

May 27, 2024

HAND DELIVERED

The Honourable Justice Darlene Jamieson
Supreme Court of Nova Scotia
The Law Courts Building
1815 Upper Water Street
Halifax, NS B3J 1S7

My Lady:

**Re: In the Matter of The Receivership of TCAS Holdings Limited, Sustainable Fish Farming (Canada) Limited, Sustainable Blue Inc. and TCAS IP Inc.
Hfx. No. 531915
Estate No. 51-126479**

1. We represent Deloitte Restructuring Inc., court appointed receiver and manager of the respondent companies (the “**Receiver**”) pursuant to an order of this Court issued April 4, 2024 (the “**Appointment Order**”). These written submissions are in support of the Receiver’s motion for approval of its actions to date, an increase in the Receiver’s borrowing authority, and approval of a sales and investment solicitation process, including a stalking horse purchase agreement from the Applicant, 4595756 Nova Scotia Limited.
2. This motion is scheduled to be heard at 2pm on June 3, 2024.

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SERVICE, NOTICE AND ABRIDGEMENT OF TIME

3. The relief sought in this motion is pursuant to the BIA and therefore the Bankruptcy and Insolvency General Rules supersede our Civil Procedure Rules in the event of any inconsistency. BIA Rule 3 states:

3 In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

4. As this is a matter where the BIA does not specify a minimum notice requirement, BIA Rule 6 applies. Rule 6 states:

6 (1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

(2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules

(a) must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or

(b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.

(3) A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.

(4) The court may, on an ex parte application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.

5. In terms of measuring the four days provided for under BIA Rule 6, the period of time is governed by BIA Rule 4, which stipulates clear business days:

- 4 If a period of less than six days is provided for the doing of an act or the initiating of a proceeding under the Act or these Rules, calculation of the period does not include Saturdays or holidays.
6. In accordance with BIA Rule 6(1), the motion materials will be served electronically by email on Monday, May 27, 2024. No opposition is anticipated. Proof of service by affidavit will be filed in advance of the hearing of the pending motion.
7. Although we anticipate filing and serving the notice materials within the foregoing timeline, we have included a request for the abridgment of time in case there is any breakdown in service. BIA 6(4) grants the Court authority to amend these time limits, including to reduce them. Given the nature of the relief sought and the surrounding circumstances, we submit that this is an appropriate circumstance for the Court to abridge the time for the hearing of this matter if such abridgement is required.

Approval of Activities to Date

8. The Receiver is seeking approval by the Court of its activities to date as described in the First Report and Second Report. We submit that this approval is common in receiverships overseen by this Court and the relief sought is limited to matters disclosed in the reports. In our submission, this relief is appropriate and should be granted.

Sales Investment and Solicitation Process (SISP)

9. The Receiver is seeking the Court's approval of a sales and investment solicitation process ("**SISP**") and a stalking horse agreement to purchase substantially all of the assets of the respondent companies (collectively, the "**Debtors**") by the Applicant who is their senior secured creditor. As described in the Second Report, the Receiver has concluded that the SISP is the most viable way to maximize the realizable value of the assets of the Debtors and allow their operations to continue as a going concern.

10. The Receiver is requesting approval of the stalking horse agreement attached to SISP procedures as described in the Second Report (the “**Stalking Horse Agreement**”) for the purpose of approving it as an approved bid under the SISP only. The Receiver has concluded that the Stalking Horse Agreement will provide stability and create efficiency in the SISP by clearly identifying the Applicant’s desire to purchase the assets of the Debtors and disclose the quantum of its purchase price.

11. The SISP has been developed by the Receiver with input from the Debtors’ management and the Applicant. It contemplates a two-phase process where bidders will be qualified to make binding offers for the assets of the Debtors, and proceed to an auction if there is at least one qualified bidder other than the Applicant. The closing of any sale or investment whether by the Stalking Horse Agreement or otherwise will be conditional upon further approval of this Court. Further particulars of the advertising and solicitation for bidders can be found in the Second Report.

12. The SISP will be overseen by the Receiver and contemplates the following dates:

| Milestone | Deadline |
|--|--|
| Commencement date | • Immediately following the granting of the SISP Order |
| Non-binding expressions of interest for Phase 1 | • June 21, 2024 |
| Phase 2 Bid Deadline | • August 2, 2024 |
| Auction Date | • August 7, 2024 |
| Sale Approval Motion (as defined below) in Court | • Forthwith after the conclusion of the auction |
| Closing of the Transaction | • Within 2 days of the Sale Approval Motion |

13. The Receiver has negotiated and, subject to this Court’s approval, agreed to the Stalking Horse Agreement with the Applicant (in such capacity, the “**Stalking Horse**”).

Bidder"). Pursuant to the Stalking Horse Agreement, the Stalking Horse Bidder has agreed to acquire substantially all of the assets of the Debtors. Key provisions, include:

- a. Assets are sold on an "as is, where is" basis with few representations and warranties;
- b. The purchase price is equal to the sum of: (i) senior secured debt owing by the Debtors, (ii) all borrowings made by the Receiver, (iii) costs to cure any assumed contracts, (iv) assumed liabilities, and (v) the professional fees of the Receiver and its counsel;
- c. Employees will be offered employment on terms no less favourable than prior to the Receivership;
- d. The Stalking Horse Bidder has the right to exclude specified assets and liabilities prior to the time of closing but any such amendment does not effect the Purchase Price;
- e. If the Stalking Horse Bidder is unsuccessful then it shall be entitled to payment of its professional fees in respect of the Stalking Horse Agreement to a maximum of \$100,000. There is no break fee or other termination payment if the Stalking Horse Agreement is not closed; and
- f. Closing is conditional on Court approval but there are no other significant conditions to closing in the view of the Receiver.

14. Further details on the Stalking Horse Agreement and the Receiver's analysis can be found in the Second Report.

15. The Receiver submits that stalking horse agreements are an accepted tool in receiverships and other insolvency proceedings in Canada whether proceeding under the *Companies Creditors' Arrangement Act* ("CCAA") or *Bankruptcy and Insolvency Act*. Considering a stalking horse arrangement sales process, Justice Morawetz in *Re Brainhunter* (62 CBR (5th) 41 [Brainhunter]) identified the following list of non-exclusive factors to be considered when evaluating a stalking horse sales process (at para 13):

- a. Is a sale transaction warranted at this time?
- b. Will the sale benefit the "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?

16. In approving the stalking horse sales process, the Court gave the following reasons (Brainhunter at para 19):

In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the "economic community". I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

17. In the context of receivership proceedings where the stalking horse purchaser is pursuing a credit bid like the present motion, the Ontario Superior Court in *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd* (2012 ONSC 1750) at paras 6-8 noted:

Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the

efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

- (i) the fairness, transparency and integrity of the proposed process;
- (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
- (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings.

. . . I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest CCAA process:

To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.

18. In the present motion, the stalking horse purchaser is the senior secured lender, who is also providing interim receivership financing, and is also a shareholder in the Debtors. Given that the Stalking Horse Bidder is related to the Debtors, the decision

of the British Columbia Supreme Court in *Freshlocal Solutions Inc. (Re)* 2022 BCSC 1616 [Freshlocal] is relevant. That Court considered a motion from the CCAA debtor for approval of a stalking horse agreement with its interim lender which agreement was opposed by the debtor's other secured lenders. The Court declined to approve the stalking horse agreement.

19. The Court based its decision on the following factors:

- There was not a competitive process behind the stalking horse agreement and there was no transparency related to how the purchase price was arrived at (paras 37-40);
- Under the terms of the letter of intent for the stalking horse agreement with the interim lender, the debtors were prohibited from making any contact with any bidder other than the interim lender (para 37);
- No stakeholder expressed support of the stalking horse agreement or concern if it was not approved (para 48);
- The primary secured creditors did not approve of the stalking horse agreement (paras 57-60); and
- The terms of the break fee and expense reimbursement were considered to be unreasonably prejudicial. In particular, the Court noted that (a) the fees were intended to partially offset interest and fees charged under the interim financing (which the Court noted were conspicuously low); (b) the expense reimbursement was included in the purchase price, meaning that the interim lender would recover expenses regardless of whether their bid was successful; and (c) the agreement provided the interim lender with the option to terminate if certain waivers were not obtained from third parties while also retaining the break fee and expense reimbursement (paras 61-72).

20. The Receiver submits that the circumstances in the present motion are distinguishable from those faced by the British Columbia court in Freshlocal. In particular:

- Since this is a credit bid by the senior secured lender, a competitive process was impractical. However, the purchase price is transparent in that it is the amount of outstanding indebtedness owing by the Debtors together with reasonable related costs.
- The indebtedness which is the basis of the credit bid was advanced by a third party lender and assigned to the Applicant. Cox & Palmer has reviewed and provided the Receiver with its independent opinion that the security for the indebtedness is valid.
- The SISP contemplates an open process overseen by the Receiver without restrictions as to bidder contact.
- The Applicant is the primary stakeholder in this proceeding given the amount owed to it and the secured nature of its indebtedness.
- There is no break fee in the event that the Stalking Horse Bidder is unsuccessful and its expense reimbursement is capped.

21. For the foregoing reasons, the Receiver submits that the SISP and Stalking Horse Agreement are reasonable and should be approved by the Court.

Increase in Borrowing Authority and Borrowing Charge

22. The Appointment Order is based on the Court's precedent as published in the practice memorandum and permits increases in the authorized borrowing authority by further order of the Court (Appointment Order at para 26). The Receiver is asking for a further increase in this authority from \$2,500,000 to \$6,000,000.

23. The Second Report contains an updated cash flow forecast to August 25, 2024, which should align with conclusion of the SISP and sale approval. This updated forecast is based on a status quo basis where the Receiver continues to operate the Debtors' business until the SISP is completed and a transaction closed.

24. The Applicant supports the Receiver's request and is prepared to fund up to \$5,750,000 on the existing terms, which is the amount specified in the cash flow forecast. As previously described, the nature of the Debtors' business makes this borrowing necessary to provide liquidity and administer the SISP. The Receiver is seeking \$250,000 additional borrowing authority than what the cash flow forecast anticipates as needed and what the Applicant has presently agreed to fund in order to address unforeseen circumstances between now and the end of the Summer.

25. The Receiver does not view the additional borrowing as prejudicial to the other creditors of the respondent companies given the existing debt and security held by the Applicant.

All of which is respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Gavin D. F. MacDonald', with a stylized flourish at the end.

Gavin D. F. MacDonald
GDFM/lb
Enclosures

Cc: Service List