

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

**IN THE MATTER OF THE NOTICE OF INTENTION TO
MAKE A PROPOSAL OF CANADIAN UNION
PROMOTIONS INC., A CORPORATION INCORPORATED
UNDER THE *CANADIAN BUSINESS CORPORATIONS ACT***

FACTUM OF CANADIAN UNION PROMOTIONS INC.
(Extension of Time to File a Proposal and approval of stalking horse sales process)
(returnable October 22, 2020)

October 16, 2020

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PART I – NATURE OF THIS MOTION

1. This motion is by the debtor, Canadian Union Promotions Inc. (“**CUP**”) for an order:
 - a) authorizing a “stalking horse” sale process;
 - b) approving the “stalking horse” asset purchase agreement (the “**Stalking Horse APA**”) entered into on October 16, 2020 between CUP and Younion Travels, Inc. (the “**Purchaser**”) as the stalking horse bid in the sale process;
 - c) approving the \$7,500 break fee set out in section 6.4 of the Stalking Horse APA;
 - d) extending the Notice of Intention (“**NOI**”) period for CUP from October 22 to December 7, 2020; and
 - e) granting an administrative charge in the amount of \$50,000 in favour of Crowe Soberman Inc. in its capacity as proposal trustee for CUP (the “**Trustee**”) for its fees and disbursements.

PART II – OVERVIEW

2. CUP is a business that began in 2007. It offers services to labour unions for marketing, promotional and software services for managing union affairs and communicating with members. It has 17 employees and 3 contractors.
3. CUP’s recent business history is that it began the development of the software product that it now offers in 2014 with certain key and larger union customers. In 2020, CUP was ready to begin marketing that product to a wider set of possible union clients, but the pandemic hit, and the marketing of the product has been slowed as a result.
4. CUP’s financial pressures that led to the filing of the NOI arise principally from a demand made by Royal Bank of Canada (”**RBC**”) at the end of July for repayment of a line of credit and outstanding Visa card amounts in the total amount of \$832,297.65. RBC relied upon CUP being off covenant for the financial year end of December 31, 2019, and on the Visa accounts being above their limit despite Visa advising CUP that notices of that had not been sent due to the early stages of the pandemic.

5. Also related to CUP’s financial pressures was the termination in 2019 of a relationship with a major client, the Power Workers Union. This caused both a loss of ongoing revenue, and the non-payment of more than \$1 million in accounts receivable due by that union to CUP, which has been strenuously resisted including by the retainer of Blakes by that union.
6. CUP accordingly filed a NOI on August 8, 2020 pursuant to the *Bankruptcy and Insolvency Act* (the “**BIA**”), which stayed RBC’s demand. CUP sought an extension of its NOI on September 8, 2020 for the purpose of attempting to arrange takeout equity or debt financing for RBC’s loan amounts. RBC consented to the extension on that basis, which was granted, but RBC made it clear that it would oppose any further extension.
7. Since the first extension, CUP’s efforts to find new equity or debt to take out RBC have failed. CUP accordingly accepts that its assets must be sold to satisfy RBC’s debt (to the extent possible) unless RBC wishes to take a different approach, which it has made clear it does not.
8. CUP’s assets are primarily leased equipment, very modest inventory, intellectual property in the software it has developed, goodwill, and whatever the contested receivable from the Power Workers Union might be worth.
9. Management of CUP has arranged for a stalking horse offer in the amount of \$250,000 plus assumption of all equipment leases to be made through a related company. CUP has also arranged for a CBV valuation of CUP’s assets, which shows that the price offered is reasonable.
10. CUP accordingly proposes the stalking horse offer be accepted as the basis for a sales process, because that will generate better recovery for CUP’s creditors (really not extending beyond RBC) than a liquidation after a bankruptcy, and will also better protect the interests of CUP’s other stakeholders, such as suppliers, customers and employees.
11. RBC has indicated that they oppose the relief sought and seek a bankruptcy unless their security position is improved by the granting of secured guarantees. RBC currently has no guarantees for its loan.

PART II – FACTS

A. Background of CUP

12. CUP was incorporated on November 7, 2007. CUP's business is to offer physical and software products and services that assist trade unions, notably in their marketing, management and communications. CUP started off offering promotional materials such as shirts, pens and banners. It then expanded its activities to the creation of various software solutions specifically tailored for unions, including a membership management and grievance platform, as well as a comprehensive communications platform, a mobile application, website services, and a members' portal, in addition to providing managed (expert) services and support.¹
13. CUP has approximately 50 clients, ranging from small, local unions (representing from 250 to 50,000 workers) to provincial unions (representing from 20,000 to 150,000 workers). CUP works for example with the Ontario Public Service Employees Union, which represents approximately 150,000 workers.²
14. CUP has 17 employees and 3 contractors. It is a private company primarily owned by its president, Shy Jacoby, and family members.³
15. CUP began an expansion in 2014 by developing a scalable software platform to address the needs of labour unions regarding management, duties, and communications for union management and members. The software was to work with both larger unions and smaller or medium sized unions.⁴

¹ Affidavit of Shy Jacoby sworn October 16, 2020 (the “**October 16 Affidavit**”), paras 5 and 6; Motion Record, Tab 2.

² October 16 Affidavit, para. 7; Motion Record, Tab 2.

³ October 16 Affidavit, para. 8; Motion Record, Tab 2.

⁴ October 16 Affidavit, para. 9; Motion Record, Tab 2.

16. Since 2014, CUP devoted funds to developing the software and increasing staff to support operations and grow the client base. CUP's plan had been to do a launch of the software product more widely in early 2020.⁵
17. As part of that growth, CUP entered into a loan agreement with RBC in 2018. The loan was initially for \$650,000 plus a Visa facility but was later increased to \$850,000. CUP granted to RBC a first ranking chattel security position over its assets. No other security or guarantees were requested or granted.⁶

B. Causes of insolvency

18. In 2019, CUP experienced a setback in the loss of the Power Workers Union as a major client, which CUP believes was the result of a change in leadership at that union. In addition, the new leadership of that union has withheld payment of an account payable to CUP of more than \$1 million, which set back CUP's financial situation beyond the loss of ongoing revenues. Attempts to secure payment of that receivable were strongly resisted, with the Power Workers Union retaining Blake, Cassels & Graydon LLP to oppose all attempts made by CUP's counsel to collect payment.⁷
19. In the fall of 2019, RBC placed CUP into special loans. CUP worked with RBC special loans to reduce the amount of the operating line from \$850,000 to \$650,000.⁸
20. By the end of 2019, CUP had gained considerable momentum, and was potentially months away from a product release after years of work and investment. But in early 2020, the effects of the COVID-19 worldwide pandemic reached Canada. As union offices dramatically reduced their attendance and activities, the demand for CUP's services likewise diminished, and the economic situation forced CUP to temporarily downsize its

⁵ October 16 Affidavit, para. 10; Motion Record, Tab 2.

⁶ October 16 Affidavit, para. 11; Motion Record, Tab 2.

⁷ October 16 Affidavit, para. 12; Motion Record, Tab 2.

⁸ October 16 Affidavit, para. 13; Motion Record, Tab 2.

operations. Further, the COVID-19 restrictions eroded most if not all hopes for a short-term launch of the new software product.⁹

21. In response, CUP attempted to reduce expenses, deferred management's compensation from January to August of 2020, negotiated lease payment deferrals through October, and restructured the rent payments for CUP's leased premises. CUP also received the federal wage subsidy program.¹⁰
22. RBC raised concerns in July of 2020 about CUP's loan position, and in particular that CUP was off covenant for the fiscal year ending Dec. 31, 2019 and that the Visa cards had been over their limits. CUP had not been given any notice by Visa of the cards being over limit, and was advised by Visa that this had been due to the pandemic.¹¹ Aside from the Visa cards, CUP was not in any payment default with RBC.¹²
23. RBC nonetheless made demand on CUP on July 29, 2020 for a combined amount of \$837,297.65.¹³ After seeking advice, CUP filed its NOI on August 8, 2020, which was before the expiry of the 10 day period in s. 244 of the BIA for RBC's demand.¹⁴
24. If not for the RBC demand, CUP would not have filed under the BIA.

C. Steps Post NOI filing

25. RBC has in correspondence with counsel for CUP made allegations about CUP's conduct, so CUP's actions since filing the NOI will be set out in more detail.
26. After filing the NOI, CUP continued to operate its business and maintained the expense reduction measures noted above.¹⁵

⁹ October 16 Affidavit, para. 14; Motion Record, Tab 2.

¹⁰ October 16 Affidavit, para. 15; Motion Record, Tab 2.

¹¹ October 16 Affidavit, paras. 18; Motion Record, Tab 2.

¹² October 16 Affidavit, para. 17; Motion Record, Tab 2.

¹³ October 16 Affidavit, para. 20; Motion Record, Tab 2.

¹⁴ October 16 Affidavit, para. 21-22; Motion Record, Tab 2.

¹⁵ October 16 Affidavit, para. 23; Motion Record, Tab 2.

27. CUP also worked both on its own and through the assistance of the Trustee to seek new equity and/or debt financing in order to attempt to repay RBC.
28. CUP engaged PricewaterhouseCoopers Capital Finance LLC to prepare a Confidential Information Memorandum.¹⁶
29. CUP also contacted (either directly or with the assistance of the Trustee) nine sets of investors, venture capital firms or lenders in order to attempt to raise financing. None of those attempts were successful, with the parties either being unwilling to lend against CUP's assets, unwilling to loan other than smaller amounts as DIP loans, or not being prepared to loan funds or make equity injections under the circumstances.¹⁷
30. In the period leading up to the first expiry of the NOI on September 8, 2020, counsel for CUP and for RBC discussed an extension. Counsel for RBC indicated that RBC was prepared to consent to an extension for the purpose of RBC being repaid. That was CUP's plan for its restructuring, so counsel for CUP so noted.
31. Despite CUP's attempts, no takeout financing of RBC's loan proved possible.
32. CUP accordingly concluded that it was required to sell its assets given RBC's position that it wanted its loan repaid.¹⁸
33. In assessing the possibilities for selling its assets, CUP commissioned a report of a CBV to provide guidance on CUP's assets.¹⁹ The valuator reported that valuation of CUP's business revenue was less than what was recorded because only the contracted revenue for ongoing services such as software would be of interest to a third party purchaser, so the marketing revenue that CUP also achieves on a monthly basis was not considered. This

¹⁶ October 16 Affidavit, para. 32(a); Motion Record, Tab 2. Confidential Exhibit "D" to the October 16 Affidavit; Compendium of Canadian Union Promotions Inc., tab 1.

¹⁷ October 16 Affidavit, para. 32(b) to (j); Motion Record, Tab 2.

¹⁸ October 16 Affidavit, paras.33-35; Motion Record, Tab 2.

¹⁹ October 16 Affidavit, para. 38; Motion Record, Tab 2; Confidential Exhibit "F" to the October 16 Affidavit; Compendium of Canadian Union Promotions Inc., tab 2.

accounts for why CUP's cash flow throughout the NOI period has remained positive, which is different from the conclusions of the valuator.²⁰

- 34. In light of that report, management for CUP arranged for the Stalking Horse APA to be offered for a purchase price of \$250,000 plus assumption of the equipment leases. CUP believes that this represents an appropriate level of recovery for RBC as the only creditor who is likely to see any recovery, and an appropriate result for the other stakeholders of CUP such as suppliers, customers and employees.²¹
- 35. Counsel for CUP wrote to RBC to advise of the planned approach that a stalking horse offer on a going concern sale was expected to achieve more benefit than a bankruptcy and a liquidation.²².
- 36. In response, RBC accused CUP of acting in bad faith by now doing something other than seeking to repay RBC. RBC demanded a bankruptcy unless it was provided with additional secured guarantees for its loan.²³
- 37. CUP and its principals are not, however, prepared to grant RBC guarantees now that were not requested when RBC made the loan, or - more to the point - when RBC made demand on that loan in the middle of a pandemic.²⁴

D. Details of the Stalking Horse APA

- 38. The material terms of the Stalking Horse APA include.²⁵

²⁰ October 16 Affidavit, para. 39; Motion Record, Tab 2. Updated cash flow projections, Exhibit "I" to the October 16 Affidavit; Motion Record, Tab 2(I).

²¹ October 16 Affidavit, para. 36; Motion Record, Tab 2.

²² October 16 Affidavit, para. 43; Motion Record, Tab 2; Exhibit "G" to the October 16 Affidavit; Compendium of Canadian Union Promotions Inc., tab 3.

²³ October 16 Affidavit, para. 44; Motion Record, Tab 2; Exhibit "H" to the October 16 Affidavit; Compendium of Canadian Union Promotions Inc., tab 4.

²⁴ October 16 Affidavit, para. 45; Motion Record, Tab 2.

²⁵ Stalking Horse APA, Exhibit "E" to the October 16 Affidavit; Motion Record, Tab 2(E).

- (a) **Purchased Assets** – all property of CUP, including intellectual property in the software it has developed, goodwill, and accounts receivable including the Power Workers Union Claim.
- (b) **Assumed Contracts** – customer contracts and equipment leases.
- (c) **Assumed Obligations** – equipment leases.
- (d) **Conditions** – nothing other than Court approval and no other superior bid.
- (e) **Purchase Price** – \$250,000 (\$25,000 deposit) plus assumption of the equipment leases.
- (f) **Break Fee** – \$7,500.

E. Sale Process

39. The material terms of the proposed sale process are as follows:²⁶

- (a) **Notice** – within five (5) business days of the granting of the Draft Sale Process Order, the Trustee will publish notice of the Sale Process in the *National Post* (National Edition) and distribute teaser letters to potentially interested parties;
- (b) **Data Room** – within five (5) business days of the granting of the Draft Sale Process Order, the Trustee will begin making a confidential data room available to those parties who have signed confidentiality agreements;
- (c) **Bid Deadline** – bids must be submitted to the Trustee no later than 5pm (Toronto time) on November 23, 2020 (the “**Bid Deadline**”);
- (d) **Trustee to Determine Qualified Bids** – among other things, in order for a bid to qualify as a Qualified Bid (as that term is defined in the Draft Sale Process Order), it must be on terms no less favourable than and no more burdensome than the

²⁶ Stalking Horse APA, Schedule G, Exhibit “E” to the October 16 Affidavit; Motion Record, Tab 2(E).

Stalking Horse APA, must not contain any provision for a break fee or expense reimbursement and must contain a purchase price that is at least \$250,000 plus the \$7,500 Break Fee and an additional increment of \$5,000 (i.e. \$262,500). The Proposal Trustee retains sole discretion to determine whether a bid will be considered a Qualified Bid;

- (e) **Auction** – if one or more Qualified Bids are received, the Proposal Trustee will schedule and conduct an auction (the “**Auction**”) no more than five (5) business days after the Bid Deadline. The Proposal Trustee has sole discretion to set the terms of the Auction; and
- (f) **Approval of Sale** – the Companies to seek Court approval of the successful bid within ten (10) business days following the Auction or, if no Qualified Bids are received other than the bid under the Stalking Horse APA, within ten (10) business days of the Bid Deadline.

PART III – ISSUES AND THE LAW

- 40. The issues are (i) whether the court should order the sale process and approve the Stalking Horse APA, including the break fee, and (ii) whether the court should extend the time for CUP to file a proposal.

A. Sale process and Stalking Horse APA

- 41. This Court has jurisdiction to order the proposed sale process and approve the Stalking Horse APA for purposes of constituting the stalking horse bid, including under BIA s. 65.13. Stalking horse sale processes are not a rare occurrence in restructurings, whether NOIs or proceedings under the *Companies’ Creditors Arrangement Act*²⁷ (“**CCAA28 For clarity, the court is for now asked to approve the Stalking Horse APA only for purposes of constituting the stalking horse bid. If the sale process is ordered, CUP will come to court**

²⁷ R.S.C., 1985, c. C-36, section 36.

²⁸ Notable precedents include *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169 (ON SC) [[2009 CanLII 39492](#)] (“**Nortel**”), para. 49, *Colossus Minerals Inc. (Re)*, [2014 ONSC 514](#), paras. 22-25, *Mustang GP Ltd. (Re)*, [2015 ONSC 6562](#) (“**Mustang**”), paras. 36-40 and *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#) (“**Danier Leather**”), paras. 20-35.

at the end of it for approval of the best transaction located, i.e. the one under the Stalking Horse APA or a better one.²⁹

42. In *Nortel*,³⁰ the court set out the following non-exhaustive list of guiding factors: (a) whether a sale is warranted at this time, (b) whether the sale is to benefit the whole “economic community”, (c) whether any of the debtors’ creditors have a *bona fide* reason to object to the sale of the business, and (c) whether there is a better viable alternative.³¹
43. These have been used in NOI proceedings as well. A notable precedent is *Mustang*.³² There the court referenced *CCM*³³ (a receivership) and the *Soundair*³⁴ principles to set out the following additional factors: (a) the fairness, transparency and integrity of the proposed process, (b) the commercial efficacy of the proposed process in light of the specific circumstances of the case, and (c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.³⁵
44. In light of those factors the proposed sale process and the Stalking Horse APA should be approved, including for the following reasons:
 - (a) the process will be run exclusively by the Trustee to ensure fairness and impartiality,
 - (b) through the Stalking Horse APA, the process establishes a floor value while providing an opportunity for superior realization,
 - (c) the Stalking Horse APA itself ensures fair recovery for creditors and that the business will continue,

²⁹ See *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#) (“CCM”), para. 16.

³⁰ *Nortel*.

³¹ *Nortel*, para. 49.

³² *Mustang*.

³³ *CCM*, paras. 6-7; *Danier Leather*, paras. 23-25.

³⁴ [1991] O.J. No. 1137 (ON CA) [[1991 CanLII 2727](#)].

³⁵ *Mustang*, para. 39.

(d) the Trustee is recommending approval of the process including for the following reasons:

- (i) the timeline appears to provide prospective purchasers with sufficient time to complete due diligence and submit competitive bids,
- (ii) putting the assets through a competitive sale process will result in the marketplace determining their value,
- (iii) it is a commonly used method to sell distressed assets in Canadian insolvency proceedings,
- (iv) the Stalking Horse APA, and the sale of CUP's business as a going concern, is expected to provide greater value than CUP's bankruptcy,
- (v) CUP has the cashflow necessary to sustain its businesses during the sale process, and
- (vi) it will accelerate the realization of the assets which is commercially reasonable in the circumstances.

45. On the break fee specifically, those are commonplace in stalking horse agreements and have been permitted provided that they are not so large as to be penal or chill the process. A break fee with additional expense reimbursement of up to 4-5% has been approved.³⁶ Here the break fee is 3%. Further, as seen above, the proposal trustee is recommending approval of the Stalking Horse APA including the break fee, because it is within the range of break fees included in similar sized transactions and because it offers a reasonable balance between its potential adverse effect as a sale deterrent and the offer under the Stalking Horse APA as a sale stimulator.

46. The primary purpose of financial restructurings is "to permit the debtor to carry on business, and, where possible, avoid the social and economic costs of liquidating its

³⁶ See *Danier Leather*, para. 42 (provides references to precedents approving 4% of stalking bid amount break fees and cumulative break fee/expense reimbursements amounts of 5%).

assets.”³⁷ The sale process and stalking horse bid are in the best interests of all stakeholders, including customers, suppliers, creditors and employees, for the reasons set out above.

47. BIA s. 65.13(5) imposes additional considerations for approval of a purchase where a related party is the purchaser. In this case, the valuation report provides a basis to conclude that the Stalking Horse APA would represent a reasonable recovery if no other bidder appears, and the further public sale process will ensure that the Stalking Horse APA is both exposed to market while also preserving a “floor” of recovery for creditors and maintaining CUP’s business as a going concern while doing so.

B. Extension of time to file a proposal

48. BIA s. 50.4(9) sets out the criteria that must be met for the court to order an extension of the time to file a proposal: (a) the insolvent person has acted, and is acting, in good faith and with due diligence; (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and (c) no creditor would be materially prejudiced if the extension being applied for were granted.

49. Here, the extension would be to effect the sale process, assuming it is ordered. As seen above, CUP is acting in good faith and with due diligence, the sale process is part of the process to formulate a viable proposal, and stakeholders (including creditors) will, on a balance, receive more value from the Stalking Horse APA and the process than in bankruptcy.

50. The allegations by RBC in its correspondence that CUP has not acted in good faith are misplaced. CUP did attempt to do what it said it intended to do when seeking the first NOI extension. RBC’s real complaint seems to be that this did not work, and that RBC may now not recover all of its loan in circumstance when it was the one who precipitated the insolvency event, as indicated by RBC’s new demand that it be given additional security.

³⁷ *Century Services Inc. v Canada (Attorney General)*, [2010 SCC 60](#), para. 15; *9354-9186 Québec inc. v Callidus Capital Corp.*, [2020 SCC 10](#), Tab 7 of the Brief, para. 41.

If RBC does not recover its full loan, its actions will have yielded that result, not anything that CUP has done (or not done) since the filing of the NOI.

PART IV – NATURE OF THE ORDER SOUGHT

51. CUP therefore seeks an order in the form of the draft Sale Order filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of October, 2020.



R. Brendan Bissell,
counsel for Canadian Union Promotions Inc.

SCHEDULE A – LIST OF AUTHORITIES

1. *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169 (ON SC), [2009 CanLII 39492](#)
2. *Colossus Minerals Inc. (Re)*, [2014 ONSC 514](#)
3. *Mustang GP Ltd. (Re)*, [2015 ONSC 6562](#)
4. *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#)
5. *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#)
6. *Royal Bank of Canada v Soundair Corp.*, [1991] O.J. No. 1137 (ON CA) [\[1991 CanLII 2727\]](#)
7. *Century Services Inc. v Canada (Attorney General)*, [2010 SCC 60](#)
8. *9354-9186 Québec inc. v Callidus Capital Corp.*, [2020 SCC 10](#)

SCHEDULE B – RELEVANT STATUTES

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

Notice of intention

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

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

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

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

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

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

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

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

- Court may not extend time**

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

Court may terminate period for making proposal

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

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

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

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(4) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b)** whether the trustee approved the process leading to the proposed sale or disposition;

- (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

- (5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that
 - (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
 - (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

- (6) For the purpose of subsection (5), a person who is related to the insolvent person includes
 - (a) a director or officer of the insolvent person;
 - (b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and
 - (c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

- (7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

- (8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, s. 36:

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b)** whether the monitor approved the process leading to the proposed sale or disposition;
- (c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d)** the extent to which the creditors were consulted;
- (e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

- (a)** good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- (b)** the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

- (a)** a director or officer of the company;
- (b)** a person who has or has had, directly or indirectly, control in fact of the company; and
- (c)** a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL
OF CANADIAN UNION PROMOTIONS INC., A CORPORATION
INCORPORATED UNDER THE *CANADIAN BUSINESS CORPORATIONS ACT*

Estate No. 31-2663507

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced in TORONTO

**FACTUM OF CANADIAN UNION
PROMOTIONS INC.**

**(Stay Extension and Approval of Sale Process and
Stalking Horse Agreement)
(Motion Returnable [...])**

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