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BY EMAIL

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Roger Bilodeau, Q.C., Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario K1A 0J1

RE: File No. 38594
Reply to the Joint Factum of Interveners, The Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Dear Mr. Registrar,

We represent the Appellants 9354-9186 Québec Inc. (formerly Bluberi Gaming Technologies Inc.) and 9354-9178 Québec Inc. (formerly Bluberi Group Inc.) (collectively, the "**Debtors**") and hereby respond to the Joint Factum of Interveners, The Insolvency Institute of Canada ("**IIC**") and the Canadian Association of Insolvency and Restructuring Professionals ("**CAIRP**") (the "**Joint Factum**"). In this reply, we will use the definitions already adopted in our own Factum.

A. The Commonality of Interest Test

We agree with the submissions made by the Interveners on the proposed classification of creditors under the plan and the commonality of interest test applicable thereto. We add two comments.

First, it is telling that the Interveners – who are respectively a national, non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals, in the case of IIC, and a national professional association of insolvency and restructuring professionals whose membership includes the vast majority of the Licensed Insolvency Trustees who act as receivers and trustees in Canada, in the case of CAIRP – are not concerned that the purposive interpretation of the commonality of interest test advocated by the Debtors would result in fewer plans being approved by creditors or be submitted to the court for consideration and approval. To the contrary, the Interveners correctly note that "the QCA Decision breaks with existing case-law without cogent analysis of relevant precedents or *policy objectives underpinning creditor classification*" (Joint Factum, par. 15; our italics).

Second, the Interveners support the adoption by this Court of the 128-year old principle laid out in *Sovereign Life* and applied by lower courts ever since: "Where, among the creditors in question, there are *different facts 'which may differently affect their minds and their judgment, they must be divided into different classes*.'" (Joint Factum, par. 9; our italics). The application of this test can only lead to one result

in this case, as the representations of the Interveners make plain: the QCA Decision "omits to consider […] the *apparent conflict between unsecured creditors wishing to maximize their recovery with those of a plan sponsor wishing to minimize the cost of securing a release* for itself under the plan." (Joint Factum, par. 14; our italics). It inevitably follows that Callidus and the other creditors cannot vote in the same class and that the plan is doomed to fail for that reason alone.

B. LFAs are not plans of arrangement

We agree with the Interveners that LFAs are not plans of arrangement because they do not compromise the creditors' legal rights vis à vis the debtor– exactly like interim financing, sales of assets and other processes undertaken to satisfy creditors' claims (Joint Factum, par. 17-23). We further agree that "mandating that all LFAs be considered plans of arrangement […] would run counter to the expressed objectives and interpretation of the CCAA and unduly stifle the role of CCAA courts and their ability to effectively oversee the restructuring process." (Joint Factum, par. 28).

The Interveners add that "if creditors are faced with either a financing scheme to potentially maximize the assets available to creditors or a *viable* plan, *then a vote should be ordained to deal with said plan*" (Joint Factum, par. 24; underlining by the Interveners; our italics). This warrants two comments.

First, the Debtors disagree that a vote *should* always be ordered in such circumstances. To order a meeting of creditors whenever a financing scheme is faced with an alternative, viable plan could hinder, unnecessarily delay and increase the costs of the restructuring process. Whether or not a given plan should be submitted to a vote of the creditors is a determination that should be made by the CCAA Court in the exercise of its discretion and in light of the circumstances of each case.

Second, this debate is inconsequential in this case because the plan presented by Callidus is *not viable* for all the reasons mentioned in our Factum and, with regard to classification of creditors, supported by the Interveners. Faced with a plan that it correctly determined was not *viable,* the QSC committed no error in refusing to approve the holding of a new meeting of creditors and in authorizing the LFA.

Best regards,

Jean-Philippe Groleau

JPG/mcl

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