

Court No. 35-2199056
Estate No. 35-2199056

**ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)**

IN THE MATTER OF THE PROPOSAL OF
BG FURNITURE LTD.
OF THE TOWN OF WALKERTON
IN THE PROVINCE OF ONTARIO

FACTUM OF BG FURNITURE LTD.

December 20, 2016

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PART I: NATURE OF THE PROCEEDING

1. Until October 7, 2016, BG Furniture Ltd. ("**BG Furniture**" or the "**Company**") operated as a manufacturer of high-quality solid wood furniture out of its production facility located in Walkerton, Ontario (the "**Facility**"). The business (including its predecessors) has been in operation since 1927 and has manufactured in the Facility since 1938.
2. On October 7, 2016, BG Furniture ceased its ordinary business operations and laid off its employees as a result of the significant financial distress it was experiencing.
3. As a result of its inability to pay its obligations as they became due, BG Furniture commenced these proposal proceedings *Bankruptcy and Insolvency Act R.S.C., 1985, c. B-3* (Canada) (the "**BIA**") by filing a Notice of Intention to Make a Proposal on December 14, 2016 (the "**NOI**"), pursuant to which Collins Barrow Toronto Limited was named as the Proposal Trustee (in such capacity, the "**Proposal Trustee**"). Pursuant to the NOI, all proceedings against BG Furniture have been stayed for 30 days commencing December 14, 2016.
4. Prior to filing its NOI, BG Furniture negotiated a Stalking Horse Investment Term Sheet (the "**Stalking Horse Investment Term Sheet**") with 2544311 Ontario Limited (the "**Stalking Horse Bidder**"), which contemplates a minimum equity investment in the amount of \$800,000, and which is subject to this Court's approval and creditor approval of the BIA proposal to be submitted to BG Furniture's creditors (the "**BIA Proposal**"), among other conditions set out therein.

5. Assuming it is approved by this Court, the Company and the Proposal Trustee will implement a sale and investment solicitation process ("**SISP**") and the Stalking Horse Investment Term Sheet which will serve as a "baseline" for any bids received in the SISP and will operate to ensure that value is maximized under the SISP.
6. 2544311 Ontario Limited (the "**DIP Lender**") has also agreed, subject to this Court's approval, to provide an interim financing facility (the "**DIP Facility**") in order to provide BG Furniture with the necessary financing to recommence its business operations during these proposal proceedings and thereafter.
7. As such, BG Furniture brings this motion for an Order, inter alia,:
 - (a) approving the execution by BG Furniture of a DIP Commitment Letter (the "**DIP Commitment Letter**") between BG Furniture and 2544311 Ontario Limited or its nominee (in either case, the "**DIP Lender**") describing the amount, priority, terms and conditions of the proposed DIP Facility, granting the DIP Charge (as defined below) in the maximum principal amount of \$300,000.00 and authorizing certain payments from advances under the DIP Facility;
 - (b) approving the SISP;
 - (c) approving the execution by BG Furniture of the Stalking Horse Investment Term Sheet between the Stalking Horse Bidder and BG Furniture for the acquisition of new shares to be issued by BG Furniture to the Stalking Horse Bidder in consideration of a minimum amount of \$800,000.00 (the "**Investment Amount**") in the context of the BIA restructuring proposal;

- (d) approving and ratifying the Stalking Horse Investment Term Sheet and the transaction and Break Fee (as defined below) contemplated therein;
- (e) granting an Administration Charge (as defined below) in the amount of \$150,000.00; and
- (f) granting a charge in favour of the directors and officers of BG Furniture in the amount of \$25,000.00 (the "**D&O Charge**"); and
- (g) extending the stay of proceedings granted upon the filing of the Notice of Intention to File a Proposal dated December 14, 2016 (the "**NOI**") to February 5, 2017.

PART II: FACTS

Background

8. BG Furniture was incorporated under the laws of the Province of Ontario on January 23, 2014. BG Furniture's registered address is located at its Facility, being 75 Ridout Street, Walkerton Ontario, N0G 2V0. Dirk Nielson and Adam Hofmann are the Company's directors.

Reference: Affidavit of Adam Hofmann sworn December 19, 2016, Motion Record, Tab 2 ("*Hofmann Affidavit*") at para 3 & 9; Exhibit "A" to the *Hofmann Affidavit*.

9. BG Furniture is the successor to Bogdon & Gross Furniture Company Limited ("**Bogdon**"), which filed a Notice of Intention to Make a Proposal under the BIA on March 4, 2014. BG Furniture acquired the assets of Bogdon through the BIA proposal process. However, BG Furniture assumed an unsustainable amount of pre-filing

indebtedness as part of the purchase price for the assets, the cost of its lending arrangements were not affordable and it had insufficient working capital to succeed.

Reference: *Hofmann Affidavit, supra*, at paras 4 & 7.

10. Prior to October 7, 2016, BG had approximately 40 fulltime employees, approximately 31 of whom were hourly, unionized employees, who are members of the United Steel Workers, Local 1-500 (the "**Union**").

Reference: *Hofmann Affidavit, supra*, at paras 6 & 7.

Assets & Liabilities

11. BG Furniture has the following principal assets:
 - (a) The Facility and the lands upon which the Facility is located (the "**Lands**");
 - (b) Equipment, with an estimated gross liquidation value of approximately \$470,000.00 (excluding leased equipment);
 - (c) Raw materials and inventory with an estimated gross liquidation value of approximately \$70,000; and
 - (d) Accounts receivable, in the amount of approximately \$21,000.00.

Reference: *Hofmann Affidavit, supra*, at para 10; Exhibit "C" to the *Hofmann Affidavit, supra*.

12. BG Furniture has liabilities of approximately \$3,590,360.

Reference: *Hofmann Affidavit, supra*, at paras 11 - 26; Exhibits "D" – "O" to the *Hofmann Affidavit, supra*.

13. BG Furniture has reached an agreement with the Union in respect of the unpaid wages and other issues. BG has no unpaid pension contributions or accrued pension liabilities.

Reference: *Hofmann Affidavit, supra*, at paras 26 - 27; Exhibit "P" to the *Hofmann Affidavit, supra*.

DIP Financing, Stalking Horse Investment Term Sheet and SISP

14. The purpose of these proceedings is to preserve, maximize and realize value of the benefit of all stakeholders. This will require the resuscitation and maintenance of the Company's enterprise value, which was lost when ordinary course operations ceased.

15. BG Furniture currently has approximately \$470,000.00 in back orders. Fulfilling these orders is expected to generate positive cash flow for the Company and allow the enterprise to maintain its customers. Unless BG Furniture immediately re-commences its business operations, it will lose these orders.

Reference: *Hofmann Affidavit, supra*, at paras 28 & 29.

16. BG Furniture and 2544311 Ontario Limited entered into negotiations to secure additional funding in order to implement a restructuring plan, to provide BG Furniture with working capital and to fund BG Furniture's payroll (including the unpaid payroll). These negotiations ultimately resulted in the DIP Commitment Letter and the Stalking Horse Investment Term Sheet.

The DIP Facility

17. BG Furniture cannot re-commence its business operations without first securing new operating financing. The DIP Lender has agreed to provide the DIP Facility to BG

Furniture up to the maximum principal amount of \$300,000, subject to BG Furniture obtaining an Order in this proceeding on the terms requested, granting the DIP Charge over all of the property, assets and undertaking of BG Furniture including the Lands (collectively, the "**Property**"), in priority to all creditors, and certain other conditions. The proposed DIP Charge would rank second in priority to the proposed Administration Charge (defined below).

Reference: *Hofmann Affidavit, supra*, at paras 33 & 34.

18. Pursuant to the DIP Commitment Letter, which is subject to this Court's approval:
 - (a) The DIP Lender shall make available to BG Furniture a non-revolving loan in the maximum amount of \$300,000 (the "**DIP Loan**");
 - (b) Interest shall be calculated at the rate of 6% per annum;
 - (c) The DIP Loan shall mature on May 1, 2017; and
 - (d) Amounts under the DIP Loan shall be advanced by the DIP Lender in increments of \$50,000, which are subject to the terms and conditions contained in the DIP Commitment Letter.

Reference: Exhibit "R" to the *Hofmann Affidavit, supra*.

SISP & The Stalking Horse Bid

19. Pursuant to the proposed SISP, with the assistance of the Proposal Trustee, BG Furniture will solicit offers for equity investments as well as offers to purchase some or all of the Property. Upon this Court's approval, BG Furniture intends to immediately implement the proposed SISP.

20. The proposed SISP contemplates a marketing and solicitation period of approximately 7 weeks. With the assistance of the Proposal Trustee, the process will involve a combination of targeted (*e.g.*, to other industry participants) and broad (*e.g.*, advertising in newspaper) marketing and solicitation efforts, and will be supported by the creation of a "data room" housing all BG Furniture's confidential and commercially sensitive information and records. BG Furniture's management will also be available to assist with Facility tours and to respond to any specific inquiries.

Reference: *Hofmann Affidavit, supra*, at paras 36 & 37; Exhibit "S" to the *Hofmann Affidavit, supra*.

21. In conjunction with the proposed SISP, BG Furniture is also seeking approval of the Stalking Horse Investment Term Sheet between the Company and the Stalking Horse Bidder, which will serve as a "baseline" for any third-party bids submitted through the SISP.

22. The Stalking Horse Investment Term Sheet contemplates an equity investment by the Stalking Horse Bidder in the amount of approximately \$800,000.00 (the "**Investment Amount**"), to be invested in BG Furniture and distributed to its creditors. The Stalking Horse Bidder is permitted to increase the Investment Amount at any time during the bid deadline prescribed in the proposed SISP. Said equity investment is contingent on creditor approval of the BIA Proposal and an Order of the Court sanctioning the BIA Proposal and The Stalking Horse Investment Term Sheet (the "**Approval & Sanction Order**"), among other conditions.

Reference: *Hofmann Affidavit, supra*, at paras 39, 41 – 42; Exhibit "T" to the *Hofmann Affidavit, supra*.

23. If the conditions in the Stalking Horse Investment Term Sheet are met, the Investment Amount will be used for the following purpose:
- (a) repayment of any outstanding amounts secured by the Administration Charge (estimated to be \$0 on the proposed closing date);
 - (b) repayment of the amounts secured by the DIP Charge (estimated to be in an amount of \$250,000 on the proposed closing date); and
 - (c) funding the BIA Proposal by the Company to its secured, preferred and unsecured creditors.

Reference: *Hofmann Affidavit, supra*, at para 43.

24. In the event that the Stalking Horse Bid is accepted by BG Furniture but BG Furniture's creditors do not approve the BIA Proposal (such that BG Furniture is automatically deemed bankrupt), the Stalking Horse Bidder will have an option to purchase all the Property (other than Excluded Assets, as may be designated by the Stalking Horse Bidder) (collectively, the "**Purchased Assets**"), exercisable within 5 business days of the vote against the BIA Proposal, in consideration of payment of the Investment Amount and subject to Court approval pursuant to an Approval & Vesting Order.

Reference: *Hofmann Affidavit, supra*, at para 44; Exhibit "T" to the *Hofmann Affidavit, supra*.

25. The following chart summarizes the key dates set out in the SISF:

DATE	DESCRIPTION
December 22, 2016	Court Approval of SISF
December 22, 2016 – January 6, 2017	Marketing and solicitation process
February 10, 2017	Deadline for submissions of Qualified Bids
February 17, 2017	Enter into definitive Investment Agreement and/or Asset Purchase Agreement
Week of February 27, 2017	Either: Submit BIA Proposal and notify creditors of vote, if necessary (<i>e.g.</i> , if the Stalking Horse Investment Term Sheet is Successful Offer); OR

	If Stalking Horse Investment Term Sheet is not a Successful Offer, Motion for approval and vesting order re: Successful Offer(s), depending on Court availability
Week of March 13, 2017	Creditor Meeting to vote on BIA Proposal, if necessary
Week of March 20, 2017	Either: If BIA Proposal is not accepted by creditors, motion for Approval and Vesting Order in respect of sale of Purchased Assets to Stalking Horse Bidder; OR If BIA Proposal is accepted by creditors, motion for Approval and Sanction Order

Reference: Exhibit "S" to *Hofmann Affidavit, supra*.

26. In the event BG Furniture elects not to proceed with the transaction contemplated by the Stalking Horse Investment Term Sheet, BG Furniture will pay to the Stalking Horse Bidder a break fee in an amount equal to the greater of \$40,000.00 and 5% of the Investment Amount should same be increased by the Stalking Horse Bidder over the course of the SISP (the "**Break Fee**").

Reference: Exhibit "T" to *Hofmann Affidavit, supra*.

Administration Charge

27. In order to undertake the SISP, BG Furniture seeks a first-ranking charge over the Property in favour of BG Furniture's counsel, the Proposal Trustee and the Proposal Trustee's counsel for professional fees incurred in connection with these proceedings to a maximum of \$150,000.00 (the "**Administration Charge**"). The Administration Charge will rank first in priority to all other encumbrances to the Property, including the DIP Charge.

Reference: *Hofmann Affidavit, supra*, at para 51.

D&O Charge

28. BG Furniture seeks approval of a D&O Charge over the Property in the amount of \$25,000.00, in priority to all other charges except the Administration Charge and the DIP Charge, to indemnify its officers and directors in respect of post-filing liabilities that they incur in such capacities.

Reference: *Hofmann Affidavit, supra*, at para 54.

Extension of Time for BIA Proposal

29. The SISP contemplates completion in March 2017. Consequently, BG Furniture seeks an Order extending the stay of proceedings by 45 days from the date upon which this motion is scheduled to be heard, to February 5, 2017.

Reference: *Hofmann Affidavit, supra*, at para 54.

PART III: ISSUES

30. This Motion raises the following issues:
- (a) Should this Court approve the DIP Commitment Letter implementing the DIP Facility and granting the DIP Charge?
 - (b) Should this Court approve the SISP, including the Stalking Horse Investment Term Sheet and the transaction contemplated therein?
 - (c) Should this Court approve and ratify the Stalking Horse Investment Term Sheet and in particular, the Break Fee contemplated therein?
 - (d) Should this Court grant the Administration Charge?
 - (e) Should this Court grant the D&O Charge?

- (f) Should this Court extending the stay of proceedings granted upon the filing of the NOI to February 5, 2017?

PART IV: LAW & LEGAL AUTHORITIES

Issue 1: Should this Court approve the DIP Commitment Letter, implementing the DIP Facility and granting the DIP Charge?

- 31. Section 50.6 of the BIA expressly authorizes the Court to approve interim financing and order a priority charge for amounts advanced to a debtor pursuant to said financing.
- 32. Section 50.6(5) of the BIA sets out the following factors to be considered by the Court in considering whether to grant an Order approving DIP financing and a DIP financing charge:
 - (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.

Reference: Section 50.6(5) of the BIA.

DIP Financing

33. In the context of a Proposal under the BIA, the Court has granted DIP financing where:
- (a) the evidence was that the debtor would cease operations if the relief were not granted;
 - (b) the DIP facility was supported by the proposal trustee; and
 - (c) the DIP loan is required to permit the SISP to proceed.

Reference: *Mustang GP Ltd. (Re)*, 2015 ONSC 6562 ("**Mustang**") at paras 28 - 29;
Colossus Minerals Inc. (Re), 2014 ONSC 514 ("**Colossus**") at paras 7 – 9;
Re P.J. Wallbank Manufacturing Co. Limited, 2011 ONSC 7641 ("**Wallbank**") at paras 17-18

Brief of Authorities, Tabs 1, 2 & 3, respectively.

34. The Court has recognized that the *Companies' Creditors Arrangement Act* ("**CCAA**") is an analogous restructuring statute to the proposal provisions of the BIA.

Reference: *Mustang, supra*, at para 31.
Danier Leather Inc. (Re), 2016 ONSC 1044 ("**Danier**") at para 24.

Brief of Authorities, Tabs 1 & 4, respectively.

35. Although in the context of a restructuring proceeding under the CCAA, this Court has recognized that the existence of a financing facility is of critical importance to a restructuring company to ensure stable continuing operations during the restructuring process and to provide reassurance to the various stakeholders that the company will

continue to have the financial resources to pay its suppliers and employees, and to carry on its business in the ordinary course.

36. Accordingly, this Court has found that debtor-in-possession financing is a pre-condition to a successful restructuring.

Reference: *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 ("U.S. Steel") at para 9.
Brief of Authorities, Tab 5.

DIP Lender's Charge

37. When determining whether it is appropriate to grant a DIP lender's charge in the Proposal context, any prejudice to existing creditors is a relevant consideration.

38. While a DIP lender's charge will impact the creditors' positions to some degree, this Court held that where the company would face immediate cessation of business activities if the DIP financing and lender's charge were not approved, on balance the benefit to all stakeholders of a DIP facility significantly outweighs any prejudice.

Reference: *Wallbank*, supra at para 24.
Brief of Authorities, Tab 3.

39. This Court has also held that it is not realistic to conceive of a DIP Loan proceeding in the absence of the DIP Lender's Charge receiving the priority, nor is it realistic to investigate the possibility of third-party debtor-in-possession financing without a similar priority.

Reference: *U.S. Steel*, supra at para 18.
Brief of Authorities, Tab 5.

40. In this case, this Court's approval of the DIP Facility is a necessary pre-condition to a successful restructuring of BG Furniture. The following factors support the approval of the DIP Facility and the DIP Lender's Charge:

- (a) The period during which BG Furniture will be subject to the BIA Proposal proceedings is anticipated to be relatively short. If the Stalking Term Investment Sheet is implemented, the proposal will be voted on during the week of March 13, 2017, and the necessary approval the following week;
- (b) BG Furniture has already ceased operations, and has been inoperative for over 2 months. The proposed DIP Facility will enable BG Furniture to immediately recommence its ordinary business operations and is necessary in order to recall approximately 34 employees from their temporary layoff and to fund payroll;
- (c) Said commencement of its ordinary business operations will enable BG Furniture to immediately realize value from its assets. In particular, said commencement will enable BG Furniture to complete approximately \$470,000.00 in back orders, which will generate positive cash flow over the BIA proceedings and allow the Company to maintain its customers;
- (d) As evidenced in the cash flow statement filed as part of this proceeding, the DIP Facility is necessary to provide BG Furniture with working capital and fund BG Furniture's payroll (including unpaid payroll). The proposed DIP Facility will also provide the Company with sufficient financing to implement the SISF;

- (e) The proposed DIP Facility will enhance the prospects of the Company making a viable proposal to its creditors by providing sufficient working capital to implement a restructuring and by providing reassurance to the various stakeholders that the company will continue to have the financial resources to pay its suppliers and employees, and to carry on its business in the ordinary course;
- (f) Upon its recommencement, management of the Company will operate the business with a view to assisting the Proposal Trustee with the SISP and BIA Proposal;
- (g) No creditor will be materially prejudiced by the proposed DIP Facility or DIP Charge. In any event, any prejudice would be significantly outweighed by the benefit to all stakeholders by the re-commencement and continued operations of the Company's ordinary business activities, as described above; and
- (h) The Proposal Trustee supports the DIP Facility.

Issue 2: Should this Court approve the SISP, including the Stalking Horse Investment Term Sheet and the transactions contemplated therein?

41. The use of stalking horse bids to set a baseline for the bidding process has been recognized by Canadian courts as a reasonable and useful element of a sales process. Its use maximizes the value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse bids have been approved for use in receivership proceedings, BIA proposals, and CCAA proceedings.

Reference: *Mustang, supra* at para 39;
Danier, supra at para 20

Brief of Authorities of the Applicant, Tabs 1 & 4, respectively.

Section 65.13 of the BIA

42. The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider when deciding whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA.

Reference: *Colossus, supra* at paras 22-26;
Danier, supra at para 21.

Brief of Authorities, Tabs 2 & 4, respectively.

43. A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, and it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

Reference: *Mustang, supra* at para 36;
Danier, supra at para 22.

Brief of Authorities, Tabs 1 & 4, respectively.

The Test – The Nortel Criteria

44. In *Re Brainhunter*, Justice Morawetz considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring application under the CCAA and in particular s. 36, which parallels s. 65.13 of the BIA.

45. Citing his decision in Nortel Networks Corp, Justice Morawetz set out four factors (the "**Nortel Criteria**") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

- (a) Is a sale transaction warranted at this time?
- (b) Will the sale benefit 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?

Reference: *Re Brainhunter Inc.*, 2009 CarswellOnt 8207 ("**Re Brainhunter**") at paras. 13-17;
Re Nortel Networks Corp., 2009 CarswellOnt 4467 ("**Nortel**") at para. 49.

Brief of Authorities, Tabs 6 & 7, respectively.

46. Although the Nortel Criteria were set out in the context of a CCAA proceeding, this Court has held that Nortel Criteria are of assistance on a motion to approve a sale process in proposal proceedings under the BIA.

Reference: *Mustang, supra* at para 38;
Danier, supra at para 24-25.

Brief of Authorities, Tabs 1 & 4, respectively.

47. In approving a proposed SISP, this Court has also considered whether proposal trustee is in support of same.

Reference: *Mustang, supra* at para 40.
Colossus, supra at para 26;
Danier, supra at para 37;

Brief of Authorities, Tabs 1, 2 & 4, respectively.

(i) The SISP is warranted at this time

48. Given that BG Furniture has already ceased ordinary business operations and has been inoperative for over 2 months, the SISP is warranted at this time. If BG Furniture does not immediately implement the SISP and the Stalking Horse Investment Term Sheet, BG Furniture will be unable to re-commence its operations and re-capture any going concern value, complete significant backorders (and ultimately generate positive cash flow for the business), and recall its key employees.

Reference: *Hofmann Affidavit, supra* at para 50.

(ii) The SISP will benefit the "whole economic community"

49. The SISP offers an open and transparent process; it invites equity investment opportunities and offers to repurchase some or all of the Property. The Stalking Horse Investment Term Sheet establishes a "floor price" for any third-party bids submitted through the SISP, which will assist in maximizing the value of the business for the benefit of all of its stakeholders.
50. Not only will approval of the SISP benefit BG Furniture's business, but it will also revive jobs, existing contracts and business relationships. Ultimately, it will provide stability to the business as it will assist in reassuring customers, employees, suppliers and other business partners and stakeholders that the business will continue as a going concern.

Reference: *Hofmann Affidavit, supra*, at para 40.

(iii) The Company's Creditors Have No Reason to Object

51. The Investment Amount prescribed in the Stalking Horse Investment Term Sheet will provide significantly better recoveries for each creditor class than would be realized in a liquidation. This is particularly so given that the nature and condition of the Lands and

the Facility would pose significant challenges for uses other than manufacturing wood furniture. As such, there would be no reason for the Company's creditors to object to the proposed SISP or Stalking Horse Investment Term Sheet.

Reference: *Hofmann Affidavit, supra*, at para 45.

(iv) The SISP is the Best Viable Option

52. In light of the specific use of the Lands and Facility noted above, the Stalking Horse Investment Term Sheet represents the highest and best value to be obtained for the Company's assets at this time, subject to a higher offer being identified through the SISP.

53. Lastly, the Proposal Trustee supports the approval and immediate implementation of the SISP.

Reference: *Hofmann Affidavit, supra*, at para 38

Issue 3: Should this Court approve and ratify the Stalking Horse Investment Term Sheet and the Break Fee contemplated therein?

54. Break fees in favour of a stalking horse bidder are frequently approved in insolvency proceedings, and do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected.

Reference: *Danier, supra* at para 41.

Brief of Authorities, Tab 4.

55. This Court has approved break fees in the range of 3-4% and expense reimbursements in the range of 2% as reasonable.

Reference: *Danier, supra*, at para 42;
W.C. Wood Corp. Ltd., [2009] O.J. No. 4808 ("Wood Corp") at para 3.

Brief of Authorities, Tabs 4 & 8, respectively.

56. In this case, the Stalking Horse Investment Term Sheet contains a 5% Break Fee in favour of the Stalking Horse Bidder, and does not contain an additional expense reimbursement provision.
57. For the reasons set out above, the Company submits that the Stalking Horse Investment Term Sheet should be approved in the context of the overall restructuring plan and the SISP. As such, the Company submits that the Break Fee in this case is appropriate and reasonable.
58. The Company's management has approved the terms of the Stalking Horse Investment Term Sheet including the Break Fee. The Proposal Trustee has also reviewed same and has concluded that each is reasonable in the circumstances.

Issue 4: Should this Court grant the Administration Charge?

59. BG Furniture seeks approval of a first-priority Administration Charge in the maximum amount of \$150,000 to secure the fees and disbursements of its counsel, the Proposal Trustee and counsel to the Proposal Trustee in respect of these BIA proceedings.
60. The authority to grant the Administration Charge is found in Section 64.2 of the BIA, which provides that the Court may order such charge to the benefit of counsel to the applicant under the BIA and/or the proposal trustee and its counsel, provided that the secured creditors who are likely to be affected by the security or charge have received notice of the relief being sought.

Reference: Section 64.2 of the BIA.

61. This Court has granted an administration charge even where notice to creditors may have been short.
62. This Court has recognized that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self-evidently necessary to navigate to completion. The debtors typically have limited means to obtain this professional assistance.

Reference: *Mustang, supra*, at para 33;
Colossus, supra, at para 13.

Brief of Authorities, Tabs 2 & 4, respectively.

63. The Administration Charge is necessary to complete the SISP and the Company's BIA Proposal, which would be impossible to implement without the assistance of the Company's counsel, the Proposal Trustee and its legal counsel.
64. All of the Company's creditors have been provided with notice of the within motion.
65. The cash flow statement filed as part of this proceeding and the DIP Facility both contemplate payment of professional fees on a bi-weekly basis through the duration of these BIA proceedings. As such, it is anticipated at this time that at the conclusion of the proceedings there will not be any amounts payable under the Administration Charge.

Reference: *Hofmann Affidavit, supra*, at para 53.

Issue 5: Should this Court grant the D&O Charge?

66. BG Furniture seeks approval of a D&O Charge over the Property to indemnify its directors and officers for obligations and liabilities they may incur after the filing of the

NOI, in priority to all other charges except the Administration Charge and the DIP Charge.

67. The authority to grant such a charge is found in Section 64.1 of the BIA, which provides that on application by a person who filed an NOI and on notice to secured creditors, the Court may order such charge in favour of any director or officer in an amount it considers appropriate. The Court may also order that the security or charge rank in priority over the claim of any secured creditor.

Reference: Section 64.1 of the BIA.

68. This Court has approved a D&O charge in numerous cases, and has considered factors such as the importance of the directors and officers continued involvement in the restructuring process and existing insurance coverage, among other things.

Reference: *Mustang, supra*, paras 34-35
Colossus, supra, at paras 17-21;
Danier, supra, at paras 64-71;

Book of Authorities, Tabs 1, 2 & 4, respectively.

69. In this case, the involvement of BG Furniture's directors and officers is critical to the successful implementation of the SISP. The re-commencement of BG Furniture's business operations and the conduct of the BIA proceeding could potentially expose the directors and officers to liability. The protection offered by the D&O Charge is necessary to ensure the directors and officers continued involvement in the restructuring process.
70. All of the Company's creditors have been provided with notice of the within motion.
71. The D&O Charge applies only to claims or liabilities that the directors and officers of BG Furniture may incur after the date of the NOI and does not cover misconduct or gross

negligence. The directors and officers of BG Furniture do not enjoy insurance coverage under any existing policies.

Issue 6: Should this Court extending the stay of proceedings granted upon the filing of the NOI to February 5, 2017?

72. The NOI was filed on December 14, 2016, and the 30 day initial stay of proceedings provided for under section 50.4(8) of the BIA will expire on January 12, 2017.
73. As the SISP contemplates completion in March of 2017, BG Furniture is seeking an order extending the stay of proceedings by 45 days from the date upon which this motion is scheduled to be heard, to February 5, 2017.
74. The authority to grant the requested extension is found in section 50.4(9) of the BIA, which provides that an extension may be granted where the Court is satisfied that:
- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
 - (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
 - (c) no creditor would be materially prejudiced if the extension being applied for were granted.

Reference: Section 50.4(9) of the BIA.

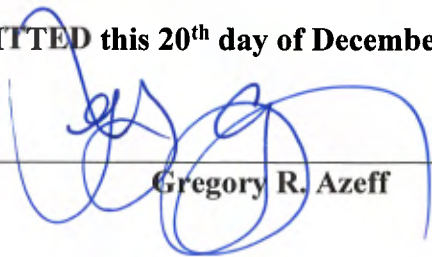
75. In this case, an extension under s. 50.4(9) is necessary for the BG Furniture to effectively pursue the SISP. The following factors support the approval of an extension of the stay of proceedings:

- (a) By seeking authorization to implement a SISP and Stalking Horse Investment Term Sheet, the Company is acting in good faith and with due diligence, with a view to maximizing value for all of its stakeholders;
- (b) The additional time granted by the extension will enable BG Furniture to complete the SISP and the restructuring process, which will increase the likelihood of a viable proposal being made to creditors and completion of a feasible sale transaction;
- (c) Approval of the requested extension will reduce procedural costs over the course of the BIA proceedings, by eliminating the need to prepare and attend at a separate extension motion;
- (d) The requested extension will not materially prejudice any of the Company's creditors. In fact, the extension will assist in reassuring stakeholders that both the BIA process and business operations will continue beyond the next four weeks;
and
- (e) The Proposal Trustee supports the requested extension.

PART V: ORDER REQUESTED

76. In light of the foregoing, the Company respectfully requests that this Court grant the relief sought in this motion in the draft form of Order attached at Tab 3 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of December, 2016.



Gregory R. Azeff

SCHEDULE A
LIST OF AUTHORITIES

1. *Mustang GP Ltd. (Re)*, 2015 ONSC 6562 (S.C.J. [Commercial List]).
2. *Colossus Minerals Inc. (Re)*, 2014 ONSC 514 (S.C.J. [Commercial List]).
3. *Re P.J. Wallbank Manufacturing Co. Limited*, 2011 ONSC 7641 (S.C.J. [Commercial List]).
4. *Danier Leather Inc. (Re)*, 2016 ONSC 1044 (S.C.J. [Commercial List]).
5. *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 (S.C.J. [Commercial List]).
6. *Re Brainhunter Inc.* 2009 CarswellOnt 8207 (S.C.J. [Commercial List]).
7. *Re Nortel Networks Corp.*, 2009 CarswellOnt 4467 (S.C.J. [Commercial List]).
8. *W.C. Wood Corp. Ltd.*, [2009] O.J. No. 4808 (S.C.J. [Commercial List]).

**SCHEDULE B
RELEVANT PROVISIONS AND STATUTES**

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

Section 50.4

Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

- (a) the insolvent person's intention to make a proposal,
- (b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
- (c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

- (a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;
- (b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and
- (c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

- (a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

- (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
- (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
- (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
- (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

Section 50.6

Order — interim financing

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.

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are 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.

Priority

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

Priority — previous orders

(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

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.

Section 64.1

Security or charge relating to director's indemnification

64.1 (1) On application by 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) 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 property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

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

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Section 64.2

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.

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.

Section 65.13**Restriction on disposition of assets**

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

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

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.

Related persons

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

(a) a director or officer of the insolvent person;

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

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

Assets may be disposed of free and clear

(7) 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 insolvent person 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

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

IN THE MATTER OF THE PROPOSAL OF BG FURNITURE LTD.
OF THE TOWN OF WALKERTON IN THE PROVINCE OF ONTARIO

Court No. 35-2199056
Estate No. 35-2199056

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

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