

Court File No. 31-2587191
Estate File No. 31-2587191

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

IN BANKRUPTCY AND INSOLVENCY

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
TRADE SECRET WEB PRINTING INC., OF THE CITY OF ETOBICOKE, IN THE
PROVINCE OF ONTARIO**

**CROWE SOBERMAN INC., in its capacity as
Licensed Insolvency Trustee of Trade Secret Web Printing Inc.**

**FACTUM OF THE MOVING PARTY, TRADE SECRET WEB PRINTING INC.
(Motion Returnable December 16, 2019)**

Dated: December 13, 2019

BLANEY McMURTRY LLP
Barristers and Solicitors
1500 - 2 Queen Street East
Toronto, ON M5C 3G5

David Ullmann (LSO #423571)
Tel: (416) 596-4289
Fax: (416) 594-2437
dullmann@blaney.com

Mervyn D. Abramowitz (LSO #28325R)
Tel: (416) 597-4887
Fax: (416) 593-3396
mabramowitz@blaney.com

Alex Fernet Brochu (LSO #77644D)
Tel: (416) 593-3937
Fax: (416) 596-2140
afernetbrochu@blaney.com

Lawyers for the Moving Party, Trade Secret
Web Printing Inc.

TO: SERVICE LIST

PART I: OVERVIEW

1. Trade Secret Web Printing Inc. (“**Printing**” or the “**Company**”) operates as a printer for specialty printing, catalogs, magazines, commercial printing and packaging.

2. The Company is insolvent, is in default of several of its equipment leases, and is currently the defendant in a number of lawsuits. On November 22, 2019, Printing filed a Notice of Intention to Make a Proposal (“**NOI**”) in accordance with the provisions of the *Bankruptcy and Insolvency Act* (“**BIA**”). Crowe Soberman Inc. was appointed as Proposal Trustee (the “**Proposal Trustee**”).

3. Printing is seeking the following relief: (a) a charge for professional fees (“**Administration Charge**”); (b) approval of limited interim financing to fund operating costs during the proposal period, as well as a charge in respect of the said financing; (c) approval of a Sales and Investor Solicitation Process (“**SISP**”); (d) approval of the terms of a stalking horse purchase agreement; and (e) an extension of the stay period for filing a proposal. Each of these requests are supported by the Proposal Trustee and are not opposed.

4. Printing also seeks an Order empowering the Proposal Trustee to perform its obligations under and in accordance with the SISP, and to take such further steps as it considers necessary or desirable in carrying out the SISP.

PART II - FACTS

Background

5. Printing operates as a commercial printer, performing and producing specialty printing, catalogs, magazines, commercial printing and packaging. Printing currently has 57 employees,

many of whom have been with the Company for many years.¹ It operates from leased premises located at 40 Horner Avenue, Etobicoke, Ontario.²

6. B & Y Holdings Inc. (“**B & Y**”) is a related entity. It is the landlord of the premises in which Printing operates its business. B & Y’s registered office address is also at 40 Horner Avenue, Etobicoke, Ontario.³

7. B & Y is also a secured creditor of Printing, having previously advanced to it the sum of approximately \$2 million to permit the repayment of Printing’s debt owed to the Bank of Montreal. B & Y secured this advance by filing a financial statement under the *Personal Property Security Act* reflecting its General Security Agreement with Printing.⁴

Factors leading to the filing of the NOI

8. The Company is a party to various equipment leases, several of which are now in default. In fact, some of the lessors have already commenced legal proceedings and made efforts to enforce their security and take possession of certain of those pieces of equipment. Printing cannot operate its business without that equipment.⁵

9. Printing currently owes approximately \$12 million to its creditors, including more than \$1 million on a priority basis to Canada Revenue Agency (“**CRA**”) for source deductions,

¹ Affidavit of Bashir Harb, sworn December 11, 2019 (the “**Harb Affidavit**”), paras 4-5, Motion Record of Trade Secret Web Printing (the “**Motion Record**”), Tab 2, p 11.

² Harb Affidavit, para 3, Motion Record, Tab 2, p 11.

³ Harb Affidavit, para 7, Motion Record, Tab 2, p 12.

⁴ Harb Affidavit, para 8, Motion Record, Tab 2, p 12.

⁵ Harb Affidavit, paras 11-12, Motion Record, Tab 2, p 12-13.

approximately \$6 million to its secured creditors, and the balance to its unsecured creditors.⁶

10. Those secured creditors whose interests may be prejudiced by the orders being sought in this motion have been provided with notice of the herein motion.⁷

11. As a result of its serious financial issues, and the fact that it was not able to restructure its affairs on an informal basis, despite prior discussions and attempts in that regard, on November 22, 2019, Printing commenced restructuring proceedings under the BIA by filing an NOI, and Crowe Soberman Inc. was appointed as the Proposal Trustee.⁸

12. The Company has filed a cash flow statement which indicates that Printing is facing a liquidity crisis, and cannot meet its current cash needs. The Company will require additional financing in the short term to be able to operate up and until the end of the proposed SISP.⁹

Charge for Professional Fees

13. The Company is seeking a charge over the assets, undertakings and property of Printing (the “**Property**”) with respect to the fees and expenses of its counsel, the Proposal Trustee, and Proposal Trustee’s counsel in the amount of \$250,000 (the “**Administration Charge**”), which will rank in priority to all other charges, security interests and encumbrances.¹⁰

14. Printing has retained Blaney McMurtry LLP (“**Blaney**”) to assist it in the process of

⁶ Harb Affidavit, para 13, Motion Record, Tab 2, p 13.

⁷ Harb Affidavit, para 15, Motion Record, Tab 2, p 13.

⁸ Harb Affidavit, paras 17-18, Motion Record, Tab 2, p 14.

⁹ Harb Affidavit, paras 19, 27-28, Motion Record, Tab 2, p 14-16.

¹⁰ Harb Affidavit, paras 2 and 21, Motion Record, Tab 2, p 10, 14.

restructuring its affairs and making a proposal to its creditors. Blaney will assist in formulating a proposal, which will hopefully be accepted by the creditors, thereby preventing the bankruptcy of Printing. Blaney will also provide Printing with strategic advice with respect to the operations of its business and the SISP in respect to the Property. Blaney has already been in contact with the Proposal Trustee with respect to the herein motion and will continue to liaise with the Proposal Trustee and Printing's creditors in the course of the proposal.¹¹

DIP Financing and DIP Lender's Charge

15. B & Y (or the "**DIP Lender**") has advised it is prepared to advance to Printing up to the sum of \$250,000 (the "**DIP Loan**") under a credit facility, pursuant to a Debtor-in-Possession Term Sheet.¹² The key provisions of the proposed DIP Loan are as follows:¹³

- (a) the DIP Loan will be in the amount of no more than \$250,000;
- (b) the DIP Loan will include the sum of \$90,000, which reflects the amount already advanced to Printing on an urgent basis, as described below;
- (c) the interest rate will be 5% per annum, calculated monthly;
- (d) there is a closing fee equal to 2% of the maximum principal amount;
- (e) the DIP Loan must be supported by a court-ordered charge (the "**DIP Lender's Charge**") over all of the property, assets and undertakings of Printing, which DIP Lender's Charge will be subordinate to the Administration Charge, but ranking in priority to all other interests, and retroactively approving the \$90,000 amount

¹¹ Harb Affidavit, paras 22-23, Motion Record, Tab 2, p 14-15.

¹² Harb Affidavit, para 29, Motion Record, Tab 2, p 16.

¹³ Harb Affidavit, Exhibit G, Motion Record, Tab 2, p 121-125.

already advanced under the DIP Loan; and

(f) the terms of the Initial Order must be satisfactory to the DIP Lender.

16. The proposed DIP Loan is of a relatively modest size, and is critical to a successful restructuring as it will allow Printing to continue to operate its business, and manage and maximize the value of Printing's Property and prepare it for sale.¹⁴

17. Because of urgent liquidity issues, the DIP Lender has already advanced funds in the amount of approximately \$90,000, so that Printing could fund its payroll and make other urgent payments. However, it had been agreed between Printing and the DIP lender that these advances were intended to be advances under the DIP Loan.¹⁵

SISP and Stalking Horse

18. Under the SISP being sought, the Proposal Trustee will conduct a public process with a view of finding a new investor or purchaser for all or part of the Company's business and / or assets (collectively, the "**Assets**").¹⁶

19. The DIP Lender shall submit a stalking horse bid (the "**Stalking Horse Bid**") for the purchase of substantially all of the Assets on an "as is, where is" basis. The Stalking Horse Bid provides for a reasonable purchase price, as determined by the parties herein, which will include a cash payment, plus the assumption of certain secured debt owing to the DIP Lender in the amount

¹⁴ Harb Affidavit, paras 30-31, Motion Record, Tab 2, p 16.

¹⁵ Harb Affidavit, para 33, Motion Record, Tab 2, p 16.

¹⁶ Harb Affidavit, para 34, Motion Record, Tab 2, p 17.

of \$1,800,000.¹⁷

20. The proposed Stalking Horse Bid has an expense reimbursement of \$75,000, but no “break fee” if the Stalking Horse Bid is not the winning bid in the SISP. Thus the principals of the Company and the related corporation are not trying to add on large fees that might remove additional funds from the creditors in this proceeding.¹⁸

21. An initial incremental bid will have to be in the amount of at least \$100,000 to exceed the Stalking Horse Bid, but all subsequent incremental bids can be in amounts of \$25,000, thereby making the process more accessible to anyone who wishes to make further bids.¹⁹

22. The Stalking Horse Bid also contemplates the assumption by the DIP Lender of all employees, the assumption of certain equipment leases to be specified at time of closing, and the purchase of all of the accounts receivables.²⁰

23. These terms are reflected in the agreement of purchase and sale for the Assets between the Proposal Trustee and the DIP Lender, with a notional closing date of February 1, 2020 (the “**Stalking Horse Purchase Agreement**”).²¹

24. The SISP has all the ordinary features of a Court-supervised sales process, including the use of a listing agent, the qualification of offers by a court officer (not management), and the use

¹⁷ Harb Affidavit, paras 35-36, Motion Record, Tab 2, p 17.

¹⁸ Harb Affidavit, para 37, Motion Record, Tab 2, p 17.

¹⁹ Harb Affidavit, para 38, Motion Record, Tab 2, p 17-18.

²⁰ Harb Affidavit, para 39, Motion Record, Tab 2, p 18.

²¹ Harb Affidavit, para 40, Motion Record, Tab 2, p 18.

of confidentiality to ensure the process is fair. The Proposal Trustee will accept Qualified Offers (as defined in the SISP) until January 15, 2020. If no Qualified Offer greater than the Stalking Horse Bid is received, the DIP Lender will be declared the successful bidder under the previously court-approved Stalking Horse Purchase Agreement.²²

25. The SISP provides for the general solicitation of bids which allows sufficient flexibility to ensure that value is maximized for the benefit of the creditors. Moreover, the Stalking Horse Bid will set a minimum “floor” price in respect of the SISP, and the Stalking Horse Purchase Agreement will provide stability to the stakeholder community by ensuring that the outcome of the SISP will be a successful purchase of the Assets.²³

PART III - ISSUES AND LAW

26. This motion addresses the following issues:

- (a) Should this Court approve the Administration Charge;
- (b) Should this Court approve the DIP Loan and DIP Lender’s Charge (as defined below);
- (c) Should this Court approve the SISP, as described in the First Report of the Proposal Trustee (the “**First Report**”); and
- (d) Should this Court approve the terms of the Stalking Horse Purchase Agreement, as described in the First Report.

²² Harb Affidavit, paras 41-43, Motion Record, Tab 2, p 18-19.

²³ Harb Affidavit, paras 35, 43-44, Motion Record, Tab 2, p 17-19.

Approval of the Administration Charge

27. The Company has engaged the following professionals in the NOI process: (a) Blaney McMurtry LLP, as counsel for the Applicants; and (b) Crowe Soberman Inc. as Proposal Trustee.

28. The Company is requesting that the Proposal Trustee, along with its counsel, and counsel to the Company, be protected by a charge up to a maximum of \$250,000 as security for their respective fees and disbursements.²⁴

29. Section 64.2 of the BIA expressly provides that the Court has jurisdiction to grant a charge for fees and expenses of advisors or experts:²⁵

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.

²⁴ Harb Affidavit, para 2, Motion Record, Tab 2, p 10.

²⁵ *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 ("BIA"), s 64.2, Factum of Trade Secret Web Printing Inc., Schedule B ("Schedule B").

30. In granting an administration charge in a BIA proceeding involving a SISP, the Court must consider whether:²⁶

- (a) the proposed services are essential to a successful proceeding under the BIA as well as for the conduct of the SISP; and
- (b) the quantum of the proposed charge is appropriate given the complexity of the debtor's business and of the SISP, both of which require the supervision of the Proposal Trustee.

31. An administration charge will be justified where the involvement of professional advisors is critical to a successful restructuring and to the navigation of the proposal process by the debtor.²⁷

32. The Company submits that the Administration Charge should be approved by this Court because:²⁸

- (a) The professionals will assist the Company in its restructuring efforts under the BIA, and there are no duplication of roles;
- (b) The professionals' expertise, advice, guidance and participation will be essential to a successful restructuring and will ensure that the value of the Company's assets is maximized for the benefit of all stakeholders; and
- (c) The quantum of the Administration Charge is fair and reasonable given the complexity of the business, the value of the Company's assets and liabilities, and the number of affected stakeholders.

²⁶ *Colossus Minerals Inc, Re*, 2014 ONSC 514 ("*Colossus*"), paras 13-14, Book of Authorities of Trade Secret Web Printing Inc. ("*BOA*"), Tab 1.

²⁷ *Mustang GP Ltd, Re*, 2015 ONSC 6562 ("*Mustang*"), para 33, BOA, Tab 2.

²⁸ Harb Affidavit, paras 22-25, Motion Record, Tab 2, p 14-15.

Approval of the DIP Loan and Related Charge

33. The Company seeks approval of the DIP Loan with B & Y and a charge in favour of B & Y to the extent of the Company's borrowings under the DIP Loan, which will rank subordinate to the Administration Charge, but ahead of all other charges and security interests.

34. Section 50.6(1) of the BIA gives the Court the statutory authority and discretion to approve the DIP Loan and to grant the DIP Lender's Charge.²⁹

35. Section 50.6(5) sets out the following factors to be considered by the Court in deciding whether to grant a DIP charge:³⁰

Factors to be considered

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

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

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

36. In *Mustang GP Ltd, Re (Mustang)* and *PJ Wallbank Manufacturing Co, Re*, the Court

²⁹ BIA, s 50.6(1), Schedule B.

³⁰ BIA, s 50.6(5), Schedule B.

granted the DIP loan and related charge where the evidence showed that if the relief was not granted, the debtor would cease operations, and where the DIP loan was supported by the proposal trustee.³¹

37. In *Colossus Minerals Inc, Re (Colossus)*, the Court found it appropriate to approve a DIP loan and related charge on the evidence relating to the s. 50(6)(5) factors which was highly similar to Printing's situation:³²

- (a) the DIP loan was to last during the currency of the SISP, and cash flow statements showed the DIP loan was necessary and sufficient to fund the debtor's cash requirements until that time;
- (b) current management would continue to operate the company during the stay period to assist in the SISP. Justice Wilton-Siegel stated that because the DIP lender was a significant creditor of the debtor, the DIP loan reflected the confidence of significant creditors in the debtor and its management;
- (c) the terms of the DIP loan were consistent with the terms of DIP financing facilities in similar proceedings;
- (d) absent the DIP loan, the likelihood of a viable proposal was very low;
- (e) the DIP loan was required to permit the SISP to proceed, which was necessary for any assessment of the options of a sale and to a proposal under the BIA, and would fund the care and maintenance of the debtor's assets; and
- (f) the proposal trustee had recommended that the Court approve the relief sought and

³¹ *Mustang*, para 28, BOA, Tab 2; *PJ Wallbank Manufacturing Co, Re*, 2011 ONSC 7641 ("*PJ Wallbank*"), paras 17-19, 24, BOA, Tab 3.

³² *Colossus*, paras 3-10, BOA, Tab 1.

supported the DIP loan and related charge.

38. The following factors support the approval of the DIP Loan and the granting of the DIP Lender's Charge, which satisfy the considerations set out in s. 50.(5) above:

- (a) notice has been provided to the secured creditors likely to be affected by the DIP Lender's Charge;³³
- (b) Printing's ability to make draws under the DIP Loan will provide stability to the business and help address Printing's immediate need for funding;³⁴
- (c) the value of the DIP Loan is appropriate and reasonable. The DIP Loan provides for a maximum amount of \$250,000, of which only \$90,000 has now been advanced during the proposal process, to ensure that the Company could fund its payroll and other urgent, but limited expenses. None of the funds are being used to repay any pre-filing amounts or indebtedness;³⁵
- (d) without the DIP Loan, the Company will be unable to fund its ongoing business operations and restructuring efforts under the NOI proceedings;³⁶
- (e) the Proposal Trustee supports the need for interim financing, and is of the opinion that the benefits of the DIP Loan and DIP Lender's Charge outweigh the prejudice to the Company, the creditors, and employees that these stakeholders would experience if they are not granted; and
- (f) any potential prejudice arising from the DIP Loan and the DIP Lender's Charge to

³³ Harb Affidavit, para 15, Motion Record, Tab 2, p 13.

³⁴ Harb Affidavit, para 30, Motion Record, Tab 2, p 16.

³⁵ Harb Affidavit, paras 29 and 32, Motion Record, Tab 2, p 16.

³⁶ Harb Affidavit, paras 27-28, Motion Record, Tab 2, p 15-16.

the Company's secured creditors is outweighed by its upside in terms of ensuring maximal value of the Assets for the SISP.

Approval of the SISP and Stalking Horse Purchase Agreement

39. The Company requests approval of the SISP and Stalking Horse Purchase Agreement, which will work together to provide stability to all stakeholders while allowing sufficient flexibility to ensure that value is maximized for the benefit of the creditors.

Approval of the Stalking Horse Purchase Agreement

40. Section 65.13 of the BIA provides the Court with the authority to approve a sale of assets in the context of a proposal.³⁷

41. Section 65.13(4) sets out the factors to be considered by the Court in approving a sale of assets:³⁸

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;

³⁷ BIA, s 65.13, Schedule B.

³⁸ BIA, s 65.13(4), Schedule B.

(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.

42. In *Komtech Inc, Re*, Justice Kane considered the approval of a bidding process and the preliminary approval of a stalking horse asset purchase agreement (the “**Agreement**”). In evaluating the Agreement and bid process, Justice Kane noted the following, *inter alia*:³⁹

- (a) the Agreement represented consideration materially in excess of the likely liquidation value, which strongly supported the recommendation of the trustee that the Agreement be approved;
- (b) the bid process would solicit offers above that contained in the Agreement, which could increase consideration and payment to the creditors;
- (c) the Agreement represented continued employment to a large majority of the debtor’s existing employees, and a lower level of financial disruption to the existing customer base and suppliers of the debtor; and
- (d) notice of the motion for a vesting order would provide creditors with an opportunity to express concerns regarding the initial approval of the Agreement and of the bid process and amounts.

43. Section 65.13(5) sets out additional factors to be considered by the Court in approving a sale of assets between related persons, after consideration of the 65.13(4) factors:⁴⁰

³⁹ *Komtech Inc, Re*, 2011 ONSC 3230 (“*Komtech*”), paras 8-19, BOA, Tab 4.

⁴⁰ BIA, s 65.13(5), Schedule B.

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.

44. The following factors support the approval of the Stalking Horse Purchase Agreement, which satisfies the considerations set out in ss. 65.13(4) and (5) above:

- (a) the contemplated process leading to the proposed sale of Assets through the Stalking Horse Purchase Agreement is the proposed SISP, which is reasonable in the circumstances and will only be implemented if the Court approves it;
- (b) the Proposal Trustee supports the Stalking Horse Purchase Agreement as a backstop to the SISP;⁴¹
- (c) the Stalking Horse Purchase Agreement will only be concluded if there is no higher Qualified Offer received through the SISP, thus ensuring the highest possible return for all stakeholders;⁴²
- (d) the parties involved consider the purchase price for the Assets to be reasonable and fair, and expect this price to be supported by the Proposal Trustee;⁴³
- (e) the Stalking Horse Purchase Agreement represents continued employment for

⁴¹ Harb Affidavit, para 42, Motion Record, Tab 2, p 18-19.

⁴² Harb Affidavit, para 42, Motion Record, Tab 2, p 18-19.

⁴³ Harb Affidavit, para 36, Motion Record, Tab 2, p 17.

Printing's existing 57 employees;⁴⁴

- (f) key secured creditors were provided with notice of the herein motion and were provided with an opportunity to express any concerns regarding the approval of the Stalking Horse Purchase Agreement;⁴⁵
- (g) good faith efforts were and will continue to be made to sell or otherwise dispose of the Assets to non-related parties through the SISP process;⁴⁶ and
- (h) B & Y will only be declared the successful bidder pursuant to the Stalking Horse Purchase Agreement in the event that no greater Qualified Offer is received, thus ensuring that consideration received by the related party is necessarily superior to consideration that would be received under any other offer.⁴⁷

Approval of the SISP, Backstopped by a Stalking Horse Bid, as a Sale Process

45. In *Mustang*, Justice Rady found that the criteria established by Justice Morawetz in *Nortel Networks Corp, Re*⁴⁸ in approving a stalking horse sale process (the “**Nortel Criteria**”) were of assistance on a motion to approve a sale process in proposal proceedings under the BIA.⁴⁹

46. The Nortel Criteria are as follows:

- (a) is a sale transaction warranted at this time?

⁴⁴ Harb Affidavit, para 39, Motion Record, Tab 2, p 18.

⁴⁵ Harb Affidavit, para 15, Motion Record, Tab 2, p 13.

⁴⁶ Harb Affidavit, paras 41-43, Motion Record, Tab 2, p 18-19.

⁴⁷ Harb Affidavit, para 42, Motion Record, Tab 2, p 18-19.

⁴⁸ *Nortel Networks Corp, Re*, [2009] OJ No 3169, 55 CBR (5th) 229 (Ont Sup Ct – [Commercial List]) at para 13, BOA, Tab 5.

⁴⁹ *Mustang*, paras 36-38, BOA, Tab 2.

- (b) will the sale benefit the whole “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

47. Although the decision to approve a particular form of sale process is distinct from the approval of a proposed sale, the reasonableness and adequacy of the sale process must be assessed in light of the factors taken into account by the Court when considering the approval of a proposed sale:⁵⁰

- (a) the fairness, transparency and integrity of the proposed process;
- (b) the commercial efficacy of the proposed process in light of the specific circumstances; and
- (c) whether the sale process will optimize the chances of securing the best possible price for the assets up for sale.

48. In *Colossus*, Justice Wilton-Siegel listed the following considerations as relevant to his approval of the proposed SISP:⁵¹

- (a) the SISP is necessary to permit the debtor to determine whether a sale transaction is available that would be more advantageous to the debtor and its stakeholders than a proposal under the BIA;
- (b) the SISP allows for the assessment of whether a sale under the SISP or under a bankruptcy is more beneficial to the creditors;

⁵⁰ *Mustang*, para 39, BOA, Tab 2; *CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd*, 2012 ONSC 1750 (“*CCM Master*”), para 6, BOA, Tab 6.

⁵¹ *Colossus*, paras 22-27, BOA, Tab 1.

- (c) the Court retains the authority to approve any sale under s. 65.13 of the BIA; and
- (d) the Proposal Trustee supports the proposed SISP

49. The use of a stalking horse bid to set a baseline for the bidding process has been recognized by Canadian courts as a reasonable and useful element of a sales process,⁵² which maximizes the value of a business and enhances the fairness of the sale process.⁵³

50. In *Danier Leather Inc, Re*, Justice Penny also applied the Nortel Criteria in evaluating the proposed SISP, which included a stalking horse bid feature.⁵⁴ Moreover, Justice Penny considered whether the proposed SISP would result in a transaction that was at least capable of satisfying the section 65.13 criteria for approval of a sale of assets under the BIA, for the following reasons:⁵⁵

- (a) the proposed SISP was designed to be flexible and allow parties to submit an offer for some or all of the debtor's assets, make an investment in the debtor, or acquire the business as a going concern, with the goal of improving upon the terms of the stalking horse agreement;
- (b) the proposal trustee and financial advisor supported the SISP and viewed it as reasonable and appropriate in the circumstances;
- (c) the duration of the SISP was reasonable and appropriate in the circumstances;
- (d) a sale process which allowed the debtor to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy which did not allow for the going concern option; and

⁵² *Mustang*, para 39, BOA, Tab 2; *CCM Master*, para 7, BOA, Tab 6.

⁵³ *Danier Leather Inc, Re*, 2016 ONSC 1044 ("*Danier*"), para 20, BOA, Tab 7.

⁵⁴ *Danier*, paras 22-25, BOA, Tab 7.

⁵⁵ *Danier*, paras 35-40, BOA, Tab 7.

- (e) the consideration received for the assets under the stalking horse agreement appeared to be fair and reasonable, and represented a fair and reasonable benchmark for all other bids in the SISP.

51. In approving the sale process and stalking horse agreement in *Mustang*, Justice Rady stated:⁵⁶

40 I am satisfied that the sale process and stalking horse agreement should be approved. It permits the sale of the debtors' business as a going concern, with obvious benefit to them and it also maintains jobs, contracts and business relationships. The stalking horse bid establishes a floor price for the debtors' assets. It does not contain any compensation to StormFisher Environmental Ltd. in the event a superior bid is received, and as a result, a superior bid necessarily benefits the debtors' stakeholders rather than the stalking horse bidder. The process seems fair and transparent and there seems no viable alternative, particularly in light of FCC's earlier lack of success. Finally, the proposal trustee supports the process and agreement.

52. The following factors support the approval of the proposed SISP backstopped by the Stalking Horse Bid, which satisfy the considerations set out above:

- (a) the SISP is an open and transparent process, and absent the Stalking Horse Purchase Agreement, the SISP could potentially result in substantially less consideration for the Assets;⁵⁷
- (b) the SISP allows Printing to test the market and obtain the best possible price for the Assets;⁵⁸

⁵⁶ *Mustang*, para 40, BOA, Tab 2.

⁵⁷ Harb Affidavit, paras 35, 43-44, Motion Record, Tab 2, p 17, 19.

⁵⁸ Harb Affidavit, paras 41-42, Motion Record, Tab 2, p 18-19.

- (c) the SISP is necessary to determine whether a sale transaction is available that would be more advantageous than the Stalking Horse Purchase Agreement;
- (d) the SISP is a flexible process that allows parties to submit offers for some or all of the Assets or to make an investment in Printing;⁵⁹
- (e) the SISP allows for the possibility of Printing being purchased as a going concern;⁶⁰
- (f) the Stalking Horse Purchase Agreement represents a fair and reasonable benchmark for all other bids in the SISP;⁶¹ and
- (g) the proposal trustee supports the SISP and views the SISP as reasonable and appropriate in the circumstances.

PART IV - RELIEF REQUESTED

53. Printing therefore respectfully requests the relief an Order substantially in the form of the draft Order attached at Tab 3 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS DAY BY:



Mervyn D. Abramowitz for the Moving
Party, Trade Secret Web Printing Inc.

⁵⁹ Harb Affidavit, para 34, Motion Record, Tab B, p 17.

⁶⁰ Harb Affidavit, paras 34 and 39, Motion Record, Tab B, p 17-18.

⁶¹ Harb Affidavit, paras 35-36, Motion Record, Tab B, p 17.

SCHEDULE “A” - AUTHORITIES

- | No. | Case |
|------------|--|
| 1. | <i>Colossus Minerals Inc, Re</i> , 2014 ONSC 514 |
| 2. | <i>Mustang GP Ltd, Re</i> , 2015 ONSC 6562 |
| 3. | <i>PJ Wallbank Manufacturing Co, Re</i> , 2011 ONSC 7641 |
| 4. | <i>Komtech Inc, Re</i> , 2011 ONSC 3230 |
| 5. | <i>Nortel Networks Corp, Re</i> , [2009] OJ No 3169, 55 CBR (5th) 229 (Ont Sup Ct – [Commercial List]) |
| 6. | <i>CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd</i> , 2012 ONSC 1750 |
| 7. | <i>Danier Leather Inc, Re</i> , 2016 ONSC 1044 |

SCHEDULE "B" - LEGISLATION

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

Order — interim financing – Division I proposals

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Priority

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

Factors to be considered

- (5)** In deciding whether to make an order, the court is to consider, among other things,
- (a)** the period during which the debtor is expected to be subject to proceedings under this Act;
 - (b)** how the debtor's business and financial affairs are to be managed during the proceedings;
 - (c)** whether the debtor's management has the confidence of its major creditors;
 - (d)** whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
 - (e)** the nature and value of the debtor's property;
 - (f)** whether any creditor would be materially prejudiced as a result of the security or charge; and
 - (g)** the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Court may order security or charge to cover certain costs — Division I proposals

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.

Individual

(3) In the case of an individual,

- (a) the court may not make the order unless the individual is carrying on a business; and
- (b) only property acquired for or used in relation to the business may be subject to a security or charge.

Restriction on disposition of assets - Division I proposals

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.

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.

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF TRADE SECRET WEB PRINTING INC., OF THE CITY OF ETOBICOKE, IN THE PROVINCE OF ONTARIO

**CROWE SOBERMAN INC., in its capacity as
Licensed Insolvency Trustee of Trade Secret Web Printing Inc.**

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
*Proceeding commenced at **TORONTO*****

FACTUM OF TRADE SECRET WEB PRINTING INC.

BLANEY MCMURTRY LLP
Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto ON M5C 3G5

David T. Ullmann (LSO #42357I)
Tel: (416) 596-4289
Fax: (416) 594-2437
Email: dullmann@blaney.com

Mervyn D. Abramowitz (LSO #28325R)
Tel: (416) 597-4887
Fax: (416) 593-3396
Email: mabramowitz@blaney.com

Alex Fernet Brochu (LSO # 77644D)
Tel: (416) 593-3937 Fax: (416) 596-2140
Email: afernetbrochu@blaney.com

Counsel for Trade Secret Web Printing Inc.