

**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 TEHAMA INC.

FACTUM OF THE APPLICANT

(Returnable February 9, 2023)

February 8, 2023

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PART I – OVERVIEW

1. On January 20, 2023, Tehama Inc. (the “**Company**”) sought and obtained an order (the “**Initial Order**”) under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (the “**CCAA**”), among other things:
 - (a) appointing Deloitte Restructuring Inc., as monitor in these proceedings (the “**Monitor**”); and
 - (b) granting a stay of proceedings (the “**Stay of Proceedings**”) up to and including January 30, 2023.
2. On January 30, 2023, the Company sought and obtained an amended and restated Initial Order (“**ARIO**”), among other things, extending the Stay of Proceedings to and including March 31, 2023.
3. The Company files this factum in support of its motion for an order (the “**SISP Approval Order**”):
 - (a) approving a sale and investment solicitation process (“**SISP**”);
 - (b) authorizing and empowering the Company to enter into the stalking horse purchase agreement dated February 7, 2023 (the “**Stalking Horse APA**”) between the Company and 14667913 Canada Inc. (“**Newco**” or the “**Stalking Horse Bidder**”), *nunc pro tunc*, with such minor amendments as may be acceptable to each of the parties thereto, with the approval of the Monitor; and

(c) confirming that the Stalking Horse APA represents the “Stalking Horse Bid” as defined in, and for the purposes of, the SISP.

4. The Company submits that the relief requested is necessary to ensure the Company’s continued operations and is in the interest of its stakeholders. The relief is also supported by the Monitor.

PART II – FACTS

5. The facts relevant to this proceeding are fully set out in the affidavits of Rob White sworn January 20, 2023 (the “**First White Affidavit**”),¹ January 26, 2023 (the “**Second White Affidavit**”)² and February 7, 2023 (the “**Third White Affidavit**”), respectively.

A. Overview of the Company’s Business and Need for CCAA Relief

6. The Company is in the business of providing a next-generation “desktop as a service” (DaaS) platform which enables customers to utilize cloud-based virtual offices, room and desktops from anywhere in the world. The Company’s services are often used in the context of critical services delivery, including services to support IT infrastructure.³

7. Following months of liquidity challenges, the Company recently faced a severe liquidity crisis, had limited cash on hand, and was generally unable to meet its obligations as they became due. After exploring various strategic alternatives, the Company’s board of directors determined

¹ First White Affidavit, the Company’s Motion Record dated February 7, 2023 (the “**Motion Record**”), Tab 2A.

² Second White Affidavit, Motion Record, Tab 2B.

³ Third White Affidavit, at para. 6, Motion Record, Tab 2.

to seek urgent relief under the CCAA. Accordingly, on January 20, 2023, the Company sought and obtained the Initial Order and on January 30, 2023, sought and obtained the ARIO.⁴

B. The Company's Activities Since the ARIO was Granted

8. Since the granting of the ARIO, the Company has, with the assistance and oversight of the Monitor, acted in good faith and with due diligence to, among other things:

- (a) stabilize and continue the Company's business and ordinary course operations;
- (b) communicate with key stakeholders regarding the CCAA proceedings and the granting of the ARIO;
- (c) assist the Monitor in preparing notices to creditors and other stakeholders as required under the ARIO;
- (d) submit advance requests to the DIP Lender to borrow under the DIP Facility in accordance with the DIP Commitment;
- (e) conserve costs, including through certain employee terminations;
- (f) disclaim certain agreements, with the Monitor's approval, including the sublease for its office premises in Ottawa;
- (g) together with the Monitor, develop the SISP;
- (h) negotiate the Stalking Horse APA; and

⁴ Third White Affidavit, at paras. 7, 11, Motion Record, Tab 2.

- (i) prepare the materials in support of this motion for the SISP Approval Order.⁵

9. The Company now seeks additional relief intended to advance the purposes of these CCAA proceedings and facilitate the Company's restructuring efforts, most notably the implementation of the SISP.⁶

C. The SISP⁷

10. The SISP was developed in consultation with the Monitor and sets out the terms and procedures for a fair and efficient sale process so as to: (a) obtain the highest and best offer for the Company's business operations and activities (the "**Business**"), including all of its assets, rights, undertakings and properties (collectively, the "**Property**"); and (b) ensure certainty for the growth and the long-term continuation of the Business, all in the best interests of the Company's stakeholders, including its employees, creditors, suppliers and other contracting parties.⁸

11. The SISP describes, among other things: (a) the Property available for sale and the opportunity for an investment in the Business; (b) the manner in which prospective bidders may gain access to due diligence materials concerning the Property and the Business; (c) the manner in which bidders and bids become Qualified Bidders, Qualified Bids, and Auction Bidders, as applicable; (d) the evaluation of bids received; (e) the guidelines for the ultimate selection of the Successful Bid and/or the Back-Up Bid; and (f) the process for obtaining such approvals (including the approval of the CCAA Court) as may be necessary or appropriate in respect of a Successful

⁵ Third White Affidavit, at para. 13, Motion Record, Tab 2.

⁶ Third White Affidavit, at para. 14, Motion Record, Tab 2.

⁷ Capitalized terms used but not otherwise defined in this section of have the meanings given to them under the SISP.

⁸ Third White Affidavit, at para. 15, Motion Record, Tab 2.

Bid.⁹ Further details regarding the SISP, including key dates, are summarized in the Third White Affidavit.¹⁰

12. The Company believes that the SISP will provide a flexible, efficient, fair and equitable process for canvassing the market for potential buyers of the Property or investors in the Business and maximizing recovery for the Company's stakeholders. Accordingly, the SISP's approval and implementation is in the best interests of the Company and its stakeholders.¹¹

13. Further, the Monitor is supportive of the proposed SISP.¹²

D. The Stalking Horse APA¹³

14. To enhance the efficacy of the SISP and establish an appropriate, valuable and competitive floor for bids submitted in accordance therewith, the Company entered into the Stalking Horse APA with the Stalking Horse Bidder.¹⁴

15. The Stalking Horse APA will provide comfort in the marketplace that there is a sale agreement in place and the Business will continue following the completion of the SISP, because a transaction will close for certain. The Stalking Horse APA is critical to the SISP process and to the stability of the Company's operations.¹⁵

⁹ Third White Affidavit, at para. 17, Motion Record, Tab 2.

¹⁰ Third White Affidavit, at paras. 15-24, Motion Record, Tab 2.

¹¹ Third White Affidavit, at paras. 19, 23, Motion Record, Tab 2.

¹² Second Report of the Monitor dated February 7, 2023, at para. 43.

¹³ Capitalized terms used but not otherwise defined in this section have the meanings given to them in the Stalking Horse APA.

¹⁴ Third White Affidavit, at para. 25, Motion Record, Tab 2.

¹⁵ Third White Affidavit, at para. 26, Motion Record, Tab 2.

16. Prior to the commencement of the CCAA proceedings, a group of investors in the Company incorporated Newco for the purposes of completing an assignment of debt and security between Newco and the Canadian Imperial Bank of Commerce (“**CIBC**”). At the time, CIBC was the sole secured creditor of the Company.¹⁶

17. Newco is the DIP Lender and now the proposed Stalking Horse Bidder. In order to: (a) maintain Newco’s independence in relation to the SISP as the proposed Stalking Horse Bidder; and (b) to maintain the integrity and fairness in relation to the implementation of the SISP, the Company has nominated an independent director (the “**Independent Director**”) to assist, guide, evaluate and consult with the Monitor regarding the SISP on behalf of the Company. The Independent Director is not affiliated with Newco, has been briefed and is fully supportive of the Stalking Horse APA and SISP.¹⁷

18. The purchase price for the Purchased Assets is based on a credit bid of the amount of the secured debt owing by the Company which was acquired by Newco from CIBC. The credit bid amount is approximately \$2,812,833.33. No break fee or other fees are payable pursuant to the Stalking Horse APA.¹⁸ A summary of the key terms and provisions of the Stalking Horse APA is summarized in the Third White Affidavit.¹⁹

19. At this time, approval of the Stalking Horse APA is being sought solely for the purposes of approving it as the Stalking Horse Bid in the SISP. If the proposed SISP Approval Order is granted and the Stalking Horse APA is approved for this narrow purpose, it will be subject to

¹⁶ Third White Affidavit, at para. 27, Motion Record, Tab 2.

¹⁷ Third White Affidavit, at para. 28, Motion Record, Tab 2.

¹⁸ Third White Affidavit, at para. 29, Motion Record, Tab 2.

¹⁹ Third White Affidavit, at para. 30, Motion Record, Tab 2.

higher and otherwise superior bids received by the Company in the SISP. To the extent the Stalking Horse Bid is the Successful Bid in the SISP, the Company will seek approval of the transaction contemplated by the Stalking Horse APA at an Approval and Vesting Order Motion.²⁰

20. The Monitor supports the approval of the Stalking Horse APA.²¹

PART III – ISSUES

21. The issues before this Honourable Court are whether this Court should:

- (a) approve the SISP; and
- (b) authorize and empower the Company to enter into the Stalking Horse APA between the Company and the Stalking Horse Bidder, *nunc pro tunc*, and confirm that the Stalking Horse APA represents the “Stalking Horse Bid” as defined in, and for the purposes of, the SISP.

PART IV – LAW AND ARGUMENT

A. The SISP Should be Approved

22. The proposed SISP is structured to adequately expose the Company’s Business and Property to the market within a timeline commensurate with the Company’s liquidity constraints, as reflected in the Revised Cash Flow.²²

²⁰ Third White Affidavit, at para. 31, Motion Record, Tab 2.

²¹ Third White Affidavit, at para. 33, Motion Record, Tab 2; Second Report of the Monitor dated February 7, 2023, at para. 43.

²² Second White Affidavit, at paras. 15, 17, 27, Motion Record, Tab 2B; Second Report of the Monitor dated February 7, 2023, at para. 34.

23. The CCAA confers jurisdiction on courts to approve a sale process, including a “stalking horse” sale process, in respect of the business or assets of an applicant prior to or in the absence of a plan of compromise and arrangement.²³

24. In *Re Nortel Networks Corp.* (“**Nortel**”), the Court held that the following factors should be considered in determining whether a sale should be approved:

- (a) is a sale transaction warranted at this time;
- (b) will the sale benefit the whole “economic community”;
- (c) do any of the applicant’s creditors have a *bona fide* reason to object to a sale of the business; and
- (d) is there a better viable alternative.²⁴

25. Although the approval of a sale process is distinct from the approval of a sale, courts have nevertheless employed the considerations enumerated under section 36 of the CCAA to inform the application of the “Nortel factors”. These considerations include:

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

²³ CCAA, s. 11; *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ONSC) at paras 47-48 (“**Nortel**”); *Brainhunter Inc. (Re)*, 2009 CanLII 72333 (ONSC) at para 13 (“**Brainhunter**”); *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 (“**Sino-Forest**”), at paras 40-41; *In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands*, 2020 ONSC 3565 at para 61 (“**Green Growth**”)

²⁴ *Nortel*, at para 49; *Brainhunter*, at para 13; *Sino-Forest*, at para 41. See also, *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107, at paras 20-21 citing *CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd*, 2012 ONSC 1750 at para 6 (“**CCM**”).

- (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 its opinion the sale or disposition would be more beneficial to creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which 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.²⁵

26. Applied to this case, the Company submits that the SISP should be approved given that:

- (a) the Company is insolvent and unable to continue operations without a sale of or investment in the Business;
- (b) the SISP was developed, in consultation with both the Monitor and the Independent Director, to provide a flexible, efficient, fair and equitable process for canvassing the market for potential buyers of, or investors in, the Business and maximizing recovery for the Company's stakeholders;

²⁵ CCAA, at s. 36; *Brainhunter*, at paras 16-17; *Green Growth*, at para 61.

- (c) the Monitor is of the view that the SISP timeline is appropriate in the circumstances and will provide sufficient opportunity to solicit interest for a sale of the Business and Property or the reorganization or recapitalization of the Business;
- (d) as the best option for maximizing recovery available to the Company at this time, the SISP is in the best interests of both the Company and its stakeholders;
- (e) in addition to assisting in the development of the SISP, and given that the Company and the Stalking Horse Bidder are related, the Monitor and Independent Director have various consent, consultation and other rights under the SISP, including with respect to extending timelines, dispensing with Bid requirements, and terminating the SISP;
- (f) the SISP builds off of the company's prior efforts in 2021 and 2022 to seek investment in the Business;
- (g) the Company and the Monitor have communicated with the Company's stakeholders and, to date, no objections to the proposed SISP, the sale of the Business or Property or potential investment in the Business have been raised; and
- (h) the Monitor is supportive of the proposed SISP and believes that the SISP is the best option available to the Company at this time.²⁶

²⁶ Third White Affidavit, at paras. 15, 19, 20, 23-24, Motion Record, at Tab 2; Second Report of the Monitor, at paras. 13-15, 25, 43.

B. The Stalking Horse APA Should be Approved

27. Pursuant to the proposed SISP Approval Order, the Company is seeking approval of the Stalking Horse APA, solely for the purposes of approving it as the Stalking Horse Bid in the SISP. As noted above, if the Stalking Horse Bid is the Successful Bid in the SISP, the Company will seek approval of the transaction contemplated by the Stalking Horse APA at a subsequent motion to this Court.

28. Stalking horse agreements are frequently utilized in insolvency proceedings “to facilitate sales of businesses and assets and [...] establish a baseline price and transactional structure for any superior bids”.²⁷ As this Court has previously held, the “use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process.”²⁸

29. Stalking horse agreements have been approved by Courts concurrently with a sale process in numerous CCAA proceedings.²⁹

30. In the present case, approval of the Stalking Horse APA is appropriate given that:

- (a) the SISP incorporating the Stalking Horse APA is the most cost-efficient and effective means available to maximize value and recoveries, while ensuring the

²⁷ *Danier Leather Inc. (Re)*, 2016 ONSC 1044 (“*Danier*”), at para [20](#); *Cannapiece Group Inc v Carmela Marzili*, 2022 ONSC 6379 at paras [4](#), [8](#) (“*Cannapiece*”); *CCM*, at para [7](#); *Brainhunter*, at para [13](#).

²⁸ *Danier*, at para [20](#).

²⁹ *Brainhunter*, at paras [11-12](#), [20-21](#); *Green Growth*, at paras [5](#), [51-53](#), [62](#); *Cannapiece*, at paras [2](#), [5](#), [13](#); *Nortel*, at paras [2](#), [56](#); *In the Matter of a Plan of Compromise or Arrangement of Harte Gold Corp (December 20, 2021)*, Toronto, CV-21-00673304-00CL (Order) (ONSC) at paras 3-5; *In the Matter of a Plan of Compromise or Arrangement of Just Energy Group et al. (August 18, 2022)*, Toronto, CV-21-00658423-00CL (Order) (ONSC) at paras 3-4, 7, 9-10.

preservation of the Business as a going concern and the continued employment of a significant number of the Company's employees;

- (b) the Stalking Horse APA will serve as an appropriate backstop and valuable floor for bids in the proposed SISP while ensuring the preservation of the Business as a going concern and the continued employment of a significant number of the Company's employees;
- (c) the baseline Purchase Price and transaction structure proposed under the Stalking Horse APA is designed to promote the submission of competitive bids in the SISP, and thereby maximize value for the Company and its stakeholders;
- (d) the Company, exercising its business judgement, believes that the consideration provided under the Stalking Horse APA, including the Purchase Price, is fair and reasonable;
- (e) there is no break fee or expense reimbursement clause;
- (f) the Monitor is supportive of the Stalking Horse APA for the purpose of acting as the Stalking Horse Bid in the SISP and believes the Stalking Horse APA's approval is in the best interests of the Company's stakeholders as it will protect downside risk while facilitating the submission of potentially superior bids in the SISP; and

- (g) the Monitor has further observed that the Stalking Horse APA has terms and conditions that are reasonable and customary in comparison to precedents that Monitor has reviewed in other CCAA proceedings.³⁰

PART V – RELIEF REQUESTED

31. The Company submits that the relief sought on the within motion is appropriate in the circumstances and consistent with prior orders of this Court in other CCAA proceedings and respectfully request that the proposed form of SISP Approval Order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on February 8, 2023.



DENTONS CANADA LLP
Counsel for the Applicant

³⁰ Third White Affidavit, at paras. 25-31, Motion Record, Tab 2; Second Report of the Monitor, at paras. 30-31,

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Nortel Networks Corporation (Re)*, [2009 CanLII 39492 \(ONSC\)](#)
2. *Brainhunter Inc. (Re)*, [2009 CanLII 72333 \(ONSC\)](#)
3. *Sino-Forest Corporation (Re)*, [2012 ONSC 2063 \(CanLII\)](#)
4. *In The Matter of A Plan of Compromise or Arrangement of Green Growth Brands Inc.*, [2020 ONSC 3565 \(CanLII\)](#)
5. *Walter Energy Canada Holdings, Inc. (Re)*, [2016 BCSC 107 \(CanLII\)](#)
6. *CCM Master Qualified Fund v. blutip Power Technologies*, [2012 ONSC 1750 \(CanLII\)](#)
7. *Danier Leather Inc. (Re)*, [2016 ONSC 1044 \(CanLII\)](#)
8. *Cannapiece Group Inc v. Marzili*, [2022 ONSC 6379 \(CanLII\)](#)
9. *In the Matter of a Plan of Compromise or Arrangement of Harte Gold Corp* ([December 20, 2021](#)), [Toronto, CV-21-00673304-00CL \(Order\) \(ONSC\)](#)
10. *In the Matter of a Plan of Compromise or Arrangement of Just Energy Group et al.* ([August 18, 2022](#)), [Toronto, CV-21-00658423-00CL \(Order\) \(ONSC\)](#)

**SCHEDULE “B”
RELEVANT STATUTES**

[Companies' Creditors Arrangement Act, RSC 1985, c C-36](#)

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Restriction on disposition of business assets

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

Notice to creditors

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

Factors to be considered

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

Additional factors — related persons

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

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

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

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

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

Restriction — employers

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

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

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