

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

B E T W E E N:

IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
SANDVINE CORPORATION, SANDVINE HOLDINGS UK LIMITED, PROCERA
NETWORKS, INC., PROCERA HOLDING, INC., NEW PROCERA GP COMPANY, and
SANDVINE OP (UK) LTD.

Applicants

FACTUM OF THE APPLICANTS

November 13, 2024

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PART I - NATURE OF THE APPLICATION

1. On November 7, 2024, Sandvine Corporation (“**Sandvine Canada**”), and the other applicant companies (collectively, the “**Applicants**”, and together with the partnership Procera II LP, the “**Sandvine Entities**”, and collectively with certain non-filing entities, “**Sandvine**” or the “**Company**”), were granted protection under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**,” and the within proceedings, the “**CCAA Proceedings**”) pursuant to an initial order (the “**Initial Order**”) of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”).

2. The Initial Order, among other things: (i) granted Sandvine a stay of proceedings for the permitted initial ten-day period (the “**Stay of Proceedings**”); (ii) appointed KSV Restructuring Inc. as monitor in the CCAA Proceedings (the “**Monitor**”); (iii) approved the retention of GLC Advisors & Co., LLC and GLC Securities, LLC as financial advisor (the “**Financial Advisor**”) to Sandvine; (iv) approved certain agreements (the “**First DDTL Amendment**” and the “**DIP Credit Agreement**”), which documented the terms of a debtor-in-possession facility (the “**DIP Facility**”) made available to Sandvine by certain of its existing lenders (the “**DIP Lenders**”), and granted a charge in respect of amounts owing under the DIP Facility (the “**DIP Charge**”), provided that no draws under the DIP Facility can be made pending further Order of the Court; and (iv) granted an Administration Charge and a Directors’ Charge (each as defined below).

3. Prior to the commencement of the CCAA Proceedings, Sandvine and the Existing Loan Lenders (as defined below) under Sandvine’s First Lien Credit Agreement negotiated various agreements that document a set of comprehensive financing and restructuring transactions (the “**Restructuring Transactions**”). The Restructuring Transactions are set out in a restructuring

support agreement (the “**RSA**”) and attached term sheet (the “**Restructuring Term Sheet**”) entered into with holders of 97% of the Existing Loans (the “**Consenting Stakeholders**”). The proposed going concern transaction, to be tested through a sale process in the CCAA Proceedings, provides for: (i) all of the Company’s funded debt obligations to be converted into a 50% equity share of a restructured company and new first lien financing; and (ii) Consenting Stakeholders that provided new money commitments to receive 50% equity of the restructured company as consideration for such commitments, in each case subject to dilution from any management incentive plan.

4. In order to implement the Restructuring Transactions, or a superior transaction generated from a sale process, and facilitate their continued operations during the CCAA Proceedings, the Applicants seek the following orders:

- (a) an Amended and Restated Initial Order (the “**ARIO**”), which will, among other things: (i) authorize the Applicants to draw on the DIP Facility; (ii) grant the Transaction Fee Charge (as defined below) in favour of the Financial Advisor; (iii) increase the maximum amounts secured by the Administration Charge and Directors’ Charge; and (iv) extend the Stay of Proceedings until January 31, 2025; and

- (b) an order (the “**SISP Order**”), which will, among other things: (i) approve a sale and investment solicitation process in respect of the Sandvine Entities (the “**SISP**”); and (ii) authorize and empower the Sandvine Entities to enter into a transaction agreement (the “**Stalking Horse Transaction Agreement**”) with the Consenting Stakeholders (the “**Stalking Horse Bidder**”), on substantially the same economic

terms set out in the Restructuring Term Sheet, which will serve as the stalking horse bid in support of the SISP (the “**Stalking Horse Bid**”).

5. The RSA and the Restructuring Term Sheet are the product of a consensual resolution with the vast majority of Sandvine’s Existing Loan Lenders and permit the Sandvine Entities to continue operating during the CCAA Proceedings by ensuring access to the DIP Facility. The proposed SISP, as contemplated by the RSA and supported by the Stalking Horse Transaction Agreement, represents the best path forward in the CCAA Proceedings, as it provides certainty and stability to the Sandvine Entities and their stakeholders by ensuring a going concern transaction, while also enabling the Applicants and the Financial Advisor, under the supervision and oversight of the Monitor, to test the market and pursue the possibility of a superior transaction, to the benefit of all stakeholders.

PART II - SUMMARY OF FACTS

6. The facts are more fully set out in the Affidavit of Jeffrey A. Kupp¹ and the First Report of the Monitor.²

A. The Restructuring Transactions

7. In August 2024, after a review of its financial position, Sandvine concluded that it would require additional liquidity before the end of September 2024. After concluding that obtaining financing from a new source would be highly unlikely in the circumstances, Sandvine, with the assistance of its legal and financial advisors, determined to engage in negotiations with lenders that held Existing Loans under Sandvine’s First Lien Credit Agreement (the “**Existing Loan**”).

¹ Affidavit of Jeffrey A. Kupp, sworn November 6, 2024 [Kupp Affidavit]. Capitalized terms not otherwise defined have the same meaning as in the Kupp Affidavit.

² First Report of the Monitor dated November 12, 2024 [First Report].

Lenders”).³ These negotiations resulted in Sandvine and the Consenting Stakeholders executing the RSA and related documents that provide for the Restructuring Transactions.⁴

8. Pursuant to the terms of the RSA, the Consenting Stakeholders agreed to support the Restructuring Transactions, which contemplate, among other things, a proposed transaction that would: (i) convert the Existing Loans into a 50% equity share of a restructured company; (ii) provide US \$125 million in exit financing; and (iii) provide the Consenting Stakeholders that provided new money commitments with 50% of the equity of the restructured company as consideration for such commitments (equity allocations are in each case subject to dilution from any management incentive plan). The proposed going-concern transaction is intended to be tested through a sale process as part of the CCAA Proceedings, and to serve as the Stalking Horse Bid within that sale process.⁵

B. The SISP

9. The proposed SISP contemplates a two-phase process, to be run by Sandvine and the Financial Advisor, under the supervision and oversight of the Monitor, which will solicit bids in connection with potential sale of all or parts of the Property or Business (each as defined in the Initial Order), or investment in, restructuring, recapitalization, refinancing or other form of reorganization of all or some of the Sandvine Entities or all or part of the Business. The SISP is proposed to commence on November 18, 2024.⁶

³ Kupp Affidavit at paras. 98-100. See Kupp Affidavit at paras. 101-102 for a detailed summary of the negotiations.

⁴ Kupp Affidavit at paras. 102-103.

⁵ Kupp Affidavit at paras. 16, 103. See Kupp Affidavit at paras. 108-123 for a detailed summary of the Restructuring Transactions.

⁶ Kupp Affidavit at paras. 160, 162.

10. During Phase 1 of the SISP, a teaser and process letter will be transmitted to potentially interested parties identified by Sandvine and the Financial Advisor. Interested parties must enter into non-disclosure agreements (each, an “**NDA**”), following which they will be provided with a confidential information memorandum and given access to a virtual data-room containing due diligence information.⁷ Parties that have executed an NDA will then be required to submit letters of intent to bid (each, an “**LOI**”) which must: (i) identify the potential purchaser and provide a general description of the assets and/or business(es) of Sandvine that would be the subject of the bid; (ii) provide for the payment of the Minimum Transaction Value (as defined below), including the provision of required transition services; (iii) reflect a reasonable prospect of culminating in a Qualified Bid (as defined below), as determined by Sandvine in consultation with the Financial Advisor and the Monitor; and (iv) be received by 5:00 p.m. (Eastern Time) on December 18, 2024 (the “**Phase 1 Bid Deadline**”).⁸

11. Following the Phase 1 Bid Deadline, Sandvine and the Financial Advisor, in consultation with the Monitor, will determine whether any LOIs constitute Phase 1 Qualified Bids. On December 20, 2024, bidders who have submitted Phase 1 Qualified Bids (each, a “**Phase 1 Qualified Bidder**”) will be invited to participate in Phase 2 of the SISP, and will be requested to submit a binding offer (a “**Phase 2 Bid**”) meeting the additional requirements set out in the SISP (a “**Qualified Bid**”, and such party, a “**Qualified Bidder**”) by January 27, 2025 (the “**Qualified Bid Deadline**”). Sandvine and the Financial Advisor, in consultation with the Monitor, will then determine whether the Phase 2 Bids received constitute Qualified Bids, and will select one or more

⁷ Note that selected due diligence information may be withheld from parties that have executed an NDA if Sandvine determines, in its sole discretion, such information represents proprietary or sensitive competitive information.

⁸ Kupp Affidavit at para. 162. See Kupp Affidavit at paras. 164-166 for a detailed summary of the Phase 1 process and evaluation criteria.

successful bid(s) (the “**Successful Bid**”, and such bidder, the “**Successful Bidder**”), which may be before or after electing to proceed with an auction.⁹

12. To qualify as a Phase 1 Qualified Bid or Qualified Bid, each LOI or Phase 2 Bid must provide for consideration equal to the “**Minimum Transaction Value.**” The Minimum Transaction Value consists of: (i) the payment of all amounts outstanding under the DIP Credit Agreement, unless otherwise agreed to by the requisite lenders thereunder in their sole discretion; (ii) the payment of all amounts outstanding under the First Lien Credit Agreement, unless otherwise agreed to by the requisite lenders thereunder in their sole discretion; (iii) the payment of any claims ranking in priority to those outstanding under the DIP Credit Agreement and First Lien Credit Agreement, including any claims secured by Court-ordered charges, unless otherwise agreed to by the applicable holders of such claim and the applicable beneficiaries of such Court-ordered charges, each in their sole discretion; (iv) the payment of the amount of cash designated by Sandvine and the Monitor as necessary to fund the professional fees to be incurred in connection with the wind-up of the CCAA Proceedings and any further proceedings or wind-up costs; and (v) the agreement to provide transition services on substantially the terms contained in the Stalking Horse Transaction Agreement. Information relating to the requirements set forth in subparagraphs (iv) and (v) will be provided by the Financial Advisor to each SISP Participant (as defined in the SISP Order) no later than December 9, 2024, which is seven business days prior to the Phase 1 Bid Deadline.¹⁰

13. If no Phase 1 Qualified Bid has been received on or before the Phase 1 Bid Deadline, or no Qualified Bid (other than the Stalking Horse Transaction) has been received on or before the

⁹ Kupp Affidavit at para. 162. See Kupp Affidavit at paras. 167-169 for a detailed summary of the Phase 2 process and evaluation criteria.

¹⁰ Kupp Affidavit at paras. 164, 167.

Qualified Bid Deadline, the SISP will be terminated, and the Stalking Horse Transaction will be considered the Successful Bid, subject to approval by this Court. If one or more Qualified Bids has been received on or before the Qualified Bid Deadline, Sandvine and the Financial Advisor, in consultation with the Monitor, may elect to proceed with an auction process to determine the Successful Bid(s), which would take place on January 31, 2025, at 10:00 a.m. (Eastern Time). Following selection of the Successful Bid(s), the Applicants will apply to the Court for an order or orders approving the Successful Bid(s).¹¹

C. The Stalking Horse Transaction Agreement

14. The RSA and Restructuring Term Sheet set out the key terms to be included in the Stalking Horse Transaction Agreement. Under the terms of the contemplated Stalking Horse Transaction Agreement: (i) the existing loans under the DDTL Facility (including the DIP Facility) will be converted into and exchanged for approximately US \$125 million in exit facility first lien term loans on a dollar-for-dollar and *pari passu* basis; (ii) in exchange for committing to advance the aggregate of US \$50 million (US \$45 million net of backstop commitment fees) under the DDTL Facility and DIP Facility, the Consenting Stakeholders will receive 50% of the NewCo Common Equity (subject to dilution by any management incentive plan); (iii) all remaining Existing Loans will be exchanged for 50% of the NewCo Common Equity (subject to dilution by any management incentive plan); and (iv) all general unsecured claims and existing equity interests in New Procera GP Company and Procera II LP will be cancelled for no consideration, except for any general unsecured claims that NewCo agrees to assume or retain pursuant to the Stalking Horse Transaction Agreement.¹²

¹¹ Kupp Affidavit at paras. 162, 169.

¹² Kupp Affidavit at para. 103(d). See Kupp Affidavit at para. 120 for a detailed summary of the contemplated Stalking Horse Transaction Agreement.

15. The RSA provides that the contemplated Restructuring Transactions may be implemented pursuant to an approval and reverse vesting order in the CCAA Proceedings, unless Sandvine and the Required Consenting Stakeholders otherwise elect to implement the Restructuring Transactions through an approval and vesting order or a plan in the CCAA Proceedings (or such other process commenced in accordance with the RSA).¹³

PART III - THE ISSUES AND THE LAW

16. This Factum addresses the following issues:

- (a) the SISP should be approved;
- (b) the Sandvine Entities should be authorized and empowered to enter into the Stalking Horse Transaction Agreement on substantially the same economic terms set out in the Restructuring Term Sheet;
- (c) the Sandvine Entities should be authorized to draw on the DIP Facility;
- (d) the Transaction Fee Charge should be approved;
- (e) the Administration Charge and Directors' Charge should be increased; and
- (f) the Stay of Proceedings should be extended to January 31, 2025.

A. The SISP Should be Approved

17. It is well established that a CCAA court has the jurisdiction to approve a sale process in relation to a CCAA debtor's business and assets, prior to the development (or even in the absence)

¹³ Kupp Affidavit at para. 121.

of a plan of compromise and arrangement. The Court in *Nortel* identified a number of factors that should be considered in determining whether to authorize a sale process, including:¹⁴

- (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?

18. Although the *Nortel* criteria were articulated prior to the 2009 amendments to the CCAA, the Court in *Brainhunter* confirmed that the same criteria apply under the post-2009 CCAA in determining whether a sale process should be approved.¹⁵

19. The Applicants submit that each of the *Nortel* criteria are satisfied in respect of the SISP:

- (a) **The SISP is Warranted at this Time:** The SISP is warranted and necessary at this time. The Applicants are insolvent and are dependent on the financing provided by the Consenting Stakeholders pursuant to the RSA, which contemplates the proposed SISP, and represents the culmination of negotiations with Sandvine's key stakeholders. The SISP, as supported by the Stalking Horse Bid, was developed by Sandvine in consultation with its legal and financial advisors and KSV in its capacity as Proposed Monitor,¹⁶ and is supported by the Monitor as a recognized mechanism for maximizing recovery and preserving stability in insolvency

¹⁴ *Nortel Networks Corp. (Re)* (2009), [2009 CanLII 39492 \(ON SC\)](#) at paras. 48-49.

¹⁵ *Brainhunter Inc. (Re)*, [2009 CanLII 72333 \(ON SC\)](#) at paras. 15-17.

¹⁶ Kupp Affidavit at para. 160.

proceedings.¹⁷ Courts grant significant weight to the opinion of a monitor or financial advisor that a proposed sale process and associated stalking horse bid represent the most effective means of obtaining the best realization on a debtor's assets.¹⁸

- (b) **The SISP Will Benefit the Entire Economic Community:** The SISP, as supported by the Stalking Horse Transaction Agreement, is the most effective means of realizing the value of the Applicants' assets for the benefit of the entire economic community. Courts have frequently noted the inherent benefits of a SISP which incorporates a stalking horse bid. For example, in *Danier Leather*, the court found that the use of stalking horse bids maximizes the value of a business for the benefit of its stakeholders and enhances the fairness of the overall sale process.¹⁹ In particular, the court accepted that the stalking horse bid was in the interest of the entire economic community because it would establish a price floor as part of the public marketing process for the debtors' assets.²⁰ The Monitor supports the SISP, as it provides for the comprehensive marketing of the Sandvine Entities' Business with the assistance of the Financial Advisor, a highly qualified financial advisory and investment banking firm.²¹
- (c) **Sandvine's Creditors do not have Any Reason to Object:** The Applicants do not believe that there is any *bona fide* reason for any creditors to object to the SISP or

¹⁷ First Report at para. 3.7.7(b).

¹⁸ See i.e., *Validus Power Corp. (Re)*, [2023 ONSC 6367](#) at paras. 52-53 [*Validus*]; *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#) at para. 37 [*Danier Leather*].

¹⁹ *Danier Leather*, at para. 20.

²⁰ *Danier Leather*, at para. 31. See also *Cannapiece Group Inc v. Carmela Marzili*, [2022 ONSC 6379](#) at para. 8 [*Cannapiece*]; *Fire & Flower Holdings Corp., et al. (Re)*, [2023 ONSC 4048](#) at paras. 28-29 [*Fire & Flower*].

²¹ First Report at para. 3.7.1(a).

the Stalking Horse Transaction Agreement. The proposed SISP is an open and transparent process, and the support of the Stalking Horse Bid, by establishing a floor price for the Sandvine Entities' Property and Business, will maximize recovery obtained on those assets to the benefit of creditors generally.²² The timelines set out in the SISP appropriately balance the need to adequately canvass the market while simultaneously protecting against the risk of market decline by providing for automatic termination of the SISP and, if approved by the Court, consummation of the Stalking Horse Bid if no LOIs or Qualified Bids are received.²³ Interested parties will be able to effectively participate in the SISP, thereby both testing the Stalking Horse Bid,²⁴ and providing an opportunity to complete a transaction with greater value for the benefit of all stakeholders.²⁵

- (d) **There is No Better Viable Alternative:** No viable alternative to the SISP exists at this time. As discussed above, the Applicants are dependent on financing provided by the Consenting Stakeholders pursuant to the RSA, which, in the reasonable business judgment of Sandvine, was the only source of financing reasonably available to the Applicants in the circumstances.²⁶ The proposed SISP has been designed to fit within the timelines contained in the DIP Credit Agreement, which provides milestone dates for the SISP.²⁷

²² See *Danier Leather*, at paras. 31-33.

²³ Kupp Affidavit at para. 170.

²⁴ Kupp Affidavit at para. 170.

²⁵ First Report at para. 3.7.1(d).

²⁶ Kupp Affidavit at para. 100.

²⁷ First Report at para. 3.7.1(h).

B. Sandvine Should be Authorized and Empowered to enter into the Stalking Horse Transaction Agreement on Substantially the Same Economic Terms Set out in the Restructuring Term Sheet

20. It is well-accepted that a stalking horse transaction is a beneficial mechanism well-suited to supporting a SISP.²⁸ SISPs incorporating stalking horse transactions have been approved by the court on many occasions,²⁹ including in circumstances where the definitive transaction agreements were still being finalized.³⁰

21. Sale processes incorporating stalking horse bids are commonly evaluated on the basis of the *Nortel* criteria, as discussed above. In addition, when appraising whether a debtor should be authorized to enter into a proposed stalking horse agreement, the courts have considered: (i) the fairness, transparency and integrity of the proposed process; (ii) the commercial efficacy of the proposed process in light of the specific circumstances; and (iii) whether the sale process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.³¹ Further, the following additional factors have also been found to be relevant in evaluating a stalking horse agreement:³²

- (a) How did the stalking horse agreement arise?
- (b) What are the stability benefits?

²⁸ See, i.e., *Danier Leather*, at para. 20.

²⁹ See, i.e., *Cannapiece*, at paras. 4-5; *Danier Leather*, at para. 36; *Fire & Flower*, at paras. 28-29; *Validus*, at para. 65.

³⁰ See, i.e., *Black Press Ltd. (Re)*, (January 25, 2024), B.C.S.C., No. S-240259 Vancouver Registry ([SISP Approval Order](#)) at para. 6; *Canadian Overseas Petroleum Limited (Re)*, (March 19, 2024), A.B.K.B., 2401-03404 ([SISP Approval Order](#)) at para. 6; *Urthecast International Corp. (Re)*, (October 16, 2020), B.C.S.C., No. S-208894 Vancouver Registry ([Sales Process Order](#)) at para. 4.

³¹ *Validus*, at para. 33.

³² *Validus*, at para. 34.

- (c) Does the timing support approval?
- (d) Who supports or objects to the stalking horse agreement?
- (e) What is the true cost of the stalking horse agreement? and
- (f) Is there an alternative?

22. In *Validus*, the court held that while different courts have framed these considerations slightly differently, they are ultimately consistent with one another, and essentially ask whether the proposed process, including its stalking horse component, will likely result in the best recovery on the assets being sold pursuant to a fair and transparent process.³³

23. The Applicants submit that the Stalking Horse Transaction Agreement, substantially on the economic terms set out in the Restructuring Term Sheet, will likely result in the best recovery on the Applicants' assets. The Applicants should be authorized to enter into the Stalking Horse Transaction Agreement based on both the *Nortel* criteria and the additional criteria outlined above:

- (a) **Development of the Stalking Horse Transaction Agreement and Stability Benefits:** The terms of the Stalking Horse Transaction Agreement, as reflected in the Restructuring Term Sheet, were the culmination of extensive negotiations between Sandvine and the Consenting Stakeholders,³⁴ and provide significant stabilizing benefits by setting a price floor on Sandvine's assets and ensuring that the SISP will ultimately result in a successful going concern transaction.³⁵

³³ *Validus*, at paras. 35-37.

³⁴ Kupp Affidavit at paras. 98-102.

³⁵ First Report at para. 3.7.1(b).

- (b) **Timing Considerations:** The timelines and terms of the proposed SISP are fair and reasonable in the circumstances and will provide sufficient time for interested parties to fully participate in the SISP and test the Stalking Horse Bid.³⁶ The Monitor is of the view that the duration of the SISP provides ample time for interested parties to perform diligence and submit offers, and properly balances the need to ensure adequate time for generating a superior transaction while managing the costs associated with the ongoing CCAA Proceedings.³⁷
- (c) **Stakeholder Support:** Both the Monitor and Consenting Stakeholders (who represent holders of over 97% of Sandvine’s Existing Loans) support the approval of the SISP and the Stalking Horse Transaction Agreement. The Monitor is not aware of any objections to the SISP or Stalking Horse Transaction Agreement.³⁸
- (d) **True Cost:** The “true cost” of the Stalking Horse Transaction Agreement is minimal, as there are no bid protections (such as break fees, or expense reimbursements) in favour of the Stalking Horse Bidder, which will further foster a dynamic and competitive bid environment.³⁹

24. Further, the Minimum Transaction Value is reasonable and appropriate in the circumstances. The Minimum Transaction Value provides appropriate guideposts to potentially interested parties as to the consideration needed to constitute a Qualified Bid,⁴⁰ and courts regularly approve SISPs containing minimum bid amounts which are designed to ensure that any successful bids satisfy the pre-filing indebtedness of first-ranking secured creditors, such as the

³⁶ Kupp Affidavit at para. 170.

³⁷ First Report at para. 3.7.1(f).

³⁸ First Report at para. 3.7.1(g)-(h).

³⁹ First Report at para. 3.7.1(e).

⁴⁰ First Report at para. 3.7.1(f)(iii).

lenders under the DDTL Credit Agreement and First Lien Credit Agreement.⁴¹ The requirement to provide transition services on substantially the same terms as the Stalking Horse Transaction Agreement, which is part of the Minimum Transaction Value, reflects the reality of Sandvine's efforts to exit jurisdictions in a responsible and reasonable manner and is a necessary requirement for any going concern sale transaction involving Sandvine.⁴²

25. Potential bidders will have full knowledge of the Minimum Transaction Value, as the SISP Order requires that a substantially final draft of the Stalking Horse Transaction Agreement (including the terms of any transition services to be provided) must be provided to each SISP Participant no later than seven business days prior to the Phase 1 Bid Deadline. Further, a copy of the Stalking Horse Transaction Agreement will be posted on the Monitor's website, served on the service list, and provided to each SISP Participant.⁴³ The Monitor has successfully adopted a similar approach in the past, in which a form of stalking horse transaction agreement was presented to bidders a week before the Phase 1 SISP deadline, and believes this approach offers sufficient time for interested parties to review the Stalking Horse Transaction Agreement, conduct preliminary due diligence, and submit an LOI.⁴⁴

26. In light of the benefits outlined above, the Applicants should be authorized and empowered to finalize the Stalking Horse Transaction Agreement substantially in accordance with the economic terms set out in the Restructuring Term Sheet. The Applicants will return to this Court to seek approval of any Successful Bid(s) resulting from the SISP (including the Stalking Horse

⁴¹ *Keb Hana Bank v. Misrahi Commercial (The One) LP. et al.*, (June 11, 2024), Ont. S.C.J [Commercial List], Court File No. CV-21- 00707839-00CL ([Endorsement of Justice Osborne](#)) at para. 92. See, e.g., *Sino-Forest (Re)*, (March 30, 2012), Ont. S.C.J [Commercial List], Court File No. CV-12-9667-00CL ([Sale Process Order](#)), in which the court approved a sale process requiring potential bidders to provide "qualified consideration" in an amount equal to 85% of aggregate amounts outstanding on certain notes.

⁴² First Report at para. 3.7.1(f)(iv).

⁴³ Kupp Affidavit at para. 161.

⁴⁴ First Report at para. 3.7.1(c).

Bid), and do not seek any relief approving the sale and vesting of any of the Property and/or Business as part of the Stalking Horse Transaction Agreement approval at this time.

C. The Applicants Should be Authorized to Draw on the DIP Facility

27. The Initial Order approved the DIP Facility, pursuant to which the DIP Lenders agreed, in accordance with their obligations under the RSA, to provide additional financing to Sandvine up to the amount of US \$30 million. The Applicants now seek the authority to draw on the DIP Facility up to a maximum principal of US \$30 million.

28. The factors set out in s. 11.2(4) of the CCAA support the requested relief. Sandvine will need access to the DIP Facility during the CCAA Proceedings in order to continue to operate its business and maintain minimum liquidity during the proposed extended Stay of Proceedings. The DIP Facility will provide stability and permit the Applicants to restructure their business and participate in the SISF, while continuing to fund payroll and other critical obligations. The Monitor supports the requested draw authorization.⁴⁵

D. The Transaction Fee Charge Should be Approved

29. As part of the Initial Order, the Court approved the retention of the Financial Advisor in an engagement letter dated June 29, 2024 (the “**GLC Engagement Letter**”). The Administration Charge currently provides protection in respect of the Financial Advisor’s Monthly Advisory Fees (as defined in the GLC Engagement Letter), but does not secure additional compensation potentially due to the Financial Advisor pursuant to the GLC Engagement Letter, namely: (i) the “**Transaction Fee**” payable to the Financial Advisor on a Restructuring or Sale Transaction (as defined in the GLC Engagement Letter); and (ii) the “**Discretionary Fee**” of US \$750,000, which

⁴⁵ Kupp Affidavit at paras. 119, 134; First Report at paras. 4.1.1-4.1.2.

Sandvine may determine to pay before completing a Restructuring or Sale Transaction (together with the Transaction Fee, the “**Additional Fees**”).

30. The Applicants therefore seek a charge (the “**Transaction Fee Charge**”) in the amount of US \$7 million in order to secure the Additional Fees potentially payable to the Financial Advisor under the GLC Engagement Letter. The Court has the jurisdiction to grant charges in respect of the fees of a financial advisor pursuant to s. 11.52 of the CCAA,⁴⁶ with such charges being the typical “basis on which financial advisors are incentivized to continue to work for companies involved in restructuring.”⁴⁷

31. The Additional Fees and the Transaction Fee Charge are supported by the Monitor and should be approved by the Court. The amount of the Transaction Fee was determined by the Sandvine Entities and the Monitor, in collaboration with the Financial Advisor, is supported by the Consenting Stakeholders and the Monitor,⁴⁸ and will incentivize the Financial Advisor to obtain the highest value transaction possible for the benefit of Sandvine’s stakeholders, while the Discretionary Fee will provide Sandvine with a mechanism to recognize the services provided by the Financial Advisor during the CCAA Proceedings. Securing the Additional Fees by way of a court-approved charge will provide the Financial Advisor with certainty as it assists Sandvine over the course of the CCAA Proceedings, including with respect to the proposed SISF.⁴⁹

E. The Administration Charge and Directors’ Charge Should be Increased

32. The Initial Order approved the Administration Charge in the amount of US \$2.5 million. The Applicants now seek to increase the Administration Charge to US \$5.4 million. Similarly, the

⁴⁶ *Walter Energy Canada Holdings, Inc., (Re)*, [2016 BCSC 107](#) at paras. 39-43 [*Walter Energy*].

⁴⁷ *Tacora Resources Inc. (Re)*, [2023 ONSC 6126](#) at para. 152.

⁴⁸ First Report at paras. 6.4.3-6.4.4.

⁴⁹ First Report at para. 6.4.4.

Initial Order approved the Directors' Charge in the amount of US \$4.4 million, which the Applicants now seek to increase to US \$5.73 million.⁵⁰

33. The Court has discretion to grant and increase these charges in amounts that the Court considers appropriate pursuant to sections 11.51 and 11.52 of the CCAA.⁵¹ The Monitor was involved in the calculation of both the Administration Charge and Directors' Charge, and supports both increases, given the complexity of the CCAA Proceedings and the expected contributions to be provided by the beneficiaries of these charges.⁵²

F. The Stay of Proceedings Should be Extended

34. Pursuant to section 11.02 of the CCAA, the Court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the Court that it has acted, and is acting, in good faith and with due diligence. There is no statutory time limit on how long a stay of proceedings can be extended.

35. The Applicants have acted in good faith and with due diligence throughout the CCAA Proceedings. The Applicants, as supported by the Monitor, ask that the Stay of Proceedings be extended up to and including January 31, 2025, in order to provide the Sandvine Entities with the time needed to complete Phase 1 of the SISP, including seeking Court approval of the Stalking Horse Transaction in the event no Phase 1 Qualified Bids (as defined in the SISP) are received. The Monitor does not believe that any creditor will be materially prejudiced by the extension, and subject to this Court granting the Sandvine Entities the authority to draw on the DIP Facility,

⁵⁰ Kupp Affidavit at paras. 142, 147.

⁵¹ See Applicants' Initial Order Factum at paras. 50-54.

⁵² First Report at paras. 6.2.2, 6.3.4, 6.3.6.

Sandvine will have sufficient liquidity to fund its operations and the cost of the CCAA Proceedings through the extension.⁵³

36. The Stay of Proceedings operates to stay any rights held by creditors to effect pre-filing versus post-filing set-off. The Supreme Court has held that set-off rights of this type are, aside from rare exceptions, subject to the CCAA stay of proceedings,⁵⁴ and orders which permit set-off rights of this type to be exercised only with the consent of the Monitor and the court have been granted in CCAA proceedings.⁵⁵ Subjecting such set-off rights to the Stay of Proceedings therefore both accords with the law as stated by the Supreme Court and is appropriate in the circumstances, as any attempts by creditors to exercise set-off rights of this type would both restrict the Applicants' liquidity and distract the Applicants' management from the ongoing sale process at a crucial time in the Applicants' restructuring.

PART IV - NATURE OF THE ORDER SOUGHT

37. The Applicants therefore request that this court grant an Amended and Restated Initial Order substantially in the form of the draft Order attached at Tab 2 of the Motion Record and a SISP Order substantially in the form of the draft Order attached at Tab 5 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of November, 2024:



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Lawyers for the Applicants

⁵³ First Report at paras. 5.0.2-5.0.3.

⁵⁴ *Montréal (City) v. Deloitte Restructuring Inc.*, [2021 SCC 53](#) at para. 4.

⁵⁵ See, i.e., *2675970 Ontario Inc. et al. (Re)*, (August 28, 2024), Ont S.C.J. [Commercial List], Court File No. CV-24-00726584-00CL ([Initial Order](#)) at para. 17; *Ted Baker Canada Inc. et al. (Re)*, (April 24, 2024), Ont S.C.J. [Commercial List], Court File No. CV-24-00718993-00CL ([Initial Order](#)) at para. 18.

TO: THE ATTACHED SERVICE LIST

SCHEDULE “A”: LIST OF AUTHORITIES

1. *2675970 Ontario Inc. et al. (Re)*, (August 28, 2024), Ont S.C.J. [Commercial List], Court File No. CV-24-00726584-00CL ([Initial Order](#))
2. *Black Press Ltd. (Re)*, (January 25, 2024), B.C.S.C., No. S-240259 Vancouver Registry ([SISP Approval Order](#))
3. *Brainhunter Inc. (Re)*, [2009 CanLII 72333 \(ON SC\)](#)
4. *Canadian Overseas Petroleum Limited (Re)*, (March 19, 2024), A.B.K.B., 2401-03404 ([SISP Approval Order](#))
5. *Cannapiece Group Inc v. Carmela Marzili*, [2022 ONSC 6379](#)
6. *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#)
7. *Fire & Flower Holdings Corp. et al. (Re)*, [2023 ONSC 4048](#)
8. *Keb Hana Bank v. Misrahi Commercial (The One) LP. et al.*, (June 11, 2024), Ont. S.C.J [Commercial List], Court File No. CV-21- 00707839-00CL ([Endorsement of Justice Osborne](#))
9. *Montréal (City) v. Deloitte Restructuring Inc.*, [2021 SCC 53](#)
10. *Nortel Networks Corp. (Re)* (2009), [2009 CanLII 39492 \(ON SC\)](#)
11. *Urthecast International Corp. (Re)*, (October 16, 2020), B.C.S.C., No. S-208894 Vancouver Registry ([Sales Process Order](#))
12. *Sino-Forest (Re)*, (March 30, 2012), Ont. S.C.J [Commercial List], Court File No. CV-12-9667-00CL ([Sale Process Order](#))
13. *Tacora Resources Inc. (Re)*, [2023 ONSC 6126](#)
14. *Ted Baker Canada Inc. et al. (Re)*, (April 24, 2024), Ont S.C.J. [Commercial List], Court File No. CV-24-00718993-00CL ([Initial Order](#))
15. *Validus Power Corp. (Re)*, [2023 ONSC 6367](#)
16. *Walter Energy Canada Holdings, Inc. (Re)*, [2016 BCSC 107](#)

**SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY-LAWS**

COMPANIES’ CREDITORS ARRANGEMENT ACT

R.S.C., 1985, c. C-36, as amended

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[...]

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

[...]

Interim financing

11.2 (1) On application by a debtor company 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 company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

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

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[...]

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and 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 the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

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

[...]

Court may order security or charge to cover certain costs

11.52 (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 debtor company 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 monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; 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 their effective participation in proceedings under this Act.

Priority

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

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED Court File No: CV-24-00730836-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SANDVINE CORPORATION, SANDVINE HOLDINGS UK LIMITED, PROCERA NETWORKS, INC., PROCERA HOLDING, INC., NEW PROCERA GP COMPANY, and SANDVINE OP (UK) LTD.

Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

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