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.

October 12, 2022

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TO: **THE SERVICE LIST**

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PART I - OVERVIEW[1]

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. This factum is submitted in support of the motion of the Company in the NOI Proceeding for an order, among other things, approving a sale and investor solicitation process (the "**SISP**") and authorizing the execution by the Company of the stalking horse share purchase agreement (the "**Stalking Horse Agreement**") between the Company and Elektrophoenix GmbH (the "**Stalking Horse Purchaser**") as the stalking horse bid for the purpose of conducting the SISP (the "**Stalking Horse Bid**").

[1] Capitalized terms used herein but not otherwise defined have the meaning ascribed thereto in the affidavit of Clive Dias sworn October 6, 2022, Motion Record of iS5 Communications Inc. dated October 6, 2022, tab 3 ("**Third Dias Affidavit**").

3. The purpose of the SISP is to:

(a) identify one or more financiers, purchasers of and/or investors in the Company, its business and/or its assets to make an offer ("**Bid**") that is superior to the offer contemplated by the Stalking Horse Bid; and

(b) to complete the transactions contemplated by any such Bid or, if no other Bids are accepted, by the Stalking Horse Bid.

4. On this motion, the Company is also seeking:

(a) an extension of the time period for the Company to file a proposal with the Official Receiver under the BIA in the NOI Proceeding and the associated stay of proceedings in favour of the Company to and including December 1, 2022 (the "**Stay Extension**"); and

(b) approval of the third report of Grant Thornton Limited ("**Grant Thornton**"), in its capacity as proposal trustee in this proceeding (in such capacity, the "**Proposal Trustee**") dated October 6, 2022 (the "**Third Report**") and the actions, conduct and activities of the Proposal Trustee described therein.

PART II - FACTS

Background

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

Third Dias Affidavit at paras 3–4.

6. Prior to the commencement of the NOI Proceeding, the Company engaged the services of IOI Capital and Markets, LLC ("**IOI Capital**") 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.

Third Dias Affidavit at para 26.

7. 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.

Third Dias Affidavit at para 5.

8. Together, the SISP and the Stalking Horse Agreement achieve this goal. If approved by this Court, the SISP will create an opportunity for the Company to canvass interest in a potential sale of the Company's assets and/or potential investment in the business, and the Stalking Horse Agreement represents a firm agreement for the acquisition of the Company on a going concern basis that will act as the minimum bid in the SISP.

The Stalking Horse Agreement

9. The Stalking Horse Agreement will, subject to Court approval, serve as the "stalking horse bid" in the SISP.

Third Dias Affidavit at para 13.

10. Pursuant to the terms of the Stalking Horse Agreement, the Stalking Horse Purchaser will agree to purchase all of the Company's shares pursuant to a transaction to be implemented through a "reverse vesting order".

Third Dias Affidavit at para 14.

11. 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 the DIP Lender under the DIP Term Sheet. 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.

Third Dias Affidavit at para 15.

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

Third Dias Affidavit at para 16.

13. The Stalking Horse Agreement contemplates a break fee in the amount of USD $200,000 and an expense reimbursement in the amount of USD $50,000 (the "**Break Fee and Expense Reimbursement**"), which will be paid to the Stalking Horse Purchaser if it is not selected as the Successful Bid in the SISP. The Break Fee and Expense Reimbursement are intended to compensate the Stalking Horse Purchaser for the time and resources it has expended in negotiating the Stalking Horse Agreement.

Third Dias Affidavit at para 17.

14. If the Stalking Horse Agreement is the Successful Bid, the net proceeds of the purchase price will be distributed to the Company's first-ranking senior secured creditor, SVB, and the second lien secured noteholders. It is not expected that any unsecured creditors of the Company will receive distributions.

Third Dias Affidavit at para 22.

The SISP

15. The Stalking Horse Agreement will provide for the marketing of the Company's business and assets pursuant to the proposed SISP.

Third Dias Affidavit at para 25.

16. In order to protect the release of certain sensitive commercial information to the Company's competitors, the SISP contemplates a two-phase bidding process:

(a) during the first phase, after executing a non-disclosure agreement, bidders will receive access to certain of the Company's information in a confidential data room to permit those parties to evaluate the opportunity and determine whether they are interested in submitting a non-binding letter of intent; and

(b) if a bidder submits a qualified bid under the first phase of the bid process, it will be invited to participate in the second phase of bidding where it will be provided with additional commercially sensitive information.

Third Dias Affidavit at para 27.

17. The SISP will be initiated by distribution of a teaser document to hundreds of potentially interested parties, including all parties that IOI Capital contacted pursuant to the Pre-

Filing Marketing Process, which teaser describes the opportunity and invites those parties to consider a potential transaction with the Company.

Third Dias Affidavit at paras 29–30.

18. The SISP was designed to attract offers for the Company's business and/or assets that are superior to the offer contemplated in the Stalking Horse Agreement.

Third Dias Affidavit at para 31.

19. The Stalking Horse Agreement will serve as a baseline bid and will focus interested parties to improve upon the offer contained in the Stalking Horse Agreement.

Third Dias Affidavit at para 33.

20. The SISP contemplates that the Company can accept, subject to Court approval, one (or more than one, if for distinct and compatible transactions) of the qualified phase 2 bids as a Successful Bid and one (or more than one, if for distinct and compatible transactions) of the qualified phase 2 bids as the Back-up Bid, which acceptance will be conditional upon the failure of the transaction(s) contemplated by the Successful Bid to close.

Third Dias Affidavit at para 34.

21. In order for a Bid other than the Stalking Horse Agreement to be a Successful Bid, the Company, in consultation with the Proposal Trustee, must determine that the purchase price or overall imputed value of the Bid is greater than the USD $5 million purchase price in the Stalking Horse Agreement by at least USD $350,000 (the "**Minimum Bid Amount**").

Third Dias Affidavit at para 35.

22. The Minimum Bid Amount is designed to ensure that there are sufficient cash proceeds from the Successful Bid to pay the Break Fee and Expense Reimbursement in the event the Stalking Horse Agreement is not the Successful Bid, and to prevent *de minimis* overbids.

Third Dias Affidavit at para 35.

23. If more than one qualified Bid is received in phase 2 of the bid process, the Company will pursue an auction.

Third Dias Affidavit at para 36.

24. The outside date for closing a transaction under the SISP is anticipated to be December 23, 2022, or such other date as the parties may agree to, acting reasonably.

Third Dias Affidavit at para 37.

25. Under the terms of the SISP, the Company shall be under no obligation to accept the highest or best offer or any offer (other than the offer contained in the Stalking Horse Agreement if no other higher or better offer is accepted).

Third Dias Affidavit at para 38.

26. The Proposal Trustee, the DIP Lender and SVB are supportive of the SISP.

Third Dias Affidavit at paras 39–40.

PART III - ISSUES

27. The issues to be determined by this Court are whether:

(a) the SISP should be approved;

(b) the Stalking Horse Agreement, including the Break Fee and Expense Reimbursement, should be approved and accepted as the Stalking Horse Bid in the SISP;

(c) the Stay Extension should be granted; and

(d) the Third Report and the actions, conduct and activities of the Proposal Trustee described therein should be approved.

PART IV - LAW & ARGUMENT

The SISP Should Be Approved

The SISP Satisfies the Nortel Criteria

28. This Court has considered and applied the following four criteria, which were recited by Justice Morawetz (as he then was) in *Re Nortel Networks Corp.*, when deciding whether to approve a sale process backstopped by a stalking horse bid in proposal proceedings under the BIA (collectively, the "***Nortel* Criteria**"):

(a) Is a sale transaction warranted at this time?

(b) Will the sale benefit the whole "economic community"?

(c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) Is there a better viable alternative?

> ***Danier Leather Inc (Re)*, 2016 ONSC 1044 [*Danier Leather*] at paras 23–33**; ***Mustang GP Ltd (Re)*, 2015 ONSC 6562 [*Mustang*] at paras 37–38**; ***Nortel Networks Corporation (Re)* (2009), 179 ACWS (3d) 265, 55 CBR (5th) 229 (Ont Sup Ct J) at para 49**.

29. In the present case, the *Nortel* Criteria are satisfied.

30. The SISP and the transaction sought thereby is warranted at this time for a number of reasons.

31. First, as evidenced by the Pre-Filing Marketing Process, the Company has made reasonable efforts in search of alternate financing or an acquisition transaction, and has attempted to restructure its operations and financial affairs since October 2021, all of which has been unsuccessful. At this juncture, the Company has exhausted all of the remedies available to it outside of a court-supervised sale process—in fact, the principal purpose for which the Company commenced the NOI Proceeding is to implement a court-supervised sale process in an attempt to prevent the Company from being liquidated. The SISP will result in the most viable alternative to liquidation available to the Company.

Third Dias Affidavit at paras 5 & 26.

32. Second, the most recent cash flow statement for the Company prepared by the Proposal Trustee demonstrates the cash needs of the Company. The Company continues to incur greater expenses than receipts on a weekly basis because its operations are not profitable. It is critical that the Company undertake the SISP and close a transaction. If a transaction closes on or before the week ending December 2, 2022, it does not appear that the Company will require the second advance under the DIP Term Sheet. In the absence of a transaction, it is expected that the Company's financial situation will continue to deteriorate and its value will erode.

Third Dias Affidavit at paras 42–43 and Exhibit "C".

33. Third, the duration of the SISP is reasonable and appropriate in the circumstances having regard to the Company's financial situation and the fact that many potentially interested

parties are familiar with the Company, and its assets and business given their participation in the Pre-Filing Marketing Process.

34. The Company has worked with the Proposal Trustee to develop the SISP timelines, which contemplate a 45-day marketing and bid period. This period is intended to provide the Company with the time it requires to adequately canvass the market for possible Bids that are superior to the transaction contemplated in the Stalking Horse Agreement while accounting for the precarious financial situation facing the Company.

Third Dias Affidavit at para 26.

35. Potential bidders will have sufficient time to assess the Stalking Horse Bid and potentially submit a superior bid. The SISP balances the need to have a sale accomplished in a reasonable timeframe to limit the costs associated with the NOI Proceeding with the desire to properly expose the business and the assets to the marketplace to maximize recoveries for the stakeholders.

36. Fourth, the SISP is designed to be flexible and allows parties to submit an offer for some or all of the Company's assets, or to make an investment in the Company or acquire the business as a going concern, all with the goal of improving upon the value of the transaction contemplated in the Stalking Horse Agreement. The SISP also gives the Company and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

Third Dias Affidavit at para 33.

37. Finally, the SISP will benefit the whole of the economic community. In particular:

(a) the Stalking Horse Bid will establish the floor price for the sale of the Company, thereby guaranteeing some recovery for the Company's stakeholders;

(b) the SISP will subject the Company to a public marketing process and permit higher and better offers to replace the Stalking Horse Bid; and

(c) a potential sale transaction, including the transaction contemplated in the Stalking Horse Agreement, will result in a going concern solution and the continuation of employment for a majority the Company's employees.

Third Dias Affidavit at paras 15, 27, 31 & 33–35.

38. Absent the Stalking Horse Bid, the SISP could potentially result in the receipt of substantially less consideration from the sale of the Company. As evidenced by the lack of interest generated by the Pre-Filing Marketing Process, the Stalking Horse Purchase Agreement represents the highest and best value to be obtained for the Company at this time, subject to a higher offer being identified through the SISP.

The SISP Will Result in a Transaction Capable of Satisfying 65.13 of the BIA

39. Although the decision to approve a particular form of sale process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sale process proposed by a debtor must be assessed in light of the factors that a court will take into account when considering the approval of a proposed sale.

***CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750 [*CCM Master*] at para 6.**

40. Section 65.13 of the BIA codifies this Court's power to approve a sale of assets in a proposal proceeding. Subsection 65.13(4) sets out the following non-exhaustive list of factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee 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.

> ***Danier Leather, supra*, at para 21**; ***Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] at s 65.13**.

41. This Court has considered the factors listed in section 65.13 of the BIA when approving a stalking horse sale process under the BIA.

> ***Danier Leather, supra*, at paras 34–35**; ***Colossus Minerals Inc (Re)*, 2014 ONSC 514 [*Colossus Minerals*] at paras 22–26**.

42. This Court has applied the same factors in determining whether to approve of a transaction similar to the transaction contemplated by the Stalking Horse Agreement (*i.e.* a

transaction whereby the purchaser becomes the sole shareholder of the debtor upon closing pursuant to the terms of a reverse vesting order).

> ***Harte Gold Corp (Re)*, 2022 ONSC 653 at paras 22–23**.

43. While the approval of the transaction contemplated in the Stalking Horse Agreement is not before the Court on this motion, the SISP will result in a transaction that is at least capable of satisfying the criteria set out in section 65.13 of the BIA.

44. First, as discussed above, the SISP satisfies the *Nortel* Criteria, which are a guide for determining whether a court-supervised sale process is reasonable in the circumstances.

45. Second, the Proposal Trustee supports the SISP and views it as reasonable and appropriate.

> **Third Dias Affidavit at para 39; Third Report of the Proposal Trustee dated October 6, 2022 ("Third Report") at paras 43, 47–48 & 52.**

46. Third, the Company has kept its creditors apprised of its intention to seek Court approval of the SISP and the Stalking Horse Agreement since the commencement of the NOI Proceeding.

47. Fourth, a transaction that allows the Company to continue as a going concern would likely be more beneficial to the Company's creditors and other stakeholders than a bankruptcy, which does not allow for the going concern option.

48. Finally, the consideration to be received under the Stalking Horse Agreement appears at this point to be *prima facie* fair and reasonable and represents a fair and reasonable

benchmark for all other bids in the SISP, particularly in light of the unsuccessful Pre-Filing Marketing Process.

49. The SISP should be approved by this Court as it represents the most efficient and fair process to be administered in the circumstances and it will sufficiently expose the Company for sale to the marketplace and generate maximum value for the Company's stakeholders.

The Stalking Horse Agreement Should Be Accepted as the Stalking Horse Bid

50. The use of a sale process that includes a stalking horse agreement maximizes value for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties

> ***Danier Leather, supra*, at para 20**; ***CCM Master, supra*, at para 7**.

51. The factors to be considered when determining the reasonableness of a stalking horse bid are also those used by the court when determining whether a proposed sale should be approved. As described above, in the case of proposal proceedings under the BIA, those factors are set out in section 65.13 of the BIA.

> ***Leslie & Irene Dube Foundation Inc v P218 Enterprises Ltd*, 2014 BCSC 1855 at para 21**.

52. Much of the discussion above with respect to the SISP and the factors set out in section 65.13 of the BIA is applicable to the Stalking Horse Agreement and need not be repeated. However, the Stalking Horse Agreement is, in its own right, reasonable in the circumstances,

will benefit the Company's creditors and other stakeholders and contemplates a sale of the Company for reasonable and fair consideration.

53. The Stalking Horse Agreement creates certainty by way of an unconditional bid and establishes a floor value for the sale of the Company while providing an opportunity to market the Company for superior realization. If approved and accepted as the Stalking Horse Bid, the Stalking Horse Agreement will guarantee some recovery for the Company's creditors.

54. Additionally, 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. It also provides stability during the SISP.

Third Dias Affidavit at para 24.

55. Also, for the reasons set out below, the Break Fee and Expense Reimbursement is reasonable in the circumstances.

56. The Stalking Horse Agreement is reasonable in the circumstances; this court ought to approve it and accept it as the Stalking Horse Bid.

The Break Fee and Expense Reimbursement should be approved

57. Break fees and expense reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected.

Danier Leather, supra, **at para 41.**

58. In reported decisions on motions to approve staking horse sale processes, this Court has considered and approved break fees between 1.8% and 5%.

> ***Danier Leather, supra*, at paras 42–43**; ***CCM Master, supra*, at para 13**; ***Parlay Entertainment Inc (Re)*, 2011 ONSC 3492 [*Parlay*] at para 12**.

59. Together, the Break Fee and Expense Reimbursement are 5% of the purchase price stipulated in the Stalking Horse Agreement and are commercially reasonable for a transaction of this size. In the event that the Break Fee and Expense Reimbursement are paid, the will be given as consideration for the time and resources the Stalking Horse Purchaser has expended in negotiating the Stalking Horse Agreement.

> **Third Dias Affidavit at para 17.**

60. The adverse sale deterrent effect that the Break Fee and Expense Reimbursement could potentially cause is balanced by the salutary effects entailed by having the Stalking Horse Agreement as a sale stimulator, as well as the stability brought to the SISP. The Break Fee and Expense Reimbursement will not jeopardize other potential purchasers' ability to bid in the SISP.

61. In the circumstances, the Break Fee and Expense Reimbursement are reasonable and should be approved.

The Stay Extension Should Be Granted

62. Section 50.4(9) of the BIA sets out when this Court may grant a debtor an extension of time to file a proposal:

> **Extension of time for filing proposal**
>
> **(9)** The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and

the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

***BIA*, *supra*, at s 50.4(9).**

63. Where the factors set out in section 50.4(9) of the BIA are found to exist, this Court routinely grants debtors extensions of time to file a proposal.

See *Eureka 93 Inc et al (Re)*, 2020 ONSC 2532 at para 10–11; *Colossus Minerals, supra*, at paras 37–43.; *Parlay, supra*, at para 6.

64. An extension of time for a debtor to file a proposal will often be necessary to allow the debtor to carry out a sale process and to formulate a proposal to its creditors.

***Mustang, supra*, at para 41.**

65. Where a debtor is not granted an extension of time to file a proposal, bankruptcy will likely follow. The purpose of the BIA proposal scheme is rehabilitation, not liquidation. Insolvent companies should have the chance to put forward their proposal.

***Mustang, supra*, at para 41; *In the Matter of the Proposal of Cogent Fibre Inc*, 2015 ONSC 5139 at paras 7–8.**

66. The Stay Extension to December 1, 2022 will permit it to conduct the SISP and to return to Court to seek approval of the Successful Bid in the SISP or, if no other Bids are accepted, by the Stalking Horse Bid.

Third Dias Affidavit at paras 44.

67. The Company has acted, and continues to act, in good faith and with due diligence in taking steps to facilitate either an acceptable sale or restructuring of its business. The Company is not aware of any creditors that would be prejudiced by the requested Stay Extension, and will have sufficient liquidity to continue to fund its operations through the requested Stay Extension.

Third Dias Affidavit at paras 45–46.

68. Consequently, the factors set out in section 50.4(9) of the BIA have been met in this case.

69. The Proposal Trustee and the DIP Lender are supportive of the Stay Extension.

Third Dias Affidavit at para 47.

70. For the foregoing reasons, the Stay Extension should be granted.

The Third Report and the Actions, Conduct and Activities Described Therein

71. 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.**

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

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

PART V - ORDER REQUESTED

74. The Company requests that this Court make an order substantially on the terms of the draft order included at tab 2 to the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of October, 2022.

FASKEN MARTINEAU DuMOULIN LLP

Fasken Martineau DuMoulin LLP

Lawyers for the Moving Party,
iS5 Communications Inc.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Danier Leather Inc (Re)*, 2016 ONSC 1044;

2. *Mustang GP Ltd (Re)*, 2015 ONSC 6562;

3. *Nortel Networks Corporation (Re)* (2009), 179 ACWS (3d) 265, 55 CBR (5th) 229 (Ont Sup Ct J);

4. *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750;

5. *Harte Gold Corp (Re)*, 2022 ONSC 653;

6. *Colossus Minerals Inc. (Re)*, 2014 ONSC 514;

7. *Leslie & Irene Dube Foundation Inc v P218 Enterprises Ltd*, 2014 BCSC 1855;

8. *Eureka 93 Inc et al (Re)*, 2020 ONSC 2532;

9. *Parlay Entertainment Inc (Re)*, 2011 ONSC 3492;

10. *In the Matter of the Proposal of Cogent Fibre Inc*, 2015 ONSC 5139; and

11. *Hangfen Evergreen Inc (Re)*, 2017 ONSC 7161.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS*Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended

Extension of time for filing proposal

50.4 (9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall 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

(4) 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 trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee 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

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), 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 insolvent person; 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

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

(a) a director or officer of the insolvent person;

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

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

Assets may be disposed of free and clear

(7) 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 insolvent person 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

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

Restriction — intellectual property

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person 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 (7), that sale or disposition does not affect the 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.

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

FACTUM OF THE MOVING PARTY, iS5 COMMUNICATIONS INC.

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