

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

IN THE MATTER OF THE NOTICE OF INTENTION TO  
MAKE A PROPOSAL OF DANIER LEATHER INC., a  
corporation incorporated pursuant to the laws of the  
Province of Ontario, with a head office in the City of Toronto,  
in the Province of Ontario

---

**FACTUM OF DANIER LEATHER INC.**  
**(Re: Sales and Investor Solicitation Process, Stalking Horse Agreement and Court  
Ordered Charges)**

---

**DAVIES WARD PHILLIPS & VINEBERG LLP**  
Barristers & Solicitors  
155 Wellington Street West  
Toronto, ON M5V 3J7

Jay A. Swartz (LSUC #15417L)  
jswartz@dwpv.com  
Natalie Renner (LSUC #55954A)  
nrenner@dwpv.com

Tel: 416.863.0900  
Fax: 416.863.0871

Lawyers for Danier Leather Inc.

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

IN THE MATTER OF THE NOTICE OF INTENTION TO  
MAKE A PROPOSAL OF DANIER LEATHER INC., a  
corporation incorporated pursuant to the laws of the  
Province of Ontario, with a head office in the City of Toronto,  
in the Province of Ontario

**FACTUM OF DANIER LEATHER INC.**

**PART I ~ OVERVIEW**

1. On this motion Danier Leather Inc. (the "**Company**") seeks approval of, among other things, the sales and investor solicitation process set out in its motion materials (the "**SISP**") and the Stalking Horse Agreement (as defined below), certain Court-ordered charges over its assets and property relating to certain administrative costs of the restructuring proceedings, the indemnification of its officers and directors and a key employee retention plan (collectively, the "**Charges**").
2. The Company sought protection under the *Bankruptcy and Insolvency Act* by filing notice of intention to make a proposal on February 4, 2016 in order to permit the Company to implement a Court-approved SISP with the goal of identifying one or more potential purchasers of, or investors in, the Company or its business and assets.
3. The SISP and the proposed Stalking Horse Agreement have been carefully considered by the Company, KSV Kofman Inc., in its capacity as proposal trustee (the "**Proposal Trustee**") and Consensus Advisory Services LLC and Consensus Securities LLC (jointly, the "**Financial Advisor**"). In the circumstances, the

Company is confident that the SISP and the Stalking Horse Agreement will result in the maximum value for the Company's business (the "**Business**") or assets.

4. The Proposal Trustee agrees with this assessment. The Proposal Trustee is also of the view that the SISP is a fair and open process and the best method to either identify the Stalking Horse Agreement as the highest and best bid for or to produce an offer that is superior to the Stalking Horse Agreement.

5. In addition, the Company has identified a number of parties, including its professional advisors, directors and officers and certain key employees who are integral to the successful implementation of the SISP. The Company is therefore seeking the Court's approval to grant certain charges over its property and assets to secure the fees and expenses of these parties, as applicable.

## **PART II ~ FACTS**

6. The facts relevant to this motion are set out in the Affidavit of Brent Houlden sworn February 4, 2016 (the "**Houlden Affidavit**"), the affidavit of Michael O'Hara sworn February 4, 2016 and the First Report of the Proposal Trustee dated February 5, 2016 (the "**First Report**"). The following is a summary of some of the central facts to this motion.

### **Background**

7. The Company filed a Notice of Intention (the "**NOI**") to make a proposal under the *Bankruptcy and Insolvency Act* on February 4, 2016. The Company is an integrated designer, manufacturer and retailer of leather and suede apparel and

accessories. The Company primarily operates its retail business from 84 stores located throughout Canada and does not own any real property. The Company employs approximately 1,293 employees.

Affidavit of Brent Houlden sworn February 4, 2016 [Houlden Affidavit]  
at para. 11, Motion Record of Danier Leather Inc. [Motion Record], Tab  
2

8. Personal property security searches and *Bank Act* searches conducted against the Company show registrations in favour of the following parties (collectively, the "**Existing Security**"): (a) personal property and *Bank Act* registrations in favour of Canadian Imperial Bank of Commerce ("**CIBC**") in respect of an asset-based lending facility the Company has with CIBC (the "**ABL Facility**"), (b) a personal property registration in favour of Hewlett-Packard Financial Services Canada Company in respect of office equipment, and (c) personal property registrations in favour of Honda Canada Finance Inc. and Toyota Credit Canada Inc. in respect of motor vehicles leased to the Company's executives.

Houlden Affidavit at paras. 12-17, Motion Record, Tab 2

9. As more particularly described in the Houlden Affidavit, the Company has suffered declining revenues and profitability over the last two years resulting primarily from issues in implementing its strategic plan. The overly accelerated pace of change in both personnel and systems resulting from the strategic plan has contributed to fashion and inventory miscues, which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

Houlden Affidavit at paras. 18-22 and 32, Motion Record, Tab 2

10. Commencing in late 2014, the Company implemented a series of operational and cost reduction initiatives in an attempt to return the Company to profitability. These initiatives have included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing the Company's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, the Company engaged the Financial Advisor and formed a special committee (the "**Special Committee**") comprised of independent members of its board of directors to explore strategic alternatives to improve the Company's financial circumstances, including soliciting an acquisition transaction for the Company and refinancing the Company's operating line of credit (the "**Operating Facility**") with the Canadian Imperial Bank of Commerce ("**CIBC**").

Houlden Affidavit at paras. 23-27, Motion Record, Tab 2

11. As part of its mandate, the Financial Advisor conducted a seven month marketing process to solicit offers from interested parties to acquire the Company (the "**2015 Solicitation Process**") pursuant to which the Financial Advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing the Company and the Business. Over the course of the 2015 Solicitation Process, the Financial Advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of the Company or refinance its Operating Facility. One of the principal reasons that the 2015 Solicitation Process was unsuccessful is that it focused

on soliciting an acquisition transaction, which ultimately became unappealing to interested parties as the Company's risk profile was too great and an acquisition transaction did not afford prospective purchasers the ability to restructure the Company's affairs without incurring significant costs.

Houlden Affidavit at paras. 25-26, Motion Record, Tab 2

12. The Special Committee ultimately determined that the 2015 Solicitation Process would not likely result in a capital transaction. In an effort to generate cash, the Company sold its real property at St. Clair Avenue, Toronto, Ontario for net proceeds of \$11.6 million and used the proceeds to partially repay its indebtedness to CIBC and converted the Operating Facility into the ABL Facility.

Houlden Affidavit at paras. 27-29, Motion Record, Tab 2

13. Despite the Company's efforts to restructure its financial affairs and turn around its operations, the Company has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. The Company currently has approximately \$9.6 million in cash on hand but is projected to be cash flow negative every month until at least September 2016. The Company anticipates that it will be required to borrow under the ABL Facility in July 2016. In addition, for the 12 months ending December 31, 2015, 30 of the Company's 84 store locations were unprofitable on a four-wall basis. If the Company elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

Houlden Affidavit at paras. 22, 34 and 36, Motion Record, Tab 2

14. The Company would not have had the financial resources to sufficiently implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, the Company commenced these proceedings under the BIA for the purpose of entering into the Stalking Horse Agreement and implementing the second phase of the SISP.

Houlden Affidavit at para. 37 and 41, Motion Record, Tab 2

### **The Stalking Horse Agreement**

15. The SISP is comprised of two phases. In the first phase, the Company engaged the services of the Financial Advisor to find a stalking horse bidder (the "**Stalking Horse Process**"). The Financial Advisor corresponded with 22 parties, 19 of whom had participated in the 2015 Solicitation Process and were therefore familiar with the Company and the Business. In response, the Company received three offers and, with the assistance of the Financial Advisor and the Proposal Trustee, selected the agency agreement (the "**Stalking Horse Agreement**") with GA Retail Canada, ULC or an affiliate thereof (the "**Agent**") as the successful bid. The Agent is an affiliate of Great American Group LLC, which has extensive experience in conducting retail store liquidations, having led inventory dispositions for a wide variety of current and former retailers, including Target Canada, Sterling Shoes, Petcetera, Zacks Fashion, Cache, Love Culture, Payless Shoes, Office Depot and Officemax.

Houlden Affidavit at paras. 4, 41-45, Motion Record, Tab 2

16. On February 4, 2016, the Company and the Agent entered into the Stalking Horse Agreement, subject to Court approval. Pursuant to the Stalking Horse

Agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of the Company's inventory (the "**Merchandise**") and, subject to certain exceptions, furniture, fixtures and equipment ("**FF&E**") located in 76 of the Company's stores and outlet centres. The Agent will dispose of the Merchandise by conducting a "store closing" or similar sale at the Stores (the "**Sale**").

Houlden Affidavit at paras. 46-47, Motion Record, Tab 2

17. The Stalking Horse Agreement provides that the Company will receive a net minimum amount (the "**Guaranteed Amount**") equal to 94.6% (the "**Guaranty Percentage**") of the aggregate "Cost Value" of the Merchandise (as determined in accordance with the Stalking Horse Agreement), provided that the Cost Value of the Merchandise on the date that the Sale commences is no less than \$22 million and no more than \$25 million, certain inventory mix thresholds are satisfied and provided that the Sale commences by March 3, 2016. On this basis, the Company will receive between \$20.8 million and \$23.7 million on account of the Guaranteed Amount, subject to adjustments. After payment of the Guaranteed Amount and the expenses of the Sale, the Agent is entitled to retain a 5% commission calculated pursuant to the Stalking Horse Agreement. Any additional proceeds of the Sale after payment of the Commission are divided equally between the Agent and the Company.

Houlden Affidavit at para. 47, Motion Record, Tab 2

18. Pursuant to the Stalking Horse Agreement, the Agent will be responsible for the expenses of the Sale, which include, among other items: (a) payroll, benefits and an employee incentive plan for store level employees; (b) occupancy costs on a per



diem and per store basis; (c) advertising, promotional and signage expenses; and (d) costs associated with the supervision of the sale by the liquidator.

Houlden Affidavit at para. 48, Motion Record, Tab 2

19. The Agent has agreed to provide a letter of credit to secure its obligations to pay the Guaranteed Amount and, once such amount has been paid in full, such letter of credit will secure one week's expenses.

Houlden Affidavit at para. 49, Motion Record, Tab 2

20. The Stalking Horse Agreement also provides that the Agent is entitled to (a) break fee in the amount of \$250,000 (the "**Break Fee**"); (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed \$100,000 (the "**Expense Reimbursement**"); and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the Sale in an amount not to exceed \$175,000 (the "**Signage Costs Obligations**"), each payable if another bid is selected as the Successful Bid (as defined below) and the transaction contemplated by the Successful Bid is completed. Collectively, the Break Fee, the maximum amount payable under the Expense Reimbursement and the Signage Costs Obligations represent approximately 2.5% of the minimum consideration payable under the Stalking Horse Agreement. If another liquidator submits the Successful Bid, it will be required to purchase the signage from the Agent at its cost.

Houlden Affidavit at paras. 51-52, Motion Record, Tab 2

21. The Stalking Horse Agreement is structured to allow the Company to proceed with the second phase of the SISP (described in greater detail below) and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the Stalking Horse Agreement contemplates liquidating the Company's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP.

Houlden Affidavit at para. 54, Motion Record, Tab 2

### **The SISP**

22. The Company, in consultation with the Proposal Trustee and Financial Advisor, have established the SISP and the procedures set out therein (the "**SISP Procedures**") which are to be followed in conducting the second phase of the SISP.

Houlden Affidavit at para. 56 and 57, Motion Record, Tab 2

23. Pursuant to the SISP, interested parties may make a binding proposal (a "**Bid**") to acquire the Business or all or substantially all or any part of the Company's assets (a "**Sale Proposal**"), to make an investment in the Company (an "**Investment Proposal**") or to liquidate the Company's inventory and furniture, fixtures and equipment (to the extent not sold pursuant to a Sale Proposal) (a "**Liquidation Proposal**").

Houlden Affidavit at para. 58, Motion Record, Tab 2

24. A bid must comply with certain requirements under the SISP to constitute a "**Qualified Bid**". Such requirements include, among other things:

- (a) a cash deposit equal to 10% of the consideration or imputed value of the proposed transaction;
- (b) in the case of a Liquidation Proposal, it must be for an amount that exceeds the Guaranty Percentage by not less than 2%; and
- (c) in the case of a Sale Proposal or Investment Proposal, the overall result or value of the purchase price or imputed value must be an amount that exceeds the Guaranty Percentage by not less than 2%.

Houlden Affidavit at para. 63, Motion Record, Tab 2

25. The Company, in consultation with the Proposal Trustee, Financial Advisor and OCI (as defined below), if applicable, will evaluate Qualified Bids on various grounds, and may (a) accept, subject to Court approval, one or more Qualified Bids (each, a "**Successful Bid**"), (b) conditionally accept, subject to Court approval, one or more Qualified Bids (each, a "**Back-Up Bid**"), which acceptance will be conditional upon the failure of the transactions contemplated by the Successful Bid to close, or (c) pursue an auction (the "**Auction**") in accordance with the procedures set out in the SISP.

Houlden Affidavit at para. 66, Motion Record, Tab 2

26. The Company may, in its discretion, conduct the Auction if it receives more than one Liquidation Proposal (which are Qualified Bids). The Company has asked for Sale Proposals to be submitted on a sealed basis on the Bid Deadline (as defined in the SISP). However, if the Company receives a Sale Proposal or Investment Proposal (which is a Qualified Bid), which the Company or Proposal Trustee considers would result in a greater value being received than the Liquidation Proposals, then the Proposal Trustee may include such Qualified Bid(s) in the Auction.

Houlden Affidavit at para. 67, Motion Record, Tab 2

27. The key dates of the second phase of the SISP are as follows:

<b>Commencement of Second Phase of the SISP:</b>	The second phase of the SISP will commence upon approval by the Court
<b>Bid Deadline:</b>	February 22, 2016
<b>Advising Interested Parties Whether Bids Constitute Qualified Bids:</b>	No later than two business days after Bid Deadline
<b>Determining Successful Bid and Back-Up Bid (if there is no Auction):</b>	No later than five business days after Bid Deadline
<b>Advising Qualified Bidders of Auction date and location (if applicable):</b>	No later than five business days after Bid Deadline
<b>Auction (if applicable):</b>	No later than seven business days after Bid Deadline
<b>Bringing Motion for Approval:</b>	Within five business days following determination by the Company of the Successful Bid (at Auction or otherwise)
<b>Back-Up Bid Expiration Date:</b>	No later than 15 business days after the Bid Deadline, unless otherwise agreed
<b>Outside Date</b>	No later than 15 business days after the Bid Deadline

Houlden Affidavit at para. 72, Motion Record, Tab 2

28. The timelines in the SISP have been designed having regard to the seasonal nature of the Business and the fact that inventory values will depreciate significantly as the Spring season approaches. The timelines also ensure that any purchaser of the Business as a going concern has the opportunity to make business decisions well in advance of the Company's busiest season, being the Fall/Winter

season. These timelines are necessary to generate maximum value for the Company's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 Solicitation Process and were given access to a data room containing non-public information about the Company at that time, which information has not materially changed other than to add more inventory information and update the currency of the financial information in the data room.

Houlden Affidavit at para. 75, Motion Record, Tab 2

29. The Company does not believe that there is a better viable alternative to the proposed SISP and Stalking Horse Agreement as demonstrated by the 2015 Solicitation Process.

Houlden Affidavit at para. 76, Motion Record, Tab 2

**Financial Advisor and OCI Inc.**

30. The Financial Advisor has been retained to assist the Company in implementing the SISP. Pursuant to the terms of its engagement letter with the Company (the "**Financial Advisor Engagement Letter**"), the maximum aggregate amount payable to the Financial Advisor on account of (a) its success fee, which cannot exceed US\$525,000 and (b) its bonus, which cannot exceed \$150,000, for a maximum aggregate payment of US\$675,000 (US\$50,000 of which has already been paid to the Financial Advisor by way of retainer).

Houlden Affidavit at paras. 77-78, Motion Record, Tab 2

31. The Company has also retained OCI Inc. ("**OCI**") to implement the SISP in certain international markets. Pursuant to the terms of its engagement letter with the

Company (the "**OCI Engagement Letter**"), OCI is entitled to receive a success fee equal to 4% of any transaction originated by OCI involving the Company and one or more strategic parties introduced to the Company by OCI.

Houlden Affidavit at para. 70-80, Motion Record, Tab 2

### **Consensus Charge**

32. The Company is seeking a charge in the amount of US\$500,000 to cover the Financial Advisor's maximum success fees payable under the Engagement Letter (being US\$525,000 less US\$25,000 paid to such fee from the retainer) (the "**Consensus Charge**"). The Consensus Charge would rank behind the Existing Security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge (each as defined below).

Houlden Affidavit at paras. 81-82, Motion Record, Tab 2

### **Administration Charge**

33. In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to the Company, the directors of the Company and their counsel, the Company seeks a charge (the "**Administration Charge**") on its property and assets in the amount of \$600,000. The Administration Charge would rank behind the Existing Security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge.

Houlden Affidavit at paras. 83-85, Motion Record, Tab 2

## **D&O Charge**

34. The directors and officers have been actively involved in the attempts to address the Company's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of the within proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

Houlden Affidavit at para. 89, Motion Record, Tab 2

35. The Company maintains a directors and officers insurance policy with Chubb Insurance Company of Canada, Liberty Mutual Insurance and Arch Insurance Canada (collectively, the "**Policy**"). The Policy contains an exclusion in the event there is a change in risk thereunder and there is potential for there to be insufficient coverage for an insurable event arising after the filing of the NOI.

Houlden Affidavit at para. 87, Motion Record, Tab 2

36. The Company has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that their insurance coverage is insufficient. The Company does not anticipate it will have sufficient funds to satisfy those indemnities.

Houlden Affidavit at para. 88, Motion Record, Tab 2

37. The Company seeks approval of a priority charge (the "**D&O Charge**") to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the NOI. It is proposed that the D&O Charge be in

an amount not to exceed \$4.9 million and rank behind the Existing Security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

Houlden Affidavit at para. 86, Motion Record, Tab 2

38. The amount of the D&O Charge takes into account payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course and the Company expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

Houlden Affidavit at paras. 88-89, Motion Record, Tab 2  
First Report at para. 5.2

### **Key Employee Retention Plan and Charge**

39. The Company developed a key employee retention plan (the "**KERP**") that applies to 11 of the Company's employees, an executive of the Company and the Company's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction in respect of the Company. The KERP was reviewed and approved by the Board.

Houlden Affidavit at para. 90, Motion Record, Tab 2

40. Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with the Company until the earlier of the completion of the SISP, the date upon which the liquidation of the Company's inventory is complete, the date upon which the Company ceases to carry on



business, or the effective date that the Company terminates the services of such employees.

Houlden Affidavit at para. 91, Motion Record, Tab 2

41. The aggregate maximum amount of the retention payments to key employees is \$213,50. In addition, the Company will pay each of the consultant and the Company's executive (a) a \$25,000 retention bonus, (b) a further \$25,000 retention bonus calculated on a pro rata basis for each day they remain in their positions after the first three months following the date of the NOI, and (c) an amount equal to \$105,000 plus HST as a termination payment.

Houlden Affidavit at para. 91, Motion Record, Tab 2

42. The Company is requesting approval of the KERP and a charge for up to \$524,000 (the "**KERP Charge**") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances, other than the Existing Security, the Administration Charge, the Consensus Charge and the D&O Charge.

Houlden Affidavit at para. 92, Motion Record, Tab 2

### **PART III ~ ISSUES**

43. This Factum will address the following of the issues before the Court:

- (a) Should the Stalking Horse Agreement and the SISP be approved;
- (b) Should the payment of the Break Fee, the Expense Reimbursement and the Signage Costs Obligations be approved in accordance with the Stalking Horse Agreement;
- (c) Should the Court authorize the Company to perform its obligations under its engagement letters with the Financial Advisor and OCI, including making the payments contemplated thereunder;

- (d) Should the Court approve the Administration Charge and the Consensus Charge;
- (e) Should the Court approve the D&O Charge;
- (f) Should the Court approve the KERP and the KERP Charge; and
- (g) Should the Court grant a sealing order in respect of the KERPs and the Offer Summary (as defined below)?

#### **PART IV ~ LAW & ARGUMENT**

**Issue 1: Should the Stalking Horse Agreement and Sale Process be approved?**

##### **The Law – Approval of a Stalking Horse Agreement and Sale Process**

44. The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefits 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.

*CCM Master Qualified Fund Ltd. v. blutip Power Technologies*, 2012 ONSC 1750 at para. 7 [Commercial List], Brief of Authorities of Danier Leather Inc. [Brief of Authorities], Tab 1

45. The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA.

*Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 22-26 (S.C.J.), Brief of Authorities, Tab 2

*Re Komtech Inc.*, 2011 CarswellOnt 6577 at paras. 8-19 (S.C.J.), Brief of Authorities, Tab 3

46. A distinction should be drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not address the factors a court should consider when deciding whether to approve a sale process.

47. In *Re Brainhunter*, this Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved (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?

*Re Brainhunter*, 2009 CarswellOnt 8207 at paras. 13-17 (S.C.J. [Commercial List]), Brief of Authorities, Tab 4

*Re Nortel Networks Corp.*, 2009 CarswellOnt 4467 at para. 49 (S.C.J. [Commercial List]), Brief of Authorities, Tab 5

48. While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA.

*Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60 at para 24, Brief of Authorities, Tab 6

*Re Indalex Ltd.*, [2013] 1 S.C.R. 271 at paras. 50-51, Brief of Authorities, Tab 7

*Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 29-30 (S.C.J.), Brief of Authorities, Tab 2

*Re Komtech Inc.*, 2011 CarswellOnt 6577 at paras. 20-23 (S.C.J.), Brief of Authorities, Tab 3

*Re Mustang GP Ltd.*, 2015 CarswellOnt 16398 at para. 31 (S.C.J.), Brief of Authorities, Tab 8

49. Furthermore, in *Mustang*, this Court applied the Nortel Criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA.

*Re Mustang GP Ltd.*, 2015 CarswellOnt 16398 at paras. 37-38 (S.C.J.), Brief of Authorities, Tab 8

50. These proceedings are premised on the implementation of a sale process using the Stalking Horse Agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, the Company is seeking approval of the Stalking Horse Agreement for purposes of conducting the SISP; it is not asking this Court to approve the transactions contemplated in the Stalking Horse Agreement (other than the payment of the Break Fee, the Expense Reimbursement and the Signage Costs Obligations). The Company will apply to this Court once a Successful Bid has been selected under the SISP to seek approval of the transactions contemplated therein.

51. It is respectfully submitted that the Nortel Criteria are the appropriate criteria to be considered when approving a sale process and, while section 65.13 of the BIA and should be considered, it is not directly engaged other than to ensure that the sale process is not so flawed that it is not capable of resulting in a proposed transaction

that could satisfy the section 65.13 criteria. On that basis, the Company submits, for the following reasons, that on application of the Nortel Criteria, the Stalking Horse Agreement and SISP should be approved.

**(a) The sale process is warranted at this time**

52. The SISP is warranted at this time for a number of reasons.

53. First, 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 2014, 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. The SISP will result in the most viable alternative for the Company, whether it be a sale of assets or the Business (through an auction or otherwise) or, an investment in the Company.

54. Second, the Company projects that it will be cash flow negative for the next six months and there is no certainty that the Company will be able to borrow under the ABL Facility to finance its operations. If the SISP is not implemented in the immediate future, the Company's revenues will continue to decline, it will incur significant indebtedness and the value of the Business will erode, thereby decreasing recoveries for the Company's stakeholders.

55. Third, the market for the Company's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the Business is seasonal in nature. Any purchaser of the Business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it

wishes to carry by March 2016 in order to be sufficiently prepared for the Fall/Winter season, which has historically been the Company's busiest season.

**(b) The SISP will benefit the whole of the economic community**

56. The Company and the Proposal Trustee concur that the SISP and the Stalking Horse Agreement will benefit the whole of the economic community. In particular:

- (a) the Stalking Horse Agreement will establish the floor price for the Company's inventory, thereby maximizing recoveries;
- (b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking Horse Agreement; and
- (c) should the SISP result in a sale transaction for all or substantially all of the Company's assets, this may result in the continuation of employment, the assumption of lease and other obligations, the sale of raw materials and inventory owned by the Company, etc.

**(c) No creditor has come forward with any *bona fide* concerns**

57. Any concerns of creditors (which are presently unknown) are not *bona fide* objections to the SISP. The SISP is an open and transparent process. To the extent the creditors are not satisfied with the value of the Stalking Horse Agreement, the entire purpose of the SISP is to market the Business in an effort to receive higher and better consideration for the assets or investment in the Company. Absent the Stalking Horse Agreement, the SISP could potentially result in substantially less consideration for the Business and assets.

**(d) There is no better viable alternative**

58. Given the indications of value obtained through the 2015 Solicitation Process, the Stalking Horse Agreement represents the highest and best value to be obtained for the Company's assets at this time, subject to a higher offer being identified through the SISP.

**The SISP is capable of resulting in a transaction that could satisfy the section 65.13 criteria**

59. Section 65.13 of the BIA provides in part, as follows:

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.

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.

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 65.13

60. In the present case, in addition to satisfying the Nortel Criteria, the SISP will result in a transaction capable of satisfying the 65.13 criteria (to the extent such criteria are capable of being satisfied at this stage of the process) for the following reasons:

- (a) the SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of the Company's assets, make an investment in the Company or acquire the business as a going concern, with the goal of improving upon the terms of the Stalking Horse Agreement and gives the Company and Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process;
- (b) the Proposal Trustee and the Financial Advisor support the SISP and views it as reasonable and appropriate in the circumstances (including the timelines set out therein);
- (c) the duration of the SISP is reasonable and appropriate in the circumstances having regard to the Company's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with the Company and its business given their participation in the 2015 Solicitation Process and/or the Stalking Horse Process;
- (d) a sale process which allows the Company to be sold as a going concern is more beneficial than a sale under a bankruptcy, which does not allow this option; and
- (e) the consideration to be received for the assets under the Stalking Horse Agreement is fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

First Report of the Proposal Trustee [First Report] at para. 4.9  
Affidavit of Michael O'Hara sworn February 4, 2016 [O'Hara Affidavit]  
at paras. 37-42 and 52, Motion Record, Tab 3

**Issue 2: Should the Break Fee, the Expense Reimbursement and the Signage Costs Obligations be approved?**

61. Break fees and expense and costs 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 administrative expenses may be expected".

Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4, Brief of Authorities, Tab 23

62. Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court.

*Re Nortel Networks Corp.*, [2009] O.J. No. 4293 at paras. 12 and 26 (S.C.J. [Commercial List]), Brief of Authorities, Tab 9, where a 3% break fee and a 2% expense reimbursement were approved.

*Re W.C. Wood Corp. Ltd.*, [2009] O.J. No. 4808 at para. 3 (S.C.J. [Commercial List]), Brief of Authorities, Tab 10, where a 4% break fee was approved.

*Re MPH Graphics Inc.*, 2014 ONSC 947 at paras. 1-4, Brief of Authorities, Tab 11, a proposal proceeding where a 5.7% break fee was approved.

*Re Parlay Entertainment Inc.*, 2011 ONSC 3492 at paras. 12-16, Brief of Authorities, Tab 12, a proposal proceeding where a 2.4% break fee and 2.4% expense reimbursement were approved.

63. The Break Fee, the Expense Reimbursement and the Signage Costs Obligations in the Stalking Horse Agreement fall within the range of reasonableness. Collectively, the Break Fee, the maximum amount payable under the Expense Reimbursement and the Signage Costs Obligations represent approximately 2.5% of the minimum consideration payable under the Stalking Horse Agreement. In addition, if a Liquidation Proposal (other than the Stalking Horse Agreement) is the Successful Bid, the Company is not required to pay the Signage Costs Obligations. Instead, the Successful Bidder (as defined in the SISP) will be required to buy the signage and advertising material from the Agent at its cost.

64. In the exercise of their business judgment, the Board unanimously approved the Break Fee, the Expense Reimbursement and the Signage Costs Obligations.

65. The Proposal Trustee and the Financial Advisor have both reviewed the Break Fee, the Expense Reimbursement and the Signage Costs Obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

- (a) the maximum amount of the Break Fee, Expense Reimbursement and Signage Costs Obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the Stalking Horse Agreement, which is within the normal range of transactions of this nature;
- (b) each bidder requested a break fee and expense reimbursement as part of their proposal in the Stalking Horse Process;
- (c) without these protections, a party has little incentive to act as the stalking horse bidder; and
- (d) the Break Fee, Expense Reimbursement and Signage Costs Obligations are unlikely to discourage a third party from submitting an offer in the SISP.

First Report at para. 4.3.1

O'Hara Affidavit at para. 52, Motion Record, Tab 2

**Issue 3: Should the Court authorize the Company to perform its obligations under its engagement letters with the Financial Advisor and OCI, including making the payments contemplated thereunder?**

66. Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

- (a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;
- (b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and
- (c) whether the success fee is necessary to incentivize the financial advisor.

*Re Sino-Forest Corp.*, 2012 ONSC 2063 at paras. 46-47 [Commercial List], Brief of Authorities, Tab 13

*Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 28-36, Brief of Authorities, Tab 2

67. The SISP contemplates that the Financial Advisor will continue to be intimately involved in administering the SISP.

68. The Financial Advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the Financial Advisor has greatly assisted the Company in its restructuring efforts to date and has gained a thorough and intimate understanding of the Business. The continued involvement of the Financial Advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

O'Hara Affidavit at paras. 7-9, Motion Record, Tab 2

69. In light of the foregoing, among other factors, the Company and the Proposal Trustee are in support of incentivizing the Financial Advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the Financial Advisor Engagement Letter are reasonable in the circumstances and will incentivize the Financial Advisor.

Houlden Affidavit at paras, 77-78, Motion Record, Tab 2  
First Report at paras. 3.4 and 3.5

70. The Company has also engaged OCI to implement the SISP in certain international markets on the belief that it has expertise that warranted this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets, which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to the Company.

71. The Company and the Proposal Trustee believe that the quantum and nature of the success fee payable pursuant to the OCI Engagement Letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

First Report at paras. 3.4 and 3.5

72. Accordingly, an order approving the Financial Advisor Engagement Letter and the OCI Engagement Letter is appropriate in the circumstances.

**Issue 4: Should the Court approve the Administration Charge and the Consensus Charge?**

73. Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA. Section 64.2 provides in part as follows:

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that

all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 64.2

74. Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process.

*Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 11-15 (S.C.J.), Brief of Authorities, Tab 2

*Re Arctic Glacier Income Fund*, 2012 CarswellMan 827 at paras. 22-26 (Q.B.), Brief of Authorities, Tab 14

*In the Matter of the Proposal of Clothing for Modern Times Ltd.*, Court File Number 31-1513595, Order dated July 11, 2011 at para. 7, Brief of Authorities, Tab 15

75. The Company submits that this is an appropriate circumstance for the Court to grant the Administration Charge and the Consensus Charge. The quantum of the proposed Administration Charge and the Consensus Charge are fair and reasonable given the nature of the SISF. Each of the parties whose fees are to be secured by the Administration Charge and Consensus Charge has played (and will

continue to play) a critical role in these proposal proceedings and in the SISP and the Administration Charge and the Consensus Charge are necessary to secure the full and complete payment of their fees. Finally, the Administration Charge and the Consensus Charge will be subordinate to the Existing Security and do not prejudice any known secured creditor of the Company.

**Issue 5: Should the Court approve the D&O Charge**

76. The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA, which provides as follows:

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful

misconduct or, in Quebec, the director's or officer's gross or intentional fault.

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 64.1

77. In *Colossus Minerals* and *Mustang*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers may not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers is critical to a successful sales process under the BIA.

*Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 11-15 (S.C.J.), Brief of Authorities, Tab 2

*Re Mustang GP Ltd.*, 2015 CarswellOnt 16398 at paras. 34-35 (S.C.J.), Brief of Authorities, Tab 8

78. The Company submits that the Court should approve the D&O Charge for the following reasons:

- (a) the D&O Charge will only apply to the extent that the directors and officers do not have coverage under the Policy or the Company is unable to satisfy its indemnity obligations;
- (b) the directors and officers of the Company may not continue their involvement with the Company without the protection of the D&O Charge but their continued involvement is critical to the successful implementation of the SISP;
- (c) the D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence; and
- (d) the Proposal Trustee has indicated that the D&O Charge is reasonable in the circumstances and supports the D&O Charge.

Houlden Affidavit at paras. 87-89, Motion Record, Tab 2  
First Report at para. 5.2

79. The amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable where the Company fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course and the Company expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

**Issue 6: Should the Court approve the KERP and the KERP Charge**

80. Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to a company's restructuring efforts.

*Re Nortel Networks Corp.*, [2009] O.J. No. 1044 at para. 4 (S.C.J. [Commercial List]), Brief of Authorities, Tab 16

81. In *Re Grant Forest Products Inc.*, Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

- (a) whether the Monitor supports the retention plan;
- (b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;
- (c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of the company;
- (d) whether the quantum of the proposed retention payments is reasonable; and
- (e) the business judgment of the board of directors regarding the necessity of the retention payments.

*Re Grant Forest Products Inc.*, [2009] O.J. No. 3344 at paras. 8-22 (S.C.J. [Commercial List]), Brief of Authorities, Tab 17



82. While *Re Grant Forest Products Inc.* involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA.

*In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10, Brief of Authorities, Tab 18

*In the Matter of the Notice of Intention to Make a Proposal of XS Cargo Limited Partnership*, Court File No. 32-1896275, Order dated August 6, 2015 at paras. 13-14, Brief of Authorities, Tab 19

*In the Matter of the Proposal of Clothing for Modern Times Ltd.*, Court File No. 31-1513595, Order dated July 11, 2011 at para. 10, Brief of Authorities, Tab 15

83. The Company submits that the KERP and the KERP Charge should be approved for the following reasons:

- (a) the Proposal Trustee supports the granting of the KERP and the KERP Charge;
- (b) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with the Company throughout the SISP and are therefore likely to pursue other employment opportunities;
- (c) the Company has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of the Company;
- (d) the Proposal Trustee is of the view that the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist to maximize realizations; and
- (e) the KERP was reviewed and approved by the Board.

Houlden Affidavit at para. 90, Motion Record, Tab 2  
First Report at para. 5.3

**Issue 7: Should the Court grant a sealing order in respect of the KERPs and the Offer Summary?**

84. Section 137(2) of the *Courts of Justice Act* (Ontario) provides courts with the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record, notwithstanding the general principle that court hearings should be open to the public:

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.

*Courts of Justice Act*, R.S.O. 1990, c. C.43, S. 137(2)

85. In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

- (a) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and
- (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42 at para. 53 (S.C.C.), Brief of Authorities, Tab 20

86. In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders.

*Re Stelco Inc.*, [2006] O.J. No. 275 at paras. 2-5 (S.C.J. [Commercial List]), Brief of Authorities, Tab 21  
*Re Nortel Networks Corp.*, 2009 CarswellOnt 4467 at para. 57 (S.C.J. [Commercial List]), Brief of Authorities, Tab 5  
*Re Hollinger Inc.*, 2011 ONCA 579, [2011] O.J. No. 3977 at para. 11, Brief of Authorities, Tab 22

87. The Company is seeking a sealing order in respect of the KERPs and the offer summary attached as Confidential Appendix 1 to the First Report (the "**Offer Summary**").

88. It would be detrimental to the operations of the Company to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated.

89. The Offer Summary contains highly sensitive commercial information of the Company and the Business that could undermine the integrity of the SISP. The disclosure of the Offer Summary prior to the completion of a transaction (or multiple transactions) under the SISP would pose a serious risk to the SISP in the event that the transaction (or multiple transactions) does not close as it could jeopardize dealings with any future prospective purchasers or liquidators or the Company's assets.

90. If granted, the Sealing Order will protect the commercial interests of the Company and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the Offer Summary, namely the lack of immediate public access to all documents filed in these proceedings.

91. As a result, it is submitted that the test for a sealing order has been met and the Court should make an order that the KERPs and the Offer Summary be treated as confidential, sealed and not form part of the public record in the within proceedings pending the completion of these proposal proceedings.


**PART V ~ ORDER SOUGHT**

92. The Company respectfully requests that this Court grant the relief sought on this motion in the draft form of Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

February 5, 2016

  
\_\_\_\_\_  
Jay Swartz

  
\_\_\_\_\_  
Natalie Renner

Lawyers for the Applicants

**SCHEDULE "A"**  
**AUTHORITIES**

1. *CCM Master Qualified Fund Ltd. v. blutip Power Technologies*, 2012 ONSC 1750 [Commercial List]
2. *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 (S.C.J.)
3. *Re Komtech Inc.*, 2011 CarswellOnt 6577 (S.C.J.)
4. *Re Brainhunter*, 2009 CarswellOnt 8207 (S.C.J. [Commercial List])
5. *Re Nortel Networks Corp.*, 2009 CarswellOnt 4467 (S.C.J. [Commercial List])
6. *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60
7. *Re Indalex Ltd.*, [2013] 1 S.C.R. 271
8. *Re Mustang GP Ltd.*, 2015 CarswellOnt 16398 (S.C.J.)
9. *Re Nortel Networks Corp.*, [2009] O.J. No. 4293 (S.C.J. [Commercial List])
10. *Re W.C. Wood Corp. Ltd.*, [2009] O.J. No. 4808 (S.C.J. [Commercial List])
11. *Re MPH Graphics Inc.*, 2014 ONSC 947
12. *Re Parlay Entertainment Inc.*, 2011 ONSC 3492
13. *Re Sino-Forest Corp.*, 2012 ONSC 2063 [Commercial List]
14. *Re Arctic Glacier Income Fund*, 2012 CarswellMan 827 (Q.B.)
15. *In the Matter of the Proposal of Clothing for Modern Times Ltd.*, Court File Number 31-1513595, Order dated July 11, 2011
16. *Re Nortel Networks Corp.*, [2009] O.J. No. 1044 (S.C.J. [Commercial List])
17. *Re Grant Forest Products Inc.*, [2009] O.J. No. 3344 (S.C.J. [Commercial List])
18. *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013
19. *In the Matter of the Notice of Intention to Make a Proposal of XS Cargo Limited Partnership*, Court File No. 32-1896275, Order dated August 6, 2015

20. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42 (S.C.C.)
21. *Re Stelco Inc.*, [2006] O.J. No. 275 (S.C.J. [Commercial List])
22. *Re Hollinger Inc.*, 2011 ONCA 579

**Secondary Sources**

23. Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1

**SCHEDULE "B"**  
**EXCERPTS FROM RELEVANT STATUTES**

*Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3*

**Security or charge relating to director's indemnification**

- 64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

**Priority**

- (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

**Restriction — indemnification insurance**

- (3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

**Negligence, misconduct or fault**

- (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

**Court may order security or charge to cover certain costs**

- 64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

- (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
- (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

#### Priority

- (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

#### 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.

*Courts of Justice Act*, R.S.O. 1990, c. C.43

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.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF  
DANIER LEATHER INC., a corporation incorporated pursuant to the laws of the Province  
of Ontario, with a head office in the City of Toronto, in the Province of Ontario

Court File No: 31-CL-2084381

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Commercial List)**

Proceeding commenced at Toronto

**FACTUM OF DANIER LEATHER INC.**

**DAVIES WARD PHILLIPS & VINEBERG LLP**  
155 Wellington Street West  
40<sup>th</sup> Floor  
Toronto, ON Canada M5V 3J7

Jay A. Swartz (LSUC #15417L)  
jswartz@dwpv.com  
Natalie Renner (LSUC #55954A)  
nrenner@dwpv.com

Tel: 416.863.0900  
Fax: 416.863.0871

Lawyers for Danier Leather Inc.