

District of: Ontario
Division No.: 09-Toronto
Court No.: 31-2547832
Estate No.: 31-2547832

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

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF 3070
ELLESMERE DEVELOPMENTS INC.**

FACTUM OF 3070 ELLESMERE DEVELOPMENTS INC.

September 10, 2019

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TO: **SERVICE LIST**

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PART I - INTRODUCTION

1. This is a motion by 3070 Ellesmere Developments Inc. (“**Ellesmere**”) for an order, among other things, approving a stalking horse purchase agreement and related sale process for its real property, appointing a restructuring advisor, granting a charge over its property for certain administrative costs related to the within proposal proceedings, and the extending of the stay of proceedings.
 2. Ellesmere filed a notice of intention to make a proposal on August 20, 2019, so that it could implement the sale process described herein to maximize the value of its real property for the benefit of all its stakeholders.
 3. The Proposal Trustee (defined below) supports the relief sought by Ellesmere.
-

PART II - SUMMARY OF FACTS

A. Background: Ellesmere's Business

4. Ellesmere is a privately-held Ontario corporation that carries on business as a real estate holding company. Ellesmere owns a vacant parcel of land municipally known as 3070 Ellesmere Road, Scarborough, Ontario, M1E 4C3 (the "**Property**").¹

5. Ellesmere purchased the Property on January 24, 2014, with the intention of developing a 26-storey condominium tower, including retail and commercial space as well as 339 residential units (the "**Project**").²

6. In 2016, Ellesmere was introduced to the principals of 2518358 Ontario Inc. ("**Rise**"). Rise's principals have experience with design and construction of student housing in Ontario.³

7. Ellesmere and Rise entered into a joint venture agreement for the Project on May 13, 2016 (the "**Joint Venture Agreement**"). The Joint Venture Agreement was amended by an agreement dated November 11, 2016 (with the Joint Venture Agreement, the "**Amended Joint Venture Agreement**").⁴

8. The terms of the Amended Joint Venture Agreement included, among other terms:⁵

- (a) the joint venture would continue until all residential dwelling units were constructed or sold;
- (b) thirty days after the commencement of excavation of the Property, title would be conveyed to a nominee corporation to hold title in trust for

¹ Affidavit of Tong Liu, sworn August 29, 2019 ("**Liu Affidavit**") at paras 4-5 (Motion Record of Ellesmere ("**MR**") at Tab 2, p 39).

² Liu Affidavit at para 6 (MR at Tab 2, p 39).

³ Liu Affidavit at para 8 (MR at Tab 2, p 39).

⁴ Liu Affidavit at paras 9, 10, Exhibits "D" and "E" (MR at Tab 2, pp 39-40, Tabs 2D, 2E).

⁵ Liu Affidavit at para 11, Exhibit "D" and "E" (MR at Tab 2, p 40, Tabs 2D, 2E).

Ellesmere and Rise, and Ellesmere would convey a 50% beneficial interest in the Property to Rise, subject only to a pre-existing charge to Cameron Stephens Financial Corporation ("**Cameron Stephens**"), which would be assumed by the joint venture;

- (c) Ellesmere's initial contribution of \$8 million to the Project was acknowledged and it was agreed that Rise would fund any additional equity contributions required until it had also contributed \$8 million;
- (d) a \$2 million charge would be granted to Rise against the Property to secure costs and expenses that Rise may incur which would be discharged when title was transferred to the nominee corporation; and
- (e) profits from the Project would be split 50/50.

9. Rise was responsible for the construction of the Project. To that end, in September 2016, Rise and Ellesmere entered into a "**Construction and Project Management Agreement**" with 2135136 Ontario Inc. ("**Rise Development**"), a company affiliated with Rise, for the development and construction of the Project.⁶

10. Despite their obligations, Rise and Rise Development (together "**Rise**") breached the Amended Joint Venture Agreement and the Construction and Project Management Agreement, respectively, in that they:⁷

- (a) failed to complete site plan revision or otherwise secure construction permits from the City of Toronto;
- (b) failed to take necessary steps to proceed with construction of the Project, including but not limited to initiation of excavation in April 2017;

⁶ Liu Affidavit at para 12 (MR at Tab 2, pp 40-41).

⁷ Liu Affidavit at para 13 (MR at Tab 2, p 41).

- (c) failed to seek or secure construction financing for the Project;
- (d) failed to make payments in respect of the Property and the Project to equalize equity; and
- (e) generally took all steps to frustrate the development of the Project.

11. Rise and Ellesmere are currently litigating with each other in relation to their rights in the Project.⁸

B. Ellesmere's Creditors

i. Secured Creditors

12. On December 22, 2014, Cameron Stephens entered into a loan agreement with Ellesmere wherein Cameron Stephens loaned Ellesmere \$5,000,000 (the "**Cameron Stephens Loan Agreement**"). Cameron Stephens registered a charge against the Property in the amount of \$5,000,000 (the "**Cameron Stephens Charge**"). The Cameron Stephens Loan Agreement was extended on May 31, 2016 for a period of six months.⁹

13. On August 31, 2016, Toronto Capital Corp., as agent for a group of individual lenders (collectively "**TCC**"), entered into a loan agreement with Ellesmere and certain related entities wherein TCC loaned Ellesmere and certain related entities \$5,000,000 (the "**TCC Loan Agreement**"). TCC registered a charge against the Property in the amount of \$5,000,000 (the "**TCC Charge**").¹⁰

14. One of the lenders that is a beneficiary of the TCC Charge is 2478888 Ontario Inc. ("**247**").¹¹

⁸ Liu Affidavit at para 15, Exhibit "H" (MR at Tab 2, p 41, Tab 2H).

⁹ Liu Affidavit at para 17 (MR at Tab 2, p 42).

¹⁰ Liu Affidavit at para 18 (MR at Tab 2, p 42).

¹¹ Liu Affidavit at para 19 (MR at Tab 2, p 42).

15. Ellesmere first defaulted on the Cameron Stephens Loan Agreement in and around December 2017.¹²

16. In and around January 2018, 247 paid Cameron Stephens \$5,218,776.21 on account of all amounts owed under the Cameron Stephens Loan Agreement. 247 made this payment to protect the TCC Charge (the "**TCC Protective Disbursement**"). TCC added the TCC Protective Disbursement to the TCC Charge.¹³

17. The Cameron Stephens Charge was discharged on October 10, 2018.¹⁴

18. On May 18, 2018, 2615333 Ontario Inc. ("**261**") purchased the TCC Loan Agreement and the associated debt (but not the TCC Protective Disbursement), which at the time was \$5,758,665.53 (the "**Assignment Transaction**").¹⁵

19. 261 did not register the Assignment Transaction on title to the Property. 261 is an Ontario corporation operated by Xiao Dong Zhu, which is a person that is arm's length from 247 and Ellesmere.¹⁶

20. Also, on May 18, 2018, TCC assigned the TCC Charge to 247 alone.¹⁷

21. 247 and 261 entered into an Inter-Lender Agreement wherein 261 agreed to subordinate the interest it acquired pursuant to the Assignment Transaction to 247's interest as a result of the TCC Protective Disbursement.¹⁸

22. The result of these collective transactions is as follows:¹⁹

- a. 247 is the first mortgagee pursuant to the terms of the Cameron Stephens Loan Agreement (the "**First Mortgagee**"). The principal amount owed to

¹² Liu Affidavit at para 20 (MR at Tab 2, p 42).

¹³ Liu Affidavit at para 21 (MR at Tab 2, p 43).

¹⁴ Liu Affidavit at para 22 (MR at Tab 2, p 43).

¹⁵ Liu Affidavit at para 23 (MR at Tab 2, p 43).

¹⁶ Liu Affidavit at para 24 (MR at Tab 2, p 43).

¹⁷ Liu Affidavit at para 25 (MR at Tab 2, p 43).

¹⁸ Liu Affidavit at para 26 (MR at Tab 2, p 43).

¹⁹ Liu Affidavit at para 27 (MR at Tab 2, pp 43-44).

247 on account of this position, as at August 14, 2018, was \$5,758,665.53. Interest and legal fees continue to accrue; and

- b. 261 is the second mortgagee pursuant to the terms of the TCC Loan Agreement. The principal amount owed to 261 on account of this position, as at August 14, 2018, was \$5,218,776.21. Interest and legal fees continue to accrue.

23. On August 14, 2018, 247 issued a notice of intention to enforce security ("**NITES**"). 247 has not taken any other enforcements steps in connection with its NITES.²⁰

ii. Rise Charge

24. Rise asserts that it has a second-ranking priority charge in the amount of \$2 million registered against the Property pursuant to the terms of the Amended Joint Venture Agreement. Ellesmere disputes Rise's entitlement to this charge. The validity of the charge is subject to the litigation between Rise and Ellesmere.²¹

iii. Other Creditors

25. Ellesmere also has four judgment creditors, including two with orders that restrict the disposition of the Property. 244988 Ontario Inc., in its capacity as a shareholder of Ellesmere, commenced an action against Ellesmere and others (the "**244 Defendants**") for, among other things, oppression for Ellesmere's failure to construct the Project. On February 26, 2019, 244 Ontario obtained a default judgment against the 244 Defendants which directed the defendants to pay 244 Ontario \$3.2 million (the "**244 Judgment**") and enjoined Ellesmere from taking any steps to sell or otherwise encumber the Property.²²

26. In addition to the 244 Judgment, the Property is also subject to a certificate of pending litigation (the "**CPL Order**") in an action by three individuals who entered into

²⁰ Liu Affidavit at para 28 (MR at Tab 2, p 44).

²¹ Liu Affidavit at paras 29-30 (MR at Tab 2, p 44).

²² Liu Affidavit at para 35, Exhibit "T" (MR at Tab 2, p 45, Tab 2T).

contracts with Ellesmere for the right to purchase units in the Project (the “**CPL Action**”).²³

27. Ellesmere’s remaining creditors are the Canada Revenue Agency, the City of Toronto, Ellesmere’s counsel and consultants and real estate agents retained in connection with the Project, lenders and a few non-arm’s length entities.²⁴

C. Decision to File NOI, Appointment of CRA and Professional Group

28. As a result of Rise’s failure to inject the necessary equity and advance the Project, including securing construction financing and commencing construction, Ellesmere was rendered insolvent. Worsening the circumstance is the fact that Rise takes the position that it is the aggrieved party and therefore can block Ellesmere from advancing joint venture discussions with alternative partners. This is the sole reason that Ellesmere is unable to advance the Project and was forced to initiate the Informal Sales Process (defined below) and execute the Stalking Horse Purchase Agreement (defined below).²⁵

29. Given the restrictions imposed upon Ellesmere arising from the 244 Judgment and Ellesmere’s illiquidity, it became clear that the only path forward to selling the Property was through a court-supervised process in an insolvency proceeding.²⁶

30. As such, Ellesmere made the decision to file the NOI and Crowe Soberman Inc. was appointed proposal trustee (the “**Proposal Trustee**”). The NOI was filed on August 20, 2019 (the “**Proposal Proceeding**”).²⁷

²³ Liu Affidavit at para 36, Exhibit “U” (MR at Tab 2, p 45, Tab 2U).

²⁴ Liu Affidavit at paras 31, 32, 34, 38 (MR at Tab 2, pp 44-46).

²⁵ Liu Affidavit at para 60 (MR at Tab 2, p 52).

²⁶ Liu Affidavit at para 61 (MR at Tab 2, p 52).

²⁷ Liu Affidavit at para 62, Exhibit “X” (MR at Tab 2, p 53, Tab 2X).

31. To facilitate the Proposal Proceeding, Ellesmere seeks the appointment of FAAN Advisors Group Inc. ("**FAAN**") as chief restructuring advisor of the company ("**CRA**") to provide financial, strategic and sales process advice to Ellesmere pursuant to the terms of a letter agreement dated September 11, 2019 (the "**CRA Agreement**"). Ellesmere has determined that FAAN's restructuring expertise and experience will assist Ellesmere in successfully completing the SISP (defined below) and maximizing returns to the company's creditors.²⁸

32. As part of the Proposal Proceeding, the Proposal Trustee, counsel to the Proposal Trustee, counsel to Ellesmere, and the CRA (collectively, the "**Professional Group**") are seeking an administrative charge in the maximum aggregate amount of \$500,000 against all of Ellesmere's assets ("**Administration Charge**").²⁹

33. The Professional Group is requesting that the Administration Charge rank ahead of all secured and unsecured creditors except for the portion of the TCC Charge in favour of the First Mortgagee and a charge in favour of the Stalking Horse Purchaser (defined below).³⁰

D. Sales Process and Stalking Horse Purchaser

34. Ellesmere has been actively marketing the Property since October 2018. During this period Ellesmere has engaged listing agents to assist it in these marketing efforts (the "**Informal Sales Process**"). During the Informal Sales Process, Ellesmere received

²⁸ Liu Affidavit at para 63 (MR at Tab 2, p 53).

²⁹ Liu Affidavit at para 76 (MR at Tab 2, p 56).

³⁰ Liu Affidavit at para 77 (MR at Tab 2, p 56).

numerous offers from prospective purchasers and was close to consummating a sale transaction with at least three different purchasers.³¹

35. On August 9, 2019, CoStone Development Inc. and Campus Suites Inc. (together, the "**Stalking Horse Purchaser**") submitted a firm offer to purchase the Property. Ellesmere and the Stalking Horse Purchaser negotiated from this firm offer and executed a binding unconditional agreement on August 19, 2019 (the "**Stalking Horse Purchase Agreement**").³²

36. The key terms of the Stalking Horse Purchase Agreement include:³³

- (a) purchase of the Property on an as is, where is, basis for a purchase price of \$16,000,000 (the "**Purchase Price**"), which amount is to act as the net minimum recovery for the Property pursuant to the SISP³⁴;
- (b) payment of \$1,600,000 as a deposit;
- (c) authorization that Ellesmere is permitted to use a portion of the deposit to fund certain expenses;
- (d) an adjustment in favour of the Purchaser should the cost of remediation, as determined by an environmental remediation plan approved by the City of Toronto, exceed \$2,000,000;
- (e) conditions precedent that the Court issue an Approval and Vesting Order and that the Proposal Trustee declare the Stalking Horse Purchaser the winner of the SISP (collectively the "**Conditions**"); and
- (f) a closing date that is ten days after the Conditions have been satisfied.

³¹ Liu Affidavit at paras 39-40 (MR at Tab 2, p 46).

³² Liu Affidavit at para 42 (MR at Tab 2, p 56).

³³ Liu Affidavit at para 43 (MR at Tab 2, pp 47-48).

³⁴ Capitalized terms not defined herein shall have the meaning described in the Stalking Horse Purchase Agreement.

37. The Stalking Horse Purchase Agreement is an integral part of a sale process for the Property (the "**SISP**"). The key terms of the SISP, which are appended to the Stalking Horse Purchase Agreement, include:³⁵

- (a) potential purchasers must submit Bids by no later than November 7, 2019 (the "**Bid Deadline**"); and
- (b) for a potential bidder to qualify to participate in an auction it must submit a bid that:
 - (i) exceeds the Purchase Price, plus the Break Fee (\$400,000) and the First Overbid Increment (\$100,000);
 - (ii) is unconditional and irrevocable; and
 - (iii) includes a deposit that is 10% of the amount that they bid.

38. The Proposal Trustee will review all offers received by the Bid Deadline and determine whether an auction is necessary. If an auction is necessary, the Proposal Trustee will follow the auction guidelines as are described in the SISP.³⁶

39. The SISP will be directly overseen by the Proposal Trustee with assistance from Avison Young Commercial Real Estate (Ontario) Inc., the CRA and Ellesmere's management.³⁷

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

A. Approval of Stalking Horse Purchase Agreement and SISP

40. Ellesmere submits that the Stalking Horse Purchase Agreement and the SISP should be approved because they will maximize the return on the Property for the benefit

³⁵ Liu Affidavit at para 45 (MR at Tab 2, pp 48-49).

³⁶ Liu Affidavit at para 46 (MR at Tab 2, p 49).

³⁷ Liu Affidavit at para 47 (MR at Tab 2, p 49).

of all of Ellesmere's stakeholders. A sale process with a stalking horse agreement "maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process."³⁸

41. In determining whether to approve a sale process, a court should consider whether:³⁹

- (a) a sale transaction is warranted;
- (b) the sale will benefit the whole "economic community";
- (c) the debtor's creditors have a bona fide reason to object to the sale; and
- (d) there is a better alternative.

42. The factors set out in section 65.13 of the BIA are also indirectly relevant in deciding whether to approve a SISP.⁴⁰ Section 65.13 of the BIA provides that in deciding whether to approve a sale of a debtor's assets a court should consider:⁴¹

- (a) Whether the sale process is reasonable in the circumstances;
- (b) Whether the trustee has approved the sale process;
- (c) Whether the trustee has filed a report stating that in the trustee's opinion the sale would be more beneficial to creditors than a sale under a bankruptcy;
- (d) The extent to which the debtor's creditors have been consulted;
- (e) The effects of the proposed sale on creditors and other interested parties;
and
- (f) Whether the consideration to be received for the assets is reasonable.

³⁸ *Re Danier Leather Inc.*, 2016 ONSC 1044 at para 20 (Brief of Authorities of Ellesmere ("BOA") at Tab 1).

³⁹ *Re Danier Leather Inc.*, 2016 ONSC 1044 at para 23 (BOA at Tab 1); *Re Mustang GP Ltd.*, 2015 ONSC 6562 at para 37 (internal quotations omitted) (BOA at Tab 2).

⁴⁰ *Re Danier Leather Inc.*, 2016 ONSC 1044 at para 34 (BOA at Tab 1); *Re Colossus Minerals Inc.*, 2014 ONSC 514 at para 22 (BOA at Tab 3).

⁴¹ BIA, s. 65.13.

43. In *Re Danier Leather Inc.*, the court approved a proposed sale process and stalking horse agreement that provided for the liquidation of the debtor's assets where, among other reasons (i) the debtor would be cash flow negative for the next six months and could not borrow to finance its operations, (ii) the stalking horse agreement established a floor price for the debtor's inventory, and (iii) the proposed sale process would be open and transparent.⁴² The Court also noted that the sale process was reasonable because it was flexible, the proposal trustee supported the sale process and viewed it as reasonable and appropriate in the circumstances, the duration of the sale process was reasonable and appropriate in light of the debtor's financial circumstances, and the consideration in the stalking horse purchase agreement was a fair and reasonable benchmark for bids in the sale process.⁴³

44. Ellesmere submits that the Stalking Horse Purchase Agreement and SISP should be approved. A sale of the Property is warranted at this time. Ellesmere is insolvent, and it is unable to pay its creditors absent a sale of the Property. 247 has issued a NITES and there are two orders restricting Ellesmere's ability to deal with the Property.

45. Further, the SISP has been designed to maximize realizations for all of Ellesmere's creditors while at the same time guaranteeing a minimum purchase price that is more than the total amount owed to Ellesmere's secured creditors.

46. While certain of Ellesmere's secured creditors have objected to the SISP, it is unclear what the basis of their objection is other than that the secured creditors do not want Ellesmere to control the sale. However, Ellesmere is not administering the SISP—the Proposal Trustee is. Any sale of the Property will also be subject to court

⁴² *Re Danier Leather Inc.*, 2016 ONSC 1044 at paras 29-32 (BOA at Tab 1).

⁴³ *Re Danier Leather Inc.*, 2016 ONSC 1044 at paras 36-40 (BOA at Tab 1).

approval. No basis has been provided for why the Proposal Trustee cannot effectively oversee the SISP.

47. There is also no superior alternative to the SISP. Ellesmere's secured creditors apparently want the Property to be sold, albeit through a receiver. However, the secured creditors have not identified a receiver who has consented to act, there is no evidence that the secured creditors have obtained an offer that is superior to that of the Stalking Horse Purchase Agreement, and there is no evidence that a sale will be concluded before November 30, 2019. Any sale conducted through a receivership proceeding would likely take longer than the proposed SISP, to the expense of Ellesmere's unsecured creditors, because the secured creditors would continue to earn interest while the receiver develops and carries out a sales process.

48. Although not directly relevant, Ellesmere submits that it has satisfied the criteria under section 65.13 of the BIA. The SISP and the consideration offered under the Stalking Horse Purchase Agreement are reasonable because the SISP has been designed to maximize the value of the Property for the benefit of all of Ellesmere's stakeholders. The Proposal Trustee approves of the SISP and the Stalking Horse Purchase Agreement.⁴⁴

49. The SISP and the Stalking Horse Purchase Agreement do not prejudice Ellesmere's creditors because the Purchase Price exceeds the total amount owed to Ellesmere's secured creditors as of August 2018.

50. Accordingly, Ellesmere submits that the SISP and Stalking Horse Purchase Agreement should be approved.

⁴⁴ First Report of Crowe Soberman Inc. in its capacity as Proposal Trustee of 3070 Ellesmere Developments Inc., dated September 10, 2019 at paras 36-37 (the "**First Report**").

B. Break Fee is Reasonable

51. Ellesmere submits that the Break Fee is reasonable because it is 2.5% of the purchase price in the Stalking Horse Purchase Agreement. A break fee is “the price of stability” and not merely the “cost to the purchaser of putting together the stalking horse bid.” As a result, “some premium over simply providing for out of pocket expenses may be expected.”⁴⁵ Break fees in the range of 3% have been considered reasonable by courts.⁴⁶

52. The Break Fee is 2.5% of the purchase price offered by the Stalking Horse Purchaser and therefore is within the range that courts have considered reasonable. Further, the Proposal Trustee has reviewed the break fee and concluded that it is reasonable.⁴⁷

C. Administration Charge Should be Approved

53. Ellesmere submits that the Administration Charge should be approved because the participation of the Professional Group is necessary to ensure the success of the Proposal Proceedings. Section 64.2 of the BIA provides that a court may grant a charge in favour of the financial, legal or other professionals involved in proposal proceedings.⁴⁸ An administration charge has been approved where the charge secures the fees of professionals who’s services are necessary for a successful proposal proceeding.⁴⁹

⁴⁵ *Re Danier Leather Inc.*, 2016 ONSC 1044 at para 41 (BOA at Tab 1).

⁴⁶ *Re Danier Leather Inc.*, 2016 ONSC 1044 at para 42 (citing *Re Nortel Networks Corp.*, [2009] OJ No 4293 (Ont SCJ [Commercial List]), *Re W.C. Wood Corp.*, [2009] OJ No 4808 (Ont SCJ [Commercial List])) (BOA at Tab 1).

⁴⁷ First Report at para 28.

⁴⁸ BIA, s. 64.2.

⁴⁹ *Re Danier Leather Inc.*, 2016 ONSC 1044 at para 57 (BOA at Tab 1); *Re Colossus Minerals Inc.*, 2014 ONSC 514 at para 13 (BOA at Tab 3).

54. The services of the Professional Group are necessary to ensure the success of the Proposal Proceedings. Absent the Administration Charge, the Professional Group are unlikely to participate in the proceedings. The quantum of the charge is reasonable given the nature of the SISP.⁵⁰ Those creditors who will be primed by the charged have been provided with notice.

D. Receivership is Not Just or Convenient

55. 247 has suggested in correspondence to Ellesmere that it intends to oppose this motion and seek the appointment of a receiver. Ellesmere submits that a receivership is not just or convenient. A secured creditor may appoint a receiver under section 243(1) of the BIA if it is just and convenient.⁵¹ Similarly, a receiver may also be appointed under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (“**CJA**”) on the same basis.⁵²

56. In *Re Atsana Semiconductor Corp.*, the court dismissed a creditor’s application for the appointment of an interim receiver where the appointment would be redundant in light of a proposal trustee who “will be maintaining a close eye on the management of [the debtor’s] assets and on any proposed sale of those assets.”⁵³ The court further reasoned that while a sale of the debtor’s assets was proposed, no sale would occur without the support of the proposal trustee and the court’s approval. The court also noted that a receiver “would not be beneficial to [the debtor’s] creditors if money were diverted to fund

⁵⁰ *Re Danier Leather Inc.*, 2016 ONSC 1044 at para 58 (BOA at Tab 1); *Re Colossus Minerals Inc.*, 2014 ONSC 514 at para 14 (BOA at Tab 3).

⁵¹ BIA, s. 243(1).

⁵² CJA, s. 101.

⁵³ [2005] OJ No 3242 at para 20 (Ont SCJ) (BOA at Tab 4).

the appointment of an interim receiver, when one is not necessary to protect the creditors' valid interests."⁵⁴

57. The court in *Re Atsana Semiconductor Corp.* also noted that the creditor had not acted with clean hands because its motion materials were served late and it had tried to elicit information about the proposed sale from the debtor's employees. The court expressed concern that the creditor might be a competitor to the proposed purchaser of the debtor's assets. The court reasoned that "the goal of the court should be to fairly protect the rights of all creditors, and not to do anything that places the interests of one creditor ahead those of the others."⁵⁵

58. Similarly, in *Trez Capital Corp. v. UC Investments Inc.*, the Nova Scotia Supreme Court refused to appoint an interim receiver over debtors in a proposal proceeding where the proposal trustee opposed the application. In its report, the proposal trustee stated that the debtors were acting in good faith, no creditors would be materially prejudiced, there was overlap between the duties of an interim receiver and a proposal trustee, the debtors were required to receive and account to the court for all income generated by its property, the debtors were taking steps to safeguard their assets and the costs of an interim receiver outweighed any possible benefit. The court agreed with the proposal trustee and reasoned that the proposal trustee was carrying out many of the same duties that a receiver would carry out. This duplication, according to the court, would increase costs and mean less money for the debtor's creditors.⁵⁶

59. In *Royal Bank of Canada v. OVG Inc.*, the court applied the factors set out in section 50.4(11) of the BIA and dismissed a secured creditor's motion to terminate a

⁵⁴ [2005] OJ No 3242 at para 22 (Ont SCJ) (BOA at Tab 4).

⁵⁵ [2005] OJ No 3242 at para 23 (Ont SCJ) (BOA at Tab 4).

⁵⁶ 2013 NSSC 381 at paras 69-71 (BOA at Tab 5).

debtor's proposal proceedings and appoint a receiver because (i) the debtor was acting in good faith to find a purchaser, financier or strategic partner, (ii) the secured creditor could not establish that the debtor would not be able to formulate a viable proposal; and (iii) there was no evidence that the debtor's creditors as a whole would be materially prejudiced.⁵⁷ The court noted that if the secured creditor was repaid in full, the secured creditor's opposition would not affect the outcome of any possible proposal because the unsecured portion of its claim was small in relation to the total amount of unsecured creditors' claims.⁵⁸

60. Ellesmere submits that it is not just or convenient to appoint a receiver. The sole goal of a receivership is for a secured creditor to realize on its security. Ellesmere is proposing a sales process to maximize the realization of the Property within the next two months. It is unlikely that a receiver could monetize the Property this quickly, particularly where there is no evidence that Ellesmere's secured creditors have retained an insolvency professional that is willing to act as a receiver.

61. More importantly, Ellesmere's secured creditors have not guaranteed a minimum return of \$16 million to Ellesmere's creditors through any receivership proceeding.

62. Further, the proposed SISP is being administered by the Proposal Trustee who is a licensed insolvency trustee. The Proposal Trustee, like the proposal trustees in *Re Atsana Semiconductor Corp. and Trez Capital Corp. v. UC Investments Inc.*, is performing many of the same duties that any prospective receiver would perform including overseeing the SISP and Ellesmere's receipts and disbursements. A

⁵⁷ 2013 ONSC 1908 at para 27 (BOA at Tab 6).

⁵⁸ *Royal Bank of Canada v. OVG Inc.*, 2013 ONSC 1908 at para 27 (BOA at Tab 6).

receivership would only increase professional costs which would ultimately reduce any potential distributions to Ellesmere's unsecured creditors.

63. Moreover, the Proposal Proceedings preserve Ellesmere's ability to defend its litigation against Rise and increase recoveries to its unsecured creditors if Rise's charge is ultimately declared invalid. It is unknown whether a secured creditor would fund this litigation.

64. It is also worth noting that 247 issued its NITES thirteen months ago. In the past year, 247 has taken no steps to realize its security. If 247 was concerned that its security was dissipating it presumably would have taken steps in the interim to protect the Property. It did not.

65. Similarly, 261 has not taken any steps to enforce its security, including the issuance of a notice of intention to enforce security.

66. The Proposal Proceedings will maximize recoveries for all creditors, not just Ellesmere's secured creditors.

67. As a result, Ellesmere submits that a receivership proceeding is not just or convenient.

E. Extension of the Stay

68. Ellesmere submits that the stay of proceedings should be extended. Pursuant to section 50.4(9) of the BIA, a court may extend the initial 30 day stay of proceedings up to 45 days if:⁵⁹

- (a) the debtor is acting in good faith and with due diligence;
- (b) the debtor is likely to make a viable proposal if the extension is granted; and

⁵⁹ BIA, s. 50.4(9); *Re Mustang GP Ltd.*, 2015 ONSC 6562 at para 41 (BOA at Tab 2).

(c) no creditor will be prejudiced if the extension is granted.

69. Ellesmere submits that it is acting in good faith and with due diligence. Ellesmere seeks an extension of the stay with a view to maximizing value for its stakeholders through the SISP.⁶⁰

70. Further, Ellesmere requires additional time to complete the SISP so that it can make a proposal to its creditors.⁶¹ An extension of the stay of proceedings will increase the likelihood that it will be able to formulate such a proposal.

71. Ellesmere also submits that none of its creditors will be prejudiced if the stay is extended. The SISP will proceed during the extension period with the goal of maximizing the realization of the Property.

72. Ellesmere's forecasted cash flows demonstrate that it is expected to be able to meet its financial obligations during the stay extension period.

73. Finally, the Proposal Trustee supports the extension of the stay.⁶²

F. Sealing Order

74. Ellesmere submits that the rates charged by FAAN to Ellesmere, as set out in the CRA Agreement, should be sealed because it is necessary to protect a commercial interest. A court may seal a document pursuant to section 137(2) of the CJA.⁶³ A document may be sealed if it is necessary to prevent a serious risk to an important interest, including a commercial one.⁶⁴ In insolvency proceedings, courts have granted

⁶⁰ *Re Colossus Minerals Inc.*, 2014 ONSC 514 at para 39 (BOA at Tab 3).

⁶¹ *Re Mustang GP Ltd.*, 2015 ONSC 6562 at para 41 (BOA at Tab 2).

⁶² First Report at para 49.

⁶³ CJA, s. 137(2).

⁶⁴ *Re Danier Leather Inc.*, 2016 ONSC 1044 at para 81 (citing *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para 53) (BOA at Tab 1).

sealing orders over confidential or commercially sensitive documents to protect the interests of stakeholders.⁶⁵

75. The CRA Agreement contains sensitive commercial information about the rates charged by FAAN to Ellesmere. The disclosure of these rates could harm FAAN's competitive advantage in the marketplace of restructuring advisors. The only information being withheld from public access is the rates charged by FAAN—the terms of the CRA Agreement are otherwise public.

76. The salutary effect of disclosing the rates in the agreement outweighs the deleterious effects of not sealing the agreement—the lack of public access to three rates in a single document in the Proposal Proceedings.⁶⁶

77. Accordingly, Ellesmere submits that the rates charged by the CRA should be sealed.

PART IV - ORDER REQUESTED

78. Ellesmere therefore requests orders:

- (a) appointing FAAN as CRA of Ellesmere;
- (b) approving the first report of the Proposal Trustee, to be filed, and the conduct and activities of the Proposal Trustee as described therein;
- (c) granting the following priority charges over the property of Ellesmere:
 - (i) a charge in favour of the Stalking Horse Purchaser up to a maximum of \$622,000;
 - (ii) a charge in favour of the Professional Group;
- (d) approving the terms of the Stalking Horse Purchase Agreement;

⁶⁵ *Re Danier Leather Inc.*, 2016 ONSC 1044 at para 82 (BOA at Tab 1).

⁶⁶ *Re Danier Leather Inc.*, 2016 ONSC 1044 at para 85 (BOA at Tab 1).

- (e) approving the SISP;
- (f) approving the retention of Avison Young Commercial Real Estate (Ontario) Inc. as sales process agent for the SISP;
- (g) extending the time to file a proposal from September 19, 2019 to November 1, 2019;
- (h) sealing Confidential Exhibit "A" to the Affidavit of Tong Liu, to be sworn; and
- (i) such other relief as this Honourable Court may deem just

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of September, 2019.



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Inc.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re Danier Leather Inc.*, 2016 ONSC 1044
2. *Re Mustang GP Ltd.*, 2015 ONSC 6562
3. *Re Colossus Minerals Inc.*, 2014 ONSC 514
4. *Re Atsana Semiconductor Corp.*, [2005] OJ No 3242 (Ont SCJ)
5. *Trez Capital Corp. v. UC Investments Inc.*, 2013 NSSC 381
6. *Royal Bank of Canada v. OVG Inc.*, 2013 ONSC 1908

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Extension of time for filing proposal

50.4(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 order security or charge to cover certain costs

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

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

Priority

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

Restriction on disposition of assets

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

...

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

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a)** take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

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

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

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

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF 3070 ELLESMERE DEVELOPMENTS INC.

District of: Ontario
Division No.: 09-Toronto
Court No.: 31-2547832
Estate No.: 31-2547832

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**PROCEEDING COMMENCED AT
TORONTO**

MOVING PARTY'S FACTUM

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