their financial resources in early 2017, EDC sought the Appointment Order.³

(b) Sales Process

9. The Debtors had been searching for financing and investment from the marketplace for approximately six (6) months prior to the Appointment Order being granted. These efforts included:

- (i) communicating with several parties regarding investment in the Debtors' business;⁴
- (ii) involving a broker and investment firm to raise capital from prospective investors; and⁵
- (iii) approaching lenders in the asset-based lending space in the two months prior to the appointment of the Receiver.⁶

10. These efforts were unsuccessful, and the Debtors did not secure the requisite investment before they exhausted their cash and credit resources.⁷

11. Upon the appointment of the Receiver, the Receiver was provided with the names of thirteen (13) potential bidders with whom the Debtors were at various stages of discussion at the time of the commencement of these Receivership Proceedings. Three (3) of these parties had not begun due diligence and were either no longer interested or could not be reached.⁸

³ First Report at para 10.

⁴ First Report at para 28.

⁵ First Report at para 28.

⁶ First Report at para 29.

⁷ First Report at paras 28-29.

⁸ First Report at para 30.

12. Through the Receiver's investigations, the Receiver has determined that the market for the Debtors' assets is quite limited. The Debtors' technologically advanced shipping pallets are unique chattel, and are dispersed across the United States posing potential challenges in recovery of the assets.⁹ In addition, the funding provided by EDC to the Receiver to implement its realization strategy was limited to reflect the reasonably expected realization on the Debtors' assets. The Receiver accordingly conducted a sales process that was appropriate to the potential value of the Debtors' assets, the potential market for such assets, and the funding available to it. In building on the Debtors' efforts to solicit investment, the Receiver:

- (i) wrote to each of the remaining ten (10) of the initial thirteen parties on March 20th and 21st to request preliminary non-binding expressions of interest (the "LOIs") by March 27th (the "LOI Deadline");¹⁰
- (ii) approached or was approached by an additional eight (8) parties to make an offer for the sale and business of the Debtors by the LOI deadline, including the largest composite pallet pooler in the United States and the largest global wooden pallet pooler;¹¹
- (iii) obtained non-disclosure agreements from the potential bidders;¹²
- (iv) provided a data room containing further information regarding the Debtors' assets;¹³

⁹ First Report at paras 29, 36, 49.

¹⁰ First Report at paras 30-31.

¹¹ First Report at para 32.

¹² First Report at para 33.

¹³ First Report at para 33.

(v) assisted the potential bidders with their due diligence and provided information regarding the Debtors' assets;¹⁴

(vi) received and evaluated the bids submitted by the LOI deadline, in consultation with EDC;¹⁵

(vii) received the final offer from the Purchaser, in the form of the APA, on July 24, 2017;¹⁶ and

(viii) obtained two independent appraisals of the Debtors' assets to assist it in evaluating bids received.¹⁷

13. In addition, the Receiver also requested that each potential bidder indicate in its LOI its willingness to have its offer form the basis of a stalking horse bid to be used in a potential broader sales process.¹⁸ Five (5) non-binding expressions of interest were received by the LOI Deadline. Three (3) of the five parties indicated a willingness to be the stalking horse bidder in a broader sales process. After considerable efforts by the Receiver, only one bidder (being the Purchaser) agreed to pursue negotiation of a definitive agreement of purchase and sale.¹⁹

14. Given the nature of the market and the fact that the purchase price obtained fell within the range of the appraised value of the assets, the Receiver, in consultation with EDC, reviewed the sales process that had been conducted to that point and concluded that a further,

¹⁴ First report at para 34.

¹⁵ First Report at paras 34-36.

¹⁶ First Report at para 38.

¹⁷ First Report at paras 16, 36, 49.

¹⁸ First Report at para 33.

¹⁹ First Report at para 34.

broader sales and marketing process was not likely to produce a better result than the proposed transaction with the Purchaser.²⁰

(c) ***Material Terms of the APA Transaction***

15. Material terms of the APA Transaction include:²¹

- (i) Purchased Assets: substantially all of the assets of the Debtors other than certain Excluded Assets for which the Receiver can more easily realize upon, such as HST refunds;
- (ii) Purchase Price: \$450,000, plus the Purchaser has agreed to assumed all applicable transfer taxes;
- (iii) Deposit: \$90,000, representing 20% of the purchase price and being held by the Receiver in the Receiver's general trust account;
- (iv) As Is, Where Is: sale of the Purchased Assets is on an "as is, where is" basis, without any representation, warranty or declaration of any kind from the Receiver with respect to the Purchased Assets;
- (v) Closing Conditions: closing conditions include obtaining the Sale Approval and Vesting Order and recognition of the Sale Approval and Vesting Order by the US Court (the "**US Approval and Vesting Recognition Order**"), obtaining fully executed copies of all the closing documents listed in the APA,

²⁰ First Report at paras 35-36.

²¹ First Report at paras 39-44.

and the confirmation of all representations, warranties, and material covenants, obligations and agreements as set out in the APA;

(vi) Outside Date: September 5, 2017, or such later date as the parties may mutually agree;

(vii) Targeted Closing Date: September 1, 2017, being one business day following the hearing to obtain the US Approval and Vesting Recognition Order.

(d) Treatment of Possessory Claimants

16. Through the course of these proceedings, the Receiver became aware of a number of persons who were in possession of property of the Debtors and who had potential possessory entitlement, including manufacturers and landlords (collectively, the “**Possessory Claimants**”). The Receiver has facilitated negotiations with the Purchaser and certain of the Possessory Claimants to address the removal of the assets (the “**Stored Parts & Equipment**”) from the applicable premises upon payment of an agreed upon amount (the “**Claim Amount**”) by the Purchaser directly to the Possessory Claimant.²²

17. Specifically, the Sale Approval and Vesting Order provides, in the case of the Possessory Claimants, that the Debtors’ interest in the Stored Parts & Equipment will not vest in the Purchaser free and clear of claims and encumbrances until the Possessory Claimant is paid its Claim Amount. Upon receipt of the Claim Amount, the Possessory Claimant is required to

²² First Report at para 46.

provide the Purchaser with reasonable access to its premise to obtain the Stored Parts & Equipment on terms to be agreed to by the parties or ordered by the Court.²³

18. The Receiver has corresponded with each Possessory Claimant²⁴ outlining the above-described arrangements and enclosing a copy of the proposed Sale Approval and Vesting Order. To date, the Receiver has not received a formal objection from any of the Possessory Claimants to the relief sought. Certain Possessory Claimants have sought to clarify certain matters with the Receiver and those matters are being addressed consensually. To the extent there are any issues at the time of the hearing of this matter, the Receiver will bring those issues to the attention of the Court.

(e) Interim Distribution of Proceeds and Subsequent Distributions

19. Pursuant to the Ancillary Administration Order, shortly after the closing of the APA Transaction, the Receiver proposes to pay outstanding professional fees, other outstanding payables owing by the Receiver and an amount payable to Service Canada on account of its subrogated claim in respect of a super-priority claim provided for under the BIA to employees for unpaid wages. Following such payments by the Receiver, the Receiver proposes to make an interim distribution to EDC (the “**Interim Distribution**”). The Ancillary Administration Order also authorizes the Receiver to make subsequent distributions to EDC (not to exceed the amount of the monies advanced by EDC as Receiver’s borrowings and the EDC Indebtedness).²⁵

²³ First Report at para 46; Draft Sale Approval and Vesting Order, para 4, Tab 7 of the Receiver’s Motion Record.

(f) Approval of Fees and Disbursements of the Receiver and its Counsel

20. Pursuant to the Appointment Order and to reduce the costs of the Receivership Proceedings, the Receiver was specifically authorized to retain counsel to EDC, Blake, Cassels & Graydon LLP (“**Blakes**”), as counsel to the Receiver, save and except on matters upon which the Receiver in its judgment determined it requires independent advice, in which case the Receiver was authorized to retain independent counsel, namely Aird & Berlis LLP (“**A&B**”).²⁶

21. As part of this motion, the Receiver is also seeking approval of its fees and disbursements and those of its counsel in connection with the performance of their duties in the Receivership Proceeding as follows:²⁷

- (i) The Receiver in the amount of \$173,271.60 , plus HST, for the period from February 9, 2017 to July 31, 2017;
- (ii) Blakes, in its capacity as counsel for the Receiver, in the amount of \$92,252.97, plus HST, for the period from February 28, 2017 to July 31, 2017;
- (iii) A&B, in its capacity as independent counsel for the Receiver, in the amount of \$13,055.91, plus HST, for the period from February 23, 2017 to August 9, 2017; and
- (iv) Womble Carlyle Sandridge & Rice, LLP, in its capacity as counsel for the Receiver in the Chapter 15 Proceedings, in the amount of US\$95,661.78, plus

²⁴ The Receiver did not send a letter to LIT/Hodges Industrial Trust (the “**Landlord**”), a landlord located in Atlanta, Georgia, as a negotiated resolution was reached with the Landlord and the Receiver by way of a Stipulation filed with the US Court.

²⁵ First Report at paras 67-70.

²⁶ Appointment Order at para 3(d), Tab 2A of the Receiver’s Motion Record.

²⁷ First Report at paras 57-60.

HST and disbursements, for the period from February 22, 2017 to July 31, 2017.

(g) Activities of the Receiver and Winding Down of the Receivership Proceedings

22. The activities of the Receiver are outlined in the First Report, and include, *inter alia*, taking possession of the Debtors' head office, gaining information regarding the current state of the Debtors' business and assets, running the sales process, and conducting administrative duties, as set out in more detail in the First Report.²⁸

23. The final remaining tasks related to the administration of the Receivership Proceedings (the "**Final Activities**") include obtaining the US Approval and Vesting Recognition Order, closing the APA Transaction with the Purchaser, attending to tax matters, making distributions, and completing any statutory and administrative duties and filings required by the Receiver. Upon completion of the Final Activities, the Receiver will have completed its mandate.²⁹

24. The Receiver estimates that the fees and disbursements of the Receiver and the Receiver's Counsel to complete the remaining duties and administration of these Receivership Proceedings and Chapter 15 Proceedings (the "**Subsequent Fees**") should not exceed \$25,000 for the Receiver and \$94,000 for Receiver's Counsel (in the aggregate), excluding applicable taxes (the "**Subsequent Fee Estimate**").³⁰ The proposed Ancillary Administration Order contemplates that the Subsequent Fees shall only be subject to approval by further order of this Court in the event that (i) the Subsequent Fees exceed the Subsequent Fee Estimate, and (ii) EDC

²⁸ First Report at para 16.

²⁹ First Report at paras 71-72.

³⁰ First Report at para 68.

requests that such approval be sought within seven (7) business days of receiving written notice of the quantum by which the Subsequent Fees exceed the Subsequent Fee Estimate.

25. When the Receiver has completed the Final Activities, the Receiver proposes to file with this Court a certificate certifying that it has done so (the “**Receiver’s Discharge Certificate**”). Upon filing the Receiver’s Discharge Certificate, (i) the Receivership Proceedings will terminate, and (ii) the Receiver will be discharged and released.³¹

26. The proposed Ancillary Administration Order contemplates releases effective to the date of the Order (the “**Releases**”), and separate releases for the period between the date of the Order and the date of the termination of the Receivership Proceedings (the “**Subsequent Releases**”). In order to avoid the costs of a further motion, the Receiver proposes to serve the Receiver’s Discharge Certificate upon the E-Service List seven (7) days prior to filing it with the Court. If no objections are received, the Receiver will file the Receiver’s Discharge Certificate forthwith. If a written objection is received by the Receiver, the Subsequent Releases will only become effective if the objection is consensually resolved or upon further order of the Court.³²

³¹ First Report at paras 73-75; Draft Ancillary Administration Order, Tab 9 to the Receiver’s Motion Record.

³² First Report at paras 74-75; Draft Ancillary Administration Order, Tab 9 to the Receiver’s Motion Record.

PART III – ISSUES

27. The issues to be determined on this motion are:

- A. Should this Court grant the Sale Approval and Vesting Order?
- B. Should this Court grant the Ancillary Administrative Order?

PART IV – ARGUMENT

A. This Court Should Approve the Sale Approval and Vesting Order

(a) The Court has the Jurisdiction to Approve the APA Transaction and Vest the Purchased Assets in the Purchaser

28. This Court has the jurisdiction to approve a sale of the Debtors' assets pursuant to section 243 of the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”), which authorizes the Court to appoint a receiver to exercise any control that the Court considers advisable over the property of a debtor and its business, and take any other action that the Court considers advisable.³³

(b) The Receiver has the Authority to Enter into the APA Transaction

29. The Appointment Order empowers and authorizes the Receiver to, among other things:³⁴

- (i) market any or all of the Property (as defined therein), including advertising and soliciting offers in respect of the Property or any part of parts thereof and

³³ BIA, s. 243; Schedule B to this Factum.

³⁴ Appointment Order at para 3, Tab 2A of the Receiver's Motion Record.

negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(ii) sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business, (i) without the approval of the Court in respect of any transaction not exceeding \$50,000, provided that the aggregate consideration for all such transactions does not exceed \$250,000; and (iii) with the approval of this Court in respect of any transaction in which the purchase price exceeds the applicable amount set out in the preceding clause [...]

(iv) apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property.

30. Accordingly, by order of the Court, the Receiver was authorized to market the property, run a sales process, and to enter into the APA Transaction, and the Court has the authority to approve the APA Transaction if it considers it advisable.

(c) *The APA Transaction Satisfies the Soundair Criteria*

31. The criteria to be used by this Court to determine whether to approve a transaction are well-established and set out in *Soundair* as follows:³⁵

- (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (ii) the interests of all parties;

³⁵ *Royal Bank v. Soundair Corp.* (1991), 4 OR (3d) 1, 1991 CarswellOnt 205 (ONCA) at para 16 [*Soundair*]. Receiver's Book of Authorities ("BOA"), Tab 1.

(iii) the efficacy and integrity of the process by which offers were obtained;
and

(iv) whether there has been unfairness in the working out of the process.

32. The same considerations apply whether or not a marketing process was previously approved by the Court. In considering whether to approve a sale, Courts will take into account the circumstances of a given industry or market to determine what is a commercially reasonable, and have recognized that where a given asset is “unique” or “unusual”, “the market for potential purchasers is narrow”, sales processes may differ from assets with wider appeal to potential purchasers.³⁶ As recognized by the Ontario Court of Appeal in *Soundair*, “the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset.”³⁷

33. Absent a violation of the *Soundair* principles, the Court should uphold the business judgment of the Court officer and the parties supporting it with respect to the result of a sales process.³⁸

(i) *The Receiver has made sufficient effort to obtain the best price.*

34. As set out above, the Debtors had solicited financing and investment in their business for months prior to the appointment of the Receiver. The Receiver then conducted a fair

³⁶ *Soundair* at paras 46-48; *Skyepharm PLC v. Hyal Pharmaceutical Corp*, 1999 CarswellOnt 3641, [1991] OJ No 4300 at paras 3-7, BOA Tab 2; *Toronto Dominion Bank v. 101142701 Saskatchewan Ltd.*, 2012 SKQB 298 at paras 23, 25, 30-33, BOA Tab 3; See also *Re Nortel Networks Corp*, 2009 CarswellOnt 4467 at paras 19-21, 55-56. BOA Tab 4.

³⁷ *Soundair* at para 46.

³⁸ *Re Eddie Bauer of Canada*, 2009 CarswellOnt 5450, [2009] OJ No 3784 at para 22. BOA Tab 5.

process which sufficiently canvassed the potential pool of bidders, provided diligence support and actively pursued negotiations with such bidders.³⁹

35. The Receiver, in consultation with EDC, reviewed the sales process that had been conducted and concluded that a broader sales and marketing process was highly unlikely to produce a better result than the APA Transaction.⁴⁰

36. The Receiver also obtained two independent appraisals of the assets of the Debtors, and the purchase price of the APA Transaction falls within the range of the appraised values obtained by the Receiver.⁴¹

(ii) The APA Transaction satisfies the interests of all the parties.

37. The Receiver has considered the best interests of the stakeholders of the Debtors in recommending the approval of the APA Transaction.⁴² The APA Transaction is acceptable to EDC, the Debtors primary economic stakeholder.⁴³ This support is significant as EDC is suffering a substantial shortfall in its recovery if the APA Transaction is approved. In addition, the Receiver has facilitated negotiations between the Purchaser and the Possessory Claimants, who have to date not objected to the APA Transaction.⁴⁴

(iii) The Sales Process was efficacious and fair.

³⁹ First Report at para 35.

⁴⁰ First Report at paras 35-36.

⁴¹ First Report at para 16, 36, 49.

⁴² The Ontario Model Approval and Vesting Order notes that “in some cases, notably where this Order may be relied upon for proceedings in the United States, a finding that the Transaction is commercially reasonable and in the best interests of the Debtor and its stakeholders may be necessary.” As the proposed Sale Approval and Vesting Order will be relied on to approve the APA Transaction in the Chapter 15 Proceedings, the Receiver has included this language in the Order.

⁴³ First Report at paras 35-36.

⁴⁴ First Report at para 46.

38. The Receiver submits that the sales process it conducted was efficacious and fair. As described above, the technologically-advanced pallets that form the majority of the Purchased Assets are unique chattel and only appeal to a niche market. The Receiver reached out to numerous potential purchasers, including those mostly likely to make an offer, such as the largest composite pallet pooler in the United States and the largest global wooden pallet pooler. In the Receiver's view, the process conducted was appropriate given the nature of the assets, the resources available to the Receiver and the indicative value of the assets based on the appraisals obtained.⁴⁵

B. This Court should grant the Ancillary Administrative Order

(a) The Receiver's activities should be approved

39. The activities of the Receiver from and after the date of the Appointment Order, as set out in detail in the First Report,⁴⁶ were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Appointment Order, and were in each case in the best interests of the Debtors' stakeholders generally. The Receiver therefore respectfully submits that such activities should be approved by this Court.

(b) The fees and disbursements of the Receiver and its counsel are fair and reasonable

40. The Receiver is seeking approval of its fees and those of its counsel from the outset of these Receivership Proceedings to the period ending July 31, 2017 (and in the case of A&B, August 9, 2017). The general standard of review of a Court in reviewing the accounts of a court-appointed receiver is "whether the amount claimed for remuneration and disbursements

⁴⁵ First Report at paras 16, 36, 49.

⁴⁶ First Report at para 16 and generally.

incurred in carrying out the receivership are ‘fair and reasonable’”, which should be assessed in a holistic matter, rather than a line by line review of dockets, hours, explanations or disbursements.⁴⁷

41. The fees of the Receiver and the fees of its counsel are within an appropriate range for the type of proceeding undertaken given the nature of the assets involved and the cross-border aspect to the enforcement. The Receiver has reviewed the accounts of the professionals with EDC, and EDC supports the relief being sought.⁴⁸

(c) The Proposed Distribution is appropriate and should be approved

42. EDC is the primary economic stakeholder in these proceedings. The Receiver has received a security opinion with respect to the security granted by Axios Canada in favour of EDC from its independent counsel, which opined that, subject to the usual qualifications, EDC’s security is valid and enforceable. EDC’s security interest continues to attach to, and is valid and enforceable in respect of, the approximately 80,000 pallets located in the United States, which form part of the Purchased Assets in the APA Transaction.⁴⁹ In addition, pursuant to a postponement and subordination agreement between EDC and the secured debentureholder of Axios Corp., all monies payable to the debentureholder from Axios Corp. are to be turned over to EDC until the EDC Indebtedness is paid in full.

43. The only unencumbered assets of the Debtors that are being purchased by the Purchaser relate to certain equipment owned by Axios Logistics and Axios USA and currently in the possession of various Possessory Claimants (the “**Unencumbered Assets**”) in the United

⁴⁷ *Re Confectionately Yours Inc.* (2002), 36 CBR (4th) 200 at para 42, BOA Tab 6; *Re Nortel Networks Corporation et al*, 2017 ONSC 673 at para 15 quoting *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 at para 19, aff’d 2014 ONCA 851, BOA Tab 7.

⁴⁸ First Report at paras 57-62.

States.⁵⁰ The Purchaser and the Receiver are in the process of finalizing the “Purchase Price Allocation Schedule” to be appended to the APA. However, in the Receiver’s view the majority of the value of the Purchase Price is attributable to the pallets owned by Axios Logistics and subject to EDC’s security, such that after fees, expenses and borrowings secured by the Receiver’s Charge and Receiver’s Borrowings Charge are allocated amongst the Debtors, there is no remaining funds available from the Unencumbered Assets for distribution to secured creditors. Moreover, EDC holds (either directly or beneficially) substantially of all of the unsecured debt of Axios Logistics (99%) and Axios USA (97%).⁵¹

44. In light of the foregoing, the Receiver submits no creditors will be prejudiced by the proposed Interim Distribution and any subsequent distributions to EDC. The Interim Distribution will be equal to the net cash balance anticipated to be on hand upon the closing of the APA Transaction after providing for a reserve for the estimated professional fees of the Receiver and its counsel to complete the administration of the Receivership Proceedings. The Receiver will also confirm and address the CRA’s trust position, if any, prior to making the Interim Distribution. The sum of the Interim Distribution and any subsequent distributions to EDC will not exceed the sum of the Receiver’s Borrowing and the EDC Indebtedness.⁵² Accordingly, the distribution is reasonable and appropriate in the circumstances.

(e) ***The Receiver should be discharged once the Final Activities are completed***

45. Once the Final Activities are complete, including the closing of the APA Transaction, attending to paying professional fees, and completing any statutory and administrative duties and filing required by the Receiver, the Receiver will have substantially

⁴⁹ First Report at paras 63-64.

⁵⁰ First Report at para 65.

⁵¹ First Report at para 66.

completed its mandate as contemplated by the Appointment Order, the APA, and under the BIA and CJA.⁵³ Accordingly, the Receiver respectfully submits that the Receivership Proceedings should be terminated and the Receiver should be discharged and released following the filing of the Receiver's Discharge Certificate with the Court, certifying that it has completed Final Activities.

46. The Receiver is seeking a discharge at the hearing of this Motion as a cost savings measure given the limited proceeds obtained, and limited funding available for the administration of these Receivership Proceeding. The Receiver submits that, in the current circumstances of this receivership, it is both efficient and appropriate for this Court to grant the Receiver a discharge upon the filing of the Receiver's Discharge Certificate.⁵⁴

47. The Receiver also seeks the Releases effective to the date of the proposed Ancillary Administrative Order, if granted, and the Subsequent Releases for the period between the date of the proposed Ancillary Administrative Order and the date of the termination of the Receivership Proceeding.⁵⁵

48. The discharge mechanism proposed by the Receiver affords stakeholders an opportunity to express an objection to the Receiver's discharge and release while avoiding the costs associated with a discharge motion in the absence of an objection, and is appropriate in the circumstances. EDC is supportive of this discharge mechanism and the proposed releases. A

⁵² First Report at para 70.

⁵³ First Report at paras 71-72.

⁵⁴ First Report at para 71-73; Draft Ancillary Administration Order at paras 9-11, Tab 9 of the Receiver's Motion Record.

⁵⁵ First Report at para 73-75; Draft Ancillary Administration Order at paras 12-16, Tab 9 of the Receiver's Motion Record.

similar approach was recently approved by this Court in the CCAA proceedings of Primus Telecommunications Canada Inc. et. al.⁵⁶

⁵⁶ Stay Extension, Discharge and Termination Order”, September 16, 2016, In the matter of the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended, and in the matter of a Plan of Compromise or Arrangement of Primus Telecommunications Canada Inc. et al, “CV-16-11257-00CL.

PART V – ORDER REQUESTED

49. For the reasons stated herein, the Receiver submits that it is appropriate for this Court to grant the Sale Approval and Vesting Order and Ancillary Administration Order substantially in the forms at Tabs 7 and 9, respectively, of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of August, 2017.

Linc Rogers/ Kelly Peters
Lawyers for the Applicant

SCHEDULE “A”
LIST OF AUTHORITIES

<u>Cases</u>	
1	<i>Royal Bank v. Soundair Corp.</i> (1991), 4 OR (3d) 1, 1991 CarswellOnt 205
2	<i>Skyepharmaceutical PLC v. Hyal Pharmaceutical Corp.</i> , 1999 CarswellOnt 3641, [1991] OJ No 4300
3	<i>Toronto Dominion Bank v. 101142701 Saskatchewan Ltd.</i> , 2012 SKQB 298
4	<i>Re Nortel Networks Corp.</i> , 2009 CarswellOnt 4467, [2009] OJ No 3169
5	<i>Re Eddie Bauer of Canada Inc.</i> , 2009 CarswellOnt 5450, [2009] OJ No 3784
6	<i>Re Confectionately Yours Inc.</i> , 2002 CarswellOnt 3002, [2002] OJ No 3569
7	<i>Re Nortel Networks Corp.</i> , 2017 ONSC 673
8	“Stay Extension, Discharge and Termination order” dated September 16, 2016, In the matter of the <i>Companies’ Creditors Arrangement Act</i> , RSC 1985, c C-36, as amended, and in the matter of a Plan of Compromise or Arrangement of Primus Telecommunications Canada Inc. et al, CV-16-11257-00CL

SCHEDULE “B”
RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 243

Court may appoint receiver

(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of “receiver”

(2) Subject to subsections (3) and (4), in this Part, “receiver” means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of “receiver” — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition “receiver” in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver’s claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of “disbursements”

(7) In subsection (6), “disbursements” does not include payments made in the operation of a business of the insolvent person or bankrupt.

APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS
AMENDED, AND SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3 AS
AMENDED

Court File No: CV-17-1170-00CL

Export Development Canada and Axios Mobile Assets Corp. et al.
Applicant Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

FACTUM OF THE APPLICANT
(Sale Approval and Vesting Order & Ancillary
Administration Order)

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