

Estate / Court File No.: _____
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ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
COMMERCIAL LIST

**IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF
957855 ALBERTA LTD. (FORMERLY NEWSWEST INC.) AND ROSEBUD CREEK
FINANCIAL CORP. IN RESPECT OF METRO 360 GENERAL PARTNERSHIP**

FACTUM OF THE MOVING PARTIES

Motion for Approval & Vesting Order and Bankruptcy Procedure Order
(Returnable April 7, 2020)

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PART I – INTRODUCTION

1. On April 6, 2020, 957855 Alberta Ltd. (formerly NewsWest Inc.) (“**Alberta HoldCo**”) and Rosebud Creek Financial Corp. (“**Rosebud Holdco**” and together with Alberta HoldCo, the “**Partners**”), as the partners of Metro 360 General Partnership (“**Metro 360**” or the “**Partnership**”), each commenced proposal proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “**BIA**”) by respectively filing notices of an intention to make a proposal (each, an “**NOI**” and together the “**NOIs**”). KSV Kofman Inc. is named as the proposal trustee under the NOIs (“**KSV**” or the “**Proposal Trustee**”).¹
 2. The Partners are holding companies which together hold 100% of the interests of Metro 360, a multi-faceted marketer of information and entertainment products, including magazines, books, newspapers, audio and visual media, and consumer packaged goods.
- Shapiro Affidavit, at para. 1; Motion Record of the Moving Parties, returnable April 7, 2020 (the “**Motion Record**”), Tab 2.
3. The Partners filed the NOIs to commence these proposal proceedings in response to significant financial challenges faced by Metro 360 that intensified in light of recent global developments, including the COVID-19 pandemic and, in particular, to implement as quickly as possible a sale transaction in respect of Metro 360’s magazine and book wholesale distribution business (the “**Literature Business**”). The Literature Business, as further discussed in the Shapiro Affidavit, has been particularly affected by the current unprecedented economic circumstances and is in urgent need of a solution to re-open supply and distribution lines so that the value remaining in

¹ Capitalized terms used but not defined herein have the meaning given to such terms in the Affidavit of Daniel P. Shapiro sworn April 6, 2020 (the “**Shapiro Affidavit**”). Unless otherwise stated, all monetary amounts are expressed in Canadian dollars.

the business can be preserved and hundreds of jobs can be protected. Needing to stabilize the Literature Business, Metro 360 and the Partners, in consultation with the Proposal Trustee, began exploring potential options for a sale transaction which could be executed on an expedited basis.

Shapiro Affidavit, at para. 3; Motion Record, Tab 2.

4. This factum is filed in support of a motion by the Partners to approve a sale transaction that is the culmination of such efforts and which, subject to the approval of this Court and satisfaction of the other closing conditions, will see Great Pacific Enterprises Inc. dba TNG (the “**Purchaser**” or “**TNG**”) acquire, among other things: (i) all customer and title records of Metro 360; (ii) any and all magazine racks at Metro 360 customer locations; and (iii) the goodwill of Metro 360 in respect of its Canadian customers (the “**Transaction**”). In addition to these assets, the Purchaser will make offers of employment to almost 80 percent of Metro 360’s approximately 370 employees and assume certain key contracts, for the significant direct benefit of those employees and contract-counterparties of Metro 360.

Shapiro Affidavit, at para. 6; Motion Record, Tab 2.

5. The Transaction is an important step for the Partnership and its stakeholders in the circumstances. The Paperback and Periodical Distributors Act makes Canadian ownership a condition for the registration of any businesses engaged in the distribution of paperback and periodical publications, effectively limiting the market of prospective purchasers for the Literature Business to only the Purchaser (TNG), which is a Canadian operation and the largest player in this market. Based on such ownership restrictions and overall timing and market conditions, the Partnership and its Partners decided, in consultation with KSV, that an extensive sales process is not practical or appropriate in the circumstances, and elected to focus solely on approaching TNG to seek to develop a potential sale transaction in respect of the Literature Business in real time.

Shapiro Affidavit, at para. 7; Motion Record, Tab 2.

6. Despite the limited market, the Partnership believes that the Transaction represents the best available transaction in the unique circumstances of this market. The Transaction provides value for the Literature Business and will see the Literature Business continue on a going concern basis for the benefit of customers and suppliers, and will also see a significant portion of Metro 360's workforce receive offers of employment from TNG. Importantly, the Transaction also represents the only reasonable opportunity for Metro 360 to access unsold or dated product, which represent approximately \$37 million of refundable inventory, as TNG has agreed under the Transaction to retrieve all unsold inventory from retail accounts serviced by Metro 360 and process such returns for Metro 360's account, thereby significantly reducing the amount of supplier claims that will exist against the Metro 360 estate.

Shapiro Affidavit, at paras. 8 and 9; Motion Record, Tab 2.

7. Metro 360 and the Partners, with the assistance of professional advisors and KSV, has determined that the sale of the Literature Business pursuant to the Transaction, in conjunction with the collection of accounts receivable and the return of unsold inventory, combined with the continuation of the Partnership's other business operations, represents the best available alternative in the circumstances and will allow the Partnership to work towards presenting a restructuring plan to Metro 360's creditors at a later time that will maximize value and recoveries to them.

Shapiro Affidavit, at para. 8; Motion Record, Tab 2.

8. The Partners submit that the proposed Transaction, which is supported by KSV as the Proposal Trustee, maximizes value for the assets being sold, realizes other additional benefits which are

material to Metro 360 and its creditors, and should be approved on the basis that the criteria set out in Section 65.13 of the BIA are all satisfied, on the grounds discussed herein.

Shapiro Affidavit, at para. 10; Motion Record, Tab 2.

9. In addition to seeking approval of the Transaction, the Partners are also seeking an Order (the “**Bankruptcy Procedure Order**”) which will, among other things: (i) administratively consolidate the proceedings related to the Partners’ NOIs since the filing of such NOIs relate to Metro 360 and its business operations; (ii) approve a first priority administration charge in the aggregate amount of \$300,000; (iii) extend the stay of proceedings and other basic BIA protections resulting from the NOIs to Metro 360; (iv) approve the granting of an extension of the time to file a proposal and the corresponding stay of proceeding (the “**Stay Period**”); and (v) authorize Metro 360 and/or the Partners, in consultation with the Proposal Trustee, to complete the sale of Non-Material Residual Assets without further order of this Court for proceeds not exceeding \$200,000 in any one transaction or \$400,000 in the aggregate. The Partners believe that the foregoing relief is appropriate in the circumstances and necessary to assist Metro 360 and the Partners in efforts to develop a proposal that will result in full repayment to creditors.

Shapiro Affidavit, at para. 11; Motion Record, Tab 2.

PART II – SUMMARY OF THE FACTS

10. An overview of Metro 360, the Partners, Metro 360’s business operations, general industry challenges affecting the Literature Business, the Transaction and its key terms and benefits, among other things, are described in detail in the Shapiro Affidavit.

PART III – ISSUES AND THE LAW

11. The issues to be considered on this motion are whether the Court should:
- (a) approve the Transaction pursuant to the Purchase Agreement and vest the Assets (as defined in the Purchase Agreement) in TNG free and clear;
 - (b) approve the proposed Order approving the Transaction (the “**Approval and Vesting Order**”);
 - (c) administratively consolidate the proposal proceedings of Alberta HoldCo and Rosebud HoldCo;
 - (d) extend certain protections provided under the BIA in favour of Alberta HoldCo and Rosebud HoldCo granted by the filing of the NOIs to Metro 360;
 - (e) extend the Stay Period; and
 - (f) order the sealing of certain confidential information with respect to the Transaction.

A. THE TRANSACTION SHOULD BE APPROVED

(i) *Factors for Approval*

12. Pursuant to Section 65.13(1) of the BIA, this Court has the jurisdiction to approve a sale or disposition of assets outside of the ordinary course of business. Subsection 65.13(4) sets out the following list of non-exhaustive factors for the Court to consider in determining whether to approve a debtor’s sale of assets outside the ordinary course:

(4) *Factors to be considered* – 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.

[BIA](#), Section 65.13(4).

13. The principles for the Court to consider on a motion for the approval of a sale of assets are well established and set out in *Royal Bank v. Soundair Corp.* relating to a sale of assets by a receiver. The *Soundair* factors, which overlap with the Section 65.13(4) factors, remain relevant when considering the statutory test:

- (a) whether sufficient effort has been made to obtain the best price and that the receiver or debtor (as applicable) has not acted improvidently;
- (b) whether the interests of all parties have been considered;
- (c) the efficacy and integrity of the process by which offers have been obtained; and
- (d) whether there has been unfairness in the working out of the process.

[Royal Bank v. Soundair Corp. \(1991\), 83 D.L.R. \(4th\) 76 \(Ont. C.A.\)](#) [*Soundair*] at para. 16.

[Re Nelson Education Limited, 2015 ONSC 5557](#) at para. 37.

14. It is clear based on the case law that the Court has the jurisdiction to approve a sale transaction within BIA proposal proceedings in the absence of a proposal. Such an Order may be made where the Court is satisfied that the criteria set out in Section 65.13(4) has been satisfied.

[Komtech Inc. \(Re\), 2011 ONSC 3230](#) at para. 33.

15. Where Court approval is being sought for an immediate sale involving a previously negotiated purchase agreement without a further marketing process within Court-supervised proceedings (commonly referred to as a “pre-pack” or “quick-flip” transaction), the Court is to consider the *Soundair* principles but with specific consideration to the economic realities of the business and the specific transaction in question. Sale approval is warranted where the sale represents the best available commercial alternative in the circumstances, particularly where an extension of the process could jeopardize the continued operation of the business.

[Elleway Acquisitions Ltd. v. 4358376 Canada Inc., 2013 ONSC 7009](#) at paras. 33, 36 and 37.

[Tool-Plas Systems Inc., Re \(2008\), 48 C.B.R. \(5th\) 91 \(Ont. S.C.J. \[Commercial List\]\)](#) [*Tool-Plas*].

16. Furthermore, the Court should consider the impact on various parties and contemplate whether their position and proposed treatment would realistically be any different if an additional process was undertaken; this is unlikely to be the case where the process actually followed is consistent with what a court would have approved if the process was conducted post-filing.

[Tool-Plas, supra](#) at paras. 15-19.

17. A court should also give effect to the business judgment rule, which affords deference to the exercise of the commercial and business judgment of the debtor company in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient.

[Re Bloom Lake, 2015 QCCS 1920](#) at para. 28.

(ii) The Transaction meets the Criteria for Approval

18. The Partnership submits that the Transaction satisfies the criteria in Subsection 65.13(4) of the BIA and the *Soundair* principles:

(a) The Process was Reasonable in the Circumstances: Although there has been no formal sale process either before or within these proposal proceedings, the uniqueness of the case – including the legislative restrictions imposed by the Paperback and Periodical Distributors Act, the limited market, the nature of the Literature Business and the unprecedented economic circumstances – warrants the expedited sale of the Literature Business to TNG, which is a Canadian operation and, for the reasons set out in the Shapiro Affidavit, is the only logical and practical third-party purchaser for the Literature Business. Absent the COVID-19 crisis, a sale process would result in a sale to TNG, as the only logical and practical third-party purchaser, or a liquidation of the business. Metro 360 and the Purchaser are the only two businesses in Canada that perform the services covered by the APA and foreign companies are precluded from providing book, magazine and newspaper distribution in Canada. In these circumstances, Metro 360 and the Partners, with the assistance of its professional advisors and KSV, and in the exercise of their business judgement, determined that a transaction with TNG was the best available option in the circumstances for Metro 360 to preserve and maximize the value of the Literature Business for the benefit of the Partnership and all stakeholders, including suppliers, customers, employees and creditors. Accordingly, the process leading to the Transaction was reasonable in the circumstances at hand.

(b) The Proposal Trustee Supports the Transaction: The Proposal Trustee has been involved with and has approved of the process leading up to the proposed Transaction. The

Proposal Trustee began working with Metro 360 approximately one month ago in order to assist in identifying and securing the best restructuring alternatives and options available for Metro 360 and its stakeholders, and has participated in review, discussion and negotiation regarding the sale efforts and proposed Transaction. The Proposal Trustee supports the approval of the Transaction.

- (c) *The Transaction is more Beneficial to Creditors than a Disposition or Sale Under Bankruptcy:* The Transaction, in conjunction with the collection of accounts receivable and return of inventory, which will be facilitated by completion of the Transaction, combined with the continuation of the Partnership's other business operations, represents the best available alternative in the circumstances and will allow the Partnership at a later time to present a proposal to Metro 360's creditors that maximizes value and supports the Partnership's intention of repaying its creditors in full. The Transaction will see the going concern sale of the Literature Business for the benefit of customers, suppliers and employees, which otherwise would likely be required to cease operation and be liquidated, for cash value payable upon closing of the Transaction that will form the base of a creditor pool to be used to advance an eventual proposal. Importantly, the Transaction also represents the only reasonable opportunity for Metro 360 to access unsold or dated products, which represent approximately \$37 million of refundable inventory, as TNG has agreed under the Transaction to retrieve all unsold inventory from retail accounts serviced by Metro 360 and to process such returns for Metro 360's account, thereby significantly reducing the amount of supplier claims that will exist against the Metro 360 estate. The Transaction therefore results in an outcome for a broad range of stakeholders that is superior to a liquidation of Metro 360's assets.

- (d) Consultation and Consideration of Interested Parties: Metro 360 and the Partners have considered the interests of stakeholders throughout the sale efforts and, in particular given the challenging economic circumstances facing the Literature Business and the broader economy, have been particularly mindful of the interests of suppliers, customers and employees. TD, the only secured creditor of Metro 360 with respect to the assets for sale, has been given notice of the proposed Transaction, even though no amounts are due to TD as nothing has been drawn under Metro 360's bank line with TD.
- (e) The Transaction is a Positive Development for Stakeholders: The Transaction provides several benefits for Metro 360's stakeholders, including:
- (i) the going-concern sale of the Literature Business for cash value payable upon the closing of the Transaction that will form the base of a creditor pool to be used to advance an eventual proposal;
 - (ii) offers of employment being made by TNG to at least 23 of Metro 360's 70 salaried employees and 268 of its approximately 300 hourly employees;
 - (iii) TNG assuming and agreeing to perform certain of Metro 360's retail customer contracts, thereby facilitating the continued distribution and delivery of product for the benefit of such customers;
 - (iv) although not assuming any of Metro 360's supplier agreements, TNG maintains existing relationship with the majority of Metro 360's suppliers and is therefore expected to come to arrangements with such suppliers for increased supply, as appropriate;

- (v) the Transaction will enable Metro 360 to retrieve unsold inventory which is fully refundable. Metro 360 estimates that it has approximately \$22 million of inventory currently with retail customers and an additional \$15 million with its logistics provider. Pursuant to the Transaction, TNG has agreed to retrieve unsold inventory from retail accounts serviced by Metro 360 and process such returns for Metro 360's account at its sole cost and expense. This will greatly assist the refund process and directly cause a reduction of claims that would and could otherwise be made against Metro 360's estate; and
- (i) completion of the Transaction is expected to help facilitate Metro 360's accounts receivable collections given that product will continue to flow to customers from TNG. Further, with TNG agreeing to retrieve and return all of Metro 360's unsold inventory, Metro 360 will be better able to settle its customer accounts as customers in this industry deduct returns from their payments.
- (f) *The Purchase Price is Fair and Reasonable:* The purchase price payable under the Transaction for the limited number of assets being sold (which are, essentially, customer lists and certain equipment) is not overly significant in the context of Metro 360's overall liabilities, but it does maximize value for the particular purchased assets, such as they are, and beyond that, the Transaction offers employment to a significant number of employees, and involves the assumption of certain key contracts by the Purchaser, who is the largest player in Canada in this market, for the direct benefit of those contract-counterparties. As discussed, the Transaction also affords material additional financial benefits with respect to the collection of accounts receivable and refunds on inventory, as discussed above. In light of all these benefits, the Partnership's decision to enter into the

Transaction, which was made on an informed basis with the benefit of advice from its professional advisors and KSV, constitutes a valid and proper exercise of business judgment.

Shapiro Affidavit at paras. 8-10, 25, 42 and 46-48; Motion Record, Tab 2.

19. For the reasons referenced above, it is submitted that the Transaction satisfies the factors in Section 65.13(4) of the BIA and the principles and considerations expressed in *Soundair* and other relevant case law. The Transaction is the best transaction available in the circumstances and completion of the Transaction is in the best interests of the Partnership and its stakeholders. The Partnership therefore submits that it is appropriate for this Court to approve the Transaction.

(iii) *Compliance with Additional Requirements under Section 65.13*

20. It is submitted that all of the other statutory requirements for obtaining relief under Section 65.13 of the BIA have been satisfied:
- (a) All known creditors who have a security interest in respect of the Assets (as defined in the Purchase Agreement) and who might be affected by the relief requested in respect of the Transaction have been notified.
 - (b) Pursuant to Section 65.13(5), certain mandatory criteria must be met for a court to approval of a sale or disposition to a related party. Metro 360 and TNG are not related parties and these criteria are therefore not relevant for the purposes of this motion.

[BIA](#), Sections 65.13(5), (6) and (7).

B. THE APPROVAL AND VESTING ORDER SHOULD BE GRANTED

21. The proposed Approval and Vesting Order provides that, upon the completion of the Transaction, all of Metro 360's right, title and interest in and to the Assets will vest in TNG, free and clear of all interests, liens, charges and encumbrances.

Approval and Vesting Order at para. 4; Motion Record, Tab 3.

22. The Court has jurisdiction pursuant to Subsections 65.13(1) and (7) of the BIA to authorize a sale free and clear of any security, charge or other restriction, provided that it also orders that the proceeds of the sale are subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is affected by the order. The proposed Approval and Vesting Order provides that all claims and encumbrances shall attach to the net proceeds of the Transaction with the same priority as they had with respect to the Purchased Assets immediately prior to the sale.

[BIA](#), Section 65.13(7).

Approval and Vesting Order at para. 5; Motion Record, Tab 3.

23. Section 65.13(8) of the BIA provides that a court may only grant the authorization to sell assets outside of the ordinary course of business if the court is satisfied that the debtor "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 a proposal in respect of the debtor.

[BIA](#), Section 65.13(8).

24. Metro 360 submits that it can and will make the payments required pursuant to Section 60(1.3)(a) of the BIA. In particular, Metro 360 has paid and continues to pay all employee wages and compensation referred to in Section 60(1.3)(a) of the BIA.

Shapiro Affidavit at para. 51; Motion Record, Tab 2.

25. Regarding Section 60(1.5)(a) of the BIA, Metro 360 has continued to make contributions to the Pension Plan in accordance with existing practice and the Pension Plan, as at April 1, 2020, is fully funded. As discussed in the Shapiro Affidavit, Metro 360 has not drawn any amounts under the Credit Agreement and accordingly, it clearly can continue to satisfy its contribution requirements in respect of the Pension Plan, and therefore will make all payments required pursuant to Section 60(1.5)(a) of the BIA.

Shapiro Affidavit at paras. 33-34; Motion Record, Tab 2.

C. ADMINISTRATIVELY CONSOLIDATING THE PROCEEDINGS

26. The Partners seek to administratively consolidate the proposal proceedings of Alberta HoldCo and Rosebud HoldCo into a single proceeding. Since the Partners are related entities and they both pure holdings companies with interest in Metro 360, it would be more efficient (both in terms of costs and court resources) to administer the Partners' estates together.
27. Bankruptcy proceedings operate subject to the same general principles as other civil litigation matters – that the litigation process should secure the just, most expeditious, and least expensive determination of the proceedings on its merits.

[Bankruptcy and Insolvency General Rules, C.R.C.](#), c. 368, r 3.

[Rules of Civil Procedure, R.R.O. 1990, Reg 194](#), r 1.04(1).

28. This Court has consolidated closely related bankruptcy proceedings in similar circumstances. In *Re Electro Sonic Inc.*, the Court consolidated two proposal proceedings on the basis that the companies had highly integrated operations, shared management, and consolidated finance functions. The Court held that given the possibility of the applicants applying together for future relief, it made sense to order an administrative consolidation of the estates. This type of

consolidation does not involve a substantive merger or consolidation of the estates, and is merely an administrative process, much like civil case management.

[Electro Sonic Inc, Re, 2014 ONSC 942](#) at paras. 4 – 6.

[Mustang GP Ltd., Re, 2015 ONSC 6562](#) at para, 25.

29. It is in the interest of judicial economy to have these proceedings continue on a consolidated basis to ensure the just, expeditious and least expensive determination of the proceedings.

D. THE STAY OF PROCEEDINGS AND OTHER PROTECTIONS SHOULD BE EXTENDED TO METRO 360

30. The proposed Bankruptcy Procedure Order includes an extension of the relief granted to the Partners in the NOIs filed in connection with these proceedings to the Partnership.

Bankruptcy Procedure Order, paras. 11-12; Motion Record, Tab 5.

31. Although a partnership does not have a distinct legal existence apart from the combination of its partners and is therefore implicated in these proceedings, Metro 360 has not filed a notice of intention to make a proposal under the BIA due to the limited six month timeline contained in the BIA within which a proposal must be filed and presented to creditors. Metro 360 may require a longer period in order to maximize value and monetize certain of its businesses and investments, particularly in light of the impact of COVID-19, and therefore it is anticipated that these BIA proceedings may be converted to proceedings under the *Companies' Creditors Arrangement Act* (the "CCAA"). As a partnership cannot apply for relief under the CCAA, filing Metro 360 in a BIA proceeding could mean that it becomes stuck within the BIA process, thereby limited to only the six month window.

[Partnerships Act, R.S.O. 1990](#), c. P.5

32. In these circumstances, the Partners are requesting that the statutory protections provided under the BIA in favour of the Partners granted by the filing of the NOIs, including the stay of proceedings and the restriction on the ability of contract counterparties to terminate or amend pre-filing agreements due to insolvency, be extended to Metro 360.

Shapiro Affidavit, at para. 55; Motion Record, Tab 2.

33. In the context of CCAA proceedings, this Court determined that it has the power to extend stays of proceedings where it is just and reasonable to do so, including with respect to non-applicant parties.

[Re Lehndorff General Partners Ltd. \(1993\), 17 C.B.R. \(3d\) 24 \(Ont. Gen. Div.\)](#)
[Lehndorff] at paras. 5 and 16.

34. Courts have frequently exercised their inherent jurisdiction to extend the scope of the stay of proceedings to encompass partnerships, including in circumstances where:

- (a) the operations of the partnership are closely related to the business of the applicants;
- (b) the obligations of the partnerships are so intertwined with those of the applicants that a successful restructuring would not be possible absent a stay of enforcement actions against the partnership; and
- (c) it is just and reasonable or just and convenient to do so.

[Lehndorff, supra](#) at paras. 5, 16 and 21.

[Cinram International Inc., Re, 2012 ONSC 3767](#) at para. 37 and Sch. C at paras. 64.

35. The Partners submit that it is just and appropriate to extend the relief in the Bankruptcy Procedure Order to Metro 360 because, among other things:

- (a) Metro 360 is a general partnership and its partners are Alberta HoldCo and Rosebud HoldCo;
- (b) Metro 360 is the entity through which the Literature Business is operated; and
- (c) if any enforcement proceedings were commenced against Metro 360, it would cause significant disruption to the business and defeat the purpose of obtaining stay protection to preserve the stability of the business.

36. In the absence of extending stay protection to Metro 360, the Partnership's management team would be required to expend considerable time and effort addressing the foregoing risks rather than working to prepare a restructuring plan to be presented at a later time to Metro 360's creditors that will maximize value and support the Partnership's intention of repaying its creditors in full. The extension of BIA protection to Metro 360 will provide stability to the business and enable it to pursue a value-maximizing proposal at a later date in an orderly manner.

E. EXTENDING THE STAY PERIOD

37. The Stay Period expires on May 6, 2020. The Partners are seeking the extension of the Stay Period until and including June 19, 2020.

Bankruptcy Procedure Order, para. 13; Motion Record, Tab 5.

38. The ongoing benefit provided by the stay of proceedings is necessary for the Partners to maintain stability and protect value while the Partners, together with the Partnership, and with the assistance of the Proposal Trustee, work to complete the Transaction (which will realize value for the Literature Business, save the jobs of approximately 80 percent of the Partnership's employees and will maintain supplier and customer relationships) in conjunction with the collection of accounts receivable and the return of inventory, and advance a proposal that will

maximize value for creditors. It is important to protect ongoing operations and maintain the stability of Metro 360's other business operations while these matters are being advanced, and any disruption could result in delay or a reduction in the of value to the detriment of stakeholders.

Shapiro Affidavit at para. 55; Motion Record, Tab 2.

39. This Court has the authority to grant the requested extension under Section 50.4(9) of the BIA, which states that such an extension may be granted where the Court is satisfied that the insolvent person has acted, and is acting, in good faith and with due diligence, the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted, and no creditor would be materially prejudiced if the extension were granted.

[BIA](#), section 50.4(9).

40. In this case, each of these factors under Section 50.4(9) have been met: the Partners and Metro 360 have acted and continue to act in good faith in pursuing the Transaction; the extension will permit the Partners and Metro 360 to make progress towards advancing a value-maximizing restructuring plan; and no creditors will be materially prejudiced by extending the Stay Period to June 19, 2020. Further, the Proposal Trustee supports the request for an extension of the Stay Period.

Shapiro Affidavit at paras. 48, 54, 60; Motion Record, Tab 2.

First Report of the Proposal Trustee dated April 6, 2020 at s. 7.2 [First Report].

41. The Cash Flow Forecast shows that Metro 360 is forecast to have sufficient liquidity to operate its business throughout the proposed extension of the Stay Period.

First Report at s. 7.2(c).

F. SEALING OF THE CONFIDENTIAL SUPPLEMENT

42. The Partners and Metro 360 requests that this Court seal the confidential supplement to the First Report, which contains an unredacted copy of the Purchase Agreement, including the names and salary information of transferred employees, and the customer lists to be acquired by the Purchaser. This Court has the discretion pursuant to Section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

[*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137\(2\).](#)

43. In *Sierra Club of Canada v. Canada (Minister of Finance)*, a decision of the Supreme Court of Canada, the following test to determine when a sealing order should be made was adopted:

A confidentiality order under Rule 151 should only be granted when:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[*Sierra Club of Canada v. Canada \(Minister of Finance\)*, \[2002\] 2 S.C.R. 522 \[Sierra Club\] at para. 53.](#)

44. This Court has evaluated sealing requests by reference to the *Sierra Club* factors and frequently sealed asset purchase agreements on the basis that they contain highly sensitive commercial information, which if disclosed prior to the closing of the related transaction could be harmful to stakeholders, pose a serious risk to the restructuring process, and jeopardize dealings with any future prospective purchasers.

[*Re Comstock Canada Ltd.*, 2014 ONSC 493 at para. 16.](#)

45. With respect to the first branch of the *Sierra Club* test, the unredacted Purchase Agreement contains sensitive commercial information, including Metro 360's customer list, the customer contracts that are being assumed by TNG, and the names and salary information of transferred employees. Disclosure of the information in the unredacted Purchase Agreement could adversely impact the interests of the Partners, Metro 360 and stakeholders. In particular, the names and salary information of transferred employees is sensitive personal information that should be protected. The transferred employees also have a reasonable expectation that their names and salary information will be kept confidential.

Shapiro Affidavit at para. 52; Motion Record, Tab 2.

46. With respect to the second branch of the *Sierra Club* test, it is submitted that keeping this information confidential will not have any deleterious effects. In the normal course, outside the context of proposal proceedings, a company or partnership's competitive and confidential information and an individual's confidential personal and salary information would be kept strictly confidential and would not find its way into the public domain. In the circumstances, there is no compelling reason for allowing public disclosure of the unredacted Purchase Agreement, or the individual compensation arrangements of transferred employees.

PART IV - CONCLUSION

47. The Partnership, with the advice and assistance of its professional advisors, has determined that the sale of the Literature Business pursuant to the Transaction, in conjunction with the collection of accounts receivable and the return of inventory, combined with the continuation of the Partnership's other business operations, represents the best available alternative in the circumstances and will allow the Partnership to work towards presenting a restructuring plan to Metro 360's creditors at a later time that will maximize value and creditor recoveries. This path

will provide value for the Literature Business, will see the Literature Business continue on a going concern basis for the benefit of customers and suppliers, and will also see a significant portion of Metro 360's workforce receive offers of employment from TNG. It is respectfully requested that the Court approve the Transaction and grant the other requested relief. Given the nature of the business and the purchased assets in question, it is vital that the Transaction be approved and implemented as soon as possible, all for the reasons respectfully submitted above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 6, 2020



Goodmans LLP

SCHEDULE A

LIST OF AUTHORITIES

1. [Royal Bank v. Soundair Corp. \(1991\), 83 D.L.R. \(4th\) 76 \(Ont. C.A.\)](#)
2. [Re Nelson Education Limited, 2015 ONSC 5557](#)
3. [Komtech Inc. \(Re\), 2011 ONSC 3230](#)
4. [Elleway Acquisitions Ltd. v. 4358376 Canada Inc., 2013 ONSC 7009](#)
5. [Tool-Plas Systems Inc., Re \(2008\), 48 C.B.R. \(5th\) 91 \(Ont. S.C.J. \[Commercial List\]\)](#)
6. [Re Bloom Lake, 2015 QCCS 1920](#)
7. [Electro Sonic Inc, Re, 2014 ONSC 942](#)
8. [Mustang GP Ltd., Re, 2015 ONSC 6562](#)
9. [Re Lehndorff General Partners Ltd. \(1993\), 17 C.B.R. \(3d\) 24 \(Ont. Gen. Div.\)](#)
10. [Cinram International Inc., Re, 2012 ONSC 3767](#)
11. [Sierra Club of Canada v. Canada \(Minister of Finance\), \[2002\] 2 S.C.R. 522](#)
12. [Re Comstock Canada Ltd., 2014 ONSC 493](#)

SCHEDULE B

STATUTORY REFERENCES

BANKRUPTCY AND INSOLVENCY ACT **RSC 1985, c B-3, as amended**

s. 50.4(1)

Notice of intention - 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).

s. 50.4(8)

Where assignment deemed to have been made – 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.1) 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.

s. 50.4(9)

Extension of time for filing proposal – 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.

s. 60(1.3)

Proposals by employers – No proposal in respect of an employer shall be approved by the court unless

- (a) it provides for payment to the employees and former employees, immediately after court approval of the proposal, of amounts at least equal to the amounts that they would be qualified to receive under paragraph 136(1)(d) if the employer became bankrupt on the date of the filing of the notice of intention, or proposal if no notice of intention was filed, as well as wages, salaries, commissions or compensation for services rendered after that date and before the court approval of the proposal, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the bankrupt's business during the same period; and
- (b) the court is satisfied that the employer can and will make the payments as required under paragraph (a).

s. 60(1.5)

Proposals by employers — prescribed pension plans – No proposal in respect of an employer who participates in a prescribed pension plan for the benefit of its employees shall be approved by the court unless

- (a) the proposal provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:
 - (i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the employer can and will m

62 (1)

Filing of proposal – If a proposal is made in respect of an insolvent person, the trustee shall file with the official receiver a copy of the proposal and the prescribed statement of affairs.

s. 65.13(1)

Restriction on disposition of assets – 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.

s. 65.13(2)

Individuals – 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.

s. 65.13(3)

Notice to secured creditors – 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.

s. 65.13(4)

Factors to be considered – 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.

s. 65.13(5)

Additional factors – related persons – 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.

s. 65.13(6)

Related persons – 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).

s. 65.13(7)

Assets may be disposed of free and clear – 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.

s. 65.13(8)

Restriction – employers – 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.

69 (1)

Stay of proceedings — notice of intention – Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

- (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,
- (b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on
 - (i) the insolvent person's insolvency,
 - (ii) the default by the insolvent person of an obligation under the security agreement, or
 - (iii) the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

- (c) Her Majesty in right of Canada may not exercise Her rights under
 - (i) subsection 224(1.2) of the [Income Tax Act](#), or

(ii) any provision of the [Canada Pension Plan](#) or of the [Employment Insurance Act](#) that

(A) refers to subsection 224(1.2) of the [Income Tax Act](#), and

(B) provides for the collection of a contribution, as defined in the [Canada Pension Plan](#), an employee's premium or employer's premium, as defined in the [Employment Insurance Act](#), or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts,

in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the [Income Tax Act](#), or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the [Income Tax Act](#), or

(ii) is of the same nature as a contribution under the [Canada Pension Plan](#) if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the [Canada Pension Plan](#) and the provincial legislation establishes a *provincial pension plan* as defined in that subsection,

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

BANKRUPTCY AND INSOLVENCY GENERAL RULES

C.R.C., c. 368, r. 3.

s. 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.

RULES OF CIVIL PROCEDURE
R.R.O. 1990, Reg. 194, r. 1.04

s. 1.04(1)

General Principle – These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits

s.1.04(1.1)

Proportionality – In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

s.1.04(2)

Matters Not Provided For – Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

COURTS OF JUSTICE ACT
R.S.O. 1990, c. C.43

s.137(2)

Sealing documents – A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

PARTNERSHIPS ACT
R.S.O. 1990, c. P.5

s. 10(1)

Liability of partners – Except as provided in subsection (2), every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while the person is a partner, and after the partner's death the partner's estate is also severally liable in a due course of administration for such debts and obligations so far as they remain unsatisfied, but subject to the prior payment of his or her separate debts.

**IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF 957855
ALBERTA LTD. (FORMERLY NEWSWEST INC.) AND ROSEBUD CREEK FINANCIAL
CORP. IN RESPECT OF METRO 360 GENERAL PARTNERSHIP**

Estate / Court File No.: _____

Estate / Court File No.: _____

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
COMMERCIAL LIST
Proceeding commenced at Toronto

FACTUM OF THE MOVING PARTIES
(Returnable April 7, 2020)

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