

**COURT OF APPEAL OF ALBERTA**

**COURT OF APPEAL FILE NUMBER** 2401-0142AC  
**TRIAL COURT FILE NUMBER** 2401-01422  
**COURT** COURT OF KING'S BENCH OF ALBERTA  
**REGISTRY OFFICE:** CALGARY

IN THE MATTER OF THE COMPANIES'  
CREDITORS ARRANGEMENT ACT,  
R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF THE  
COMPROMISE OR ARRANGEMENT OF  
GRIFFON PARTNERS OPERATION  
CORPORATION, GRIFFON PARTNERS  
HOLDING CORPORATION, GRIFFON  
PARTNERS CAPITAL MANAGEMENT  
LTD., STELLION LIMITED, 2437801  
ALBERTA LTD., 2437799 ALBERTA LTD.,  
2437815 ALBERTA LTD., and SPICELO  
LIMITED

**APPLICANT**

**TAMARACK VALLEY ENERGY LTD.**

**RESPONDENTS**

GRIFFON PARTNERS OPERATION  
CORPORATION, GRIFFON PARTNERS  
HOLDING CORPORATION, AND  
GRIFFON PARTNERS CAPITAL  
MANAGEMENT LTD., STELLION LIMITED,  
2437801 ALBERTA LTD., 2437799  
ALBERTA LTD., 2437815 ALBERTA LTD.  
AND SPICELO LIMITED

NOT PARTIES TO THE APPEAL  
(MONITOR)

ALVAREZ & MARSAL CANADA INC.

NOT PARTIES TO THE APPEAL  
(PRIMARY LENDERS)

TRAFIGURA CANADA LIMITED AND  
SIGNAL ALPHA C4 LIMITED

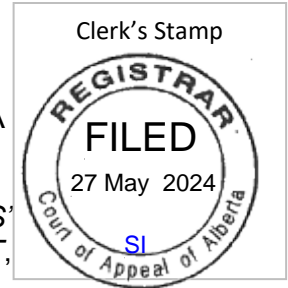
**DOCUMENT**

**MEMORANDUM OF ARGUMENT**

**ADDRESS FOR SERVICE AND  
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## I. OVERVIEW

1. Tamarack Valley Energy Ltd. (“**TVE**”) is the second secured creditor of Griffon Partners Operation Corp. (“**GPOC**”) pursuant to a Subordinated Secured Promissory Note in the amount of \$20 million plus interest granted by GPOC in favour of TVE (the “**TVE Promissory Note**”).

2. In this application, TVE seeks permission to appeal the decision of the Honourable Justice L.K. Harris (the “**Application Justice**”) dated May 14, 2024 (the “**Marshalling Decision**”).<sup>1</sup> In the Marshalling Decision, the Application Justice granted the application of the Debtors (as defined below) and held that:

- a. TVE has no claim against the assets of GPOC’s surety, Spicelo Limited (“**Spicelo**”); and
- b. GPOC’s senior secured creditors, Signal Alpha C4 Limited and Trafigura Canada Ltd. (collectively, the “**Lenders**”) are not required, pursuant to the equitable doctrine of marshalling, to exhaust their remedies under the Limited Recourse Guarantee and Securities Pledge Agreement dated July 21, 2022 between the Lenders and Spicelo (the “**Share Pledge**”) prior to realizing upon the proceeds from the sale of the equity of GPOC following a Sale and Investment Solicitation Process (“**SISP**”).<sup>2</sup>

3. TVE respectfully submits that the Application Justice erred by ignoring or failing to consider the marshalling application filed by TVE, erred in law in the consideration of the relief sought, erred in law regarding marshalling; ignored or provided insufficient reasons in respect of the law of subrogation and misapplied the law to the facts.

4. The effect of the Marshalling Decision and the Application Judge’s errors is that TVE’s security was needlessly wiped away resulting in TVE recovering none of the over \$23 million in secured debt owed to it by GPOC, to the substantial benefit of Spicelo who is not a creditor. Further, the Application Judge missed the opportunity to provide much-needed clarity from this Honourable Court on the application of the doctrines of marshalling, subrogation and equitable subordination in this jurisdiction in circumstances where a surety has contractually agreed to be a primary obligor of the principal’s debt and

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<sup>1</sup> Affidavit of Kira Lyseng, sworn May 24, 2024 (“**Lyseng Affidavit**”) at para 20, Exhibit “S”, Reasons for Decision of the Hon. Justice L.K. Harris dated May 14, 2024 (the “**Marshalling Decision**”).

<sup>2</sup> *Ibid* at para 47.

waived its right of subrogation. Creditors, debtors, sureties, guarantors and insolvency practitioners would all benefit from a decision on these issues. This is the last outstanding issue in these proceedings.

5. TVE submits that the points in issue are significant to insolvency law and to the parties, its appeal is *prima facie* meritorious and that it would not unduly hinder or delay the within proceedings, such that permission to appeal the Marshalling Decision is appropriate in the circumstances.

## II. FACTS

6. In or around July of 2022, TVE entered into negotiations with GPOC for the purchase of certain of GPOC's oil and gas assets located in Alberta and Saskatchewan (the "**TVE Transaction**"). As GPOC did not have nor contribute any cash or assets to complete the TVE Transaction, it required financing which it obtained from the Lenders and TVE.<sup>3</sup>

7. With the Lenders, GPOC entered into a Loan Agreement dated July 21, 2022, and amended as of August 31, 2022 (collectively, the "**Loan Agreement**"), whereby the Lenders agreed to advance USD\$35,869,565.21.<sup>4</sup>

8. As security for payment of performance of GPOC's obligations under the Loan Agreement, Spicelo and the Lenders entered into the Share Pledge, pursuant to which Spicelo pledged all of the common shares it holds in Greenfire Resources Ltd. as collateral (the "**Pledged Shares**").<sup>5</sup> In the recitals to the Share Pledge, the close business and financial relationship of Spicelo and GPOC is expressly acknowledged, as is the "substantial direct and indirect benefits" Spicelo will derive from the TVE Transaction.

9. Under the terms of the Share Pledge, *inter alia*, Spicelo jointly and severally, irrevocably and unconditionally guaranteed to the Lenders the due performance of GPOC's obligations (defined as including all debts and liabilities) under the Loan Agreement; Spicelo agreed to perform these obligations as the primary obligor; the Lenders had the discretion to enforce or refrain from exercising or enforcing any right or

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<sup>3</sup> Lyseng Affidavit at para 7, Exhibit "F", Affidavit of Daryl Stepanic filed on January 30 ("**Stepanic January 30 Affidavit**"), at para 24; Lyseng Affidavit at para 6, Exhibit "E", Affidavit of David Gallagher, sworn October 17, 2023, at para 11.

<sup>4</sup> Lyseng Affidavit at para 10, Exhibit "I", Affidavit No. 1 of Matthieu Milandri, sworn on March 18, 2024, at para 8 and Exhibit "C".

<sup>5</sup> Lyseng Affidavit, at para 7, Exhibit "F", Stepanic January 30 Affidavit at para 41(c) and Exhibit "M" (the "**Share Pledge**").

security against Spicelo or GPOC; the Lenders were not obliged to exhaust their recourse against, *inter alia*, any other security it may hold before realizing upon the Pledged Shares; and in the event of a sale or disposition of the equity securities of GPOC, Spicelo expressly waived any right of subrogation.<sup>6</sup>

10. Within four months of entering into the Loan Agreement, GPOC defaulted on same.<sup>7</sup> GPOC had no ability or intention to repay the Promissory Note. Jonathan Klesch, the beneficial owner and sole shareholder of Spicelo, and a director and beneficial shareholder of GPOC, stated that the Promissory Note was “a very expensive piece of paper” which he had “to get rid of as fast as we can”.<sup>8</sup>

11. Following GPOC’s default on the Loan Agreement, Mr. Klesch was involved in discussions with the Lenders while at the same time stating that, if the Lenders took steps to formally enforce the Loan Agreement, it “...could be a good option to eliminate the Tamarack note.”<sup>9</sup>

12. The Lenders issued Demands for Payment and Notices of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “**BIA**”), and in response, the Debtors filed Notices of Intention to Make a Proposal under the *BIA* (the “**NOI Proceedings**”).

13. On October 18, 2023, an Order was granted by the Alberta Court of King’s Bench approving a Sale and Investment Solicitation Process through which GPOC’s assets were to be marketed and sold (the “**SISP**”).<sup>10</sup> The SISP was extended on several occasions without a proposal being put to the Lenders and TVE prior to the expiry of the NOI Proceedings.

14. On February 7, 2024, the NOI Proceedings were continued in the within proceedings under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (the “**CCAA**”)<sup>11</sup>, with a view of concluding the SISP and presenting a proposal to the Lenders and TVE.

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<sup>6</sup> *Ibid.*

<sup>7</sup> Lyseng Affidavit at para 7, Volume 2, Exhibit “F”, Stepanic January 30 Affidavit at para 65.

<sup>8</sup> Lyseng Affidavit at para 13, Exhibit “L”, Cross Examination Transcript at pp 49:2 – 49:14.

<sup>9</sup> Lyseng Affidavit at para 3, Exhibit “B”, Affidavit of David Gallagher, dated September 19 at Exhibit “C”.

<sup>10</sup> Lyseng Affidavit at para 5, Exhibit “D”, Order of the Honourable Justice Dunlop filed on October 23, 2023.

<sup>11</sup> [RSC 1985, c C-36](#) [TAB 1].

15. The successful bidder under the SISP acquired all the shares of GPOC through a reverse vesting order approved by the Honourable Justice Burns pursuant to an order pronounced on April 10, 2024 (the “**RVO**”).<sup>12</sup> Under the RVO, there was a transfer of the entire equity of GPOC to the successful bidder.

16. The proceeds from the SISP were insufficient to satisfy the amount owing to the Lenders. However, the Lenders also have recourse to recover the debt owing under the Loan Agreement by realizing upon Spicelo’s Pledged Shares.

17. TVE’s sole source of recovery of the amount owing by GPOC under the Promissory Note is from the proceeds of the SISP. TVE is not a party to any share pledge agreement with Spicelo and does not have any recourse for recovery of amounts owing by GPOC against Spicelo or any of the other Debtors.

18. On March 12, 2024, TVE filed an application seeking an order:

- a. directing that, pursuant to the equitable doctrine of marshalling, the Lenders are required to realize upon the Share Pledge provided by Spicelo in satisfaction of the debt owing by GPOC in priority to the proceeds from the SISP; and
- b. under the terms of the Share Pledge and at equity, Spicelo does not have a right to subrogate to the Lenders’ security position as against GPOC in priority to TVE,

(the “**TVE Marshalling Application**”).<sup>13</sup>

19. On March 15, 2024, the Debtors filed a cross-application seeking, *inter alia*, declarations that TVE has no claim against the assets of Spicelo under the doctrine of marshalling and that the Lenders are not required, pursuant to the doctrine of marshalling, to exhaust their remedies under the Share Pledge prior to the Lenders realizing upon any of the proceeds from the SISP (the “**Debtors’ Application**”).<sup>14</sup>

### ***The Marshalling Decision***

20. On April 12, 2024, the Application Justice heard the TVE Marshalling Application and the Debtors’ Application (collectively, the “**Marshalling Applications**”) and issued the Marshalling Decision on May 14, 2024.

<sup>12</sup> Lyseng Affidavit at para 15, Exhibit “N”, Order of the Honourable Justice Burns filed on April 12, 2024.

<sup>13</sup> Lyseng Affidavit at para 8, Exhibit “G”, Application of TVE filed on March 12, 2024.

<sup>14</sup> Lyseng Affidavit at para 9, Exhibit “H”, Application of the Debtors filed March 15, 2024.

21. In the Marshalling Decision, the Application Justice references only the Debtors' Application. She refers to the Debtors as the "Applicants" even though TVE filed the TVE Marshalling Application first, and does not mention that TVE Marshalling Application in her reasons.<sup>15</sup>

22. This omission or oversight is significant as the issues raised and the relief sought by TVE and the Debtors markedly differ and, by following the Debtors' Application in her analysis, the Application Justice failed to consider a number of issues and arguments raised by TVE.

23. Specifically, the Application Justice did not reference the terms of the Share Pledge, which TVE submits are critical in assessing the applicability of the doctrines of marshalling and subrogation.

24. In her analysis on the exception to the single common debtor rule, the Application Judge focused on the relationship between the two debtors such that one debtor is entitled to require the other to be primarily liable to either of the creditors. At paragraph 31, she stated that such a relationship must exist, otherwise it would be inequitable to force one debtor to pay the other's debt when that debtor was not under any obligation to do so.<sup>16</sup>

25. However, the Application Justice fails to consider that under the terms of the Share Pledge, Spicelo expressly agreed that it would be the "primary obligor" to the Lenders, it would be jointly and severally liable to pay the full amount of GPOC's indebtedness to the Lenders, the Lenders had the discretion to enforce any right or security against Spicelo and the Lenders were not obligated to exhaust their recourse against any other security before realizing upon the Pledged Shares.<sup>17</sup>

26. The Application Justice erred by failing to address how contractual terms expressly agreed to by sophisticated parties impact any potential inequities of forcing one debtor (Spicelo) to pay the other's debt (GPOC). TVE's position is that there is no inequity in holding parties to the terms of agreements that they entered into willingly.

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<sup>15</sup> Marshalling Decision, *supra* note 1 at paras 2, 16 and 48.

<sup>16</sup> *Ibid*, at paras 30 and 31.

<sup>17</sup> Share Pledge, *supra* note 5.

27. The Application Justice also erred by failing to address the issue of subrogation. In the Marshalling Decision, the Application Justice stated that she first must resolve whether marshalling is available, and then if there is a right of subrogation.<sup>18</sup>

28. In this case Spicelo's right of subrogation (or lack thereof) must be considered in conjunction with applicability of the doctrine of marshalling. The Debtors argued in part that the doctrine of marshalling should not be applied as it would be pointless or illusory because of Spicelo's right of subrogation against GPOC, and subrogation would extinguish any ability of TVE as the second secured creditor to recover.

29. In doing so, the Debtors reference case law and secondary sources for the proposition that the surety exception to the single common debtor rule can only apply in circumstances where the senior and junior creditors are doubly secured against the surety, and not the debtor.

30. However, Spicelo expressly waived its right of subrogation. The Share Pledge provides that, if there is a sale of the equity securities of GPOC in connection with the exercise of the Lenders' rights and remedies under the Loan Agreement (as was the case here with the sale of the equity shares of GPOC in the SISP), Spicelo's right of subrogation terminates.<sup>19</sup>

31. The waiver of Spicelo's right of subrogation impacts the applicability of the doctrine of marshalling, distinguishes the case law cited by the Debtors and referenced by the Application Justice in the Marshalling Decision, and requires this Honourable Court's consideration in addressing the apparent gap in the jurisprudence.

32. Further on the issue of subrogation, the Application Justice failed to consider TVE's arguments that, in the event Spicelo did not contractually waive its right to subrogate against GPOC, it should not be permitted to do so at equity and under the doctrine of equitable subordination. These issues require consideration as part of the marshalling analysis. In addition, the doctrine of equitable subordination has received minimal consideration from the Supreme Court of Canada and mixed consideration from superior courts across Canada, and clarity on the application of this doctrine is of importance to insolvency law and the parties.

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<sup>18</sup> Marshalling Decision, *supra* note 1 at para 3.

<sup>19</sup> Share Pledge, *supra* note 5.

33. The Application Justice also erred by mischaracterizing TVE's arguments on why it is equitable to employ the doctrine of marshalling. She incorrectly applied the law regarding marshalling by incorrectly stating that TVE's argument was centered in part on piercing the corporate veil to expose Spicelo's beneficial owner and shareholder, Mr. Klesch's, involvement in GPOC as a basis for an exception to the single common debtor rule under the doctrine of marshalling.<sup>20</sup> Rather, TVE argued that, under the CCAA and BIA, Spicelo and GPOC are non-arm's length parties due to their common ownership and control by Mr. Klesch such that it would be inequitable not to apply the doctrine of marshalling or to allow for Spicelo to be permitted to advance a subrogated claim.

34. The Application Justice mischaracterized the relief being sought by TVE. She erred by stating that TVE is seeking repayment of debts owed by GPOC from Spicelo.<sup>21</sup> It is not. As set forth in the TVE Marshalling Application, which was ignored, TVE sought that the Lenders recover first against the Pledged Shares, followed by proceeds from GPOC's SISF, and that TVE recover any of the remaining amount from the SISF. TVE has never argued that it has a claim against Spicelo. That is the Debtors' argument.

35. The Application Justice further erred by incorrectly stating that the Lenders took no position in the Marshalling Applications<sup>22</sup> when, in fact, they expressed support at the Court hearing for the application of the doctrine of marshalling. Prejudice to senior creditors and interference with their choice of remedy to enforce their security interests are key factors to consider when applying the doctrine of marshalling. The Application Justice erred in her analysis by not taking into account the Lenders' support of TVE's position.

36. Finally, the Application Justice erred by directing the parties to agree to costs, failing which to provide written submissions within 60 days of the Marshalling Decision.<sup>23</sup> The Marshalling Applications were brought in the course of the within CCAA proceedings and there should not be any costs awarded to either party.

### III. ISSUE

37. The sole issue is whether TVE should be granted permission to appeal the Marshalling Decision.

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<sup>20</sup> Marshalling Decision, *supra* note 1 at para 36.

<sup>21</sup> *Ibid* at paras 45 and 46.

<sup>22</sup> *Ibid* at para 17.

<sup>23</sup> *Ibid* at para 49.

#### IV. LAW AND ARGUMENT

##### a. Test for Permission to Appeal

38. Section 13 of the CCAA provides that, “[e]xcept in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.”<sup>24</sup>

39. In *Bellatrix Exploration Ltd v BP Canada Energy Group ULC*,<sup>25</sup> this Honourable Court affirmed that the test for permission to appeal in CCAA proceedings requires “serious and arguable grounds that are of real and significant interest to the parties”, which can be assessed by considering the following four factors:

- a. Whether the point on appeal is of significance to the practice;
- b. Whether the point raised is of significance to the action itself;
- c. Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
- d. Whether the appeal will unduly hinder the progress of the action.<sup>26</sup>

40. In *Resurgence Asset Management LCC v Canadian Airlines Corporation*,<sup>27</sup> this Honourable Court held that the final two factors are generally of more importance than the initial two.

41. TVE submits that, in this case, each factor strongly militates in favour of granting permission to appeal the Marshalling Decision.

##### b. The Points on Appeal Are of Significance to the Practice

42. The issues raised by TVE are of significance to the practice.

43. The Application Justice’s application of the doctrine of marshalling incorrectly interprets the surety exception to the single common debtor rule and does not consider the effect of a surety agreeing to be a primary obligor of a principal’s debt nor a surety’s waiver of its right of subrogation.

<sup>24</sup> CCAA at s. 13 [TAB 1].

<sup>25</sup> *Bellatrix Exploration Ltd v BP Canada Energy Group ULC*, 2020 ABCA 178 [Bellatrix] [TAB 2].

<sup>26</sup> *Ibid* at para 16 [TAB 2].

<sup>27</sup> 2000 ABCA 149 at para 46 [TAB 3].

44. Further, there is a lack of recent case law from this jurisdiction on the application of the doctrines of marshalling and equitable subordination, and creditors, debtors, sureties, guarantors, and practitioners would benefit from a decision from this Honourable Court on these issues.

**c. The Points Raised Are of Significance to the Parties**

45. The issues raised by TVE are also of significance to the parties.

46. From TVE's perspective, the failure of the Application Justice to consider the TVE Marshalling Application, misapprehending the relief sought by TVE, failing to consider or mischaracterizing TVE's arguments, and incorrectly stating the Lenders were neutral when they in fact supported the application of marshalling, all resulted in the Application Justice finding in favour of the Debtors.

47. As a result, TVE has no prospect of recovering any of the over \$23 million in secured debt owed to it by GPOC.

48. From Spicelo's perspective, the Marshalling Decision allows it to retain ownership of the remaining Pledged Shares even though it irrevocably and unconditionally guaranteed to the Lenders the due performance of GPOC's obligations under the Loan Agreement and agreed to perform these obligations as the primary obligor.

**d. The Appeal is *Prima Facie* Meritorious**

49. In considering the merits of TVE's appeal, this Honourable Court need not conduct a full examination of same. Rather, TVE must only establish it has an arguable case, which is one that is not frivolous.<sup>28</sup> The standard is not onerous.<sup>29</sup>

50. TVE submits that given the issues outlined above with respect to the Marshalling Decision, this appeal is arguable, and not frivolous. There are serious and arguable grounds of appeal with respect to the numerous errors made by the Application Justice.

51. Further, the issues raised in TVE's appeal do not call upon the knowledge gained by a supervising judge during the CCAA process. The Application Judge did not supervise the NOI Proceedings or the within CCAA proceedings, and aside from the Marshalling Applications had no other involvement. As such, TVE submits that the usual grounds for restraint in granting leave in CCAA proceedings do not apply.

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<sup>28</sup> *Third Eye Capital v B.E.S.T. Active 365 Fund*, [2020 ABCA 160](#), at [para 10](#) [TAB 4].

<sup>29</sup> *Bellatrix*, *supra* note 25 at [para 28](#) [TAB 2].

**e. The Appeal Will Not Unduly Hinder or Delay the CCAA Proceedings**

52. TVE's appeal of the Marshalling Decision will not unduly hinder or delay the within CCAA proceedings, as the only substantive extant issue is with respect to the application of the equitable doctrines of marshalling and subrogation.

53. The sale of GPOC's equity to the successful SISP bidder has been completed and the Lenders have been repaid in full pursuant to a distribution order pronounced by the Honourable Justice E.J. Sidnell on April 17, 2024 (the "**Distribution Order**").<sup>30</sup> TVE notes that, under the Distribution Order, any distribution made to the Lenders is expressly without prejudice to TVE's interests arising from the Marshalling Applications.

54. Further, by order of the Honourable Justice B. Johnston pronounced on May 14, 2024, Alvarez & Marsal Canada Inc. has been discharged as monitor of 2437801 Alberta Ltd., 2437799 Alberta Ltd., 2437815 Alberta Ltd. and Stellion Limited and the stay period in the within CCAA proceedings have been extended to August 16, 2024.<sup>31</sup>

55. As such, there will not be any delay or hinderance of the CCAA proceedings in the event TVE is granted permission to appeal the Marshalling Decision.

**V. RELIEF REQUESTED**

56. TVE respectfully requests that it be granted permission to appeal the Marshalling Decision of the Honourable Justice L.K. Harris.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** at Calgary, Alberta this 27<sup>th</sup> day of May, 2024.

**STIKEMAN ELLIOTT LLP**

Per:



**Matti Lemmens**

**Counsel to Tamarack Valley Energy Ltd.**

**VI. TABLE OF AUTHORITIES**

**TAB AUTHORITY**

1. [Companies' Creditors Arrangement Act, RSC 1985, c C-36](#)
2. [Bellatrix Exploration Ltd v BP Canada Energy Group ULC, 2020 ABCA 178](#)
3. [Resurgence Asset Management LLC v. Canadian Airlines Corporation, 2000 ABCA 149](#)
4. [Third Eye Capital v B.E.S.T. Active 365 Fund, 2020 ABCA 160](#)

<sup>30</sup> Lyseng Affidavit at para 17, Exhibit "P", Order of the Honourable Justice E.J. Sidnell filed on April 19, 2024.

<sup>31</sup> Lyseng Affidavit at para 22, Exhibit "T", Order of the Honourable Justice B. Johnston filed on April 16, 2024.