

**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 DISCOVERY AIR INC.

APPLICANT

**FACTUM OF THE APPLICANT
(Sale Solicitation Process)
(Motion Returnable April 4, 2018)**

April 2, 2018

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PART I – NATURE OF THIS APPLICATION

1. This factum is filed in support of a motion made by Discovery Air Inc. (“**Discovery**” or the “**Applicant**”) for, among other things, approval of a sale solicitation process (“**SSP**”) and of four Stalking Horse Agreements (defined below) for the purpose of constituting stalking horse bids under the SSP.

PART II – FACTS

2. The facts supporting this motion are set out in full detail in the affidavit of Paul Bernards sworn March 28, 2018 (the “**Bernards Affidavit**”). Capitalized terms used herein and not otherwise defined have the meaning given to them in the Bernards Affidavit.

3. On March 21, 2018, Discovery obtained an initial order (the “**Initial Order**”) under the *Companies’ Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the “**CCAA**”).

Pursuant to the terms of the Initial Order, KSV Kofman Inc. was appointed as monitor (the “**Monitor**”) in these proceedings.¹

4. From the outset of the proceedings, Discovery has indicated that it plans to sell its remaining interests in its three wholly owned subsidiaries, Great Slave Helicopters Ltd. (“**GSH**”), Air Tindi Ltd. (“**ATL**”) and Discovery Mining Services Ltd. (“**DMS**”) as well as its remaining 9.7% minority interest in Top Aces Holdings Inc. (“**TA Holdings**”), the parent company of Top Aces Inc. (“**Top Aces**”).²

5. In furtherance of that process, Discovery and Clairvest have negotiated four (4) stalking horse agreements all dated as of March 21, 2018, pursuant to which Clairvest has agreed to act as a “stalking horse purchaser” in connection with Discovery’s sale of its equity interest in each of GSH, ATL and DMS (referred to herein as the “**GSH Stalking Horse Agreement**”, “**ATL Stalking Horse Agreement**” and “**DMS Stalking Horse Agreement**” and collectively, the “**Northern Stalking Horse Agreements**”), its remaining 9.7% minority interest in TA Holdings (the “**TA Stalking Horse Agreement**” and together with the Northern Stalking Horse Agreements, the “**Stalking Horse Agreements**”), and all further assets of Discovery, including intercompany obligations owed to Discovery by its subsidiaries and all claims and causes of action of Discovery against other persons.³

6. The terms of the Stalking Horse Agreements are summarized in the Bernards Affidavit and the first report of the Monitor dated March 29, 2018 (the “**First Report**”). Briefly,

(a) *Top Aces Stalking Horse Agreement.*⁴

(ii) Pursuant to the TA Stalking Horse Agreement, Discovery is selling to CEP IV Investment Limited Partnership, Clairvest Equity Partners IV Limited Partnership, DA Holdings Limited Partnership and G. John Krediet

¹ Affidavit of Paul Bernards, sworn March 28, 2018 (“**Bernards Affidavit**”) at para. 3, Tab 2 of the Motion Record of the Applicant (returnable April 4, 2018) (“**Motion Record**”)

² Bernards Affidavit at para. 8, Tab 2 of the Motion Record.

³ Bernards Affidavit at para. 8, Tab 2 of the Motion Record.

⁴ Bernards Affidavit at para 10, Tab 2 of the Motion Record.

(collectively, the “**TA Stalking Horse Bidder**”) its remaining 9.7% minority interest in TA Holdings along with other residual assets of Discovery which essentially comprise of all remaining contracts, claims, books, records and other assets owned by Discovery which are not otherwise being sold under the Northern Stalking Horse Agreements.

- (iii) The purchase price under the Top Aces Stalking Horse Agreement is a credit bid of secured indebtedness under the CV Secured Debentures and/or the DIP Facility of \$20,825,000 and the assumption of certain liabilities.
- (iv) Key conditions include approval of the SSP by April 4, 2018 and Court approval of the transaction by June 14, 2018.

(b) *Northern Stalking Horse Agreements*⁵

- (ii) Pursuant to each of the Northern Stalking Horse Agreements, Discovery has agreed to sell to 10671541 Canada Inc. (the “**Northern Stalking Horse Bidder**” and together with the TA Stalking Horse Bidder, the “**Stalking Horse Bidders**”) its 100% equity interest in each of GSH, ATL and DMS along with its remaining intercompany claims against those entities and certain other assets connected to each of those businesses (if any).
- (iii) The purchase price under each of the Northern Stalking Horse Agreements is an assumption of Clairvest secured debt (under the DIP Facility and/or the CV Secured Debentures) of (A) \$12,381,000 for GSH; (B) \$19,765,000 for ATL; and (C) \$5,000,000 for DMS plus the assumption of certain liabilities including (in each case) Discovery’s outstanding liabilities to each of CIBC, ECN and Roynat (who, in aggregate are owed approximately \$28.5 million).

⁵ Bernards Affidavit at para 10, Tab 2 of the Motion Record.

- (iv) Key conditions include Court approval of the SSP by April 4, 2018 and Court approval of the transaction by June 28, 2018.

7. There are no break fees or expense reimbursements (“**Bid Protections**”) payable to either of the Stalking Horse Bidders under any of the Stalking Horse Agreements.⁶

8. Discovery, in consultation with the Monitor, has prepared a proposed SSP. Given the relationship between Discovery and Clairvest, including Clairvest’s role as stalking horse bidder and DIP Lender, and the fact that certain principals and employees of Clairvest are directors of Discovery, it is proposed that the SSP will be overseen, conducted and run by the Monitor. Further, the terms of the SSP provide that Clairvest is not entitled to any information regarding the SSP that is not also provided to other Qualified Bidders. The proposed order approving the SSP also provides that Discovery and its representatives shall not communicate any information regarding the SSP to Clairvest.⁷

9. Briefly, the SSP provides for a solicitation period during which the Monitor (in consultation with Discovery) will solicit interest in the various transactions both through a press release as well as direct solicitation of potential bidders. The Top Aces transaction will be marketed to financial buyers only whereas the Northern Transactions will be marketed to both financial and strategic buyers. To the extent that “qualified bids” are received by the applicable bid deadline then the Monitor will conduct one or more auctions to determine the final “accepted bid”. The final transactions will be subject to Court approval. The applicable milestones contemplated by the SSP or the Stalking Horse Agreements are set out below – the Monitor has discretion to amend all applicable milestones as provided for in the SSP by up to two weeks without further court approval.⁸

⁶ Bernards Affidavit at para 11, Tab 2 of the Motion Record.

⁷ Bernards Affidavit at para 12, Tab 2 of the Motion Record.

⁸ Bernards Affidavit at para 13, Tab 2 of the Motion Record.

Milestone	Deadline (Top Aces SSP)	Deadline (GSH SSP)	Deadline (ATL SSP)	Deadline (DMS SSP)
Commencement SSP	April 4, 2018	April 4, 2018	April 4, 2018	April 4, 2018
Bid Deadline	May 21, 2018	June 4, 2018	June 4, 2018	June 4, 2018
Auction	May 31, 2018	June 14, 2018	June 14, 2018	June 14, 2018
Court Approval (not later than)	June 14, 2018	June 30, 2018	June 30, 2018	June 30, 2018
Closing Date Deadline (not later than)	July 31, 2018	July 31, 2018	July 31, 2018	July 31, 2018

PART III – ISSUES AND THE LAW

10. This issues on this motion are:

- (a) Should the SSP be approved by this Court?
- (b) Should the Stalking Horse Agreements be approved for the purposes of being stalking horse agreements in the SSP?

A. The SSP Should be approved by this Court

11. This Court has clear jurisdiction to approve a sales process within the context of the CCAA prior to the development of a plan.⁹

12. In *Re Nortel*, the Court identified a number of factors to be considered in determining whether to authorize such a sale process including:

- (a) Is a sale warranted at this time;

⁹ *Re Nortel Networks Corp., et al.* 2009 CanLii 39492 (SCJ) at para. 48 [*“Nortel”*], Tab 1 of the Brief of Authorities of the Applicant (**“Brief of Authorities”**), CCAA, s. 11(1).

- (b) will the sale be of benefit to the whole “economic community”;
- (c) do any of the debtors’ creditors have a bona fide reason to object to the sale of the business; and
- (d) is there a better viable alternative?¹⁰

13. These factors have been considered in numerous CCAA and proposal cases involving a court approved sale process.¹¹

14. Additionally, the factors set out in Section 36(3) of the CCAA are also indirectly relevant to the Court’s consideration on approval of a sale process. Those factors include:

- (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.¹²

¹⁰ *Nortel*, para. 49, Tab 1 of the Brief of Authorities.

¹¹ See, for example, *Re Brainhunter Inc.*, 2009 CarswellOnt 8207 [*Brainhunter*], Tab 2 of the Brief of Authorities, *Re Danier Leather Inc.*, 2016 ONSC 1044 [*Danier*], Tab 3 of the Brief of Authorities.

¹² CCAA, s. 36(3). See also *Brainhunter*, para. 17, Tab 2 of the Brief of Authorities, *Danier*, para. 34, Tab 3 of the Brief of Authorities.

15. The proposed SSP by Discovery meets the *Nortel* criteria and the factors set out in Section 36(3) of the CCAA for the following reasons:

- (a) The proposed SSP is warranted at this time – Discovery does not have sufficient cash flow to continue in the CCAA proceedings for a prolonged period of time as demonstrated in its cash flow projection filed with the Court¹³;
- (b) The proposed SSP will be conducted by the Monitor to ensure impartiality¹⁴;
- (c) The bid increments will be set by the Monitor in its discretion¹⁵;
- (d) The Stalking Horse Bidders will not be entitled to any information pertaining to the SSP unless such information is provided to all “Qualified Bidders” and Discovery will not be permitted to communicate directly with Clairvest on matters relating to the SSP¹⁶;
- (e) The SSP has been designed to test the market to determine whether there are higher or better offers available for any of the Transactions in order to maximize value for all stakeholders in the proceedings¹⁷;
- (f) The Stalking Horse Agreements provide for the sale of shares of the Non-Applicant Subsidiaries – the sale of the shares will result in those businesses continuing in the ordinary course with all such stakeholders to remain unaffected which is preferable to a liquidation of those businesses¹⁸;

¹³ Exhibit “H” to the Affidavit of Paul Bernards, sworn March 21, 2018 (“**Initial Affidavit**”), Tab 2 of the Application Record dated March 21, 2018 (“**Application Record**”).

¹⁴ Bernards Affidavit at para 12, Tab 2 of the Motion Record.

¹⁵ First Report of the Monitor dated March 29, 2018 (“**Monitor’s Report**”), section 6.0(3)(m)(v).

¹⁶ Monitor’s Report, section 6.2(3).

¹⁷ Monitor’s Report, section 6.3(1)(a).

¹⁸ Monitor’s Report, section 6.3(1)(g) and (k).

- (g) The SSP provides for a number of possible outcomes including parties who may be interested in purchasing the assets of one or more of the Non-Applicant Subsidiaries¹⁹;
- (h) The Monitor has recommended approval of the SSP including the milestone dates contemplated by the SSP²⁰;
- (i) Discovery is facing the maturity of over \$120 million of debt (including both secured and unsecured obligations) in the near future which it cannot repay²¹ – absent a sale process the subsidiaries are likely to not be able to continue to operate their respective businesses in the normal course– there are no other viable alternatives other than a sale process in the circumstances; and
- (j) The Monitor has already obtained a favourable legal opinion from its legal counsel, Goodmans LLP, with respect to the first priority security held by Clairvest, *inter alia*, over Discovery’s shares of GSH, ATL, DMS and TA Holdings²².

16. With respect to the TA SSP, the SSP provides that the potential buyers will be restricted to “financial parties”. Given the small percentage of shares for sale (approximately 9.7% of the overall issued shares of TA Holdings), it would be potentially detrimental to the Top Aces business and counter intuitive to provide strategic buyers (i.e. competitors) with access to confidential information through a sale process.²³

B. The Stalking Horse Agreements Should Be Approved for the Purpose of acting as stalking horse agreements in the SSP

17. Stalking horse agreements in the context of sale processes are well established in the CCAA process.²⁴ In this case, under the proposed Stalking Horse Agreements:

¹⁹ Monitor’s Report, section 6.3(1)(h).

²⁰ Bernards Affidavit at para 13(i), Tab 2 of the Motion Record.

²¹ Initial Affidavit at para 12, Tab 2 of the Application Record.

²² Monitor’s Report, section 5.0.

²³ Monitor’s Report, section 6.1.

²⁴ *Brainhunter*, para 13, Tab 2 of the Brief of Authorities, *Danier*, para 20, Tab 3 of the Brief of Authorities.

- (a) The stalking horse agreements provide for the acquisition of shares of each of the Non-Applicant Subsidiaries which will benefit the creditors, employees and other stakeholders of the Non-Applicant Subsidiaries²⁵;
- (b) The Northern Stalking Horse Agreements provide for the assumption of the remaining debt owing to Discovery's secured lenders, namely, CIBC, ECN and Roynat. The only other significant secured creditor, Textron, is also unaffected given that its secured debt facility is directly with ATL²⁶;
- (c) None of the Stalking Horse Agreements provide for any Bid Protections²⁷; and
- (d) The Stalking Horse Bidders are not allowed any preferential information regarding the SSP including the identity of other interested parties²⁸.

PART IV – NATURE OF THE ORDER SOUGHT

18. The Applicant therefore requests an Order substantially in the form filed with its motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of April 2018.



A handwritten signature in black ink, appearing to be 'J. Stur', is written over a horizontal line that extends across the page.

²⁵ Monitor's Report, sections 3.0 and 4.0.

²⁶ Monitor's Report, section 4.0.

²⁷ Monitor's Report, section 6.3(1)(f).

²⁸ Monitor's Report, section 6.2(3).

SCHEDULE A – LIST OF AUTHORITIES

1. *Nortel Networks Corp., et. al.* 2009 CanLii 39492 (SCJ)
2. *Brainhunter Inc.*, 2009 CarswellOnt 8207
3. *Danier Leather Inc.*, 2016 ONSC 1044

SCHEDULE B – RELEVANT STATUTES

Companies' Creditors Arrangement Act, R.S.C., 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

Factors to be considered

36 (3) In deciding whether to grant the authorization, the court is to consider, among other things,

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

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