BOYNECLARKE
LAWYERS | LLP

DELIVERY VIA:
Courier

FILE REFERENCE:
177166

Joshua J. Santimaw
Direct Dial: (902) 460-3451
Facsimile: (902) 463-7500
E-mail: jsantimaw@boyneclarke.ca

December 13, 2024

Halifax Regional Municipality

99 Wyse Road, Suite 600
Dartmouth
NS Canada B3A 4S5

Correspondence:
P.O. Box 876
Dartmouth Main
NS Canada B2Y 3Z5

T 902.469.9500
F 902.463.7500
www.boyneclarke.ca

Raffi A. Balmanoukian
Registrar in Bankruptcy
Supreme Court of Nova Scotia
In Bankruptcy and Insolvency
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

Re: In the matter of the Notice of Intention to make a proposal of Motryx Inc. pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended
Court No. 45907
Estate No. 51-3134197

This is the submission of the Applicant, Motryx Inc., which is seeking, *inter alia*, an order:

a) abridging notice periods and service requirements pursuant to section 6 of the *Bankruptcy and Insolvency General Rules;* and

b) approving a Sale and Investment Solicitation Process ("**SISP**").

A. Concise Statement of Facts

Motryx is in the business of delivering quality control and assurance in blood-specimen transport.

Its mission is to empower hospitals, labs and their patients with confidence that blood specimens are transported in a manner that ensures quality diagnostics and accurate testing by monitoring, measuring and reporting on quality indicators related to transport, which are relevant to testing outcomes to help laboratories fulfill requirements.

On September 27, 2024, Motryx filed a Notice of Intention to make a proposal. The Court has since granted extensions of the time for the Company to file a proposal, by Orders dated October 22, 2024, and December 5, 2024. The current extension extends to January 17, 2025.

Motryx relies upon the Third Report of the Proposal Trustee, which has been filed to assist the Court in its consideration of this Motion.

BOYNECLARKE LAWYERS | LLP

B. Service, Notice and Abridgement of Time

The relief sought in this motion is pursuant to the BIA and therefore the *Bankruptcy and Insolvency General Rules* supersede the *Nova Scotia Civil Procedure Rules* in the event of any inconsistency. BIA Rule 3 states:

3 In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

As this is a matter where the BIA does not specify a minimum notice requirement, BIA Rule 6 applies, which states:

> 6 (1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.
>
> (2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules
>
> (a) must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or
>
> (b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.
>
> (3) A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.
>
> (4) The court may, on an ex parte application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.

In terms of measuring the four days provided for under BIA Rule 6, the period of time is governed by BIA Rule 4, which stipulates clear business days:

If a period of less than six days is provided for the doing of an act or the initiation of a proceeding under the Act or these Rules, calculation of the period does not include Saturdays or holidays.

BOYNECLARKE LAWYERS | LLP

In accordance with BIA Rule 6(1), the motion materials will be served electronically by email. No opposition is anticipated. Proof of service by affidavit will be filed in advance of the hearing of the pending motion.

Although Motryx anticipates filing and serving the Motion pleadings within the foregoing timeline, it has included a request for the abridgment of time in case there is any breakdown in service. BIA 6(4) grants the Court authority to amend these time limits, including to reduce them.

Given the nature of the relief sought and the surrounding circumstances, Motryx submits that this is an appropriate circumstance for the Court to abridge the time for the hearing of this matter if such abridgement is not granted.

C. Sale and Investment Solicitation Process

The Proposal Trustee is seeking the Court's approval of a SISP which includes a Stalking Horse Asset Purchase Agreement as regards substantially all of the assets of the Company.

As described in the Third Report, the Proposal Trustee has concluded that the SISP is the most viable way to maximize the realizable value of the assets of the Company and allow its operations to continue as a going concern.

Motryx is also seeking the Court's approval of the Stalking Horse Asset Purchase Agreement, which appears as Appendix "A" to the SISP (the "**Stalking Horse Agreement**") for the limited purpose of approving it as an approved bid under the SISP.

The Proposal Trustee has concluded that the Stalking Horse Agreement will provide stability and create efficiency in the SISP by clearly identifying the desire of Aerocom GBMH & Co. ("**Aerocom**") to purchase the assets of the Company and disclosing the terms of the offer, including the quantum of its purchase price.

Given that Aerocom is a shareholder of Motryx and is also the DIP Lender, the SISP provides that the Proposal Trustee shall run the SISP independently of the Company, with the Company and management only providing such information and support as may be requested by the Proposal Trustee.

The SISP has been developed by the Proposal Trustee with input from the Company's management. It contemplates a two-phase process where bidders will be qualified to make binding offers for the Company's assets, and to proceed to an auction in the event that there is at least one qualified bidder other than Aerocom. The closing of any sale whether by the Stalking Horse Agreement or otherwise will be conditional upon further approval of the Court. Further details of the advertising and solicitation for bidders can be found in the Third Report.

BOYNECLARKE LAWYERS | LLP

The Proposal Trustee has negotiated and, subject to this Court's approval, agreed to the Stalking Horse Agreement. Pursuant to the Stalking Horse Agreement, the Stalking Horse Bidder has agreed to acquire substantially all of the assets of the Company.

Key provisions include:

a. Assets are sold on an "as is, where is" basis with few representations and warranties;

b. The purchase price is equal to the sum of: (i) a cash payment of $40,000.00 (to be applied against the Company's secured debt; and (ii) a credit for the outstanding DIP financing extended by the DIP Lender to the Company and approved by the Court.

c. The Stalking Horse Bidder has the right to exclude specified assets and liabilities prior to the time of closing but any such amendment does not affect the Purchase Price;

d. If the Stalking Horse Bidder is unsuccessful then it shall be entitled to payment of its professional fees in respect of the Stalking Horse Agreement to a maximum of $25,000. There is no break fee or other termination payment if the Stalking Horse Agreement is not closed; and

e. Closing is conditional on Court approval but there are no other significant conditions to closing in the view of the Proposal Trustee.

Further details on the Stalking Horse Agreement and the Proposal Trustee's analysis can be found in the Third Report.

The Company submits that stalking horse agreements are an accepted tool in insolvency proceedings in Canada.

In considering a stalking horse arrangement sales process, Morawetz, J., as he then was, in *Brainhunter Inc. (Re)*, 2009 CarswellOnt 8207, [2009] O.J. No. 5578 identified the following list of nonexclusive factors to be considered when evaluating a stalking horse sales process at paragraph 13:

a. Is a sale transaction warranted at this time?

b. Will the sale benefit the "economic community"?

c. Do any of the debtors' creditors have a *bona fide* reason to object to the sale of the business?

d. Is there a better viable alternative?

BOYNECLARKE LAWYERS | LLP

In approving the stalking horse sales process, Morawetz, J., gave the following reasons at paragraph 19:

"In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the "economic community". I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business."

In the context of a proceeding where a stalking horse purchaser was pursuing a credit bid like the present motion, Brown, J., held in *CCM Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750:

> [6] Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in Royal Bank v. Soundair Corp.: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:
>
> > (i) the fairness, transparency and integrity of the proposed process;
> >
> > (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
> >
> > (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.
>
> [7] The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings
>
> [8] ... I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following

BOYNECLARKE LAWYERS | LLP

> observations made by one set of commentators on the Canwest CCAA process:
>
> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.

In the present case, the stalking horse purchaser is the DIP Lender, who is also a shareholder in the Company.

Given that the Stalking Horse Bidder is related to the Company. the decision in *Freshlocal Solutions Inc. (Re),* 2022 BCSC 1616 [Freshlocal] is relevant. In that case, the Court considered a motion from the CCAA debtor seeking approval of a stalking horse agreement with its interim lender, and the agreement was opposed by the debtor's other secured lenders. The Court declined to approve the stalking horse agreement.

The Court based its decision on the following factors:

- There was not a competitive process behind the stalking horse agreement and there was no transparency related to how the purchase price was arrived at (paras 37-40);

- Under the terms of the letter of intent for the stalking horse agreement with the interim lender, the debtors were prohibited from making any contact with any bidder other than the interim lender (para 37);

- No stakeholder expressed support of the stalking horse agreement or concern if it was not approved (para 48); The primary secured creditors did not approve of the stalking horse agreement (paras 57-60); and

- The terms of the break fee and expense reimbursement were considered to be unreasonably prejudicial. In particular, the Court noted that (a) the fees were intended to partially offset interest and fees charged under the interim financing (which the Court noted were conspicuously low); (b) the expense reimbursement was included in the purchase price, meaning that the interim lender would recover expenses regardless of whether their bid was successful; and (c) the agreement

BOYNECLARKE LAWYERS | LLP

provided the interim lender with the option to terminate if certain waivers were not obtained from third parties while also retaining the break fee and expense reimbursement (paras 61-72).

The Company submits that the circumstances in the present motion are distinguishable from those in Freshlocal. In particular:

- Since this is a credit bid by the DIP Lender, a competitive process was impractical. However, the purchase price is transparent in that it is the amount of outstanding indebtedness owing by the Company together with reasonable related costs.

- The SISP contemplates an open process conducted by the Proposal Trustee without restrictions as to bidder contact.

- The DIP Lender is the primary stakeholder in this proceeding, given the amount owing to it and the secured nature of its indebtedness.

- There is no break fee in the event that the Stalking Horse Bidder is unsuccessful, and its expense reimbursement is capped.

For the foregoing reasons, the Receiver submits that he SISP and Stalking Horse Agreement are reasonable and should be approved by the Court.

D. Relief Sought

Motryx respectfully submits that its application be granted in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

BOYNECLARKE LLP

Joshua J. Santimaw

COURT FILE NO.: 09-8482-00CL
DATE: 20091218

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **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 BRAINHUNTER INC., BRAINHUNTER CANADA INC., BRAINHUNTER (OTTAWA) INC., PROTEC EMPLOYMENT SERVICES LTD., TREKLOGIC INC.

APPLICANTS

BEFORE: **MORAWETZ J.**

COUNSEL: **Jay Swartz and Jim Bunting, for the Applicants**

G. Moffat, for Deloitte & Touche Inc., Monitor

Joseph Bellissimo, for Roynat Capital Inc.

Peter J. Osborne, for R. N. Singh and Purchaser

Edmond Lamek, for the Toronto-Dominion Bank

D. Dowdall, for Noteholders

D. Ullmann, for Procom Consultants Group Inc.

HEARD & DECIDED: **DECEMBER 11, 2009**

ENDORSEMENT

[1] At the conclusion of the hearing on December 11, 2009, I granted the motion with reasons to follow. These are the reasons.

[2] The Applicants brought this motion for an extension of the Stay Period, approval of the Bid Process and approval of the Stalking Horse APA between TalentPoint Inc., 2223945 Ontario Ltd., 2223947 Ontario Ltd., and 2223956 Ontario Ltd., as purchasers (collectively, the "Purchasers") and each of the Applicants, as vendors.

[3] The affidavit of Mr. Jewitt and the Report of the Monitor dated December 1, 2009 provide a detailed summary of the events that lead to the bringing of this motion.

[4] The Monitor recommends that the motion be granted.

[5] The motion is also supported by TD Bank, Roynat, and the Noteholders. These parties have the significant economic interest in the Applicants.

[6] Counsel on behalf of Mr. Singh and the proposed Purchasers also supports the motion.

[7] Opposition has been voiced by counsel on behalf of Procom Consultants Group Inc., a business competitor to the Applicants and a party that has expressed interest in possibly bidding for the assets of the Applicants.

[8] The Bid Process, which provides for an auction process, and the proposed Stalking Horse APA have been considered by Breakwall, the independent Special Committee of the Board and the Monitor.

[9] Counsel to the Applicants submitted that, absent the certainty that the Applicants' business will continue as a going concern which is created by the Stalking Horse APA and the Bid Process, substantial damage would result to the Applicants' business due to the potential loss of clients, contractors and employees.

[10] The Monitor agrees with this assessment. The Monitor has also indicated that it is of the view that the Bid Process is a fair and open process and the best method to either identify the Stalking Horse APA as the highest and best bid for the Applicants' assets or to produce an offer for the Applicants' assets that is superior to the Stalking Horse APA.

[11] It is acknowledged that the proposed purchaser under the Stalking Horse APA is an insider and a related party. The Monitor is aware of the complications that arise by having an insider being a bidder. The Monitor has indicated that it is of the view that any competing bids can be evaluated and compared with the Stalking Horse APA, even though the bids may not be based on a standard template.

[12] Counsel on behalf of Procom takes issue with the $700,000 break fee which has been provided for in the Stalking Horse APA. He submits that it is neither fair nor necessary to have a break fee. Counsel submits that the break fee will have a chilling effect on the sales process as it will require his client to in effect outbid Mr. Singh's group by in excess of $700,000 before its bid could be considered. The break fee is approximately 2.5% of the total consideration.

[13] The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Re Nortel Networks Corp.* [2009] O.J. No. 3169, I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

(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?

[14] The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

[15] Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

[16] Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

[17] I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

[18] In this case, the Special Committee, the advisors, the key creditor groups and the Monitor all expressed support for the Applicants' process.

[19] In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the "economic community". I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

[20] With respect to the possibility that the break fee may deter other bidders, this is a business point that has been considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue

has been considered and, in the exercise of their business judgment, the Special Committee unanimously recommended to the Board and the Board unanimously approved the break fee. In the circumstances of this case, it is not appropriate or necessary for the court to substitute its business judgment for that of the Applicants.

[21] For the foregoing reasons, I am satisfied that the Bid Process and the Stalking Horse APA be approved.

[22] For greater certainty, a bid will not be disqualified as a Qualified Bid (or a bidder as a Qualified Bidder) for the reason that the bid does not contemplate the bidder offering employment to all or substantially all of the employees of the Applicants or assuming liabilities to employees on terms comparable to those set out in s. 5.6 of the Stalking Horse Bid. However, this may be considered as a factor in comparing the relative value of competing bids.

[23] The Applicants also seek an extension of the Stay Period to coincide with the timelines in the Bid Process. The timelines call for the transaction to close in either February or March, 2010 depending on whether there is a plan of arrangement proposed.

[24] Having reviewed the record and heard submissions, I am satisfied that the Applicants have acted, and are acting, in good faith and with due diligence and that circumstances exist that make the granting of an extension appropriate. Accordingly, the Stay Period is extended to February 8, 2010.

[25] An order shall issue to give effect to the foregoing.

MORAWETZ J.

DECIDED: December 11, 2009

REASONS: December 18, 2009

2

CITATION: CCM Master Qualified Fund v. blutip Power Technologies, 2012 ONSC 1750
COURT FILE NO.: CV-12-9622-00CL
DATE: 20120315

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: CCM Master Qualified Fund, Ltd., Applicant

AND:

blutip Power Technologies Ltd., Respondent

BEFORE: D. M. Brown J.

COUNSEL: L. Rogers and C. Burr, for the Receiver, Duff & Phelps Canada Restructuring Inc.

A. Cobb and A. Lockhart, for the Applicant

HEARD: March 15, 2012

REASONS FOR DECISION

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

[1] By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

[2] D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

[3] The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two

convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) $47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

[4] At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

[5] As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

[6] Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.[1] Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

(i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

---

[1] (1991), 7 C.B.R. (3d) 1 (C.A.).

[7] The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings,[2] *BIA* proposals,[3] and *CCAA* proceedings.[4]

[8] Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.[5]

B. The proposed bidding process

B.1 The bid solicitation/auction process

[9] The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

[10] Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of $100,000 as compared to the

---

[2] *Re Graceway Canada Co.*, 2011 ONSC 6403, para. 2.
[3] *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 15.
[4] *Re Brainhunter* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), para. 13; *Re White Birch Paper Holding Co.*, 2010 QCCS 4382, para. 3; *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), para. 2, and (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.); *Re Indalex Ltd.*, 2009 CarswellOnt 4262 (S.C.J.).
[5] Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding – Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of $100,000, subject to reduction at the discretion of the Receiver.

B.2 Stalking horse credit bid

[11] The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate. The purchase price is estimated to be approximately $3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

[12] The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be $103,500 less than the face value of the Notes. As explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

[13] The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of $75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid.[6]

C. Analysis

[14] Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the

---

[6] *Re Parlay Entertainment*, 2011 ONSC 3492, para. 12; *Re White Birch Paper Holding Co.*, 2010 QCCS 4915, paras. 4 to 7; *Re Nortel Networks Corp.* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.), para. 12.

prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

[15] In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

[16] Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court.[7]

[17] For those reasons I approved the bidding procedures recommended by the Receiver.

IV. Priority of receiver's charges

[18] Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent, *ex parte* basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver now seeks such priority.

[19] As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

[20] Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that

---

[7] *Re Indalex Ltd.*, 2009 CarswellOnt 4262 (S.C.J.), para. 7; *Re Graceway Canada Co.*, 2011 ONSC 6403, para. 5; *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 58.

secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as required by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

[21] I should note that the Appointment Order contains a standard "come-back clause" (para. 31). Recently, in *First Leaside Wealth Management Inc. (Re)*, a proceeding under the *CCAA*, I wrote:

> [49] In his recent decision in *Timminco Limited (Re)* ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:
>
> > In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.
>
> ...
>
> [51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.[8]

[22] In my view those comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a

---

[8] 2012 ONSC 1299 (CanLII).

receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

[23] In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

[24] The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

[25] May I conclude by thanking Receiver's counsel for a most helpful factum.

(original signed by)
D. M. Brown J.

Date: March 15, 2012

3

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Freshlocal Solutions Inc. (Re)*, 2022 BCSC 1616

Date: 20220913
Docket: S223941
Registry: Vancouver

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 and Arrangement of Freshlocal Solutions Inc., Sustainable Produce Urban Delivery Inc., 569672 BC Limited, Organics Express Inc., Mainland Fresh Distribution Inc., Food-X Urban Delivery Inc., Food-X Technologies Inc., Food-X Technologies GP Inc., Food-X Technologies (EGMS) Inc., Be Fresh (AB) Inc. and Blush Lane Organic Produce Ltd.

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	D. Gruber J. Mighton
Counsel for the Monitor, Ernst & Young Inc.:	L. Hiebert
Counsel for Silicon Valley Bank:	S. Babe
Counsel for Third Eye Capital Corporation:	S. Stephens
Counsel for the Bridge Lenders:	L. Williams F. Finn
Counsel for Export Development Bank:	K. Siddall C. Formosa
Counsel for Desjardins Securities Inc.:	J. Reynaud
Place and Date of Hearing:	Vancouver, B.C. July 14-15 and 20, 2022
Place and Date of Decision with Written Reasons to Follow:	Vancouver, B.C. July 20, 2022

Place and Date of Written Reasons: Vancouver, B.C.
September 13, 2022

INTRODUCTION

[1] The petitioners seek various relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*]. The relief includes approval of a sales and investment solicitation process (SISP), appointment of a financial advisor and charges for its fees, approval of a stalking horse agreement and, finally, extension of the stay of proceedings to August 19, 2022.

[2] On July 15, 2022, I granted all of the relief sought, save for approval of the stalking horse agreement, with written reasons to follow. These are those reasons.

BACKGROUND FACTS

[3] The petitioners are a group of companies in the organic online grocery business. Earlier in 2022, they operated three major business segments: (1) an online grocery store with two physical locations in BC operating as "Spud.ca"; (2) physical grocery stores in Alberta; and (3) a software company licensing for online grocery operations, known as "Food-X" (which has since ceased to do business). I will refer to the petitioner group as "Freshlocal".

[4] The three major secured creditors of Freshlocal are owed approximately $17.8 million. In general order of priority, they are: Silicon Valley Bank ("SVB") for $2 million; a group of lenders (collectively, the "Bridge Lenders") for $7 million; and Export Development Canada ("EDC") for $8.8 million (EDC holds a first ranking position on Food-X).

[5] The Bridge Lenders are also unsecured creditors of Freshlocal, holding $10.75 million of convertible debentures.

[6] On May 16, 2022, I granted an initial order in favour of Freshlocal. The initial relief included an administration charge of $350,000 (the "Administration Charge"), an interim financing charge up to the maximum amount of $2.5 million in favour of Third Eye Capital Corporation ("TEC") (the "Interim Lender's Charge"), and a charge of up to $250,000 for directors and officers.

[7] On May 26, 2022, I granted an amended and restated initial order (the "ARIO") that extended the stay of proceedings to June 30, 2022, approved a key employee retention plan and increased the TEC interim financing and Interim Lender's Charge to $7 million.

[8] The stay of proceedings has since been extended to July 15, 2022.

[9] When the initial hearing took place, Freshlocal's counsel made it clear that they intended to apply, as soon as possible, for approval of a SISP. In fact, substantial discussions had already taken place to that end, and specifically with TEC.

[10] TEC's term sheet for the initial interim financing dated May 13, 2022 (the "Term Sheet"), approved by the Court, expressly referred to TEC advancing a stalking horse offer within the context of a SISP:

> 20. Sale and Investment
>
> The Monitor will work with the DIP Agent to allow the DIP Agent to present a stalking hose offer ("Stalking Horse Offer"), on terms acceptable to the DIP Agent, for the economically viable assets of the Borrowers under any [SISP] to be initiated within the CCAA Proceedings. The Monitor and the Borrowers shall work together with the DIP Agent to ensure that it is granted full access to the books and records of the Borrowers, satisfactory to the DIP Agent, and shall work with the DIP Agent to ensure that the SISP, including the Stalking Horse Offer, is presented to the Court for approval expeditiously, on a timeline to be agreed to among the Borrower and DIP Agent, each acting reasonably.
>
> Should the Stalking Horse Offer not be confirmed as the winning offer within the SISP, for any reason, the Borrowers shall pay a break fee to the DIP Agent equal to 2.5% of the value of the Stalking Horse Offer plus the amount equal to the DIP Agent's costs, charges and expenses (including legal fees on a solicitor and own client full indemnity basis) incurred in respect of the Stalking Horse Offer.

[11] On May 16, 2022, when I approved TEC's interim financing, Freshlocal's counsel expressly acknowledged that the Court was not being asked to approve any SISP or stalking horse offer, nor the terms of any stalking horse offer, including as referenced in the Term Sheet quoted above.

THE SISP/STALKING HORSE OFFER

[12] On July 12, 2022, Freshlocal filed its present application. There are two aspects of the relief sought that bear on the contested issues and these reasons.

[13] Firstly, Freshlocal seeks approval of certain arrangements with a financial advisor. In fact, on June 21, 2022, Freshlocal engaged Desjardins Securities Inc. ("Desjardin") as a financial advisor in respect of its sales efforts (the "FA Engagement"). On this application, Freshlocal seeks approval of the FA Engagement, which provides for the payment of certain fees to Desjardins, being a monthly working fee and a transaction fee in respect of any ultimate purchase agreement, and the appointment of Desjardin as its financial advisor in connection with the SISP. It is a condition of the FA Engagement that Desjardins be granted court-ordered charges to secure its monthly fees (*pari passu* with the Administration Charge) and to secure its transaction fee (after the Administration Charge and the Interim Lender's Charge).

[14] No objections were raised with respect to the FA Engagement or the charges.

[15] Secondly, Freshlocal sought court approval of TEC as a stalking horse bidder.

[16] On June 23, 2022, Freshlocal entered into a binding letter of intent (LOI) with TEC respect to a potential stalking horse offer. After that time, Freshlocal engaged in extensive discussions with TEC to provide responses to various due diligence enquiries and requests.

[17] On July 12, 2022, Freshlocal and TEC entered into the definitive stalking horse agreement (the "SH Agreement") contemplated in the TEC LOI. An unredacted copy of the SH Agreement and the FA Engagement were sealed by the Court to the extent that they revealed financial terms that, if publicly available, might have harmed the integrity of the SISP. That said, Freshlocal's evidence on this application describes the key terms of the SH Agreement as follows:

a) It is structured as a reverse vesting order for the "economically viable" assets of Freshlocal;

b) Should TEC not become the ultimate purchaser, TEC would be paid a break fee of 2.5% of the ultimate purchase price under the SH Agreement and an expense reimbursement fee, the maximum amount of which is specified in the SH Agreement such that the total exposure for amounts collectible by TEC for such costs would be 3.7% of the purchase price under the SH Agreement (the "Break Fee and Expense Reimbursement"); and

c) The Break Fee and Expense Reimbursement are to be a charge on Freshlocal's assets, standing only behind the Administration Charge (and the monthly charge under the FA Engagement) and ahead of the Interim Lender's Charge.

[18] Freshlocal states that, in its opinion, the SH Agreement:

> … establishes a valuable baseline price that will: (a) act as a "protective bid" by ensuring a going-concern outcome for [Freshlocal's] remaining business units … thereby preserving approximately 850 jobs, as well as the supplier relationships that support these businesses, and (b) provide value to the SISP by setting a baseline purchase price intended to create a competitive bidding environment, thereby increasing the likelihood of a value maximizing transaction in the SISP.

[19] Specifically, Freshlocal argues that, in its sound business judgment, the terms of the SH Agreement relating to the Break Fee and Expense Reimbursement were reasonable in the circumstances as representing a significant term of TEC's participation and support of these proceedings. Freshlocal's board of directors approved the SH Agreement.

[20] The proposed SISP included ambitious timelines, with a binding LOI to be received by August 11, 2022, final agreements by September 1, 2022, and an application for court approval by September 15, 2022. No objections were raised in respect of the reasonableness of the timelines.

DISCUSSION

[21] The Bridge Lenders and EDC do not object to court approval of the SISP and the FA engagement, but they strenuously object to approval of the SH Agreement. In addition, these secured creditors point to other more nuanced provisions in the SH Agreement that they say are not appropriate. I will discuss those further terms below.

CCAA Considerations

[22] There is no dispute that this Court has jurisdiction under the *CCAA* to approve the SISP and also approve a stalking horse offer. Specific sale provisions are found in s. 36 of the *CCAA* (although not expressly addressing approval of a sales process). In addition, the general jurisdiction of the Court is found in s. 11 of the *CCAA* to approve such relief as is appropriate.

[23] Stalking horse agreements have become fairly common in *CCAA* proceedings and sales processes specifically. Sales processes in *CCAA* proceedings are usually very fact specific, as are the circumstances in which stalking horse agreements have been considered by Canadian courts in the past. Consideration must be given to the specific terms of any such agreements in the context of the *CCAA* proceedings more generally, including the financial terms of any offer. It is common to see break fees and other compensation built into the offer.

[24] That said, certain themes or factors emerge from the authorities that bear scrutiny when considering approval of any stalking horse bid.

[25] In Janis P. Sarra's "*Rescue!: The Companies' Creditors Arrangement Act*" (Toronto: Carswell, 2007) [*Sarra*] at 118, the author describes the basic rationale behind such stalking horse offers and the financial protections that are usually built into such an offer:

> In the insolvency context, it is used to signify a situation where the debtor makes an agreement with a potential bidder for a sale of the debtor's assets or business, and that agreement forms part of a process whereby an auction or tendering process is conducted to see if there is a better and higher bidder that will result in greater returns to creditors. The premise is that the stalking

> horse has undertaken considerable due diligence in determining the value of the debtor corporation, and other potential bidders can rely, to an extent, on the value attached by that bidder based on that due diligence.

[26] The above comment—and case authorities—were considered by Justice Gascon (as he then was) in *Boutique Euphoria Inc. (Re)*, 2007 QCCS 7129. At para. 37, Gascon J. set out the following non-exhaustive factors as important considerations in assessing whether a stalking horse bid process should be approved:

> 1. Has there been some control exercised at the first stage of the competition (namely that to become the stalking horse bidder) and to what extent?
>
> Two main reasons explain that first consideration.
>
> On the one hand, the stalking horse bid establishes the benchmark to attract other bids and its accuracy is therefore key to the integrity of the whole process.
>
> On the other hand, as the stalking horse bid is normally subject to a break up fee, it is even more important that it be accurate, as the call for overbids will have to exceed a certain margin over and above the stalking horse bid.
>
> In other words, some assurances should exist that the horse chosen is indeed the right one.
>
> 2. Is there a need for stability within a very short time frame for the debtor to continue operations and the restructuring contemplated to be successful?
>
> This second consideration is explained by the fact that the stalking horse bid process is generally more stringent and less flexible than a traditional call for tenders process. As a result, to resort to such a process, time should normally be of the essence.
>
> 3. Are the economic incentives for the stalking horse bidder, in terms of break up fee, topping fee and overbid increments protection, fair and reasonable?
>
> This third consideration is justified by the fact that excessive economic incentives in terms of a break up fee or other fees may chill the market and deter other potential bidders. Thus, rendering the process inefficient and, in fact, inadequate in terms of meeting its goal. The concept of fairness to all bidders here comes to mind.
>
> 4. Are the time lines contemplated reasonable to insure a fair process at the second stage of the competition, namely that to become the successful over bidder?

> This fourth consideration is obviously also linked to the fairness of the bid process to ensure, inasmuch as possible, an equal opportunity to all interested bidders.

[Emphasis added.]

[27] In *Brainhunter Inc. (Re)*, [2009] O.J. No. 5578, Justice Morawetz (as he then was), took a more generalized approach to considering the issue:

> [13] The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Re Nortel Networks Corp*. [2009] O.J. No. 3169, I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:
>
> (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?

[28] In *CCM Master Qualified Fund, Ltd. v. Blutip Power Technologies Ltd.*, 2012 ONSC 1750 [*CCM Master*] at para. 6, Justice Brown (as he then was) stated that consideration of any sales process must assess:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[29] In *CCM Master*, Brown J. also discussed relevant considerations in respect of a stalking horse bid, emphasizing potential urgency and the need for a fair sales process:

> [7] The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, *BIA* proposals, and *CCAA* proceedings.
>
> [8] ... I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a

stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.

[Footnotes omitted.]

[30] More recently, in *Danier Leather Inc. (Re)*, 2016 ONSC 1044, Justice Penny cited *Brainhunter* and, at para. 20, stated that stalking horse agreements are commonly used in insolvency proceedings as they "establish a baseline price and transactional structure for any superior bids from interested parties" and "maximizes value of a business for the benefit of its stakeholders". With respect to the break fee for the stalking horse bidder, Penny J. stated:

> [41] 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 out of pocket 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.

[31] Section 11.52 of the *CCAA* specifically provides the court with authority to grant any charge for financial incentives. A charge for financial incentives under a stalking horse bid can be considered under the factors set out in s. 11.2(4) of the *CCAA*, which relates to interim financing and related charges.

[32] In *Quest University Canada (Re)*, 2020 BCSC 1845 at paras. 53–58, I addressed authorities that have discussed the question as to whether the financial incentives in a stalking horse offer are appropriate. At para. 59, I set out certain factors that can be considered in determining whether a given break fee is fair and

reasonable in all of the circumstances in the sense that it provides a corresponding or greater benefit to the estate:

a) Was the agreement reached as a result of arm's length negotiations?;

b) Has the agreement been approved by the debtor company's board or specifically constituted committees who are conducting the sales process?;

c) Is the relief supported by the major creditors?;

d) What may be the effect of such a fee/charge? Will it have a chilling effect on the market, or will it facilitate the sales process?;

e) Is the amount of the fee reasonable? In relation to expenses anticipated to be covered, is the amount reasonable given the bidder's time, resources and risk in the process?;

f) Will the fee and charge enhance the realization of the debtor's assets?;

g) Will the fee and charge enhance the prospects of a viable compromise or arrangement being made in respect of the company?; and

h) Does the monitor support the relief?

[33] At the most basic level, the *benefits* of entering into a stalking horse bid that can be potentially achieved in these proceedings must be justified by the *costs* in doing so. That cost/benefit analysis requires a rigorous review of all the relevant circumstances toward answering the question—is a stalking horse offer appropriate at this time in these *CCAA* proceedings?

[34] As is often the case in *CCAA* proceedings, the court must make this assessment, not only on historical facts, but also with a view to what the future *might* hold for the debtor company and its stakeholders given the present state of affairs.

The Objections

[35] I propose to address the Bridge Lenders' and EDC's objections to the SH Agreement under the following headings:

1) How did the SH Agreement arise?

[36] In support of the SH Agreement, the Monitor filed its third report to the Court dated July 13, 2022.

[37] The Monitor confirms that the SH Agreement did not come about through a competitive process. The Monitor states that this arose from two factors: (1) Freshlocal had limited time and resources to engage in any process; and (2) TEC advised Freshlocal that it would be a breach of the Term Sheet if Freshlocal did not proceed with TEC as the stalking horse bidder and if it them engaged in an open sales process. As such, there is an inference that the SH Agreement arose less from Freshlocal's objective enthusiasm for the transaction and more from TEC's not so veiled threats of litigation.

[38] As noted in *Sarra*, the premise is that stalking horse bids result from "considerable due diligence" such that the amount of the bid is intended to reflect the true value of the assets against which other potential bids might be measured. Both *Danier Leather* (para. 33) and *Boutique Euphoria* (paras. 41-42) considered earlier marketing efforts in its assessment of the appropriateness of a stalking horse offer. See also *PCAS Patient Care Automation Services Inc. (Re)*, 2012 ONSC 2840 at para. 10.

[39] In *Mecachrome Canada Inc. (Re)*, 2009 QCCS 6355, the Court considered that there had been no legitimate and open process to obtain funding proposals: para. 35.

[40] I accept here that Freshlocal was under substantial time pressures to move this proceeding forward to a sale. However, it is anything but transparent as to how the purchase price in the SH Agreement came about.

[41] In that vein, Freshlocal's reference, supported by the Monitor, that the SH Agreement establishes a minimum or "floor price" is concerning. This is more akin to a "reserve bid" at auction. I acknowledge that this phrase has been used in the past to describe stalking horse bids, but it is an unfortunate one in the sense that it gives the sense that higher bids are being sought and fully expected. A more appropriate description might be "value price", where the stalking horse is put forward as an appropriate pricing of the debtor's assets, in the event that no higher offer is received.

[42] It is not the underlying rationale of a stalking horse offer to allow a bidder to get a bargain basement price, save as might be (or likely will be) exceeded in the true marketplace, while securing substantial financial benefits for that bidder (see my discussion below).

[43] Freshlocal refers to the SH Agreement guaranteeing an outcome. I accept that the SH Agreement achieves that goal, but at what cost to the stakeholders?

[44] As was noted in *Boutique Euphoria*, an important consideration is to ensure you are riding the right "horse" in the sales process by having the right "benchmark" to hopefully attract other—and higher—bids. A failure to test the market toward picking your "horse" might very well mean that the debtor has "baked in" a result with a stalking horse offer which is not necessarily reflective of the value of the assets. I accept that it will not always be possible to expose the assets for sale toward choosing a stalking horse bid; however, failure to do so may be indicative of a less than robust process at this critical first stage to choose a stalking horse offer to "lead" the SISP.

[45] In addition, the amount of the break fee was already settled in the Term Sheet. It is clear that no further negotiations regarding the amount of the break fee took place leading to the SH Agreement.

2) Stability Benefits of the SH Agreement

[46] Freshlocal, as supported by the Monitor, places considerable emphasis on the stability afforded by the SH Agreement to many stakeholders, including customers, suppliers and employees. It refers to the "positive message" that approval of the SH Agreement will allow. The Monitor states that some messaging has already been sent to suppliers about the SH Agreement and Freshlocal's intention to achieve a going-concern sale(s) under the SISP.

[47] I acknowledge that stability is a factor to be considered. However, coincidental with the SH Agreement being presented for approval, is the Court approving, with the support of all stakeholders, a SISP which is intended to market

the assets and achieve a sale as soon as possible. As the Monitor notes, stakeholders are being advised of the sales efforts underway to the extent that this news provides stability in the circumstances.

[48] Freshlocal does not provide any specific instances of any stakeholder, let alone a supplier or employee, expressing support of the SH Agreement and concerns if it is not approved.

3) The Timing Perspective

[49] To a certain extent, the timing of the SH Agreement does not support its approval.

[50] The Term Sheet did not result in TEC obtaining court approval of what was then a future stalking horse bid to be received. TEC began seeking information from Freshlocal only after the full amount of the interim financing was approved on May 26, 2022.

[51] Freshlocal's efforts to advance a sales process coalesced in late June 2022 when it engaged Desjardins (June 21) and also, entered into the binding LOI with TEC (June 23). The SH Agreement was signed on June 23, 2022. Freshlocal and Desjardins immediately started to canvass interested parties by responding to inbound enquiries and developing the SISP procedures.

[52] By the time of these arrangements in late June 2022, Desjardins had set up a data room and initiated the usual sale procedures. TEC's information requests and Freshlocal's responses were part of the information used to populate the data room.

[53] By June 28, 2022, only a week after Desjardins was engaged, 23 parties had expressed interest in the assets and executed non-disclosure agreements (NDAs). There are now over 25 parties who are evaluating a potential offer of the assets. However, what is significant is that under the terms of the LOI, Freshlocal agreed that it would only engage in negotiations with TEC and that it would have no contact

with any other potential bidder. Accordingly, it is no surprise that Freshlocal did not seek a stalking horse offer from any other potential bidder after that time.

[54] With these past and ongoing sales efforts—and the results to date—the Bridge Lenders and EDC raise the legitimate question issue as to what benefit could be achieved by the SH Agreement. In the usual course, negotiations and the execution of a stalking horse agreement take place *before* any further sales efforts. This is consistent with the idea that one of the benefits of a stalking horse bid is that other bidders can rely to some extent on the due diligence that has already been done by the stalking horse bidder and that future and duplicative negotiations with alternative parties are avoided by the debtor and those parties.

[55] In this case, other potential bidders have already entered the process and presumably are conducting their own due diligence. In that event, little or no benefit arises in that respect from the SH Agreement.

4) Who Supports/Objects?

[56] Freshlocal's counsel submits that its board of directors support the SH Agreement in their business judgment and that, therefore, judicial deference is owed to that decision. I appreciate that Freshlocal's position brings a broader perspective to the table in terms of the more general benefits to be achieved by any stalking horse offer. I accept that the broader stakeholder group must be considered in this respect.

[57] However, it should be noted that Freshlocal confirms that it feels that it is "contractually obligated" to put the SH Agreement forward in the face of TEC's position on the effect of the Term Sheet, as noted above. These circumstances would strongly suggest that Freshlocal's board of directors were circumscribed in their pursuit of a stalking horse transaction by the Term Sheet already executed: *contra Quest University* at para. 63(a). In that event, little or no deference is warranted from this Court.

[58] Based on the financial information before the Court, it is quite apparent that the Bridge Lenders and EDC will be directly and materially affected by any monies that will be payable under the charges sought in relation to the SH Agreement. This factor must be considered.

[59] It is also important to note that this same financial information (mostly sealed) supports the conclusion that the Bridge Lenders and EDC are the stakeholders who mostly stand to *benefit* from any enhancements to the SISP, including through any stalking horse offer. I consider this an important factor, given the significant priority position held by both secured creditors, who are directly affected by the SH Agreement. As stated by the Bridge Lenders' counsel, the Bridge Lenders are the fulcrum creditor here in relation to the non-Food-X assets.

[60] For reasons not entirely apparent, the Monitor seemingly pays scant attention to the views of the Bridge Lenders and EDC. The Monitor states that the market will determine their interests and that is unquestioned. The more salient consideration are the views—and business judgment—of the Bridge Lenders and EDC who stand to bear the brunt of the consequences of approval of the SH Agreement in relation to the SISP.

5) What is the True Cost of the SH Agreement?

[61] As noted by the Monitor, the financial terms of a stalking horse offer can be justified by intended benefits in the SISP, such as reducing the legal expenses of other bidders and reducing Freshlocal's legal and other expenses.

[62] I accept that the amounts of the Break Fee and Expense Reimbursement proposed in the SH Agreement are in the range of such amounts that Canadian courts have approved in other *CCAA* proceedings.

[63] Yet, there are troubling aspects of the SH Agreement in terms of the financial compensation that is sought by TEC.

[64] Firstly, TEC takes the position that the Break Fee and Expense Reimbursement are intended to partially offset the interest and fees charged under the interim financing facility, which is said to be "conspicuously low" for interim financing. The Monitor states in its report that TEC views the SH Agreement as "part of the broader economics" of the Term Sheet and emphasizes that Freshlocal very much wishes to maintain a productive relationship with its interim lender, TEC. I can only read Freshlocal's position in that light as support for a stakeholder in this proceeding who holds considerable power over a critical aspect of this proceeding, namely the purse strings.

[65] In any event, TEC's submission on this point is objectionable on many fronts. Firstly, the Term Sheet was approved based on its specific terms and nothing more. Secondly, it was expressly acknowledged at the earlier May 2022 hearing that approval of the Term Sheet did not result in any court approval of a stalking horse bid or any intended terms. TEC's counsel was present at the May 26, 2022 hearing and made no contrary submissions.

[66] TEC's efforts to now link the appropriateness of the SH Agreement to an earlier decision of this Court is to introduce considerations that are simply irrelevant. It is inappropriate to argue that the SH Agreement should be assessed on considerations that were apparently only known to TEC, were not expressed in the documentation and are contrary to submissions made to the Court as to substance of the proposed transaction (i.e. regarding the interim financing).

[67] Secondly, financial incentives, such as the Break Fee and Expense Reimbursement are, fundamentally, intended to recompense TEC for its "up front" expenses in negotiating and presenting the SH Agreement in the event that another party ends up as the ultimate successful purchaser: *Quest University* at para. 55.

[68] However, the SH Agreement provides that part of the purchase price *includes* the Expense Reimbursement, which is an unusual provision since bidders will typically cover their own expenses. Effectively, TEC recovers its expenses in any event, whether the SH Agreement is the winning bid or not.

[69] Thirdly, in the SH Agreement, Freshlocal agrees that, up to the closing, it will obtain such consents or waivers reasonably required by TEC. These are conditions to TEC's obligation to close the transaction and are not unusual. The unusual provision follows, however, which provides:

> In the event that any of the foregoing conditions are not performed or fulfilled at or before the Closing, TEC and [Freshlocal] may terminate this Agreement, in which event … the Expense Reimbursement will be due and payable, and, provided that if [Freshlocal] engages in a further sales process for the business and assets of [Freshlocal], then the Break Fee will become due and payable, and, subject to the foregoing, [Freshlocal] will also be so released unless the Vendor was reasonably capable of causing such condition or conditions to be fulfilled or unless the Vendor has breached any of its covenants or obligations in or under this Agreement. The foregoing conditions are for the benefits of [TEC] only and accordingly [TEC] will be entitled to waive compliance with any such conditions if it seems fit to do so, without prejudice to its rights and remedies at law and in equity and also without prejudice to any of its rights of termination in the event of non-performance of any other conditions in whole or in part.
>
> [Emphasis added.]

[70] The meaning of the above clause is far from clear but it suggests considerable exposure to Freshlocal and its stakeholders if Freshlocal does not succeed in obtaining the third party consents or waivers by closing that TEC requires, and the agreement terminates. In that event, it appears that Freshlocal will still owe the Expense Reimbursement to TEC. Further, this clause suggests that, if the SH Agreement should fail to close for any reason, including difficulties with third parties over whom Freshlocal has no control, TEC is still entitled to claim the break fee in any later sales process. Clearly, such provisions are unusual and there is no apparent reason for them. More importantly, the latter provision has the potential to prejudice later recoveries from the assets and there is no apparent justification for this payment to TEC.

[71] In my view, the above three aspects of the SH Agreement are either inappropriate or evidence financial terms favouring TEC that are not fair and reasonable in the circumstances. As the Court stated in *Boutique Euphoria* at para. 71, fees in relation to a stalking horse bid must be "related to the stalking horse bid process itself and the efforts undertaken towards that end."

[72] Finally, even more objectionable were TEC's counsel's submissions to this Court in support of the SH Agreement to the effect that any refusal to approve the SH Agreement could result in default under the interim lending facility. TEC's counsel did not refer to any terms of the interim financing that would support such argument. There is no merit to this comment.

6) Is there an Alternative?

[73] The Bridge Lenders and EDC submit that the sales process should go forward without the involvement of the SH Agreement.

[74] I accept that there is no guarantee that a better offer or offers will be received through the SISP beyond what TEC has put forward in the SH Agreement. However, the circumstances of the persons who have expressed interest to date, and signed NDAs, suggest a market for the assets. TEC remains fully able to present an offer for the assets that it wishes to acquire, within the terms of the SISP.

[75] Freshlocal's counsel suggests that if no transaction emerges from the SISP without the SH Agreement, SVB may be at risk. That is true, however, SVB's counsel takes no position on this application, suggesting there is little concern that this scenario will arise. Similarly, Freshlocal's counsel states that TEC is not at risk in respect of the interim lending facility.

[76] At bottom, if the SISP does not result in a better offer or offers, it will be the Bridge Lenders and EDC who bear the brunt of that. To that extent, their decision to oppose the SH Agreement has considerable force, as they are the stakeholders who will benefit or suffer at the end of the day.

CONCLUSION/POSTSCRIPT

[77] On July 15, 2022, I approved the SISP and the FA Engagement, as requested by Freshlocal, and extended the stay of proceedings.

[78] Having considered all of the circumstances, I concluded on a balance of probabilities that approval of the SH Agreement was not appropriate. Having come

to that conclusion, there is no need to specifically consider whether the charge for the financial incentives are appropriate. Accordingly, I dismissed the relief sought relating to the SH Agreement and the charges for the Break Fee and Expense Reimbursement. At that time, I advised counsel that I expected that the SISP would need to be amended to remove reference to the SH Agreement and directed them to attend before the Court later that day.

[79] When counsel reattended, Freshlocal's counsel advised that Desjardins was not prepared to continue with the SISP which simply removed references to the SH Agreement. He advised that Freshlocal was engaging with Desjardins to discuss revised terms for the FA Engagement arising from the rejection of the SH Agreement.

[80] On July 20, 2022, counsel attended with an amended SISP and an amended FA Engagement. No party opposed these amended terms and they were approved by the Court.

"Fitzpatrick J."