SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: 32-2853708

DATE: 08 August 2022

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TITLE OF PROCEEDING: IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF Is5 COMMUNICATIONS INC.

BEFORE MR. JUSTICE OSBORNE

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- [x] APPLICANT(S) – **Dylan Chochla**
- [ ] PLAINTIFF(S)

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ENDORSEMENT OF OSBORNE, J:

[1] This is a motion by iS5 Communications Inc., [the "Debtor" or "iS5"], for approval of DIP financing on an interim basis as more particularly described below, establishing an Administration Charge in the maximum amount of CDN $150,000, certain indemnification of the directors and officers and a D&O charge, and authorization for the company to pay prefiling amounts owing to certain suppliers if necessary to ensure the ongoing operation of the company, in the maximum amount of USD $120,000.

[2] The Debtor filed an NOI under the BIA on August 5, 2022. Grant Thornton Limited was named as Proposal Trustee.

[3] The relief sought proceeds on the consent of all parties present, save for that of Mr. McKenzie, counsel for the McCharles Family Trust ["MFT"].

[4] In particular, by Silicon Valley Bank ["SVB"], the primary secured lender who is most directly affected by the relief sought, and Phoenix Contact Venture Funds I GmbH ["Phoenix"], the proposed DIP lender who is also an existing creditor and the owner of approximately 14% of the equity of the Debtor, support the relief sought.

[5] MFT owns, according to the most recent capitalization table available to the proposed DIP lender, Phoenix, approximately 3.3% of the equity of the Debtor.

[6] MFT seeks an adjournment of this motion for approximately two - three weeks on the basis that it was just served with the materials last Friday, August 5, and that counsel for MFT, Mr. McKenzie, has not been able to obtain instructions from the principal of his client who is on vacation. Mr. McKenzie to the relatively brief adjournment he is seeking.

[7] Mr. McKenzie on behalf of MFT has filed no materials, nor has he sought to cross-examine the deponent on whose affidavit the Debtor relies today, Mr. Dias, recognizing as I do that he has had only a brief opportunity to consider doing so. His submissions today, however, as to why the adjournment ought to be granted, and made in the understandable absence of evidence from MFT, relate to possible concerns with the sale process contemplated by the Debtor, with Phoenix as a potential purchaser, and other matters not relevant today.

[8] While the concerns and issues or potential issues raised by Mr. McKenzie may be real and require further negotiation between the parties or a determination to be made by this Court, none of those issues is before me today. Approval of a sales process, and hopefully approval of a sale and vesting order, are all for another day.

[9] Mr. Chochla for the Applicant, supported by Phoenix and SVB, urged that the relief sought today is time-critical and emergent, and that the company will cease operations if the relief sought today is not granted.

[10] The Debtor relies on the affidavit of Mr. Dias, the chief executive officer, and principally on his evidence to the effect that the directors and officers will likely resign and leave the company without proper [or any] governance or leadership, and the fact that the company is out of money and unable to continue operations without the first advance contemplated to be made immediately pursuant to the terms of the DIP.

[11] I am satisfied that the relief sought by the Debtor should be granted and that the issues and concerns raised by Mr. McKenzie relate to the contemplated sales process and other issues not before the Court today. I have required, however, counsel for the Applicant to amend the proposed order sought to include a comeback clause permitting any affected party to return to Court as may be necessary and appropriate. I have also directed counsel that all stakeholders be put on notice and given a copy of this endorsement and a copy of the order, as revised, that I have signed today.

[12] I am satisfied that the relief sought should be granted and that there is no practical alternative to maximize the recovery for stakeholders.

[13] iS5 provides integrated services and information technology solutions to clients. It also manufactures ethernet projects primarily for industrial and infrastructure clients. It is an Ontario Corporation with its head office in Mississauga, Ontario.

[14] Until recently, the Board of Directors was comprised of five members. Two have resigned since June, 2022 as a result of liquidity issues, such that three remain.

[15] The company has 39 employees of whom 38 are full-time, salaried employees. None are unionized.

[16] The evidence of Mr. Dias, President, Chief Executive Officer and a member of the Board of Directors, is to the effect that, prior to the commencement of the NOI Proceeding, the company was negotiating with one of its existing creditors, Phoenix [or one of its affiliates], with respect to a potential sale. It has become apparent that the company lacks sufficient or indeed any liquidity to allow it the time to complete those negotiations without bridge financing.

[17] Phoenix has offered to provide DIP financing. It is contemplated that Phoenix will act in the role as a stalking horse with a view to promoting and facilitating the proposed sales process.

[18] SVB entered into an agreement with the company as of May 15, 2019 pursuant to which it agreed to make term loan advances available to the company up to an aggregate amount of USD $3 million on terms.

[19] As of July 26, 2022, the aggregate amount outstanding and payable to SVB is approximately $2 million, comprised of a term loan and revolving credit facility.

[20] The evidence of Mr. Dias is to the effect that SVB's security interest is in first priority position.

[21] The company also has issued and outstanding secured notes in the aggregate amount of CDN $11,104,905 inclusive of principal and interest, all owing to the "Secured Noteholders" as defined in the DS affidavit.

[22] The company also has approximately CAD $4 million in unsecured debt, in addition to exposure for unpaid wages and vacation pay which are contemplated by the company to be paid from the first advance under the DIP facility if approved.

[23] The company is current on all HST remittances and other government obligations such as business taxes and payments in respect of employee wage deductions at source. In addition, the company owes the Federal Economic Development Agency approximately CDN $2,590,000 in respect of two unsecured federal development loans.

[24] The Dias affidavit states that, according to the June 30, 2022 balance sheet of the Company, it is insolvent, with assets of approximately USD $6 million and total liabilities of approximately USD $13 million. The company's cash flow, operation and liquidity challenges are set out in the Dias affidavit.

[25] The DS affidavit further states that, commencing the week of August 8, 2022, the company will not have sufficient liquidity to meet its employee wages and ongoing obligations that will accrue thereafter in the absence of interim financing and further that the directors have indicated that they are unlikely to continue in that capacity as such without access to the proposed interim financing.

[26] The interim financing sought through the first advance proposed to be made under the DIP facility is limited to the amount required to allow Phoenix and the company a brief window to finalize the negotiation of a binding stalking horse purchase agreement and is capped at the maximum amount of USD $600,000.

[27] The relief sought today, as noted above, does not include approval of that stalking horse purchase agreement, and that is for another day.

[28] It was the company's liquidity crisis that led to the filing of the NOI.

[29] The company has prepared a cash flow statement which is attached to the Dias affidavit as Exhibit "N" and is also attached to the first report of the Proposal Trustee as Appendix 2.

[30] That cash flow statement supports the statements in the Dias affidavit to the effect that in the absence of approval of the DIP financing and particularly the first advance in the amount of USD $600,000, the company is insolvent and unable obligations including payroll obligations now.

[31] The DIP Term Sheet requires that the company close a transaction no later than October 31, 2022 and contemplates that Phoenix will provide further interim financing in the maximum amount of USD $1,100,000 to be advanced according to the terms of the DIP facility. That amount includes the initial advance of $600,000 referred to above.

[32] Phoenix would have the benefit of a charge over the assets of the company ranking in priority to all our claims and encumbrances, except for the Administration and D&O Charges and validly perfected security in favour of equipment lessors.

[33] The BIA at section 50.6 authorizes the approval of interim financing and an associated priority charge, if the three criteria set out in that provision are met:

a. notice has been given to secured creditors likely to be affected by the DIP Charge;

b. the amount of the DIP is appropriate and required, having regard to the debtor's cash flow statement; and

c. the DIP Charge does not secure a pre-existing obligation.

[34] I am satisfied that the criteria are met here. SVB is the company's senior secured creditor and it supports the relief sought. The second ranking secured noteholders have also received notice of the relief sought. The charges rank behind any validly perfected security interests of equipment financiers so that while they have not been provided notice, the charges are subordinate to their security interests.

[35] As noted above, the cash flow statement is clear as to both the need, and the immediacy of the need, for financing.

[36] Having considered all of the factors set out in section 50.6(5) of the BIA, I am satisfied that an order made under that section is appropriate here. They will allow the company to continue to operate as a going concern. There is no other practical alternatives. This will in turn permit the best opportunity for all stakeholders to maximize their recovery.

[37] Similarly, I am satisfied that the Administration Charge should be granted, in the maximum amount of CDN $150,000, to secure the fees and disbursements of the Proposal Trustee, and counsel. I am satisfied that the requirements of section 64.2 of the BIA have been met in this regard. Again, the secured creditors who are

likely to be affected by this security are on notice. I am satisfied that the services of the Proposal Trustee and counsel are necessary the next steps as contemplated. The quantum of the proposed charge is reasonable.

[38] I am also satisfied that the indemnity and charge in favour of the remaining directors and officers should be granted, in the maximum amount of $200,000, ranking behind the Administration Charge but above the DIP Charge. It is supported by the consent of Phoenix. Again, section 64.1 of the BIA authorizes such. The company and its stakeholders will benefit from the continued leadership and governance of those directors and officers remaining in office during the process.

[39] Finally, the company owes trade suppliers the aggregate amount of approximately USD $803,500. The evidence of Mr. Dias is to the effect that the company is dependent upon the continued supply of products from those vendors to ensure that it is able to meet the needs of its customers and therefore remain in business.

[40] Moreover, the authorization to pay prefiling amounts to those vendors deemed critical to the operations of the company is capped at a maximum aggregate amount of USD $120,000 in accordance with the cash flow statement, and subject to the approval of the Proposal Trustee or further order of this Court. In the circumstances, these limited payments are appropriate (See *1732427 Ontario Inc. v. 1787930 Ontario Inc*., 2019 ONCA at para. 13, 14).

[41] While noting the consent and support of the proposed stalking horse purchaser, itself an existing creditor and equityholder, as well as SVB, the first priority ranking creditor, I am mindful of the concerns raised by Mr. McKenzie on behalf of MFT, which is a minority [indeed a small] shareholder but not a creditor. The order provides for comeback rights for MFT and/or other affected parties. MFT or other affected parties have the ability to challenge at a later date the approval of the sales process and if the company gets that far, any sale approval and vesting order. Counsel for the company confirm that nothing prevents MFT from being a potential purchaser if it elected to submit a bid.

[42] The proposed order largely tracks the Model Order of this Court except as noted above and I am satisfied that it is appropriate in the circumstances for the above reasons. Counsel for the Applicant is directed to forthwith upload to CaseLines and file with the Commercial List Office all materials that were provided to the Court on a confidential basis, which materials can now form part of the public record.

[43] Order to go as signed by me today which shall be effective without the necessity of issuing and entering.

Osborne, J.