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.

August 30, 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**").

2. This factum is submitted in support of the motion of the Company in the NOI Proceeding for an order, among other things:

(a) extending the time period for the Company to file a proposal with the Official Receiver under the BIA in the NOI Proceeding (the "**Proposal Period**") and the associated stay of proceedings in favour of the Company to and including October 17, 2022 (the "**Stay Extension**");

(b) approving an interim distribution to the Company’s senior secured creditor, Silicon Valley Bank (“**SVB**”) in the amount of USD $209,666.66 in partial satisfaction of SVB’s secured claim (the “**Interim Distribution**”);

(c) approving the engagement of John Gillberry (“**Mr. Gillberry**”) as an independent director of the Company, and confirming that Mr. Gillberry is entitled to the benefit of the directors and officers’ indemnification and the Directors’ Charge as set out and defined in the order of the Honourable Justice Osborne made in this proceeding on August 8, 2022 (the “**DIP Order**”); and

(d) approving the first report of Grant Thornton Limited (“**Grant Thornton**”), in its capacity as proposal trustee in this proceeding (in such capacity, the “**Proposal Trustee**”) dated August 5, 2022 (the “**First Report**”), the second report of the Proposal Trustee dated August 26, 2022 (the “**Second Report**”) and the actions, conduct and activities of the Proposal Trustee described in the First Report and the Second Report.

PART II - FACTS

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

> **Affidavit of Clive Dias sworn August 26, 2022, Motion Record, Tab 2 (“Dias Affidavit”) at paras 3–4 & Exhibit “A”.**

4. The purpose of the NOI Proceeding is to provide the Company an opportunity to identify either a purchaser for its assets or an investor in the Company's business through a proposed stalking horse sale process.

Dias Affidavit at para 8.

Progress Towards Binding Stalking Horse Purchase Agreement

5. The Company has been in negotiations with Phoenix Contact Venture Funds I GmbH ("**Phoenix**") with respect to the terms of a stalking horse purchase agreement, which agreement would act as the minimum bid in a stalking horse sale process.

Dias Affidavit at paras 8 & 13.

6. Prior to the commencement of the NOI Proceeding, the Company and Phoenix entered into a non-binding letter of intent, which letter of intent sets out the terms upon which the parties are prepared to negotiate a binding stalking horse purchase agreement. The proposed purchase price in the letter of intent is in the range of USD $5 million to USD $7 million.

Dias Affidavit at para 13 & Exhibit "D".

7. The Company and Phoenix have made significant progress toward completing due diligence and negotiating a binding stalking horse purchase agreement, but it does not appear that the parties will be able to finalize the terms thereof prior to the expiry of the initial 30-day Proposal Period.

Dias Affidavit at para 14.

8. The Stay Extension to October 17, 2022 will provide the Company with the time it requires to finalize the stalking horse purchase agreement and sale process. The Company expects that it will return to Court prior to the expiry of the Stay Extension to seek approval of the stalking horse purchase agreement and sale process.

Dias Affidavit at para 15.

Receipt of SRED Tax Credit & Interim Distribution to SVB

9. On August 11, 2022, the Company received a SRED tax credit refund from the Government of Canada in the amount of CDN $1,249,942 (the "**SRED Tax Credit**").

Dias Affidavit at para 22.

10. Now that the Company has received the SRED Tax Credit, it appears that the Company has sufficient liquidity to make an interim distribution to SVB, its senior secured creditor, in the amount of USD $209,666.66 (the "**Interim Distribution**").

Dias Affidavit at para 29.

11. SVB has been supportive of the Company's NOI Proceeding, including by providing the Company with bulge financing prior to the commencement of the NOI Proceeding. The Interim Distribution is intended to repay SVB the amount of the bulge financing that it made available to the Company.

Dias Affidavit at paras 28–29.

Engagement of Mr. Gillberry as Independent Director

12. Since June 2022, two members of the Company's board of directors have resigned. Only Clive Dias, James Huff and Marcus Boker remain as directors of the Company.

Dias Affidavit at para 32.

13. In order to assist the board of directors in navigating this NOI Proceeding, the Company has engaged Mr. Gillberry to join the board of directors as an independent director.

Dias Affidavit at para 33.

14. Mr. Gillberry has extensive board experience, including with companies experiencing liquidity issues.

Dias Affidavit at para 34 and Exhibit "F".

The Stay Extension

15. The Company is seeking the Stay Extension to October 17, 2022 to permit it to advance the negotiation of the stalking horse purchase agreement with Phoenix and to pursue the sale process.

Dias Affidavit at para 42.

16. The Updated Cash Flow Statement (as defined in the Dias Affidavit) indicates that the Company will have sufficient liquidity to continue to fund its operations through the requested Stay Extension.

Dias Affidavit at paras 39 & 44 and Exhibit "G".

PART III - ISSUES

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

(a) the Stay Extension should be granted;

(b) the Interim Distribution should be approved;

(c) Mr. Gillberry's engagement as an independent director of the Company should be approved and Mr. Gillberry's entitlement to benefit from the protections afforded to directors under the DIP Order should be confirmed; and

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

PART IV - LAW & ARGUMENT

The Stay Extensions Should Be Granted

18. 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.

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3 at s 50.4(9).**

19. Where the factors set out in section 50.4(9) 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 Inc (Re)*, 2014 ONSC 514 at paras 37–43.

20. 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 GP Ltd (Re)*, 2015 ONSC 6562 [*Mustang*] at para 41.**

21. 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.**

22. The Stay Extension to October 17, 2022 will provide the Company with the time it requires to finalize the stalking horse purchase agreement with Phoenix and commence the sale

process. The Company expects that it will return to Court prior to the expiry of the Stay Extension to seek approval of the stalking horse purchase agreement and sale process.

Dias Affidavit at para 15.

23. 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.

Dias Affidavit at paras 43–44.

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

25. The Proposal Trustee and the DIP Lender (as defined in the Dias Affidavit) are supportive of the Stay Extension.

Dias Affidavit at paras 9 & 45.

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

The Interim Distribution Should Be Approved

27. Interim distributions to secured creditors are frequently made in insolvency proceedings, including in proposal proceedings under the BIA.

See Order of Osborne J dated June 22, 2022 in *In the Matter of the Notice of Intention to Make a Proposal of 2519920 Ontario Inc o/a Dove Cleaners*, Court File No 31-2803414 at para 2; Order of Hainey J dated April 5, 2018 in *In the Matter of the Proposal of 1482241 Ontario Limited*, Court File No 31-2303814 at paras 2–3.

28. The Company is current on all HST remittances, does not maintain a pension for its employees and is current on deductions from employee wages at source—only *de minimis* amounts could rank in priority to SVB's security, and the Company has sufficient liquidity to pay these amounts as they accrue.

Dias Affidavit at para 31.

29. The Proposal Trustee is in the process of obtaining a legal opinion with respect to the validity and enforceability of SVB's security, which is registered under the *Personal Property Security Act*, RSO 1990, c P.10.

Dias Affidavit at para 30.

30. The Proposal Trustee is supportive of, and the DIP Lender has consented to, the payment of the Interim Distribution.

Dias Affidavit at para 29–30.

Mr. Gillberry's Engagement as an Independent Director Should Be Approved

31. Where there is a vacancy on the board of directors of a corporation incorporated under Ontario's *Business Corporations Act*, RSO 1990, c B.16 (the "**OBCA**"), section 124(1) of the OBCA provides that a quorum of directors may fill the vacancy provided that none of the stated exceptions or limitations apply:

> **Vacancies**
>
> **124(1)** Despite subsection 126 (6), but subject to subsections (2), (4) and (5) of this section, a quorum of directors may fill a vacancy among the directors, except a vacancy resulting from,
>
> **(a)** an increase in the number of directors otherwise than in accordance with subsection (2), or in the maximum number of directors, as the case may be; or
>
> **(b)** a failure to elect the number of directors required to be elected at any meeting of shareholders.
>
> ***Business Corporations Act*, RSO 1990, c B.16 at s 124(1).**

32. Mr. Gillberry was appointed as a director of the Company by its board of directors pursuant to section 124(1) of the OBCA to replace the vacancies left by the resignation of two directors prior to the commencement of the NOI Proceedings. None of the exceptions or limitations to the power of the board of directors to do so applies in the case of Mr. Gillberry's appointment.

> **Dias Affidavit at para 32.**

33. Mr. Gillberry is a valuable addition to the Company's board of directors, will be able to assist the Company in navigating the NOI Proceeding, and will assist the Company in negotiating the stalking horse purchase agreement.

> **Dias Affidavit at para 35–36.**

34. Phoenix is supportive of Mr. Gillberry joining the Company's board of directors.

> **Dias Affidavit at para 36.**

The Proposal Trustee's Reports and the Actions, Conduct and Activities Described Therein

35. 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**.

36. The Company submits that the actions, conduct and activities of the Proposal Trustee, as set out in the First Report and the Second 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.

37. The Court should approve the First Report, the Second Report and the actions, conduct and activities of the Proposal Trustee described therein.

PART V - RELIEF SOUGHT

38. The Company requests that this Court make an order granting the relief sought as described above in paragraph 2.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of August, 2022.

FASKEN MARTINEAU DuMOULIN LLP

Fasken Martineau Dumoulin LLP

Lawyers for the Moving Party,
iS5 Communications Inc.

SCHEDULE "A"

LIST OF AUTHORITIES

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

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

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

4. ***In the Matter of the Proposal of Cogent Fibre Inc*, 2015 ONSC 5139**

5. **Order of Osborne J dated June 22, 2022 in *In the Matter of the Notice of Intention to Make a Proposal of 2519920 Ontario Inc o/a Dove Cleaners*, Court File No 31-2803414**;

6. **Order of Hainey J dated April 5, 2018 in *In the Matter of the Proposal of 1482241 Ontario Limited*, Court File No 31-2303814; and**

7. ***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.

***Business Corporations Act*, RSO 1990, c B.16, as amended**

Vacancies

124(1) Despite subsection 126 (6), but subject to subsections (2), (4) and (5) of this section, a quorum of directors may fill a vacancy among the directors, except a vacancy resulting from,

(a) an increase in the number of directors otherwise than in accordance with subsection (2), or in the maximum number of directors, as the case may be; or

(b) a failure to elect the number of directors required to be elected at any meeting of shareholders.

Appointment of directors subsequent to annual meeting

(2) Where a special resolution passed under subsection 125 (3) empowers the directors of a corporation the articles of which provide for a minimum and maximum number of directors to determine the number of directors, the directors may not, between meetings of shareholders, appoint an additional director if, after such appointment, the total number of directors would be greater than one and one-third times the number of directors required to have been elected at the last annual meeting of shareholders.

Election of directors to make quorum

(3) If there is not a quorum of directors, or if there has been a failure to elect the number of directors required by the articles or by section 125, the directors then in office shall forthwith call a special meeting of shareholders to fill the vacancy and, if they fail to call a meeting or if there are no directors then in office, the meeting may be called by any shareholder.

Where elected by class of shareholders

(4) Where the holders of any class or series of shares of a corporation have an exclusive right to elect one or more directors and a vacancy occurs among those directors,

(a) subject to subsection (5), the remaining directors elected by that class or series may fill the vacancy except a vacancy resulting from an increase in the number of directors for that class or series or from a failure to elect the number of directors for that class or series; or

(b) if there are no such remaining directors, any holder of shares of that class or series may call a meeting of the holders thereof for the purpose of filling the vacancy.

Idem, where no quorum

(5) The articles may provide that a vacancy among the directors shall only be filled by a vote of the shareholders, or by a vote of the holders of any class or series of shares having an exclusive right to elect one or more directors if the vacancy occurs among the directors elected by that class or series.

Term

(6) A director appointed or elected to fill a vacancy holds office for the unexpired term of the director's predecessor.

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