Estate No. 32-2853708
Court File No. 32-2853708

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY
(COMMERCIAL LIST)

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF iS5 COMMUNICATIONS INC., OF THE CITY OF MISSISSAUGA IN THE PROVINCE OF ONTARIO

FACTUM OF THE MOVING PARTY, iS5 COMMUNICATIONS INC.

November 28, 2022

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TO: THE SERVICE LIST

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PART I - OVERVIEW

1. On August 5, 2022, iS5 Communications Inc. (the "**Company**") commenced this proceeding (the "**NOI Proceeding**") by filing a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**") with the Office of the Superintendent of Bankruptcy.

2. The purpose of the NOI Proceeding is to provide the Company an opportunity to either identify one or more purchasers for its assets or an investor in the Company's business through a court-approved stalking horse sale and investment solicitation process (the "**SISP**").

3. On October 17, 2022, the Court issued an order (the "**SISP Order**") approving the SISP and the share purchase agreement dated October 14, 2022 (the "**Stalking Horse Agreement**") with Elektrophoenix GmbH (the "**Purchaser**") to act as the minimum bid in the SISP.

4. The Company and Grant Thornton Limited ("**Grant Thornton**"), in its capacity as proposal trustee of the Company in the NOI Proceeding (in such capacity, the "**Proposal Trustee**"), ran the SISP in accordance with the SISP Order.

5. The deadline for the submission of Phase I Bids under the SISP was November 16, 2022. No bids or expressions of interest were received. On November 16, 2022, the Proposal Trustee informed the Purchaser that the Stalking Horse Purchase Agreement was the successful bid in the SISP.

6. The Stalking Horse Agreement is conditional upon the issuance of an approval and reverse vesting order to be issued in a proceeding under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**"). The Company therefore proposes to continue this NOI Proceeding under the CCAA.

7. Among other relief, the approval and reverse vesting order will approve the transaction contemplated by the Stalking Horse Agreement (the "**Transaction**"), vest the shares of the Company in the Purchaser free and clear of all lien and encumbrances, and transfer any unwanted assets or liabilities to ResidualCo (as defined below).

8. This factum is submitted in support of the motion of the Company for:

(a) an initial order under the CCAA, among other things, (i) continuing the NOI Proceeding under the CCAA, (ii) appointing Grant Thornton as the monitor of the Company in the CCAA proceeding (in such capacity, the "**Monitor**"), (iii) staying proceedings against the Company to and including December 23, 2022 (the "**Stay Extension**"), (iv) continuing the Directors' Charge, the Administration Charge and the DIP Lender's Charge (each as defined in the Order of the Honourable Justice Osborne granted in the NOI Proceeding on August 8, 2022 (the "**First Day Order**")) to remain in force and effect in the CCAA proceeding, and (v) extending the benefit of the Administration Charge to the Monitor, counsel to the Monitor and counsel to the Company in the CCAA proceeding, and increasing the quantum of the Administration Charge from CAD $150,000 to CAD $350,000 (the "**Initial Order**");

(b) an approval and reverse vesting order, among other things, (i) authorizing and approving the Transaction, (ii) vesting out of the Company all Excluded Assets, Excluded Contracts and Excluded Liabilities (as defined in the Stalking Horse Agreement), which will be transferred to 14544072 Canada Inc. ("**ResidualCo**"), a corporation incorporated by the Company for this sole purpose, (iii) authorizing the Company to file articles of reorganization, issue New Common Shares, and undertake the Consolidation and Cancellation, and authorizing the Company to issue the Post-Consolidation Shares (each as defined in the Stalking Horse Agreement) and vesting in the Purchaser the Post-Consolidation Shares on a free and clear basis (collectively, the "**Reorganization**"), (iv) release certain claims against the Released Parties (defined below), and (v) enhancing the Monitor's powers to allow it to, among other things, act as the sole director of ResidualCo, assign ResidualCo into bankruptcy, and act as ResidualCo's trustee in bankruptcy (the "**Reverse Vesting Order**"); and

(c) an ancillary order approving: (i) payment by the Company of the fees and disbursements incurred by the Proposal Trustee and its legal counsel, Cozen

O'Connor LLP, in connection with the NOI Proceeding, (ii) the fourth report of the Proposal Trustee dated November 23, 2022 (the "**Fourth Report**"), and (iii) the actions, conduct and activities of the Proposal Trustee described in the Fourth Report (the "**Ancillary Order**").

9. The relief sought on the Company's motion is detailed further below.

PART II - FACTS

Background

10. On August 5, 2022, the Company commenced the NOI Proceeding and named Grant Thornton as the Proposal Trustee.

Affidavit of Clive Dias sworn November 22, 2022, Motion Record, Tab 3 ("Fourth Dias Affidavit") at paras 4–5.

11. Prior to the commencement of the NOI Proceeding, the Company engaged the services of IOI Capital and Markets, LLC to assist it in identifying a potential sale, recapitalization or investment transaction (the "**Pre-Filing Marketing Process**"). The Pre-Filing Marketing Process did not result in any bids.

Fourth Dias Affidavit at para 28.

12. Since the Company commenced the NOI Proceeding, its goal has been to create an opportunity to identify either a purchaser for the assets or an investor in the Company's business through a proposed stalking horse sale process. In furtherance of this goal, the SISP was conducted

and, on November 16, 2022, the Stalking Horse Agreement was identified as the successful bid therein.

Fourth Dias Affidavit at paras 6 & 16–17.

The SISP

13. On October 17, 2022, the Court made the SISP Order approving the SISP and the Stalking Horse Agreement to serve as the minimum bid in the SISP.

Fourth Dias Affidavit at para 12.

14. The SISP was administered by the Company and the Proposal Trustee in an effort to identify offers that were superior to the offer contained in the Stalking Horse Agreement.

Fourth Dias Affidavit at para 13.

15. In the Fourth Report, the Proposal Trustee describes that:

(a) a teaser document prepared by the Proposal Trustee describing the opportunity to invest in, or acquire, the Company was received by 191 interested parties;

(b) the Proposal Trustee posted advertisements of the opportunity provided by the SISP in the Globe & Mail (National Edition) and Insolvency Insider; and

(c) seven parties executed a non-disclosure agreement and were provided access to a confidential data room containing information about the Company and its business and operations.

Fourth Report of the Proposal Trustee dated November 23, 2022 (“Fourth Report”) at paras 29–35 and Appendices “6” & “7”.

16. The deadline for the receipt of non-binding expressions of interest under the first phase of the SISP was November 16, 2022. The Company did not receive any bids. In accordance with the terms of the SISP, the Stalking Horse Agreement is the successful bid and the Company now seeks approval of the Stalking Horse Agreement.

Fourth Dias Affidavit at paras 16–17.

The Stalking Horse Agreement

17. Pursuant to the terms of the Stalking Horse Agreement, the Purchaser agreed to purchase all of the Company's shares pursuant to a transaction to be implemented through the Reverse Vesting Order.

Fourth Dias Affidavit at para 18 and Exhibit "A".

18. The purchase price contemplated in the Stalking Horse Agreement is USD $5 million, a portion of which will be comprised of a "credit bid" of amounts owing by the Company to Phoenix Contact Venture Funds I GmbH (the "**DIP Lender**") under the DIP Term Sheet (as defined in the First Day Order). The cash portion of the purchase price will be sufficient to repay the Company's senior secured creditor, Silicon Valley Bank ("**SVB**"), in full, and is expected to result in a distribution to the Company's second lien secured noteholders (collectively, the "**Secured Noteholders**").

Fourth Dias Affidavit at para 19.

19. It is expected that the Purchaser will continue to operate the business as a going concern, and will continue to employ substantially all of the Company's existing employees.

Fourth Dias Affidavit at para 20.

20. The Purchaser has structured the Stalking Horse Agreement as a share purchase agreement to be implemented through the Reverse Vesting Order in order to allow Purchaser to, among other things:

(a) assume over USD $30 million in operating losses to be applied against future profits, which tax losses were factored into the purchase price;

(b) allow the Company to maintain its existing export permits and avoid the need to re-apply for those permits, which can be a lengthy, cumbersome, and uncertain process;

(c) maintain the Company's existing accounts with its vendors; and

(d) ensure that the Company is able to maintain its existing employee contracts to ensure a smooth transition of key employee resources.

Fourth Dias Affidavit at para 22.

21. The Stalking Horse Agreement contemplates that the target date to close the Transaction is the third business day following the issuance of the Reverse Vesting Order. The outside date to close the Transaction is December 23, 2022 or such later date as the Company and the Purchaser mutually agree. The Company will endeavour to close the Transaction as soon as possible after the Reverse Vesting Order is granted.

Fourth Dias Affidavit at para 26 and Exhibit "A".

22. The Proposal Trustee / proposed Monitor, the DIP Lender and SVB are supportive of the approval of the Stalking Horse Agreement and the Transaction, as are most of the largest Secured Noteholders.

Fourth Dias Affidavit at para 27; Fourth Report at para 49.

Continuation of NOI Proceedings under the CCAA

23. The Stalking Horse Agreement provides that the NOI Proceeding will be continued under the CCAA to implement the Transaction through the Reverse Vesting Order. Closing of the Transaction is conditional upon the Company obtaining the Reverse Vesting Order.

Fourth Dias Affidavit at paras 23 & 30–31.

24. The Company had liabilities at the commencement of the NOI Proceeding exceeding CDN $5 million (and continues to do so) and is insolvent.

Fourth Dias Affidavit at para 32 and Exhibit "B".

25. The Company will have sufficient liquidity to continue to fund its operations until the week ending December 23, 2022. The Company will therefore have sufficient liquidity to continue operating in the CCAA proceeding through the proposed Stay Extension, which will allow it to close the Transaction, and allow the proposed Monitor to return to Court to seek approval of the proposed distributions to the Company's secured creditors and the termination of the CCAA proceeding.

Fourth Dias Affidavit at para 33 and Exhibit "E".

26. If the Court approves the Reverse Vesting Order, substantially all of the Company's liabilities will be transferred to ResidualCo, which will be added as an applicant in the CCAA proceeding, and the Company will cease being a debtor in the CCAA proceeding and will exit the

CCAA proceeding. ResidualCo will have liabilities in excess of CDN $5 million and will be insolvent.

Fourth Dias Affidavit at para 34.

27. The Company has been acting diligently and in good faith in pursuing a going concern sale that will benefit the Company's various stakeholders. Those efforts have culminated in the Transaction, which is the only transaction available to the Company in the circumstances. The conversion of the NOI Proceeding to a CCCA proceeding through the Initial Order, and the issuance of the Reverse Vesting Order in the CCAA proceeding, are critical steps towards closing the Transaction.

Fourth Dias Affidavit at para 35.

28. Grant Thornton has consented to act as the Monitor in the CCAA proceeding. The Proposal Trustee / proposed Monitor is supportive of the Reverse Vesting Order.

Fourth Dias Affidavit at para 36 and Exhibit "C".

PART III - ISSUES

29. The issues to be determined by this Court are whether the Court should grant: (i) the Initial Order to, among other things, continue the NOI Proceeding under the CCAA and extend the stay of proceedings to and including December 23, 2022; (ii) the Reverse Vesting Order to, among other things, authorize and approve the Transaction, authorize the Reorganization, release certain claims against the Released Parties, and enhance the Monitor's powers; and (iii) the Ancillary Order to, among other things, approve the Fourth Report and the actions, conduct and activities of the Proposal Trustee described in the Fourth Report.

30. The Company submits that the Court should grant the proposed orders to allow the Company to close the Transaction (which is the only transaction available to the Company), which will provide a recovery to the Company's secured creditors and a going concern solution that will benefit the Company's many stakeholders, including ongoing employment for a substantial majority of the Company's 39 employees.

PART IV - LAW & ARGUMENT

The NOI Proceeding Should Be Continued Under the CCAA

31. Completion of the Transaction contemplated by the Stalking Horse Agreement is conditional upon the NOI Proceeding being continued under the CCAA for the purposes of obtaining the Reverse Vesting Order.

32. Section 11.6(a) of the CCAA governs the continuation under the CCAA of proceedings commenced under Part III under the BIA:

> **11.6** Notwithstanding the Bankruptcy and Insolvency Act,
>
> **(a)** proceedings commenced under Part III of the Bankruptcy and Insolvency Act may be taken up and continued under this Act only if a proposal within the meaning of the Bankruptcy and Insolvency Act has not been filed under that Part
>
> ***Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], s 11.6(a)**.

33. The Company has complied with the requirements of section 11.6 of the CCAA. On a motion to continue an NOI proceeding under the CCAA, the debtor should place before the Court evidence of the following:

(a) the debtor has not filed a proposal under the BIA;

(b) the proposed continuation would be consistent with the purposes of the CCAA; and

(c) evidence that serves as a reasonable surrogate for the information that section 10(2) of the CCAA requires accompany any initial application under the CCAA.

> ***Clothing for Modern Times Ltd (Re)*, 2011 ONSC 7522 [*Clothing for Modern Times*] at para 9**; ***Urbancorp Inc (Re)*, 2016 ONSC 3288 at para 38**.

34. The Company and the Proposal Trustee have filed the required evidence to support the proposed continuation of the NOI Proceeding under the CCAA.

35. The Company has not filed a proposal under the BIA.

36. The proposed continuation of the NOI Proceeding under the CCAA in order to complete the Transaction is consistent with one of the recognized purposes of the CCAA: in appropriate circumstances, the purposes of the CCAA will be met where the proposed reorganization involves the sale of the debtor's business as a going concern, where the alternative would be that the debtor would cease to carry on business.

> ***Clothing for Modern Times, supra*, at para 12**; ***Stelco Inc (Re)* (2004), 6 CBR (5th) 316 (Ont Sup Ct J) at para 1**; ***Consumers Packaging Inc (Re)* (2001), 27 CBR (4th) 197 (Ont CA) at paras 5** & **9**.

37. Section 10(2) of the CCAA is meant to guide the Court's determination of whether an initial application under the CCAA meets requirements of appropriateness, good faith and due diligence. Section 10(2) states:

> **10 (2)** An initial application must be accompanied by
>
> **(a)** a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
>
> **(b)** a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

> **(c)** copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

***CCAA, supra*, s 10(2)**; ***Clothing for Modern Times, supra*, at para 14**.

38. This Court has found that (i) a cash flow forecast showing that the debtor has sufficient liquidity to operate the proposed CCAA proceeding, (ii) a report from the debtor's proposal trustee commenting favourably on the reasonableness of the cash flow forecast and (iii) evidence that the debtor has been acting in good faith and with due diligence is evidence sufficient to support the granting of an order continuing proceedings commenced under part III of the BIA under the CCAA.

***Clothing for Modern Times, supra*, at paras 15–17**.

39. In the present case, the Company has, with the assistance of the Proposal Trustee, prepared a cash flow forecast (the "**Fourth Cash Flow Statement**"). The Fourth Cash Flow Statement forecasts that the Company has sufficient resources to continue operating in the CCAA proceeding until the end of the proposed period of the Stay Extension (*i.e.*, December 23, 2022). The Proposal Trustee has commented favorably on the reasonableness of the Fourth Cash Flow Statement and the forecasts therein.

Fourth Dias Affidavit at paras 33 & 55 and Exhibit "E"; Fourth Report at paras 19–23 and Appendix "4".

40. In connection with the Company's motion for, among other things, the First Day Order, the Company provided this Court with a summary of its unaudited June 30, 2022 balance sheet. That balance sheet showed that the Company had total liabilities of approximately USD $13 million, assets of approximately USD $6 million and was, therefore, insolvent. Additionally, the Company indicated that commencing the week of August 8, 2022, the Company would not have

sufficient liquidity to meet its employee wages and ongoing obligations in the absence of interim financing. Consequently, the Company sought and this Court granted the First Day Order, approving, among other things, the DIP Term Sheet to allow the Company time to negotiate the Stalking Horse Agreement.

Fourth Dias Affidavit at para 32 and Exhibit "B" at paras 51–52 & 57.

41. The Company has been acting diligently and in good faith in pursuing a going concern sale that will benefit the Company's various stakeholders. The Stalking Horse Agreement and the Transaction contemplated thereby represents the best available result from such efforts. The proposed continuation of the NOI Proceeding under the CCAA is a critical step required to close the Transaction.

Fourth Dias Affidavit at para 35.

42. The Initial Order should be granted.

The Stay Extension Should Be Granted

43. In connection with the granting of the Initial Order, the Company is seeking to have the initial stay period run for 23 days until December 23, 2022. While the proposed Stay Extension is longer than the 10-day initial stay period typically granted in initial orders pursuant to section 11.02(1) of the CCAA, where an initial order is sought pursuant to a motion to continue proceedings under the CCAA, this Court typically exercises its discretion to forgo applying the restriction in section 11.02(1).

***CCAA*, *supra*, s 11.02(1)**; **Endorsement of Cavanagh J dated October 7, 2021 in Medifocus Inc (Re), Court File No CV-20-00669781-00CL [Medifocus]**; **Initial Order of Cavanagh J dated October 7, 2021 in Medifocus at para 16**; **Initial Order of Hainey J dated September 29, 2020 in JMX Contracting Inc at al (Re), Court File No CV-20-00648528-00CL at para 16**; **Initial Order of Gilmore J dated July 31, 2020 in Tribalscale Inc (Re), Court File No CV-20-00645116-00CL at para 17**.

44. In any event, the manner that the Company has sought the proposed Stay Extension accords with the policy rationale behind the restriction provided by section 11.02 of the CCAA. The 10-day restriction on stays of proceedings provided thereby is meant to ensure that all parties potentially affected by an initial order have adequate notice and opportunity to respond substantively to the application for the initial order at a comeback hearing.

> ***Lydian International Limited (Re)*, 2019 ONSC 7473 at paras 29–31.**

45. The Court has jurisdiction to grant a stay of proceedings longer 10 days under section 11.02(2) of the CCAA. The length of a stay extension granted under section 11.02(2) is discretionary and provides the parties with relative flexibility.

> ***Sunrise/Saskatoon Apartments Limited Partnership (Re)*, 2017 BCSC 808 at para 21.**

46. In order to grant a stay under section 11.02(2) of the CCAA, this Court must be satisfied that (i) an extension of the stay of proceedings is appropriate in the circumstances and (ii) that the applicant has acted, and is acting, in good faith and with due diligence.

> ***CCAA, supra*, s 11.02(2)–(3); *Harte Gold Corp (Re)*, 2022 ONSC 653 [*Harte Gold*] at para 87.**

47. In the present case, the Company is neither seeking the Initial Order on an *ex parte* application nor on an application brought on short notice. Rather, the Company served all known parties that might be potentially affected by the Initial Order with due notice of a motion for the continuation of the NOI Proceeding—of which such notified parties are already aware—under the CCAA.

48. The Stay Extension is appropriate in the circumstances: (a) it is required to give the Company, the Purchaser and the proposed Monitor time to complete the Transaction, (b) the

Company has sufficiently liquidity to operate through the proposed Stay Extension and (c) the Proposal Trustee / proposed Monitor supports the granting of the Stay Extension.

Fourth Dias Affidavit at paras 61–63; Fourth Report at para 62.

49. As described in paragraph 40 above, the Company has been acting in good faith and with due diligence in the NOI Proceeding and is seeking the Stay Extension in the proposed CCAA proceedings to give it time to complete the Transaction.

The Reverse Vesting Order is Appropriate

50. In addition to continuing the NOI Proceeding under the CCAA, the Stalking Horse Agreement is conditional on the granting of the Reverse Vesting Order in the proposed CCAA proceeding.

51. The Court's jurisdiction to approve a transaction that is to be implemented through a reverse vesting order is found in section 11 of the CCAA, which gives the Court broad powers to make any order it thinks fit. Courts have also found jurisdiction to grant a reverse vesting order in section 36 of the CCAA, which contemplates court approval for the sale of the debtor company's assets out of the ordinary course of business. In any event, this Court has held that the factors set out in section 36(3) of the CCAA should guide the Court in evaluating the appropriateness of a reverse vesting order.

***CCAA, supra*, ss 11** & **36**; ***Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354 [*Just Energy*] at paras 29–31**; ***Arrangement relatif à Blackrock Metals Inc*, 2022 QCCS 2828 [*Blackrock Metals*] at paras 87** & **94**; ***Harte Gold, supra*, at paras 36–37**.

52. In *Harte Gold*, Justice Penny advised that the debtor, the purchaser and the monitor should be prepared to answer the following when seeking a reverse vesting order:

(a) Why is the reverse vesting order necessary in this case?

(b) Does the reverse vesting order structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the reverse vesting order structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the reverse vesting order structure?

***Harte Gold*, *supra*, at para 38.**

53. With respect to the first question, the Reverse Vesting Order is demonstrably necessary in this case to preserve the going concern value of the Company's business. The Purchaser has required that the Transaction be implemented by Reverse Vesting Order to allow it to preserve over USD $30 million in operating losses, to obtain the benefit of the Company's non-transferrable export permits which would be difficult and time consuming for the Purchaser to obtain in an asset transaction, and to maintain the Company's accounts with vendors and its contracts with employees. The Company understands that the Purchaser factored the value gained by proceeding by the Reverse Vesting Order into the purchase price and may be unwilling to proceed with the Transaction were it structured otherwise.

Fourth Dias Affidavit at paras 22 & 29; Fourth Report at paras 45–47.

54. The Transaction has been negotiated on the basis that it will be effected through the Reverse Vesting Order, the granting of which is a condition of the Staking Horse Agreement. As the Pre-Filing Marketing Process and the SISP demonstrated, the Transaction is the only option available to the Company to exit its insolvency proceeding on a going-concern basis.

Fourth Dias Affidavit at paras 22 & 29; Fourth Report at paras 45–47.

55. The remaining questions overlap with the requirements of section 36(3) of the CCAA and are addressed in the next section.

The Transaction and the Revere Vesting Order are Fair and Reasonable

56. Where the circumstances supporting the use of a reverse vesting order are present, the Court must also be satisfied that the proposed Transaction is fair and reasonable.

57. In making this determination, courts have referred to the factors set out under section 36(3) of the CCAA. Namely, (a) whether the process leading to the proposed transaction was reasonable in the circumstances, (b) whether the monitor approved the process leading to the transaction, (c) whether the monitor has filed a report stating its opinion that the transaction would be more beneficial to creditors than a sale or disposition in a bankruptcy, (d) the extent to which the creditors were consulted, (e) the effects of the proposed transaction on the creditors and other interested parties, and (f) whether the consideration to be received for the assets is fair and reasonable, taking into account their market value.

***CCAA*, *supra*, s 36(3)**; ***Just Energy*, *supra*, at para 31**; ***Blackrock Metals*, *supra*, at para 95**; ***Harte Gold*, *supra*, at para 20**; ***Green Relief Inc (Re)*, 2020 ONSC 6837 [*Green Relief*], at para 5**.

58. Additionally, as with an order under section 36 of the CCAA for the sale of assets through a traditional vesting order, a court tasked with determining the fairness and reasonableness

of a transaction to be effected by reverse vesting ought to consider the *Soundair* principles: (a) whether sufficient efforts to get the best price have been made and the parties have acted providently, (b) the efficacy and integrity of the process followed, (c) the interests of the parties, (d) and whether any unfairness resulted from the process.

> ***Just Energy, supra*****, at para 32**; ***Blackrock Metals, supra*****, at para 95**; ***Harte Gold, supra*****, at para 21**; ***Green Relief, supra*****, at para 6**; ***Royal Bank of Canada v Soundair Corp*** **(1991), 4 OR (3d) 1 (Ont CA)**.

59. Both the section 36(3) criteria and the *Soundair* principles are satisfied in this case. The SISP was developed in consultation with input from the Proposal Trustee and the Proposal Trustee recommended that this Court approve it, which this Court did by way of the SISP Order. The Proposal Trustee conducted the SISP in accordance with its terms and the SISP Order. The Proposal Trustee contacted 191 interested parties, and published notice of the SISP in the Globe and Mail (National Edition) and Insolvency Insider. Seven interested parties signed confidentiality agreements and were granted access to the data room established by the Proposal Trustee. The only bid the Company received in connection with the SISP (or the Pre-Filing Marketing Process) was the Stalking Horse Agreement.

> **Fourth Dias Affidavit at paras 13–16; Fourth Report at paras 27–39 and Appendices "6" & "7".**

60. The Proposal Trustee has reported to this Court that the Transaction will result in a better outcome for the Company's creditors than a liquidation.

> **Fourth Report, Appendix "3" at para 46.**

61. Creditors have been notified of every step of the NOI Proceeding following its commencement, and the DIP Lender, SVB and most of the largest Secured Noteholders support the approval of the Transaction. The market for the Company and its business was thoroughly

canvassed twice—the Transaction and the purchase price to be paid in connection therewith are fair and reasonable, and represent the best means to generate value for creditors and other stakeholders (suppliers, employees, etc.).

Fourth Dias Affidavit at paras 27–29; Fourth Report at paras 50–51.

62. The Company is unaware of any stakeholders that will suffer prejudice as a result of the Transaction being implemented through the Reverse Vesting Order. To the contrary, the Stalking Horse Agreement will provide for the continuation of the Company's business, thereby assuring a customer for suppliers, a tenant for the Company's landlord, employment for substantially all of the Company's employees, and an ongoing business for its many customers.

Fourth Dias Affidavit at para 29.

63. The Transaction should be approved and the Reverse Vesting Order granted.

The Reorganization is Appropriate in the Circumstances

64. The Transaction provides for the Company to effect the Reorganization. Effectively, the Reorganization involves the Company filing articles of reorganization to provide for the cancellation or redemption of outstanding shares for no consideration. New or consolidated shares will be issued to the Purchaser such that the Purchaser will become the sole holder of the outstanding equity interests in the Company.

Fourth Dias Affidavit at Exhibit "A"; Fourth Report at Appendix "5".

65. Similar approaches have been used in other transactions implemented by reverse vesting order.

***Just Energy, supra*, at paras 23 & 66; *Harte Gold, supra*, at paras 15 & 59.**

66. The share conditions of a corporation incorporated pursuant to the *Business Corporations Act*, RSO 1990, c B.16 (the "**OBCA**") that is under CCAA protection can be changed by means of articles of reorganization. Such articles of reorganization may add, change or remove any provision that is set out in the corporation's articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. These provisions of the OBCA provide this Court jurisdiction to approve the cancellation of all outstanding shares of the Company and the issuance of new shares to the Purchaser.

> ***Business Corporations Act*, RSO 1990, c B.16, ss 168 & 186; *Harte Gold*, *supra*, at paras 61–62.**

67. Section 36(1) of the CCAA contemplates that despite any requirement for shareholder approval, the court may authorize a sale or disposition out of the ordinary course even if shareholder approval is not obtained. While section 36(1) is concerned with asset sales, this Court has held that the underlying logic of the provision applies to an assessment of cancellation of shares as well.

> ***CCAA*, *supra*, s 36(1); *Harte Gold*, *supra*, at para 63.**

68. Equity claims are subject to special treatment under the CCAA to reflect the fact that shareholders have no economic interest in an insolvent enterprise. Section 6(8) prohibits court approval of a plan of compromise if any equity is to be paid before payment in full of all claims that are not equity claims. Section 22.1 provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise.

> ***CCAA*, *supra*, ss 6(8) & 22.1; *Just Energy*, *supra*, at para 58; *Harte Gold*, *supra*, at para 64; *Sino-Forest Corporation (Re)*, 2012 ONSC 4377 at paras 23–29.**

69. In circumstances like the Company's, where the shareholders have no ongoing economic interest in the Company, it would be inappropriate to allow shareholders to dictate the outcome of the restructuring.

> ***Harte Gold, supra*, at para 64**; ***Stelco Inc (Re)* (2006), 18 CBR (5th) 173 (Ont Sup Ct J) at para 11**.

70. The Reorganization is appropriate in the circumstances.

The Enhanced Powers of the Monitor are Appropriate

71. The Reverse Vesting Order contemplates that the Monitor will be granted enhanced powers to allow it to administer ResidualCo and to assist the Company in closing the Transaction and in making the proposed distributions to the Company's secured creditors upon closing of the Transaction.

> **Fourth Dias Affidavit at para 37.**

72. Upon closing of the Transaction, the Company will exit the CCAA proceeding and ResidualCo will be added as the sole debtor.

> **Fourth Dias Affidavit at para 38.**

73. ResidualCo does not have any directors and officers. Clive Dias, the only director of ResidualCo, resigned shortly after it was incorporated. The enhanced powers of the Monitor contemplate that the Monitor will have, among other things, the power to exercise any powers which may be properly exercised by a board of directors of ResidualCo, and to cause ResidualCo to make an assignment in bankruptcy.

> **Fourth Dias Affidavit at paras 39–40.**

74. The enhanced powers will allow the Monitor to act on behalf of ResidualCo and to take, on its behalf, any actions and steps which may be necessary to ensure the completion of the Transaction in accordance with the Stalking Horse Agreement and Reverse Vesting Order, and to make the anticipated distributions to the Company's stakeholders.

Fourth Dias Affidavit at para 40.

75. Once the Transaction closes, and after addressing any post-closing issues, it is expected that the Monitor will cause ResidualCo to make an assignment in bankruptcy.

Fourth Dias Affidavit at para 41.

76. The enhanced powers that the Reverse Vesting Order contemplates giving to the Monitor are intended to facilitate the reverse vesting order structure and are similar to enhanced powers given to monitors involved in similar cases.

***Harte Gold, supra*, at paras 91–93; *Just Energy, supra*, at para 69.**

The Releases in Favour of the Released Parties are Appropriate in the Circumstances

77. The Reverse Vesting Order contains typical broad releases in favour of the Company as well as certain other third parties, including (a) the directors, officers and employees of the Company and ResidualCo, (b) legal counsel and advisors of the Company and ResidualCo, (c) Clive Dias, in his capacity as former director of ResidualCo, and (d) the Proposal Trustee, the Monitor and their legal counsel (collectively, the "**Released Parties**").

78. The granting of third-party releases in connection with sales approved in CCAA proceeding has become common place, including where the sale transaction is effected by reverse vesting order.

***Blackrock Metals, supra*, at para 128; *Harte Gold, supra*, at para 79.**

79. The CCAA expressly contemplates that claims against the directors of a debtor company can be compromised and released in a plan, subject to certain exceptions. Such jurisdiction has been found to extend to transactions effected outside of the context of a plan, including in connection with transactions effect by reverse vesting order.

> ***CCAA*, *supra*, s 5.1(1)**; ***Green Relief*, *supra*, at para 23**.

80. The same test for granting third party releases in a CCAA plan applies to granting such releases in a reverse vesting order: the Court must ask whether: (a) the parties to be released were necessary to the restructuring of the debtor, (b) the claims to be released are rationally connected to the purpose of the restructuring and necessary for it, (c) the restructuring could succeed without the releases, (d) the parties being released contributed to the restructuring, and (e) the releases benefit the debtors as well as the creditors generally. It is not necessary for each of these factors to apply in order for the proposed release to be granted.

> ***Blackrock Metals*, *supra*, at para 130**; ***Harte Gold*, *supra*, at paras 80–86**; ***Green Relief*, *supra*, at paras 27–28**.

81. The releases in the Reverse Vesting Order are rationally connected to the restructuring and essential to its success. The Released Parties have made significant and often critical contributions throughout the NOI Proceeding, including in connection with the SISP. If the Reverse Vesting Order is granted, the ongoing contribution of those parties will be critical to successfully closing the Transaction. Upon closing of the Transaction, the Company's business will continue, and its going-concern value will be preserved for the benefit of stakeholders.

82. The Released Parties have made substantial contributions to the continuation of the business since the commencement of the NOI Proceeding. A release of these individuals in such circumstances is typical in CCAA proceedings and should be granted in this case.

83. The releases provided in the Reverse Vesting Order explicitly do not release or discharge any claim that is not permitted to be released under section 5.1(2) of the CCAA.

CCAA, supra, **s 5.1(2)**.

The Fourth Report and the Activities Described Therein Should Be Approved

84. This Court has held that there are good policy and practical reasons for approving a court officer's report and the activities described therein, including:

(a) allowing the court officer to bring its activities before the Court;

(b) allowing an opportunity for stakeholders' concerns to be addressed;

(c) enabling the Court to satisfy itself that the court officer's activities have been conducted in a prudent and diligent manner;

(d) providing additional protection for the court officer; and

(e) protecting creditors from delay that may be caused by re-litigation of steps or potential indemnity claims by the court officer.

***Hangfen Evergreen Inc (Re)*, 2017 ONSC 7161 at paras 15–17**.

85. The Company submits that the actions, conduct and activities of the Proposal Trustee, as set out in the Fourth Report, were necessary and undertaken in good faith pursuant to the Proposal Trustee's duties and powers set out in the BIA and the First Day Order, and were in each case in the best interests of the Company's stakeholders generally.

86. The Court should approve the Fourth Report and the actions, conduct and activities of the Proposal Trustee described therein.

PART V - ORDERS REQUESTED

87. The Company requests that this Court issue the Initial Order, the Reverse Vesting Order and the Ancillary Order, each substantially in the form attached to the notice of motion as Schedules "A", "C" and "D", respectively.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of November, 2022.

FASKEN MARTINEAU DuMOULIN LLP

Fasken Martineau DuMoulin LLP

Lawyers for the Moving Party,
iS5 Communications Inc.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Clothing for Modern Times Ltd (Re)*, 2011 ONSC 7522;
2. *Urbancorp Inc (Re)*, 2016 ONSC 3288;
3. *Stelco Inc (Re)* (2004), 6 CBR (5th) 316 (Ont Sup Ct J);
4. *Consumers Packaging Inc (Re)* (2001), 27 CBR (4th) 197 (Ont CA);
5. Endorsement of Cavanagh J dated October 7, 2021 in Medifocus Inc (Re), Court File No CV-20-00669781-00CL;
6. *Lydian International Limited (Re)*, 2019 ONSC 7473;
7. *Sunrise/Saskatoon Apartments Limited Partnership (Re)*, 2017 BCSC 808;
8. *Harte Gold Corp (Re)*, 2022 ONSC 653;
9. *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354;
10. *Arrangement relatif à Blackrock Metals Inc*, 2022 QCCS 2828;
11. *Green Relief Inc (Re)*, 2020 ONSC 6837;
12. *Royal Bank of Canada v Soundair Corp* (1991), 4 OR (3d) 1 (Ont CA);
13. *Sino-Forest Corporation (Re)*, 2012 ONSC 4377;
14. *Stelco Inc (Re)* (2006), 18 CBR (5th) 173 (Ont Sup Ct J); and
15. *Hangfen Evergreen Inc (Re)*, 2017 ONSC 7161.

SCHEDULE "B"

LIST OF AUTHORITIES

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36**

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Payment — equity claims

6 […] **(8)** No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Documents that must accompany initial application

10 […] **(2)** An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Bankruptcy and Insolvency Act matters

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

(a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

(b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

Class — creditors having equity claims

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

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.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

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.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

> **(a)** good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
>
> **(b)** the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Business Corporations Act, RSO 1990, c B.16

Amendments

168 (1) Subject to sections 170 and 171, a corporation may from time to time amend its articles to add, change or remove any provision that is permitted by this Act to be, or that is, set out in its articles, including without limiting the generality of the foregoing, to,

(a) change its name;

(b) Repealed: 1994, c. 27, s. 71 (20).

(c) add, change or remove any restriction upon the business or businesses that the corporation may carry on or upon the powers that the corporation may exercise;

(d) add, change or remove any maximum number of shares that the corporation is authorized to issue or any maximum consideration for which any shares of the corporation are authorized to be issued;

(e) create new classes of shares;

(f) Repealed: 1994, c. 27, s. 71 (20).

(g) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued;

(h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series;

(i) divide a class of shares, whether issued or unissued, into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;

(j) authorize the directors to divide any class of unissued shares into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;

(k) authorize the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series;

(l) revoke, diminish or enlarge any authority conferred under clauses (j) and (k);

(m) subject to sections 120 and 125, increase or decrease the number, or minimum or maximum number, of directors; and

(n) add, change or remove restrictions on the issue, transfer or ownership of shares of any class or series.

Idem

(2) Where the directors are authorized by the articles to divide any class of unissued shares into series and determine the designation, rights, privileges, restrictions and conditions thereof, they may authorize the amendment of the articles to so provide.

Revocation of resolution

(3) The directors of a corporation may, if so authorized by a special resolution effecting an amendment under this section, revoke the resolution without further approval of the shareholders at any time prior to the endorsement by the Director of a certificate of amendment of articles in respect of such amendment.

Change of number name

(4) Despite subsection (1), where a corporation has a number name, the directors may amend its articles to change that name to a name that is not a number name.

Authorization

(5) An amendment under subsection (1) shall be authorized by a special resolution and an amendment under subsection (2) or (4) may be authorized by a resolution of the directors.

Special Act corporations excepted

(6) This section does not apply to a corporation incorporated by special Act, except that a corporation incorporated by special Act, including a corporation to which *The Railways Act*, being chapter 331 of the Revised Statutes of Ontario, 1950, applies, may under this section amend its articles to change its name.

Reorganization

186 (1) In this section,

"reorganization" means a court order made under section 248, an order made under the *Bankruptcy and Insolvency Act* (Canada) or an order made under the *Companies Creditors Arrangement Act* (Canada) approving a proposal.

Articles amended

(2) If a corporation is subject to a reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 168.

Auxiliary powers of court

(3) Where a reorganization is made, the court making the order may also,

(a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms thereof; and

(b) appoint directors in place of or in addition to all or any of the directors then in office.

Articles of reorganization

(4) After a reorganization has been made, articles of reorganization and any other required documents and information shall be sent to the Director.

Certificate

(5) Upon receipt of articles of reorganization and any other required documents and information, the Director shall endorse the articles, in accordance with section 273, with a certificate which shall constitute the certificate of amendment, and the articles are amended accordingly.

No dissent

(6) A shareholder is not entitled to dissent under section 185 if an amendment to the articles is effected under this section.

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF iS5 COMMUNICATIONS INC., OF THE CITY OF MISSISSAUGA IN THE PROVINCE OF ONTARIO

Estate No. 32-2853708
Court File No. 32-2853708

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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