

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF SKYLINK EXPRESS INC. (the "**Applicant**")

**FACTUM OF THE APPLICANT, SKYLINK EXPRESS INC.**

July 23, 2024

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**PART 1 – INTRODUCTION**

1. The Applicant, Skylink Express Inc. (the "**Applicant**") brings this motion seeking approval of, among other things:

(a) approving the following sale transactions (collectively, the "**Transactions**"):

(i) a transaction for the sale of the 47 Aircraft (as defined below) contemplated by the agreement of purchase and sale dated July 10, 2024 (the "**Gingras Sale Agreement**") between the Applicant and Gingras Équipement Inc. ("**Gingras**");

(ii) transactions between the Applicant and Randigo LLC ("**Randigo**" and together with Gingras, the "**Purchasers**") for the sale of:

a. the 379 Aircraft (as defined below) contemplated by the agreement of purchase and sale dated July 12, 2024 (as amended, the "**379 Sale Agreement**");

- b. the 350 Aircraft (as defined below) contemplated by the agreement of purchase and sale dated July 12, 2024 (as amended, the “**350 Sale Agreement**”, together with the 379 Sale Agreement, the “**Randigo Sale Agreements**” and collectively with the Gingras Sale Agreement, the “**Sale Agreements**”) between the Applicant and Randigo;
- (b) authorizing, requesting and directing the applicable government authorities to register the transfer of ownership of the Aircrafts (as defined below) to the Purchasers in the applicable registries and discharge the encumbrances against the Aircrafts including in favour of The Toronto-Dominion Bank (“**TD**”);
- (c) authorizing and directing KSV Restructuring Inc., the monitor in the CCAA (as defined below) proceedings (the “**Monitor**”), to distribute, on behalf of the Applicant, and in its capacity as escrow agent, the net proceeds of sale from the Transactions to TD; and
- (d) sealing the confidential appendices to the fifth report of the Monitor (the “**Fifth Report**”).

## **PART 2 – SUMMARY OF FACTS**

2. Further background in these proceedings is set out in the affidavit of David Atkins sworn July 19, 2024 and the Fifth Report.

### *Background*

3. On March 11, 2024, the Applicant sought and obtained an initial order (as amended and restated, the “**Initial Order**”). The Initial Order granted the Applicant protection pursuant to the

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), and imposed a stay of proceedings (the "**Stay Period**") to March 21, 2024.<sup>1</sup>

4. On March 21, 2024, this Court extended the Stay Period up to and including April 26, 2024.<sup>2</sup> The Stay Period currently expires on July 31, 2024.<sup>3</sup>

5. The initial purpose of the CCAA proceedings had been to restructure its operating contract with its principal customer, United Parcel Service Canada Ltd. ("**UPS**");<sup>4</sup> however, such negotiations were not successful and the Applicant and UPS are presently negotiating a wind-down agreement.<sup>5</sup>

#### *The Sale Process and the LAD Transaction*

6. On May 30, 2024, the Court granted an order (the "**Sale Process Order**") authorizing the Applicant to engage 1262396 Alberta Ltd. dba Pollock Aviation (the "**Agent**") to act as its sales agent to market and sell its assets, which consist primarily of the Applicant's aircrafts (the "**Fleet**") and approved the Applicant's proposed sale process (the "**Sale Process**").<sup>6</sup>

7. The Agent, in conjunction with Skylink, and under the supervision of the Monitor, developed its proposed approach to the marketing and sale of the Fleet and other assets. Briefly, the Sale Process provided that the Fleet and other assets would be marketed for sale on a one-off or en-bloc basis without a specific bid deadline.<sup>7</sup>

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<sup>1</sup> Affidavit of David Atkins sworn July 19, 2024 ("**Atkins Affidavit**") at para. 4, Motion Record of the Applicant returnable July 29, 2024 ("**MR**"), Tab 2, p. 12.

<sup>2</sup> Atkins Affidavit at para. 6, MR, Tab 2, p. 13.

<sup>3</sup> Atkins Affidavit at para. 8, MR, Tab 2, p. 13.

<sup>4</sup> Affidavit of Kyle Dennhardt sworn May 24, 2024 at para. 8, MR, Tab 3, p. 29

<sup>5</sup> Fifth Report to Court of KSV Restructuring Inc. as Monitor of Skylink Express Inc. dated July 22, 2024 ("**Fifth Report**"), p. 6 at paras. 2.0.8 and 2.0.9.

<sup>6</sup> Atkins Affidavit at para. 9, MR, Tab 2, p. 13.

<sup>7</sup> Atkins Affidavit at para. 10, MR, Tab 2, p. 14.

8. The Sale Process has been conducted in accordance with the Sale Process Order and remains ongoing.<sup>8</sup>

9. On July 5, 2024, the Court granted an order approving a transaction for the sale of a Cessna grand caravan aircraft and Pratt and Whitney Canada engine to LAD Inc. (the “**Lad Transaction**”).<sup>9</sup> The LAD Transaction closed later in the day on July 5, 2024.<sup>10</sup>

### *The Transactions*

10. In accordance with the Sale Process, the Applicant, in consultation with the Monitor, have now negotiated and finalized the terms of the Transactions for the sale of additional Aircrafts on the terms and conditions set out in the Sale Agreements.

11. The key terms of the Gingras Sale Agreement include:<sup>11</sup>

(a) **Purchaser**: Gingras.

(b) **Assets to be Purchased**: One (1) Cessna Grand Caravan aircraft, manufacturer’s serial number 208B-0047 together with one (1) Pratt and Whitney Canada PT6A-114A engine; all appurtenances, appliances, parts, avionics, instruments, components, accessions, furnishings, items of equipment and accessories installed thereon or appurtenant thereto as set forth in the Aircraft Specification attached as Exhibit A to the Gingras Sale Agreement; a spare (uninstalled) co-pilot windshield; and all Aircraft Documents (collectively, the “**47 Aircraft**”).

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<sup>8</sup> Fifth Report, p. 2 at para. 1.0.6.

<sup>9</sup> Fifth Report, p. 2 at para. 1.0.7.

<sup>10</sup> Atkins Affidavit at para. 13, MR, Tab 2, p. 14.

<sup>11</sup> Capitalized terms used in this paragraph and not otherwise defined have the meaning given to them in the Gingras Sale Agreement.

- (c) **Purchase Price and Deposit**: For the reasons provided in Section 3.2 of the Fifth Report, the Applicant is seeking to have the purchase price and the amount of the deposit sealed pending closing of the sale of all of the Fleet. The Monitor has now received the full amount of the purchase price in escrow pending closing.
- (d) **Delivery Location**: The Applicant's designated facility at Vancouver International Airport unless otherwise agreed in writing by the parties.
- (e) **"As Is, Where Is"**: The Gingras Sale Agreement is consistent with standard insolvency transactions, i.e., to be completed on an "as is, where is" basis with minimal representations, warranties and conditions.
- (f) **Closing Date**: Five (5) Business Days following the date the Court grants the Approval and Vesting Order ("**AVO**"), or such other date as may be agreed by the parties in writing.
- (g) **Material Conditions**: include, among other things:
  - (i) the Applicant shall have delivered or cause to be pre-delivered to the Escrow Agent (being the Monitor) a copy of the International Registry's draft pre-registration report to discharge any Liens published on the International Registry;
  - (ii) the Applicant shall have delivered or caused to be pre-delivered to the Escrow Agent, any documentation as may be required to request deregistration or transfer of registration of the 47 Aircraft to Gingras; and

(iii) the Court shall have issued the AVO.<sup>12</sup>

12. The key terms of the Randigo Sale Agreements include:<sup>13</sup>

(a) **Purchaser**: Randigo.

(b) **Assets to be Purchased**:

(i) **379 Sale Agreement**: One (1) Cessna Grand Caravan aircraft, manufacturer's serial 208B-0379 together with one (1) Pratt and Whitney Canada PT6A-114A engine; all appurtenances, appliances, parts, avionics, instruments, components, accessions, furnishings, items of equipment and accessories installed thereon or appurtenant thereto as set forth in the Aircraft Specification attached as Exhibit A to the 379 Sale Agreement; and all Aircraft Documents (collectively, the "**379 Aircraft**"); and

(ii) **350 Sale Agreement**: One (1) Cessna Grand Caravan aircraft, manufacturer's serial number 208B-0350 together with one (1) Pratt and Whitney Canada PT6A-114A engine; all appurtenances, appliances, parts, avionics, instruments, components, accessions, furnishings, items of equipment and accessories installed thereon or appurtenant thereto as set forth in the Aircraft Specification attached as Exhibit A to the 350 Sale Agreement; and all Aircraft Documents (collectively, the "**350 Aircraft**", and together with the 47 Aircraft and 379 Aircraft, the "**Aircrafts**").

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<sup>12</sup> Fifth Report, pp. 7-8 at para. 3.1.1.

<sup>13</sup> Capitalized terms used in this paragraph and not otherwise defined have the meaning given to them in the Randigo Sale Agreements.



- (c) **Purchase Price and Deposit**: For the reasons provided in Section 3.2 of the Fifth Report, the Applicant is seeking to have the purchase prices and the deposit amounts sealed pending closing of the sale of all of the Fleet. The Monitor has received the deposit in escrow and expects to receive the balance of the purchase price in advance of closing.
- (d) **Delivery Location**: The Applicant's designated facility at Vancouver International Airport unless otherwise agreed in writing by the parties.
- (e) **"As Is, Where Is"**: The Randigo Sale Agreements are consistent with standard insolvency transactions, i.e., to be completed on an "as is, where is" basis with minimal representations, warranties and conditions.
- (f) **Closing Date**: Five (5) Business Days following the date the Court grants the AVOs, or such other date as may be agreed by the parties in writing.
- (g) **Material Conditions**: include, among other things:
  - (i) the Applicant shall have delivered or cause to be pre-delivered to the Escrow Agent (being the Monitor) a copy of the International Registry's draft pre-registration reports to discharge any Liens published on the International Registry;
  - (ii) the Applicant shall have delivered or caused to be pre-delivered to the Escrow Agent, any documentation as may be required to request deregistration of the 379 Aircraft and the 350 Aircraft from the register of civil aircraft maintained by Transport Canada; and

(iii) the Court shall have issued the respective AVOs.<sup>14</sup>

13. The Sale Agreements contemplate that the Purchasers shall pay the sale proceeds from each of the Transactions to the Monitor as the escrow agent. The Monitor, on behalf of the Applicant, will distribute the proceeds to TD, net of the Agent's commission and HST.<sup>15</sup>

## **TD**

14. The Applicant is indebted to TD pursuant to a credit facilities letter agreement dated November 2, 2020 (the "**TD Loan Facilities**"). TD was granted security over all of the Applicant's assets pursuant to a general security agreement, aircraft security, assignment of insurance and hypothec (the "**TD Loan Security**"). The sole shareholder of the Applicant, Momentum Decisive Solutions Canada Inc. ("**Momentum**"), provided a limited recourse guarantee of the TD Loan Facilities in the amount of \$15 million and provided security in connection with its guarantee. The current balance on the TD Loan Facilities is approximately \$10.9 million.<sup>16</sup>

15. The Monitor's legal counsel has provided the Monitor with an opinion confirming the validity and enforceability of the TD Loan Security in the Aircrafts, subject to standard assumptions and qualifications.<sup>17</sup>

16. In connection with the Initial Order, the Applicant and TD, the Applicant's senior secured lender, negotiated an escrow agreement and a forbearance agreement (collectively, the "**TD Standstill Agreements**").<sup>18</sup> Pursuant to the TD Standstill Agreements, the Applicant has agreed

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<sup>14</sup> Fifth Report, pp. 7-8 at para. 3.1.1.

<sup>15</sup> Fifth Report, p. 9 at para. 3.4.1

<sup>16</sup> Fifth Report, p. 8 at para. 2.1.2.

<sup>17</sup> Fifth Report, p. 9 at para. 2.1.3.

<sup>18</sup> Atkins Affidavit at paras. 5 and 7, MR, Tab 2, p. 13.

that the net proceeds of all sales, transfers or other disposition of assets outside of the ordinary course shall be paid to TD.<sup>19</sup>

## **PART 3 – STATEMENT OF ISSUES, LAW & AUTHORITIES**

### ***The Court Should Grant the AVOs***

17. Pursuant to Section 36 of the CCAA, the Court has the jurisdiction to approve a sale transaction within the context of CCAA proceedings. Section 36(3) of the CCAA sets out the relevant factors for consideration as follows:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.<sup>20</sup>

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<sup>19</sup> Atkins Affidavit at para. 26, MR, Tab 2, p. 17.

<sup>20</sup> *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**"), [s. 36\(3\)](#).

18. The above factors, however, are not intended to be exhaustive nor to be considered a checklist that must be followed in every transaction.<sup>21</sup> The Courts have also continued to consider the *Soundair* criteria as relevant to whether or not a sale should be approved. Those factors are similar to those set out in Section 36(3) of the CCAA and are as follows:

- (a) whether the Court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;
- (b) the interest of all parties;
- (c) the efficacy and integrity of the process by which the offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.<sup>22</sup>

19. Each of the Sale Agreements and the proposed sales of the Aircrafts satisfy the above test. Among other things:<sup>23</sup>

- (a) the process undertaken by the Agent to market the Aircrafts was commercially reasonable and consistent with the terms of the Sale Process, and with the process used to market the aircraft sold in the LAD Transaction;
- (b) the Agent is an experienced sales agent and aircraft broker and is well known in the aviation industry;
- (c) in the Agent's view, the purchase price for each of the Aircrafts is acceptable and consistent with its expectations considering the age and condition of the Aircrafts;
- (d) the Transactions are unconditional, except for Court approval;

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<sup>21</sup> *Target Canada Co. (Re)*, [2015 ONSC 1487 \(CanLII\) \["Target"\]](#) at para. 16.

<sup>22</sup> *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\) \["Soundair"\]](#) at para. 16. See also, *Target, supra* at paras. 14-17.

<sup>23</sup> Fifth Report, pp. 8-9 at para. 3.3.1.

- (e) the deposits are non-refundable unless the Court does not approve the Transactions; and
- (f) TD does not oppose the approval of the Transactions, and Momentum, as guarantor, consents to their approval.

20. The Court has the jurisdiction to direct governmental authorities to transfer ownership and discharge registrations. Vesting Orders are routinely used to (a) transfer title in real property; (b) discharge land registrations; and (c) register partial discharges in the personal property registry. Indeed, the model approval and vesting order for Ontario includes specific language in that regard.<sup>24</sup>

21. Ownership of aircrafts in Canada and aircraft security must take place in the international registry of mobile assets (the “**International Registry**”). The International Registry permits individuals and organizations to register and search financial interests in aircraft assets. Pursuant to the applicable regulations governing the International Registry in order to discharge security interests and register a sale the seller, buyer and secured party must each be a “Transacting User Entity” and a “Professional User Entity” and must consent to the discharge of a registered security interest and sale.<sup>25</sup> TD and the Applicant are each Transacting User Entities and Professional User Entities.

22. The Court recently granted such relief in connection with the LAD Transaction.<sup>26</sup> Similar orders directing governmental authorities to transfer title and discharge registrations have been granted in the context of other airline insolvencies.<sup>27</sup>

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<sup>24</sup> See: <https://www.ontariocourts.ca/sci/files/forms/com/approval-and-vesting-order-EN.doc>.

<sup>25</sup> See sections 2.1, 15 and 25 of the Regulations and Procedures for the International Registry: <https://www.internationalregistry.aero/ir-web/common/documentDownload?locale=en&documentId=4>.

<sup>26</sup> *In the Matter of Skylink Express Inc.* (July 5, 2024), Superior Court of Justice (Commercial List), Toronto, CV-24-00716267-00CL at para 4 ([Approval and Vesting Order of Justice Steele](#)); *In the Matter of Skylink Express Inc.* (July 5, 2024), Superior Court of Justice (Commercial List), Toronto, CV-24-00716267-00CL at paras 8 and 9 ([Endorsement of Justice Steele](#)).

### ***The Distribution Should be Approved***

23. Courts routinely grant orders authorizing distributions to secured creditors. In *AbitibiBowater*, the Court considered a number of factors in the context of an interim distribution including (a) whether the payee's security was valid and enforceable; (b) whether the distribution would leave the estate with sufficient liquidity; and (c) whether the amounts owed to the beneficiary of the distribution far exceed the amount of the distribution.<sup>28</sup>

24. In this case, the proposed distribution should be made. TD is the Applicant's senior secured creditor. Its security in respect of the Aircrafts is not primed by any of the charges under the Initial Order and the Applicant has agreed for all net proceeds of sale to be paid to TD by the Monitor acting as escrow agent on its behalf. The Monitor has received an opinion from its legal counsel with respect to the validity and enforceability of TD's security in respect of the Aircrafts.<sup>29</sup>

### ***The Sealing Order Should be Granted***

25. The Applicant is requesting that the confidential appendices to the Fifth Report be sealed until either the completion of the Sale Process or further Order of this Court.

26. In *Sierra Club of Canada v Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where: (i) the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and (ii) the salutary effects of the order outweigh its deleterious effects.<sup>30</sup> More recently, in *Sherman Estate v Donovan*, the Supreme Court of Canada held that a party requesting that a court exercise its discretion in a way that limits the 'open court' presumption must establish that: (i) the

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<sup>27</sup> See, for example: *In the Matter of Lynx Air Holdings Corporation et al.* (May 21, 2024), Court of King's Bench of Alberta, Calgary, 2401-02664 ([Approval and Vesting Order](#)).

<sup>28</sup> *AbitibiBowater Inc. (Arrangement relatif à)*, [2009 QCCS 6461 \(CanLII\) at para. 75](#).

<sup>29</sup> Fifth Report, p. 7 at para. 2.1.3; p. 9 at para. 3.4.1.

<sup>30</sup> *Sierra Club of Canada v Canada (Minister of Finance)*, [2002 SCC 41 \(CanLII\)](#).

openness poses a risk to an important interest of the public; (ii) the request sought is necessary to prevent the risk to the identified interest as reasonable alternative measures will not prevent said risk; and (iii) the benefits of the request outweigh the negatives as a matter of proportionality.<sup>31</sup>

27. Within the context of insolvency proceedings, it is common to seal bids and other commercially sensitive material, such as the details of competing offers, in the event that the proposed transaction not close or where further assets continue to be marketed.<sup>32</sup>

28. The confidential appendices contain the purchase prices and deposit information for the Aircrafts. If revealed, it could negatively impact i) the sale of the Aircrafts if the Transactions do not close; and ii) the sale of other assets available for sale in the Sale Process.<sup>33</sup> The salutary effects of the proposed sealing order outweigh the deleterious effects of the public not knowing the purchase price information for the Aircrafts until the remainder of the Fleet can be sold or further order of the Court.

#### **PART 4 – ADDITIONAL RELIEF**

29. The additional relief sought by the Applicant including the extension of the Stay Period to October 31, 2024, the increase in the maximum borrowing amount under the Applicant's debtor in possession credit facility (the "**DIP Facility**") and approval of the Monitor's activities as well as the fees and disbursements of the Monitor and its counsel should be approved. Among other things:

- (a) the Applicant has acted and continues to act, in good faith and with due diligence;
- (b) the extension of the Stay Period will provide the Applicant with sufficient time to close the Transactions and continue to advance the Sale Process as well as assist in the wind down of the UPS services;

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<sup>31</sup> *Sherman Estate v Donovan*, [2021 SCC 25 \(CanLII\)](#).

<sup>32</sup> See, for example: *In the Matter of Ignite Services, et al.* (November 9, 2023), Superior Court of Justice of Ontario (Commercial List), Toronto, CV-23-00708635-00CL ([Endorsement of Justice Conway](#)).

<sup>33</sup> Fifth Report, p. 8 at para. 3.2.1.

- (c) the increase in the DIP Facility is required to provide for adequate funding during the proposed Stay Period extension;
- (d) the activities of the Monitor as set out in the fourth report of the Monitor dated June 28, 2024 and the Fifth Report are consistent with its mandate pursuant to the CCAA and the Initial Order; and
- (e) the fees and disbursements as incurred by the Monitor and its counsel for the period approval is being sought are reasonable and appropriate in the circumstances.

**PART I - ORDER REQUESTED**

30. For the reasons set out above, the requested relief set out in the Applicant's notice of motion should be granted.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 23<sup>rd</sup> day of July, 2024.

  
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## Schedule "A"

### LIST OF AUTHORITIES

1. *AbitibiBowater Inc. (Arrangement relatif à)*, [2009 QCCS 6461 \(CanLII\)](#)
2. *In the Matter of Ignite Services, et al.* (November 9, 2023), Superior Court of Justice of Ontario (Commercial List), Toronto, CV-23-00708635-00CL ([Endorsement of Justice Conway](#)).
3. *In the Matter of Lynx Air Holdings Corporation et al.* (May 21, 2024), Court of King's Bench of Alberta, Calgary, 2401-02664 ([Approval and Vesting Order](#)).
4. *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)
5. *Sherman Estate v Donovan*, [2021 SCC 25 \(CanLII\)](#)
6. *Sierra Club of Canada v Canada (Minister of Finance)*, [2002 SCC 41 \(CanLII\)](#)
7. *In the Matter of Skylink Express Inc.* (July 5, 2024), Superior Court of Justice (Commercial List), Toronto, CV-24-00716267-00CL at para 4 ([Approval and Vesting Order of Justice Steele](#))
8. *In the Matter of Skylink Express Inc.* (July 5, 2024), Superior Court of Justice (Commercial List), Toronto, CV-24-00716267-00CL at paras 8 and 9 ([Endorsement of Justice Steele](#)).
9. *Target Canada Co. (Re)*, [2015 ONSC 1487 \(CanLII\)](#)

## Schedule "B"

### TEXT OF STATUTES, REGULATIONS & BY - LAWS

#### **COMPANIES' CREDITORS ARRANGEMENT ACT** R.S.C., 1985, c. C-36

##### ***Obligations and Prohibitions***

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

**36** (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

###### *Factors to be considered*

- (3) In deciding whether to grant the authorization, the court is to consider, among other things,
- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
  - (b) whether the monitor approved the process leading to the proposed sale or disposition;
  - (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
  - (d) the extent to which the creditors were consulted;
  - (e) the effects of the proposed sale or disposition on the creditors and other interested parties;  
and
  - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

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