

Bankruptcy Court File No. BK-24-03044331-0033
Estate No. 33-044331

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE *BANKRUPTCY AND*
***INSOLVENCY ACT*, RSC 1985, c B-3, AS AMENDED**

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
MAXSOLD INCORPORATED OF THE CITY OF KINGSTON IN THE PROVINCE OF
ONTARIO

FACTUM OF THE APPLICANT
(RE: ASSIGNMENT, APPROVAL AND VESTING ORDER AND ANCILLARY ORDER)

April 23, 2024

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TO: THE SERVICE LIST

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PART I – OVERVIEW

1. On February 15, 2024, MaxSold Incorporated (the “**Company**” or “**MaxSold**”) filed a Notice of Intention to Make a Proposal (“**NOI**”) under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “**BIA**”). Dodick Landau Inc. was appointed as proposal trustee under the BIA (in such capacity, the “**Proposal Trustee**”).
2. On March 14, 2024, this Court granted an order (the “**SISP Approval Order**”) that, among other things, approved the Company’s sale and investment solicitation process (“**SISP**”) and approved the Stalking Horse Asset Purchase Agreement (the “**Stalking Horse Agreement**”) between the Company and 1000822913 Ontario Inc. (the “**Purchaser**”) for purposes of constituting the “stalking horse” bid (the “**Stalking Horse Bid**”) in respect of the SISP.
3. The Proposal Trustee, with the assistance of the Company, conducted the SISP in accordance with its terms. The Company received no qualified bids, other than the Stalking Horse Bid. Accordingly, the Company now seeks the Court’s approval of the Stalking Horse Agreement and the transaction contemplated therein (the “**Transaction**”).
4. This factum is filed in support of the Company’s motion seeking two orders:
 - (a) an assignment, approval and vesting order (“**AVO**”) substantially in the form attached as Tab 3 of the Company’s Motion Record that, among other things:
 - (i) authorizes and approves the Transaction contemplated in the Stalking Horse Agreement between the Company and the Purchaser;
 - (ii) vests in the Purchaser all the Company’s right, title, benefit, and interest in and to the assets described in the Stalking Horse Agreement (the “**Purchased Assets**”) free and clear of all Encumbrances (as defined in the AVO) upon the delivery of the Proposal Trustee’s certificate; and

- (iii) assigns the agreements listed in Schedule “B” of the AVO (the “**Consent Required Contracts**”) pursuant to Section 84.1 of the BIA; and
- (b) an order (“**Ancillary Order**”) substantially in the form attached as Tab 5 of the Company’s Motion Record that, among other things:
 - (i) abridges the notice periods and service requirements pursuant to Rule 6 of the *Bankruptcy and Insolvency General Rules* (“**Bankruptcy Rules**”);
 - (ii) extends the time to file a proposal pursuant to s. 50.4(9) of the BIA for 6 days from May 1, 2024 up to and including May 6, 2024 (the “**Proposed Stay Period**”); and
 - (iii) seals Confidential Exhibit “1” (the “**Confidential Exhibit**”) attached to the Affidavit of Russ Patterson sworn April 19, 2024 (“**Patterson Affidavit**”) until the closing of the Transaction or further order of the Court.

5. The Company believes it is in the best interests of its stakeholders to complete the Transaction contemplated in the Stalking Horse Agreement. The Transaction provides material value for the Company’s creditors and permits the business to continue under a new entity that will preserve employment for some of the Company’s 147 employees, provide continued and interrupted services to its customers, and maintain ongoing revenue for the Company’s critical vendors.

6. The Proposal Trustee is supportive of the requested relief. The Company is presently unaware of any opposition to the requested relief.

PART II – FACTS

A. Background of the Company

7. MaxSold is in the business of providing streamlined and efficient online auction services for large volume content sale across Canada and the United States (the “**Business**”). The Company’s mission is to minimize waste and increase sustainability by making the process of selling a large volume of pre-owned items seamless, easy and quick.¹

8. The Company fulfills its mission by assisting sellers with all parts of the online auction process including itemizing and photographing items, hosting the auction on its live auction website (the “**Platform**”), marketing the auction through targeted ads and the Company’s extensive network of engaged and interested buyers, and organizing the payment for and pick-up of auction items.²

9. MaxSold’s Business is robust and employs approximately 147 non-unionized employees of which 43 are full-time and 104 are part-time.³

10. In addition, MaxSold has a wholly owned U.S. subsidiary, MaxSold Inc., that administers onsite services for MaxSold’s U.S. based auctions using its part-time staff, as well as remits U.S. sales taxes to local U.S. government authorities.⁴

B. The Company’s Financial Difficulties and the NOI Proceeding

11. In late 2022, the Company began experiencing cash flow challenges due to extrinsic conditions including a slower housing market and rising acquisition costs from online marketing channels.⁵

¹ Affidavit of Russ Patterson sworn April 19, 2024, Motion Record, at Tab 2 [“**Patterson Affidavit**”], para. 7.

² Patterson Affidavit, *ibid*, para. 8.

³ Patterson Affidavit, *ibid*, para. 9.

⁴ Patterson Affidavit, *ibid*, para. 11.

⁵ Patterson Affidavit, *ibid*, para. 12.

12. In response to the Company's cash flow pressures, the Company implemented an extensive operational restructuring process to decrease the Company's operating costs and enhance the Company's product and market position.⁶

13. Despite the Company's operational restructuring process, the Company continued to suffer liquidity challenges given the Company's historical debt, overbroad legacy contracts, and the extensive capital invested in modernizing the Business.⁷

14. On February 9, 2024, the Company's principal secured lender, National Bank of Canada, delivered a demand to the Company and issued a Notice of Intention to Enforce Security under section 244 of the BIA.⁸

15. To preserve its ongoing operations and value, as well as develop a long-term solution to the Company's liquidity challenges, the Company filed the NOI on February 15, 2024.⁹

16. On March 14, 2024, the Court granted the SISP Approval Order that, among other things:

- (a) extended the time to file a proposal pursuant to section 50.4(9) of the BIA up to and including April 30, 2024;
- (b) approved the SISP;
- (c) approved the Stalking Horse Agreement for the purposes of constituting the Stalking Horse Bid in the SISP;
- (d) granted a first-ranking priority administration charge against the assets, property, and undertakings of the Company, in the maximum amount of \$75,000, as security for the payment of the professional fees and disbursements incurred and to be

⁶ Patterson Affidavit, *ibid*, para. 13.

⁷ Patterson Affidavit, *ibid*, para. 8.

⁸ Patterson Affidavit, *ibid*, para. 9.

⁹ Patterson Affidavit, *ibid*, para. 10.

incurred by the Proposal Trustee, counsel to the Proposal Trustee and counsel to the Company, in connection with this proceeding (the “**Administration Charge**”); and

- (e) authorized the Company, with the written approval of the Proposal Trustee, to pay up to the maximum cumulative amount of \$272,000.00 owing to suppliers for goods or services actually supplied to the Company prior to February 15, 2024 if, in the opinion of the Company, such payment is necessary to maintain the uninterrupted operations of the Business.¹⁰

C. The Company’s Sale Efforts and the Stalking Horse Agreement

17. Prior to the filing of the NOI, in and around October 2023, the Company began soliciting prospective parties who it believed may be interested in completing a strategic transaction with the Company.¹¹

18. The Company’s initial discussions resulted in numerous parties expressing an interest in exploring a strategic transaction with the Company. As a result, after the filing of the NOI, the Company worked with the Proposal Trustee to continue to solicit interest in a sale of, or investment, in the Company.¹²

19. These efforts successfully led to the Stalking Horse Agreement as well as the development of a robust and structured marketing process in the form of the SISP.¹³

D. The SISP

20. The Company, with the assistance of the Proposal Trustee, created the SISP for the purpose of widely exposing the Company’s Business to the market and providing a structured

¹⁰ Patterson Affidavit, *ibid*, para. 11.

¹¹ Patterson Affidavit, *ibid*, para. 12.

¹² Patterson Affidavit, *ibid*, para. 12.

¹³ Patterson Affidavit, *ibid*, para. 13.

and orderly process for interested parties to perform due diligence and submit offers for a potential transaction (the “**Opportunity**”).¹⁴

21. The SISP contemplated a 30-day, single phase sale process that would be implemented and supervised by the Proposal Trustee as an officer of this Court. The Proposal Trustee was intentionally chosen to lead the SISP to protect the integrity of the SISP given the Company’s Chief Financial Officer advised the Company he was investing in the Purchaser.¹⁵

22. Interested parties, who executed non-disclosure agreements, had until 5:00 p.m. on April 15, 2024 (the “**Bid Deadline**”) to complete their due diligence and submit a binding offer that conformed with the requirements set forth in the SISP (the “**Bid Factors**”).¹⁶ The Bid Factors required the bid to, among other things:

- (a) provide for cash consideration sufficient to pay in full on closing of the transaction:
 - (i) a minimum incremental amount of \$10,000 in excess of the aggregate purchase price contemplated by the Stalking Horse Agreement; (ii) a break fee in the amount of \$30,000; and (iii) an expense reimbursement fee in the amount of a maximum of \$20,000 (inclusive of HST) as contemplated by the Stalking Horse Agreement (the “**Consideration Value**”);
- (b) be accompanied by a deposit of at least 10% of the Consideration Value, to be retained by the Proposal Trustee in trust;
- (c) contain an executed binding transaction document, including all exhibits and schedules contemplated thereby, together with a blackline against the Stalking Horse Agreement;

¹⁴ Patterson Affidavit, *ibid*, para. 18.

¹⁵ Patterson Affidavit, *ibid*, para. 38.

¹⁶ Patterson Affidavit, *ibid*, paras. 20-21.

- (d) state it is not conditional upon any condition or contingency relating to due diligence;
- (e) financing or any other material conditions precedent; and
- (f) be submitted by the Bid Deadline.¹⁷

23. After the Bid Deadline, the Proposal Trustee would consider the bids it received to determine if they complied with the Bid Factors and whether they should be declared a compliant bid (a “**Qualified Bid**”). The SISP expressly stated that the Stalking Horse Bid constituted a Qualified Bid.¹⁸

24. In the circumstances where there was more than one Qualified Bid, the Proposal Trustee would proceed with an auction to select the highest or otherwise best bid in the SISP (the “**Successful Bid**”). In the event that the Proposal Trustee, in consultation with the Company, determined that there was no Qualified Bid other than the Stalking Horse Bid, the Proposal Trustee would declare the Stalking Horse Bid as the Successful Bid.¹⁹

25. After declaring the Successful Bid, the SISP contemplated the Company would apply to the Court for approval of the Successful Bid on April 25, 2024 (subject to the Court’s availability) and close a transaction on or around April 30, 2024.²⁰

26. On March 15, 2024, this Court granted the SISP Approval Order approving the SISP.²¹

E. Conduct of the SISP

27. In accordance with the SISP Approval Order the Proposal Trustee, with the assistance of

¹⁷ Patterson Affidavit, *ibid*, para. 21.

¹⁸ Patterson Affidavit, *ibid*, para. 22.

¹⁹ Patterson Affidavit, *ibid*, para. 23.

²⁰ Patterson Affidavit, *ibid*, para. 24.

²¹ Patterson Affidavit, *ibid*, para. 19.

the Company, administered the SISP.²²

28. In accordance with the SISP, the Company populated a virtual data room (the “VDR”). The VDR contained due diligence documents, including financial statements, key contracts, performance data, forecasts, strategy documents, and a detailed Business overview deck.²³

29. On March 15, 2024, the Proposal Trustee commenced the SISP by emailing approximately 38 prospective bidders a teaser detailing the Opportunity.²⁴ The prospective bidders included a diverse list of companies including ones in the same industry, consolidators, venture capital firms, private equity firms and individual investors. The Proposal Trustee also placed a notice about the Opportunity in the Insolvency Insider newsletter and website for the duration of the SISP.²⁵

30. Ultimately, eight parties executed non-disclosure agreements and received access to the VDR.²⁶

31. The Company and Proposal Trustee dedicated significant time and resources engaging with potential bidders and assisting their due diligence. The Company attended numerous calls and meetings with potential bidders and worked to provide fulsome information to bidders.²⁷

32. Despite the extensive marketing efforts, no bid, other than the Stalking Horse Bid, was received by the Bid Deadline. However, several minutes after the Bid Deadline, the Proposal Trustee received a bid (the “**Other Bid**”) from a party that had been actively involved in the SISP (the “**Other Bidder**”).²⁸

²² Patterson Affidavit, *ibid*, para. 25.

²³ Patterson Affidavit, *ibid*, para. 26.

²⁴ Second Report of the Proposal Trustee dated April 22, 2024 (the “**Second Report**”), para. 24.

²⁵ Patterson Affidavit, *ibid*, paras. 27-28.

²⁶ Patterson Affidavit, *ibid*, para. 29.

²⁷ Patterson Affidavit, *ibid*, para. 30.

²⁸ Patterson Affidavit, *ibid*, paras. 31-32.

33. The Other Bid was not a Qualified Bid pursuant to the SISP as it was: (i) conditional upon financing; (ii) not accompanied by a cash deposit; and (iii) received after the Bid Deadline. In addition, the day after the Bid Deadline, the Other Bidder withdrew the Other Bid as it could not remove its financing condition.²⁹

34. Given the withdrawal of the Other Bid and its non-compliance with Bid Factors, the only Qualified Bid that was received was the Stalking Horse Bid. Therefore, in accordance with the SISP, on April 16, 2024, the Proposal Trustee declared the Stalking Horse Bid to be the Successful Bid under the SISP.³⁰

F. The Stalking Horse Agreement and Transaction

35. The Stalking Horse Agreement contemplates the Purchaser purchasing substantially all of the Company's assets for the cash sum of Seven Hundred and Fifty Thousand (\$750,000.00) plus the cash sum required to pay the cure costs for all of the Assumed Contracts (as defined below), if any.³¹

36. The Stalking Horse Agreement will permit the Purchaser to continue to operate the Business as a going concern for the benefit of its stakeholders and creditors.³²

37. The Transaction is the best offer received following the completion of the SISP. The SISP was robust and thoroughly canvassed the market. The SISP was transparent, fair, and conducted in a manner that treated all potential bidders in an even-handed and fair manner.³³

38. The terms of the Transaction are set out in the Stalking Horse Agreement.³⁴ The key terms of the Stalking Horse Agreement are as follows:

²⁹ Patterson Affidavit, *ibid*, paras. 33-34.

³⁰ Patterson Affidavit, *ibid*, para. 35.

³¹ Patterson Affidavit, *ibid*, para. 36.

³² Patterson Affidavit, *ibid*, para. 37.

³³ Patterson Affidavit, *ibid*, para. 48-49.

³⁴ Patterson Affidavit, *ibid*, Exhibit "D".

- (a) **The Purchaser:** The Purchaser is an arms-length party. However, as noted above, the Company's CFO is an investor in the Purchaser.
- (b) **Purchased Assets:** the Purchased Assets include all of the Company's assets, properties and undertakings, other than the excluded assets ("**Excluded Assets**"). The Purchased Assets include, but are not limited to, intellectual property, the Company's software and technology, certain contracts ("**Assumed Contracts**"), equipment, one bank account of the Company known as the "Merchant Account", and the Company's receivables.³⁵
- (c) **Excluded Assets:** the Excluded Assets include, among other things, the purchase price, all cash and money in the Company's bank accounts other than the Merchant Account, and the funds of customers held by the Company in a segregated bank account.³⁶
- (d) **"As Is, Where Is":** the assets are being purchased on an "as is, where is" basis as of the Closing Date (as defined below).³⁷
- (e) **Deposit:** an amount representing 10% of the purchase price has been paid by the Purchaser to the Proposal Trustee.³⁸
- (f) **Treatment of Employees:** five business days before closing, the Purchaser will provide a list of the employees to whom it wishes to offer new employment. The Purchaser will assume and be responsible for all liabilities in respect of the transferred employees after the Closing Date (as defined below).³⁹

³⁵ Patterson Affidavit, *ibid*, para. 39(a).

³⁶ Patterson Affidavit, *ibid*, para. 39(b).

³⁷ Patterson Affidavit, *ibid*, para. 39(c).

³⁸ Patterson Affidavit, *ibid*, para. 39(e).

³⁹ Patterson Affidavit, *ibid*, para. 39(f).

- (g) **Break Fee and Expense Reimbursement Fees:** in circumstances where the Purchaser was not the Successful Bid, the Purchaser was entitled to a break fee of \$30,000 and an expense reimbursement fee in the amount of a maximum of \$20,000. Given the Stalking Horse Bid is the Successful Bid, neither of these fees will be paid to the Purchaser.⁴⁰
- (h) **Conditions to Closing:** the conditions to closing include, among other things, the Court granting of the AVO.⁴¹

39. The “**Closing Date**” under the Stalking Horse Agreement is three business days following the issuance of the AVO, or such later date as the Company and Purchaser may agree to in writing. Accordingly, the Company and Purchaser, in consultation with the Proposal Trustee, are currently anticipating a Closing Date of May 6, 2024.⁴²

G. Cash Flow Forecast

40. MaxSold, with the assistance of the Proposal Trustee, has prepared a weekly cash flow forecast from the period from April 19, 2024 to May 6, 2024 (the “**Cash Flow Forecast**”).⁴³

41. The Cash Flow Forecast demonstrates that MaxSold will have sufficient liquidity to fund its post-filing expenses throughout the Proposed Stay Period other than a small portion of the Company’s anticipated professional fees. The professionals will collect the outstanding professional fees, if any, from the sale proceeds generated by the Transaction in accordance with the Administration Charge.⁴⁴

⁴⁰ Patterson Affidavit, *ibid*, para. 39(g).

⁴¹ Patterson Affidavit, *ibid*, para. 39(h).

⁴² Patterson Affidavit, *ibid*, para. 40.

⁴³ Second Report, *supra*, at para. 48.

⁴⁴ Second Report, *ibid*, para. 49.

PART III – ISSUES

42. The issues to be determined are whether the Court should:
- (a) abridge the time for service of this motion pursuant to Rule 6 of the *Bankruptcy Rules*;
 - (b) extend the time to file the proposal for 6 days pursuant to section 50.4(9) of the BIA;
 - (c) approve the Stalking Horse Agreement and the Transaction contemplated therein;
 - (d) assign the Consent Required Contracts identified in Schedule “B” of the AVO; and
 - (e) seal the Confidential Exhibit.

PART IV – LAW & ARGUMENT**A. The Court Should Approve the Abridgement of Time**

43. Rule 6 of the *Bankruptcy Rules* requires every notice or document served under the BIA must be received by the addressee at least business four days before the event to which it relates if it is served by electronic transmission.⁴⁵

44. As evidenced by the Affidavit of Service of Levi Rivers, the Company served its Motion Record electronically, as contemplated by Rule 6. However, the Company served its Motion Record on April 19, 2024 at 5:41 p.m., which is slightly less than four business days before the motion.⁴⁶ Accordingly, the Company seeks abridgement of time to serve the Company’s Motion Record.

45. Rules 2 and 3 of the *Rules of Civil Procedure* grant this Court with the jurisdiction to abridge the time for service in proposal proceedings where it is satisfied the interests of justice

⁴⁵ *Bankruptcy and Insolvency General Rules*, CRC, c 368, [Rule 6](#).

⁴⁶ Affidavit of Service of Levi Rivers, sworn April 22, 2024.

require abridgement.⁴⁷

46. The Company respectfully submits that this is an appropriate case for the Court to exercise its discretion to abridge the time for service for the following reasons:

- (a) on the afternoon of April 19, 2024, the day the Company served its Motion Record, the Court rescheduled the motion date of April 26, 2024 to one day earlier, April 25, 2024;
- (b) the Company's requested relief must be heard by April 30, 2024 as, without an extension of the time to file a proposal, the Company will be deemed bankrupt, which will result in irreparable harm to the value of the Company given the nature of the Company's assets;⁴⁸ and
- (c) no prejudice will result to any party by reason of the proposed abridgement.

B. The Court Should Approve the Stay Extension

47. The current stay of proceedings is set to expire on April 30, 2024. Despite diligent efforts, the Company is not yet in a position to close the Transaction and deliver a proposal to its creditors. Accordingly, the Company seeks an extension of the stay of proceedings for 6 days, up to and including May 6, 2024, to enable it to continue its restructuring efforts and close the Transaction.⁴⁹

48. Pursuant to section 50.4(9) of the BIA, the Court has the authority to extend the period for filing a proposal and the stay of proceedings for a period of 45 days where it is satisfied that:

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

⁴⁷ *Rules of Civil Procedure*, RRO 1990, Reg 194, [Rules 2.01](#) and [3.02](#). See for e.g. *In Re Entegri Wind Systems Inc*, 2009 PESC 25, [para. 3](#).

⁴⁸ Patterson Affidavit, *supra*, para. 41.

⁴⁹ Patterson Affidavit, *supra*, para. 41.

- (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 (collectively, the “**Section 50.4(9) Factors**”).⁵⁰

49. The Company submits that each of the Section 50.4(9) Factors are met in this case.

i. The Company has acted in good faith and with due diligence

50. In *Re H&H Fisheries Limited*, the court noted that “the converse of good faith is bad faith, and bad faith requires some motivation or conduct which is unacceptable”.⁵¹ In this case, there is no evidence that the Company has acted with bad faith or conducted itself in an unacceptable manner.

51. In contrast, the Company has submitted evidence, including the comments of the Proposal Trustee in the Second Report, which confirms that the Company has acted in good faith and with due diligence since the Company’s first stay extension on March 14, 2024.⁵² Specifically, the Company, with the assistance of the Proposal Trustee, has taken numerous steps to implement restructuring steps that will result in a going concern Transaction including:

- (a) continued to operate the Business in the normal course, with the oversight of the Proposal Trustee;
- (b) assisted the Proposal Trustee in implementing the SISP by meeting with potential bidders, providing documents for the VDR, and responding to due diligence questions;
- (c) prepared and served disclaimers for 8 contracts;

⁵⁰ *BIA*, s. 50.4(9). See for example, *Colossus Minerals Inc. (Re)*, 2014 ONSC 514, paras. 37-43; *Mustang GP Ltd. (Re)*, 2015 ONSC 6562 at para. 41; *Chester Basin Seafood Group Inc (re)*, 2023 NSSC 388, paras. 14 and 20-21.

⁵¹ *Re H&H Fisheries Limited*, 2005 NSSC 346 (“**H&H Fisheries**”), para. 17.

⁵² Second Report, *supra*, at para. 46.

- (d) engaged with stakeholders, employees and partners to address questions about the NOI proceeding and to build consensus on the steps contemplated in this restructuring proceeding; and
- (e) after declaring the Stalking Horse Agreement as the Successful Bid, worked to facilitate the Transaction and seek Court approval of the Stalking Horse Agreement and the Transaction contemplated therein.⁵³

52. Throughout the Proposed Stay Period, the Company will continue to act with good faith and with due diligence by, among other things, continuing to operate in the normal course and closing the Transaction for the purpose of maximizing the realization of the Business for the benefit of creditors and stakeholders.

ii. No creditor is materially prejudiced

53. In considering this factor, courts consider whether there is a significant concern that would be unreasonable for a creditor to accept.⁵⁴

54. The Company submits that there is no evidence of any material prejudice to any creditor if the requested extension is granted.⁵⁵ No additional financing is required for the Company to operate over the Proposed Stay Period.⁵⁶ The extension of the stay will assist in the likelihood of a greater net recovery to creditors by allowing the Business to continue as a going concern.

55. Conversely, if the extension is not granted, the Company will be deemed to have made an assignment in bankruptcy and the Transaction will not be completed. In such circumstances, the Company would be forced to undergo a liquidation which would result in significantly less

⁵³ Patterson Affidavit, *ibid*, para. 42.

⁵⁴ *H&H Fisheries, supra*, [para. 37](#).

⁵⁵ Second Report, *supra*, para. 47.

⁵⁶ Patterson Affidavit, *supra*, para. 45; Second Report, *ibid*, para. 49.

proceeds to the detriment of its creditors.⁵⁷

iii. The Company will likely be able to make a viable proposal

56. The Company has advised that it will use the short extension of time to maximize realization for its creditors and stakeholders by implementing the proposed Transaction that preserves the going concern operations of the Business.⁵⁸ The completion of the Transaction will permit the Company to bring a reasonable conclusion to the NOI proceeding that will result in the funds for creditors and other benefits from the continuing operation of the Business under the Purchaser.

C. The Court Should Approve the Proposed Transaction

57. This Court has jurisdiction to approve a sale of assets outside the ordinary course of business pursuant to section 65.13 of the BIA.⁵⁹

58. Section 65.13(4) of the BIA provides a non-exhaustive list of factors for this Court to consider in determining whether to approve a sale under section 65.13:

(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

⁵⁷ Patterson Affidavit, *ibid*, paras. 44-45.

⁵⁸ Patterson Affidavit, *ibid*, para. 43.

⁵⁹ BIA, [s. 65.13](#).

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

59. Courts have noted that the criteria in subsection 36(3) of the *Companies' Creditors Arrangement Act* – which are identical to those contained in subsection 65.13(4) of the BIA – correspond to the principles articulated in *Royal Bank of Canada v Soundair Corp*, for the approval of the sale of assets in an insolvency scenario:

- (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers have been obtained; and
- (d) whether there has been unfairness in working out the process.⁶⁰

60. The court also has noted that it “is not necessary for [a] debtor to present its proposal under the BIA before an order approving a sale.”⁶¹

61. The above criteria in subsection 65.13(4) and the *Soundair* principles support this Court’s approval of the Transaction:

- (a) **The SISP was developed with the Proposal Trustee.** The SISP was developed with significant input from the Proposal Trustee and after extensive discussions regarding potential alternatives.
- (b) **The SISP was fair and transparent.** The Proposal Trustee administered the SISP in accordance with its terms and the SISP Approval Order. All potential bidders were treated in an even-handed and fair manner.⁶² In particular, all potential bidders, including the Purchaser, were provided with the same information and

⁶⁰ *Feronia Inc (Re)*, 2020 BCSC 1372 at [para. 39](#) citing *Royal Bank v Soundair Corp*, [1991 CanLII 2727 \(ON CA\)](#).

⁶¹ *Komtech Inc (Re)*, 2011 ONSC 3230 at [para. 33](#).

⁶² Second Report, *supra*, para. 34.

ability to conduct due diligence.⁶³ In addition, to protect the integrity of the SISP, the Company's CFO, who is an investor in the Purchaser, was excluded from participating in the SISP on behalf of the Company and was not provided any information on the status of the SISP.⁶⁴

- (c) **The SISP made sufficient effort to obtain the best price.** The SISP involved a Stalking Horse Bid, which was intended to stimulate market interest by setting a "floor price" that bidders must bid against.
- (d) **The Transaction is in the best interests of stakeholders.** The Transaction remains the best offer and only Qualified Bid received from the SISP. The Transaction provides material value for the Company's creditors and permits the Business to continue under a new entity that will preserve employment for some of the Company's 147 employees, provide continued and interrupted services to its customers, and maintain ongoing revenue for the Company's critical vendors. The Transaction also protects a Business that provides tangible and intangible benefits to the Canadian market by offering a service that minimizes waste and supports sustainability.⁶⁵
- (e) **The Proposal Trustee supports the Transaction.** The Proposal Trustee believes the Transaction presents the best possible out come for the stakeholders in the circumstances.⁶⁶ The Proposal Trustee believes a bankruptcy and corresponding liquidation would be a suboptimal outcome as compared to the Transaction because the Company's secured creditors will likely recover significantly less proceeds in a liquidation, employees would be terminated, and customers and vendors may suffer losses.⁶⁷

⁶³ Patterson Affidavit, *ibid*, para. 48.

⁶⁴ Patterson Affidavit, *ibid*, para. 38.

⁶⁵ Patterson Affidavit, *ibid*, para. 49(c).

⁶⁶ Second Report, *supra*, para. 35.

⁶⁷ Second Report, *ibid*, para. 36.

(f) **There is no prejudice to any creditor as a consequence of the Transaction.**

No creditor objected to the SISP when it was first proposed, and, as the date hereof, the Company is not aware of any objection to the Transaction.⁶⁸

(g) **There is no viable alternative to the Transaction.** The Company does not have

the cash flow to implement another sale process. As such, the alternative to the Transaction is a bankruptcy. In a bankruptcy, the Business will likely be forced to shut down, which would result in irreparable destruction of asset value given the Company's primary asset, the Platform, requires an operating Business to retain its value. In such circumstances, employees lose their employment, customers lose their continued services, and the ongoing agreements with vendors would not be preserved.⁶⁹

(h) **The consideration given by the Purchaser is fair and reasonable in the circumstances.** The purchase price is fair and reasonable in the circumstance.

As evidenced by the results of the SISP, no superior, unconditional offer was received. The Transaction is a value-maximizing transaction that monetizes substantially all of the assets for the benefit of the Company's creditors.⁷⁰

62. Accordingly, the Company respectfully submits that this Court should approve the Transaction.

D. The Court Should Assign the Consent Required Contracts

63. In order to close and give effect to the Transaction, it is a requirement that the Consent Required Contracts be assigned to the Purchaser to allow them to continue operating the Business in the ordinary course without interruption.⁷¹

⁶⁸ Patterson Affidavit, *ibid*, para. 49(b).

⁶⁹ Patterson Affidavit, *ibid*, para. 50. Second Report, *supra*, para. 36.

⁷⁰ Patterson Affidavit, *ibid*, para. 49(b).

⁷¹ Patterson Affidavit, *ibid*, paras. 53-54.

64. Section 84.1(1) of the BIA authorizes this Court to make an order assigning the rights and obligations of a debtor under an agreement to any person who is specified by the court and agrees to the assignment.⁷² In determining whether to grant an assignment order, the Court considers the factors in subsection 84.1(4) of the BIA: (a) whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and (b) whether it is appropriate to assign the rights and obligations to that person.⁷³

65. The Company submits that is appropriate to assign the Consent Required Contracts for the following reasons:

- (a) None of the Consent Required Contracts are agreements that cannot be assigned under the BIA;⁷⁴
- (b) The Purchaser unequivocally requires the Consent Required Contracts to continue to operate the Business after the closing of the Transaction;⁷⁵
- (c) There is no prejudice caused by assigning the Consent Required Contracts as Cure Costs (as defined in the Stalking Horse Agreement), if any, will be paid by the Purchaser;⁷⁶
- (d) The Proposal Trustee supports the requested relief;⁷⁷ and
- (e) Notice has been provided to all counterparties of the Consent Required Contracts.

66. Based on the foregoing, the Company respectfully submits that it is appropriate for this Court to assign the Consent Required Contracts.

⁷² BIA, [s. 84.1](#)

⁷³ BIA, [s. 84.1\(4\)](#); *Re Aeropostale Canada Corp. (Notice of Intention)*, 2018 ONSC 1468, [paras. 39-40](#).

⁷⁴ Patterson Affidavit, *supra*, para. 57.

⁷⁵ Patterson Affidavit, *ibid*, paras. 54 and 59.

⁷⁶ Patterson Affidavit, *ibid*, para. 60.

⁷⁷ Second Report, *supra*, para. 43.

E. The Court Should Seal the Confidential Exhibit

67. The Company seeks a sealing order for the Confidential Exhibit to the Patterson Affidavit, being a copy of the Other Bid.⁷⁸

68. This Court has jurisdiction to make the sealing order sought under section 137(2) of the *Courts of Justice Act*⁷⁹ in accordance with the principles established by the Supreme Court of Canada in *Sherman Estate*.⁸⁰ Courts have applied the *Sherman Estate* test in the insolvency context to grant sealing orders over confidential or commercially sensitive documents to protect the interests of the debtor.⁸¹

69. The Confidential Exhibit discloses confidential information about the Business and the valuation of the Company's assets. If the Other Bid was to be made public, this would negatively affect the Company's ability to maximize value and maintain integrity in future sale efforts, if needed.⁸² The sealing of the Confidential Exhibit is limited to commercially sensitive information and is limited in time. The requested relief is the least restrictive means possible, and thus, compiles with *Sherman Estate* and the *Courts of Justice Act*.

PART V – RELIEF REQUESTED

70. Based on the foregoing, the Company respectfully requests that this Court grant the AVO and the Ancillary Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23RD DAY OF APRIL, 2024.



RECONSTRUCT LLP

⁷⁸ Patterson Affidavit, *supra*, para. 61.

⁷⁹ *Courts of Justice Act*, R.S.O. 1990, c. C.43 at [s. 137\(2\)](#).

⁸⁰ *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at [para 53](#); *Sherman Estate v Donovan*, 2021 SCC 25 at [para. 38](#) [**"Sherman Estate"**]. The principles are (a) whether court openness poses a serious risk to the important public interest; (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not prevent the risk; and (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

⁸¹ *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347 at [paras. 23-27](#).

⁸² Patterson Affidavit, *supra*, para. 62.

SCHEDULE "A"**List of Authorities**

1. <i>In Re Entegrity Wind Systems Inc</i> , 2009 PESC 25
2. <i>Colossus Minerals Inc. (Re)</i> , 2014 ONSC 514
3. <i>Mustang GP Ltd. (Re)</i> , 2015 ONSC 6562
4. <i>Chester Basin Seafood Group Inc (re)</i> , 2023 NSSC 388
5. <i>Re H&H Fisheries Limited</i> , 2005 NSSC 346
6. <i>Feronia Inc (Re)</i> , 2020 BCSC 1372
7. <i>Royal Bank v Soundair Corp</i> , 1991 CanLII 2727 (ON CA)
8. <i>Komtech Inc (Re)</i> , 2011 ONSC 3230
9. <i>Re Aeropostale Canada Corp. (Notice of Intention)</i> , 2018 ONSC 1468
10. <i>Sierra Club of Canada v Canada (Minister of Finance)</i> , 2002 SCC 41
11. <i>Sherman Estate v Donovan</i> , 2021 SCC 25
12. <i>Ontario Securities Commission v. Bridging Finance Inc.</i> , 2021 ONSC 4347

SCHEDULE "B"**Statutory Authorities****[Bankruptcy and Insolvency Act, RSC 1985, c B-3](#)****Notice of intention**

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

- (a) the insolvent person's intention to make a proposal,
- (b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
- (c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

- (a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;
- (b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and
- (c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

- (a) such release would unduly prejudice the insolvent person; and
- (b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

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.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

- (a)** the insolvent person has not acted, or is not acting, in good faith and with due diligence,
- (b)** the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
- (c)** the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
- (d)** the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

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.

Assignment of agreements

84.1 (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.

Individuals

(2) In the case of an individual,

- (a) they may not make an application under subsection (1) unless they are carrying on a business; and
- (b) only rights and obligations in relation to the business may be assigned.

Exceptions

(3) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- (a) an agreement entered into on or after the date of the bankruptcy;
- (b) an eligible financial contract; or
- (c) a collective agreement.

Factors to be considered

- (4) In deciding whether to make the order, the court is to consider, among other things,
- (a) whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and
 - (b) whether it is appropriate to assign the rights and obligations to that person.

Restriction

(5) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the person's bankruptcy, insolvency or failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(6) The applicant is to send a copy of the order to every party to the agreement.

[Courts of Justice Act, RSO 1990, c C.43](#)

Sealing document

137 (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

[Rules of Civil Procedure, RRO 1990, Reg 194](#)

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Effect of Non-Compliance

2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

- (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
- (b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

(2) The court shall not set aside an originating process on the ground that the proceeding should have been commenced by an originating process other than the one employed.

Court May Dispense with Compliance

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

**Extension or Abridgment
General Powers of Court**

3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

[Bankruptcy and Insolvency General Rules, CRC c 368](#)

6 (1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

(2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules

(a) must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or

(b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.

(3) A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.

(4) The court may, on an *ex parte* application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.

**IN THE MATTER OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, RSC 1985, c B-3, AS AMENDED AND**

**Court File No. BK-24-03044331-0033
Estate No. 33-3044331**

**AND IN THE MATTER OF THE NOTICE OF INTENTION TO
MAKE A PROPOSAL OF MAXSOLD INCORPORATED OF THE
CITY OF KINGSTON IN THE PROVINCE OF ONTARIO**

**ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)**

Proceedings commenced at *Ottawa*

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