

# 2005 BCSECCOM 124

February 18 2005

## **Headnote**

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act s. 114(2) Takeover Bids - Exemption from the formal takeover bid requirements in Part 13 of the Act - An issuer requires relief from prohibition against certain collateral agreements in s. 107(2) of the Act - The offeror issuer has entered into a collateral agreement with a shareholder of the offeree issuer; the agreement is entered into for valid business reasons, and not for the purpose of providing the shareholder with a benefit beyond what other shareholders of the offeree issuer will receive under the offer

## **Applicable British Columbia Provisions**

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 107(2) and 114(2)(a)

In the Matter of  
the Securities Legislation  
of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New  
Brunswick, Nova Scotia, and Newfoundland and Labrador (the Jurisdictions)

and

In the Matter of  
the Mutual Reliance Review System for Exemptive Relief Applications

and

Activant Solutions Acquisitionco Ltd. (Offeror)

and

Activant Solutions Inc. (Activant) (the Filers)

and

Speedware Corporation Inc. (Speedware)

## MRRS Decision Document

## **Background**

The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from the Filers for a decision under the securities legislation (the Legislation) of the Jurisdictions that the Severance Agreements, the Polar Termination Agreement, the Change of Control Agreements, the Twining Amending Agreement and the Prelude Agreements were made for reasons other than to increase the value of the consideration paid for those Speedware Shares that are owned or controlled by the parties to such agreements and may be entered into despite the provisions of the Legislation of

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the Jurisdictions that prohibit an offeror who makes or intends to make a take-over bid from entering into any collateral agreement, commitment or understanding with any holder or beneficial owner of securities of the offeree issuer that has the effect of providing to the holder or owner a consideration of greater value than that offered to other holders of the same class of securities (the Legislation Requested Relief).

The Decision Maker in each of the Province of Ontario and Quebec has received an application from the Filers for a decision under Ontario Securities Commission Rule 61-501 and Quebec Policy Q-27 (the Rules) that the votes attached to the Speedware Shares that are tendered to the Offer by Polar and PCI may be included as votes in a subsequent “going-private transaction” or “business combination” in the determination of whether the requisite minority approval has been obtained (the Rules Requested Relief).

Under the Mutual Reliance Review System for Exemptive Relief Applications

- (a) the Autorité des marchés financiers is the principal regulator for this application, and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation**

Defined terms contained in National Instrument 14-101 Definitions have the same meaning in this decision unless they are defined in this decision.

“Change of Control Agreements” means the change of control and non-competition agreements entered into between Enterprise and each of Cary Anderson and Daniel Waters;

“Earnout” means an additional earn-out payment of up to U.S.\$4 million due under the Prelude Purchase Agreement;

“Enterprise” means Enterprise Computer Systems, Inc., an indirect, wholly-owned subsidiary of Speedware;

“Locked-up Shareholders” means, collectively, Polar, PEP Inc., Polar Enterprise Partners LP, PCI, Reid Drury, Steve Mulherin, Ian Farquharson, Jean-Pierre Theoret, Richard Vaughn, Andrew Gutman, Nick Cristiano, James Yeates and David Lurie;

“Lock-up Agreements” means the lock-up agreement dated January 24, 2005 between the Offeror and the Locked-up Shareholders;

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“Options” means options to purchase Speedware Shares granted pursuant to Speedware's stock option plans;

“PCI” means Polar Capital Investments Inc.;

“PEP Inc.” means Polar Enterprise Partners Inc.;

“Polar” means Polar Capital Corporation;

“Polar Consulting Agreement” means the existing consulting agreement between Speedware and Polar dated April 24, 2002, as amended;

“Polar Group” means collectively, Polar, PCI and PEP Inc.;

“Polar Termination Agreement” means the termination and non-competition agreement entered into between Speedware and Polar terminating the Polar Consulting Agreement;

“Polar Termination Payment” means a lump sum payment of \$250,000 to be made in connection with the Polar Termination Agreement;

“Prelude” means Prelude Systems Inc.;

“Prelude Agreements” means, collectively, the Prelude Termination Agreement, the Prelude Pledge Amendment, the Webb Amending Agreement and the Prelude Purchase Amendment;

“Prelude Pledge Agreement” means that certain share pledge and escrow agreement, pursuant to which the Prelude Shares were pledged as security for the payments under the Earnout;

“Prelude Pledge Amendment” means the amendment to Prelude Pledge Agreement providing for the release of the Prelude Shares;

“Prelude Purchase Agreement” means the share purchase agreement pursuant to which a wholly-owned subsidiary of Speedware agreed to acquire 100% of the Prelude Shares;

“Prelude Purchase Amendment” means the amendment to the Prelude Purchase Agreement amending the terms of the Earnout;

“Prelude Shares” means the common shares of Prelude;

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“Prelude Termination Agreement” means the termination agreement providing for the termination of the Prelude Undertaking Agreement;

“Prelude Undertaking Agreement” means that certain undertaking agreement entered into in connection with Prelude Purchase Agreement which contained specific provisions intended to ensure that the ability to achieve the Earnout would not be adversely affected by certain specific actions of Speedware;

“Second Step Transaction” a transaction subsequent to the Offer that results in the Offeror (or an affiliate) acquiring all of the Speedware Shares and all of the holders of Speedware Shares receiving \$3.91 in cash for each Speedware Share;

“Senior Management” means, collectively, Andrew Gutman, Nick Cristiano and David Lurie;

“Severance Agreements” means the severance, bonus and non-competition agreements entered into between Speedware and each of the Senior Management;

“Speedware Shares” means the common shares of Speedware Corporation Inc.;

“Support Agreement” means the support agreement dated January 24, 2005 between the Offeror and Speedware;

“Twining Amending Agreement” means the amending agreement entered into between Enterprise, James Twining and Speedware amending the employment agreement of Mr. Twining;

“Warrants” means the outstanding warrants of Speedware to purchase Speedware Shares; and

“Webb Amending Agreement” means the amending agreement extending the term of the Webb employment agreement to September 30, 2005.

### **Representations**

This decision is based on the following facts represented by the Filers:

#### **Activant and the Offeror**

1. Activant is a corporation incorporated under the laws of the State of Delaware and has its head office at 804 Las Cimas Parkway, Austin, TX 78746.
2. Activant is subject to periodic reporting requirements of the United States *Securities Exchange Act of 1934*. Activant is not a reporting issuer in any

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jurisdiction of Canada and no securities of Activant are listed or posted for trading on any stock exchange in Canada.

3. The Offeror has been incorporated as a wholly-owned subsidiary of Activant, under the federal laws of Canada, for the purpose of effecting the Offer. The Offeror carries on no other business.
4. The registered office of the Offeror is Suite 3800, P.O. Box 84, 200 Bay Street, Toronto, Ontario, M5J 2Z4.
5. The Offeror is not a reporting issuer in any jurisdiction of Canada and no securities of the Offeror are listed or posted for trading on any stock exchange in Canada.
6. The Offeror will not become a reporting issuer in any jurisdiction as a result of the Offer.

### **Speedware**

7. Speedware is a corporation incorporated under the federal laws of Canada and has its head office at 9999 Cavendish Blvd, Suite 100, St. Laurent, Quebec, H4M 2X5.
8. Speedware is a reporting issuer in all of the provinces of Canada where such concept exists and the Speedware Shares are listed on the Toronto Stock Exchange.
9. Speedware's authorized capital consists of an unlimited number of Speedware Shares and an unlimited number of non-voting preferred shares, issuable in series, of which 30,637,383 Speedware Shares and no non-voting preferred shares were issued and outstanding as at January 24, 2005. As at January 24, 2005, there were 1,835,501 outstanding Options and 4,166,667 outstanding Warrants, each exercisable for one Speedware Share (and no other securities convertible into Speedware Shares).

### **The Offer**

10. The Offeror proposes to acquire all of the Speedware Shares, including all Speedware Shares issued upon the exercise of (i) currently outstanding Options and (ii) currently outstanding Warrants at a price of \$3.91 per Speedware Share, payable in cash. Based on the closing price of the Speedware Shares on the Toronto Stock Exchange on January 21, 2005, the

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Offer represents a premium of 47% over the market price of the Speedware Shares.

11. The Offer will be made by way of take-over bid circular mailed to all holders of Speedware Shares and prepared in accordance with the Legislation of the Jurisdictions.
12. The Offer will be conditional on, among other things, there being validly deposited under the Offer and not withdrawn at the time the Offeror first takes up and pays for the Speedware Shares, at least 66⅔% of the issued and outstanding Speedware Shares on a fully-diluted basis.
13. The Offeror and Speedware have entered into the Support Agreement pursuant to which the Offeror has agreed to make the Offer, subject to certain conditions, and Speedware has agreed to, among other things, recommend that its shareholders deposit their Speedware Shares under the Offer.
14. The Offeror has also entered the Lock-up Agreement with the Locked-up Shareholders pursuant to which the Locked-up Shareholders have agreed to deposit under the Offer, or cause to be deposited under the Offer, all of the Speedware Shares beneficially owned by the Locked-up Shareholders and any Speedware Shares that may be issued on the exercise of all currently outstanding Options, Warrants or other entitlements that the Locked-up Shareholders may have to acquire Speedware Shares.
15. If the Offer is successful, the Offeror intends to acquire any Speedware Shares not deposited under the Offer through a Second Step Transaction. The Offeror intends to effect the Second Step Transaction by exercising the statutory right of compulsory acquisition available under the *Canada Business Corporations Act*, or, if such right is not available, the Offeror currently intends to acquire any such Speedware Shares not so deposited by effecting a “going-private transaction” or “business combination”.
16. Speedware has received an opinion from its financial advisor, that the Offer is fair, from a financial point of view, to the holders of Speedware Shares, which opinion shall be included in the Speedware directors' circular prepared in response to the Offer.

### **Termination of Senior Management and Polar Consulting Agreement**

17. As an integral part of the transaction, upon the successful completion of the Offer, the Offeror intends to replace the existing Senior Management and terminate the Polar Consulting Agreement.

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18. The Severance Agreements and the Polar Termination Agreement were negotiated between the management of Speedware, on the one hand, and each of the Senior Management and Polar, respectively, on the other hand. Activant was not involved in the negotiation of the amounts payable under these agreements; however, Activant has reviewed the Severance Agreements and the Polar Termination Agreement and has required the inclusion of non-competition and non-solicitation covenants in such agreements. These agreements are commercially reasonable and in accordance with industry practice.

### **Severance Agreements**

19. Mr. Gutman has been a director of Speedware since 2002 and was appointed President and Chief Executive Officer of Speedware in May 2002. Mr. Gutman holds 420,622 Speedware Shares, Options to acquire an additional 505,000 Speedware Shares and Warrants to acquire an additional 124,999 Speedware Shares. The aggregate Speedware Shares held by Mr. Gutman on a fully-diluted basis represent approximately 2.9% of the outstanding Speedware Shares.
20. On January 24, 2005, Speedware entered into a severance, bonus and non-competition agreement with Mr. Gutman. Pursuant to the terms of this agreement Mr. Gutman will receive a lump sum payment plus continue his current health care benefits for a period of 18 months following his termination as a result of completion of the Offer, in return for which he has agreed to release Speedware from any future claims and not to compete with certain of the business of, or solicit any employees of, Speedware for a period of 18 months.
21. Mr. Cristiano was appointed Chief Financial Officer of Speedware in December 1999. Mr. Cristiano holds 59,500 Speedware Shares and Options to acquire an additional 155,000 Speedware Shares. The aggregate Speedware Shares held by Mr. Cristiano on a fully-diluted basis represent approximately 0.6% of the outstanding Speedware Shares.
22. On January 24, 2005, Speedware entered into a severance, bonus and non-competition agreement with Mr. Cristiano. Pursuant to the terms of this agreement Mr. Cristiano will receive a lump sum payment plus continue his current health care benefits for a period of 12 months following his termination as a result of completion of the Offer, in return for which he has agreed to release Speedware from any future claims and not to compete with

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certain of the business of, or solicit any employees of, Speedware for a period of 12 months.

23. Mr. Lurie was appointed Director of Acquisitions of Speedware in May 2002. Mr. Lurie holds 119,048 Speedware Shares, Options to acquire an additional 52,500 Speedware Shares and Warrants to acquire an additional 41,667 Speedware Shares. The aggregate Speedware Shares held by Mr. Lurie on a fully-diluted basis represent approximately 0.6% of the outstanding Speedware Shares.
24. On January 24, 2005, Speedware entered into a severance, bonus and non-competition agreement with Mr. Lurie. Pursuant to the terms of this agreement Mr. Lurie will receive a lump sum payment plus continue his current health care benefits for a period of 12 months following his termination as a result of completion of the Offer, in return for which he has agreed to release Speedware from any future claims and not to compete with certain of the business of, or solicit any employees of, Speedware for a period of 12 months.

### **Polar Termination Agreement**

25. Polar owns 90,000 Speedware Shares. In addition, PCI, a subsidiary of Polar, owns 27,135 Speedware Shares and manages PEP Inc. Polar beneficially owns 96% of PCI. Polar's compensation for management services to PEP Inc. includes a fee calculated as a percentage of the net realized income of PEP Inc.
26. PEP Inc. owns 5,828,805 Speedware Shares and Warrants to acquire an additional 2,485,831 Speedware Shares.
27. PCI indirectly owns 30.9% of the equity of PEP Inc.
28. In the aggregate, the Polar Group owns approximately 23% of the outstanding Speedware Shares on a fully-diluted basis.
29. Pursuant to an agreement dated April 24, 2002, Polar provides consulting services to Speedware. The Polar Consulting Agreement renews annually (at the option of Polar) in accordance with its terms.
30. On November 30, 2004, the board of directors of Speedware approved the extension of the term of the Polar Consulting Agreement until April 30, 2006 at a monthly fee of \$20,833. In 2004, the monthly fee paid under the Polar Consulting Agreement was \$20,833.

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31. On December 6, 2004, the board of directors of Speedware authorized Speedware to approve the termination of the Polar Consulting Agreement.
32. On January 24, 2005, Speedware entered into the Polar Termination Agreement terminating the Polar Consulting Agreement for a lump sum payment of \$250,000, in return for which Polar has agreed not to compete with certain of the business of, or solicit any employees of, Speedware for a period of 12 months. The Polar Termination Agreement also contained mutual releases.
33. The Polar Termination Payment was determined between Speedware and Polar and represents the amount that would have been payable for the remainder of the term under the Polar Consulting Agreement until April 2006. Other than requiring the inclusion of the non-competition and non-solicitation covenants, Activant was not involved in the negotiation of the Polar Termination Agreement.
34. The benefit granted to Polar is not conferred for the purpose, in whole or in part, of increasing the value of the consideration paid for the Speedware Shares tendered to the Offer by Polar.
35. The conferring of the benefit is not, by its terms, conditional on Polar supporting the Offer in any manner.
36. Based on the Speedware Shares held directly by Polar and attributing (i) 96% of the consideration payable to PCI in exchange for the Speedware Shares tendered to the Offer by PCI and (ii) 29.66% of the consideration payable to PEP Inc. in exchange for the Speedware Shares tendered to the Offer by PEP Inc., Polar will receive approximately \$10,096,287 as consideration for the Offer.
37. Absent the relief requested herein, the Offeror may not be able to count the 90,000 Speedware Shares tendered to the Offer by Polar and the 27,135 Speedware Shares tendered to the Offer by PCI for the purpose of any required minority approval in a Second Step Transaction pursuant to the Rules.

### **Change of Control Agreements**

38. The Change of Control Agreements were negotiated between management of Speedware and Enterprise, on the one hand, and each of Messrs. Anderson and Waters, respectively, on the other hand. Activant was not involved in the

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negotiation of the amounts payable under these agreements; however, Activant has reviewed the Change of Control Agreements and has required the inclusion of non-competition and non-solicitation covenants. These agreements are commercially reasonable and in accordance with industry practice.

39. Mr. Anderson was appointed Senior Vice President, Research & Development of Enterprise in May 2002. Mr. Anderson holds 3,000 Speedware Shares and Options to acquire 73,000 Speedware Shares. The aggregate Speedware Shares held by Mr. Anderson on a fully-diluted basis represent approximately 0.2% of the outstanding Speedware Shares.
40. On January 24, 2005, Speedware entered into a change of control and non-competition agreement with Mr. Anderson providing for a lump sum payment plus continuation of his current health care benefits for one year in the event that he is terminated “without cause” within 12 months of the completion of the Offer, in return for covenants not to compete with the business of, or solicit employees of, Speedware for a period of 12 months.
41. Mr. Waters was appointed Vice President, Sales of Enterprise in August 2002. Mr. Waters holds 107,143 Speedware Shares and 53,000 Options. The aggregate Speedware Shares held by Mr. Waters on a fully-diluted basis represent approximately 0.44% of the outstanding Speedware Shares.
42. On January 23, 2005, Speedware entered into a change of control and non-competition agreement with Mr. Waters providing for a lump sum payment plus continuation of his current health care benefits for one year in the event that he is terminated “without cause” within 12 months of the completion of the Offer, in return for covenants not to compete with the business of, or solicit employees of, Speedware for a period of 12 months.

### **Twining Amending Agreement**

43. Mr. Twining was appointed President of Enterprise and Executive Vice President of Speedware in April 2001. Mr. Twining holds 110,357 Speedware Shares and Options to acquire an additional 250,000 Speedware Shares. The aggregate Speedware Shares held by Mr. Twining on a fully-diluted basis represent approximately 0.98% of the outstanding Speedware Shares.
44. On November 30, 2004, the board of directors of Speedware authorized Speedware to enter into an amendment to Mr. Twining's employment agreement in the event of his termination within one year following a change of control resulting from the completion of the Offer.

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45. On January 24, 2005, Enterprise entered into the Twining Amending Agreement providing for a lump sum payment plus continuation of his current health care benefits for 12 months, in the event that Mr. Twining is terminated “without cause” within 6 months of the completion of the Offer and a lump sum payment plus continuation of his current health care benefits for 12 months in the event that he is terminated “without cause” between 6 and 12 months following the completion of the Offer, in return for covenants from Mr. Twining not to voluntarily terminate his employment for a period of 6 months from the date of completion of the Offer. Additionally, if Mr. Twining remains employed with Enterprise for a period of 6 months following completion of the Offer, he will be guaranteed a bonus entitlement with respect to the current fiscal year.
46. The Twining Amending Agreement was negotiated between the management of Speedware and Enterprise, and Mr. Twining. Activant was not involved in the negotiation of the amounts payable under this agreement. The Twining Amending Agreement is commercially reasonable and in accordance with industry practice.

### **Prelude Agreements**

47. On July 19, 2004, Speedware acquired 100% of the Prelude Shares.
48. Under the terms of the Prelude Purchase Agreement, a wholly-owned subsidiary of Speedware agreed to acquire 100% of the Prelude Shares for U.S.\$9.765 million in cash (subject to certain adjustments) plus the Earnout due in July 2005. The Earnout was subject to Prelude achieving certain revenue and profitability based performance targets.
49. Don Webb, President, founder and principal shareholder of Prelude, remained President of Prelude after closing of the acquisition, and in connection with the Prelude Purchase Agreement subscribed for 224,611 Speedware Shares (at a price of CDN \$2.95, for an aggregate of U.S.\$500,000).
50. In connection with the Prelude Purchase Agreement, certain other agreements were entered into with, or on behalf of, the vendors of Prelude Shares, including the Prelude Undertaking Agreement and the Prelude Pledge Agreement.
51. Prior to signing the Support Agreement, Activant required that Speedware take such actions as is required to terminate the Undertaking Agreement, modify the Prelude Pledge Agreement to provide for the release of the Prelude

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Shares, subject to certain conditions, on September 30, 2005, amend the Prelude Purchase Agreement to change the terms and conditions upon which the Earnout is paid, and amend the existing employment agreement with Mr. Webb to extend the employment term from June 30, 2005 until September 30, 2005, with each of the foregoing to become effective concurrently with the completion of the Offer.

52. On January 24, 2005 Speedware entered into the Prelude Agreements.
53. Under the Prelude Agreements, the aggregate amount of the Earnout remains unchanged at U.S.\$4 million; however, Speedware has assured the payment of U.S.\$3 million regardless of financial performance, as a result, in part, of actual results to date, with such U.S.\$3 million to be paid in three equal instalments on March 31, 2005 (or, if later, following completion of the Offer), June 30, 2005, and September 30, 2005. The remaining U.S.\$1 million of the Earnout remains subject to financial performance and becomes payable after December 31, 2005. The final two payments of the Earnout (totalling U.S. \$2 million) will be held in an escrow account pending determination of certain indemnification claims under the Prelude Purchase Agreement.
54. Mr. Webb owns in the aggregate 224,611 Speedware Shares which constitutes approximately 0.6% of the outstanding Speedware Shares on a fully-diluted basis. Mr. Webb is not one of the Locked-up Shareholders.
55. Particulars of each of the Severance Agreements, the Polar Termination Agreement, the Change of Control Agreements, the Twining Amending Agreement and the Prelude Agreements will be disclosed in the take-over bid circular and the directors' circular with respect to the Offer.
56. The Severance Agreements, the Polar Termination Agreement, the Change of Control Agreements, the Twining Amending Agreement and the Prelude Agreements have been entered into for legitimate business reasons that are unrelated to the holdings of Speedware Shares, Options or Warrants of the parties thereto and are not for the purposes of (i) conferring an economic or collateral benefit on Messrs. Gutman, Cristiano, Lurie, Twining, Anderson, Waters or Webb or Polar that the other holders of Speedware Shares do not enjoy, nor (ii) providing a consideration of greater value than that offered to the other holders of Speedware Shares.

### **Decisions**

Each of the relevant Decision Makers is satisfied that the tests contained in the Legislation and the Rules that provide the Decision Maker with the jurisdiction to make the decisions have been met.

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The decision of the Decision Makers in each of the Jurisdictions under the Legislation is that the Legislation Requested Relief is granted.

Daniel Laurion  
Surintendant de la Direction de l'encadrement des marchés des valeurs

The decision of the Decision Makers in each of the Province of Quebec and Ontario under the Rules is that the Rules Requested Relief is granted.

Daniel Laurion  
Surintendant de la Direction de l'encadrement des marchés des valeurs