

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SIMEX INC., IWERKS
ENTERTAINMENT, INC., SIMEX-IWERKS MYRTLE BEACH,
LLC

FACTUM OF THE APPLICANTS
(CCA Comeback Motion)

(Returnable January 29, 2024, at 11:00am via Judicial Videoconference)

January 27, 2024

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(the “**Applicants**”)

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PART I – OVERVIEW

1. This factum is filed in connection with a motion by the Applicants returnable on January 29, 2024 (the “**Comeback Motion**”) in their proceedings under the *Companies' Creditors Arrangement Act* (the “**CCAA**”) for, among other things:

- (a) an amended and restated initial order (the “**ARIO**”), which amends and restates the initial order granted to the Applicants on January 19, 2024 (the “**Initial Order**”) to provide certain amended or additional relief, including:
 - a. extending the initial 10-day stay of proceedings to May 3, 2024 (the “**Extended Stay Period**”);
 - b. confirming the Applicants’ ability to borrow up to the maximum principal amount of USD \$600,000 under the DIP Term Sheet;

- c. confirming that the Administration Charge (as defined in the Initial Order) shall extend to the maximum amount of USD \$500,000;
 - d. confirming that the DIP Lender's Charge (as defined in the Initial Order) shall extend to the maximum amount of USD \$600,000;
 - e. confirming that the D&O Charge (as defined in the Initial Order) shall extend to the maximum amount of USD \$300,000; and
 - f. approving the sale and investment process appended as Schedule "A" to draft ARIO (the "SISP"), attached as Schedule "A" to the Applicants' within Notice of Motion, at Tab 1A of the Applicants' Motion Record; and
2. such other relief as counsel may advise and Honourable Court may deem appropriate.

PART II – THE FACTS

3. The facts with respect to this comeback motion are briefly recited herein and are more fully set out in the Affidavit of Michael Needham sworn January 17, 2024 (the "**Jan 17 Affidavit**"), the Affidavit of Michael Needham sworn January 24, 2024 (the "**Jan 24 Affidavit**"), as well as the Report of the Proposed Monitor dated January 18, 2024 and the First Report of the Monitor dated January 26, 2024 (the "**First Report**").

4. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Jan 24 Affidavit.

A. GRANTING OF INITIAL ORDER AND ACTIVITIES SINCE THE INITIAL ORDER WAS GRANTED

5. On January 19, 2024, the Court granted the Initial Order. Pursuant to the Initial Order, Deloitte Restructuring Inc. was appointed as CCAA Monitor (in such capacity, the "**Monitor**").¹

6. Since the Initial Order was granted, the Applicants have acted in good faith and with due

¹ Jan 24 Affidavit, para 4. and Exhibit "B".

diligence. The Applicants have, among other things, worked with Monitor to address (i) initial post-filing matters; (ii) communications with employees; (iii) the recognition proceedings in the United States; (iv) communications with key stakeholders; (v) preparation for the anticipated approval and commencement of the SISP; and, (vi) preparation for this comeback motion. ²

B. PROPOSED SISP & STAY EXTENSION

7. The Applicants developed the SISP in consultation with the Monitor and their senior secured creditor, Royal Bank of Canada. ³

8. The key provisions of the SISP are summarized as follows:

- a. immediate preparatory steps were taken by and with the Monitor following of the Initial Order, including identification of potentially interested investors and potentially interested purchasers, as well as preparation of SISP materials such as the “teaser”, non-disclosure agreement and form of purchase agreement, all of which continues to be in progress as of the date hereof;
- b. an active, public launch of the process immediately following the issuance of the ARIQ;
- c. solicitation of interest on an “as is, where is” basis;
- d. a forty-five (45) day period for marketing and due diligence;
- e. a target offer/bid deadline of March 14, 2024;
- f. a potential auction where appropriate;
- g. negotiation of a final successful offer; and
- h. Court approval of the successful offer, recommended by the Monitor, and closing thereafter. ⁴

² Jan 24 Affidavit, para 4.

³ Jan 24 Affidavit, para 15.

⁴ Jan 24 Affidavit, para 16 and SISP, Exhibit “D”.

9. The target closing of any transaction resulting from the SISP is no later than May 3, 2024. All of the target deadlines in the SISP are as follows:⁵

Milestone	Timeline	Targeted Deadline
Commencement date	Immediately following the approval of the SISP Process	January 29, 2024
Preparation of SISP materials (i.e., Teaser, Investment Memorandum, Buyer list, Notices for trade publication, NDA, populate EDR)	10 days (following Initial Order, certain preparatory work was done)	January 29, 2024
Bid Deadline	45 days	March 14, 2024
Auction Date (if applicable)	1 day	March 21, 2024
Finalize Transaction agreement	7 days	March 29, 2024
Sale Approval Motion (as defined below) in CCAA Court		April 19, 2024 (outside date)
Closing of the Transaction		May 3, 2024 (outside date)

10. The Applicants seek an extension of the initial 10-day stay period until the end of the Extended Stay Period (being May 3, 2024), so as to facilitate the SISP in full, for the benefit of all stakeholders.

11. The Applicants' extended cash flow forecast, appended to the Jan 24 Affidavit as Exhibit "B" (the "**Extended Cash Flow Forecast**"), projects that the Applicants shall – with continued access to borrowings under the DIP Term Sheet – have sufficient funds to maintain operations through the conclusion of the SISP.⁶

C. CONFIRMATION OF AVAILABILITY UNDER DIP TERM SHEET AND EXTENSION OF COURT-ORDERED CHARGES

12. In the Initial Order, the Court approved the maximum available borrowings under the DIP Term Sheet in the principal amount of USD \$600,000 but limited the availability to USD \$200,000

⁵ Jan 24 Affidavit, para 17 and SISP, Exhibit "D".

⁶ Jan 24 Affidavit, Extended Cash Flow Forecast, Exhibit "C".

during the initial 10-day stay period.⁷

13. In the Initial Order, the Court also approved the following charges (collectively, the “Charges”) and the respective limitations thereto during the initial 10-day stay period:⁸

Charge	Full Value of Charge (USD)	Limitation on Charge during Initial Stay Period (USD)
Administration Charge	\$500,000	\$200,000
DIP Lender’s Charge	\$600,000	\$390,000
D&O Charge	\$300,000	\$230,000

14. The initial limitations on borrowings under the DIP Term Sheet and on the extent of the Charges will end following the initial 10-day stay period and, thereafter, the Applicants will have access to the full amount of the available borrowings under the DIP Term Sheet and the benefit of the full value of the Charges – all of which is appropriate in the circumstances and will facilitate the implementation of the SISP. Through the granting of the proposed ARIO, this Honorable Court will be confirming the lifting of the foregoing limitations.

PART III– ISSUES

15. The issues to be determined by the Court with respect to this motion, are whether:

- a. this Court should extend the initial 10-day stay period until the end of the Extended Stay Period; and
- b. this Court should approve the SISP?

16. The Applicants submit that the answer to each question is – *yes*.

⁷ Jan 24 Affidavit, para 9 and Initial Order, Exhibit “B”.

⁸ Jan 24 Affidavit, para 12 and Initial Order, Exhibit “B”. [Note: there is a typographical error in the Jan 24 Affidavit that the full value of the D&O Charge was approved at \$400,000 but, in fact, such value as approved in the Initial Order is \$300,000.]

PART IV – THE LAW**A. APPROVAL OF THE STAY EXTENSION**

17. Pursuant to section 11.02(2) of the CCAA, the Court may grant an extension of the initial stay period under the Initial Order, if the Court is satisfied that (a) the Applicants have acted, and are acting, in good faith and with due diligence; and (b) that circumstances exist that make the order appropriate.

18. Extending the initial stay period in this case is reasonable and appropriate as the Applicants have acted in good faith and with due diligence in the CCAA proceedings to date to, among other things, working with the Monitor to prepare the SISP for immediate “launch” should the ARIO be approved and to seek immediate recognition of these proceedings in the US. Additionally, no stakeholders will experience material prejudice if this relief is granted.⁹

19. An extension of the stay will allow the Applicants to undertake the following, for the benefit all existing stakeholders: (i) continue to explore and implement restructuring steps to lower costs; and (ii) implement the SISP in full, to effect a restructuring of the Applicants’ business.

20. As noted above, the Extended Cash Flow Forecast indicates that, with the advances made available under the DIP Term Sheet, the Applicants will have sufficient liquidity to meet its obligations during the stay extension period being sought.¹⁰

21. The extension is supported by the Monitor and the Applicants’ senior secured lender.¹¹

22. For the reasons set out above, the Applicants submit that the initial 10-day stay period should be extended until the end of the Extended Stay Period (being May 3, 2024).

⁹ First Report, paras 16-17.

¹⁰ Jan 24 Affidavit, Extended Cash Flow Forecast, Exhibit “C”.

¹¹ First Report, paras 18 and 33,

B. APPROVAL OF THE SISP

23. In determining whether it is appropriate to authorize a sales process of a debtor company's assets, this Court has previously found that the following non-exhaustive factors may be considered:

- a. Is a sale warranted at this time?
- b. Will the sale be of benefit to the whole "economic community"?
- c. Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- d. Is there a better viable alternative?¹²

24. In examining whether a sales process is appropriate, this Court has also taken into account the factors set out in section 36(3) of the CCAA, which are normally considered when deciding whether to approve a sale transaction itself, including not limited to:

- a. whether the process is reasonable in the circumstances;
- b. whether the monitor approved the process; and
- c. the extent to which the creditors were consulted.¹³

25. In the context of the factors set out above, the Applicants submit that the SISP is reasonable and appropriate in the circumstances and should be authorized and approved by this Court as:

- (a) *the SISP is warranted at this time*: the Applicants are insolvent and unable to continue operations without restructuring the Company's debt through a sale of, or investment in, the business enterprise;¹⁴
- (b) *the SISP will benefit the whole economic community*: the SISP will fairly canvass the market to identify potential purchasers of the Applicant's assets and undertakings or potential investors in the Applicants' business with a view to generating the best possible outcome for creditors

¹² *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ON SC) at para. 49

¹³ *Brainhunter Inc. (Re)* 2009 CanLII 72333 (ON SC) at para 13-17, CCAA, S. 36(3)

¹⁴ Jan 17 Affidavit, paras 8-9 and 93; Exhibit "A" to Jan 24 Affidavit, Tab 2A of Motion Record.

and other stakeholders (such as employees and business partners);

- (c) *the senior secured creditor has been consulted and supports the process:* the Applicants' senior secured creditor, Royal Bank of Canada, supports the approval of the SISP and has agreed to fund the process a DIP Lender;¹⁵
- (d) *none of the Applicants' creditors have a bona fide reason to object to the SISP:* the SISP will see the business continue to operate, pay post-filing obligations, and any resultant transaction will maximize value, and potentially allow the business to continue as a going concern – no creditor will be materially prejudiced;
- (e) *the Monitor supports the SISP:* the Applicants have worked with the Monitor to craft and prepare for the SISP and the Monitor supports the same.¹⁶
- (f) *there is no better alternative than the SISP:* there is no viable alternative to the SISP as the Applicants are operating on the basis of DIP financing and require a comprehensive sale and investment process to expeditiously pursue a long-term solution to their financial issues;
- (g) *the proposed SISP is reasonable in the circumstances:* the SISP is consistent with insolvency industry practices in such proceedings and in like circumstances, and, if successful, will enable the Applicants to realize on the going-concern value of their business enterprise, generating a preferred and more valuable alternative to a liquidation, for the benefit of all stakeholders.¹⁷

26. In summary, the proposed SISP has the support of the Monitor and the Applicants' senior secured creditors, is a reasonable and appropriate process in the circumstances, consistent with prevailing insolvency practices and will allow the Applicants to maximize value for its stakeholders and will potentially allow the business to continue as a going concern.

¹⁵ Jan 24 Affidavit, paras 15 and 18.

¹⁶ First Report, para 30.

¹⁷ Jan 24 Affidavit, para 18.

27. For the reasons set out above, the Applicants submit that the SISP should be approved.

PART II- ORDER SOUGHT

28. For the foregoing reasons, the Applicants respectfully request that this Honorable Court grant the draft Amended and Restated Initial Order substantially in the form of the order, attached as Schedule "A" to the Applicants' within Notice of Motion, at Tab 1A of the Applicants' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of January 2024.



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**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ON SC [Comm List])
2. *Brainhunter Inc. (Re)*, 2009 CanLII 72333 (ON SC [Comm List])

**SCHEDULE “B”
RELEVANT STATUTES**

Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36

Definitions

Stays, etc. — initial application

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

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

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

Stays, etc. — other than initial application

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

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

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

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.

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Court File No.: CV-24-00713128-0000

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