

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

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF  
VIAFOURA INC.,  
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

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**FACTUM OF NATIONAL BANK OF CANADA**

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**BORDEN LADNER GERVAIS LLP**  
World Exchange Plaza  
100 Queen Street, Suite 1300  
Ottawa, ON K1P 1J9

**Karen Perron**  
E: kperron@blg.com  
T: 613.369.4795

**Hugo Babos-Marchand**  
E: hbabosmarchand@blg.com  
T: 514.954.2556

Lawyers for National Bank of Canada

TO: **CHAITONS LLP**  
5000 Yonge Street, 10<sup>th</sup> Floor  
Toronto, ON M2N 7E9

**George Benchetrit**  
E: george@chaitons.com  
T: 416.218.1141

Lawyers for KSV Kofman Inc., Proposal Trustee

AND TO: **KSV KOFMAN INC.**  
150 King Street West, Suite 2308  
Toronto, ON M5H 1J9

**Bobby Kofman**  
E: bkofman@ksvadvisory.com  
T: 416.932.6262

**Mitch Vininsky**  
E: mvininsky@ksvadvisory.com  
T: 416.932.6013

Proposal Trustee

AND TO: **GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto, ON M5G 1V2

**Jennifer Stam**  
E: stam@gsnh.com  
T: 416.597.5017

Lawyers for Viafoura Inc.

AND TO: **BRAUTI THORNING LLP**  
161 Bay Street, Suite 2900  
Toronto, ON M5J 2S1

**Steven Weisz**  
E: sweisz@btlegal.ca  
T: 416.304.6522

Lawyers for Espresso Capital Ltd.

AND TO: **TORONTO-DOMINION BANK**  
TD Commercial Banking  
TD Bank Tower  
66 Wellington Street West  
Toronto, ON M5K 1E9

**Jeffrey Swan**  
Director, Financial Restructuring  
E: jeff.swan@td.com  
T: 416.308.9215

AND TO: **DLA PIPER (CANADA) LLP**  
Suite 6000, 1 First Canadian Place  
PO Box 367, 100 King St. W.  
Toronto, ON M5X 1E2

**Edmond Lamek**  
E: edmond.lamek@dlapiper.com  
T: 416.365.3444

Lawyers for Intercap Equity Inc.

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## STATEMENT OF LAW

### PART I – OVERVIEW

1. National Bank of Canada (the “**Bank**”) is the largest creditor of Viafoura Inc. (“**Viafoura**” or the “**company**”). In the within proceedings, Viafoura, by its proposal trustee KSV Kofman Inc. (“**KSV**”), seeks an order increasing the DIP Facility, approving the Sale Process and approving the Stalking Horse Agreement. [REDACTED]

2. The Bank was not consulted by the company or by KSV regarding the sales process prior to service of the within motion. The DIP lender and the Stalking Horse Bidder, Intercap Equity Inc. (“**Intercap**”), is the majority shareholder of Viafoura. No evidence has been presented by the company or by KSV that suggests that they canvassed the market or conducted any other due diligence prior to selecting Intercap as the Stalking Horse Bidder. To the contrary, the parties have tunnel vision and appear to have orchestrated these proceedings from the outset with a view that Intercap would present a stalking horse bid.

3. In the absence of having canvassed the market, the Bank is concerned that [REDACTED]

[REDACTED] The Bank’s position is that the company and its stakeholders would benefit from an open sales process and that in the circumstances, an open sales process will maximize the value of potential bids. The Bank will suffer a real and substantial prejudice if the Sale Process is allowed to proceed. In addition, the Bank submits that approval of the Sale Process

and Stalking Horse Agreement would lead to a manifestly unjust result in view of the conduct of Viafoura and Intercap in these proceedings.

## **PART II – THE FACTS**

### **A. The Parties**

4. The Bank is a financial institution providing, among other services, financing to small and medium-sized businesses. The Bank is the primary secured creditor of Viafoura.

**Affidavit of Annie Nguyen sworn February 7, 2020 (the “Nguyen Affidavit”),  
para 4, Motion Record of National Bank of Canada (“MR”), Tab 1, p. 1.**

5. Viafoura is a corporation registered pursuant to the laws of Canada and its registered office address is located at 372 Bay Street, Suite 1800, Toronto, Ontario.

**Nguyen Affidavit, para 5, MR, Tab 1, p. 2.**

**Corporate Profile Report, Exhibit “A” to Nguyen Affidavit, MR, Tab 1A.**

6. Intercap is the DIP Facility lender and the Stalking Horse bidder, and is the primary shareholder of Viafoura holding approximately 30% of Viafoura’s preferred shares. The agreement between Intercap and Viafoura setting out the terms and conditions of Intercap’s investment in the company contains several provisions which require Intercap’s approval prior to certain decisions being made and/or transactions being entered into.

**Nguyen Affidavit, para 7, MR, Tab 1, p. 2.**

### **B. The Bank’s Loans and Security Instruments**

7. In accordance with the terms of an Offer of Financing dated December 11, 2018 (the “**Loan Agreement**”), the Bank granted several credit facilities to Viafoura including:
  - a. A line of credit in the amount of \$2,500,000;
  - b. Mastercard credit cards up to \$150,000;
  - c. A global net risk line for foreign exchange contracts up to \$100,000 (CAD); and,

- d. A facility up to \$1,500,000 in order to finance tax credits in respect of SR & ED tax credits receivables;

(collectively the “**Credit Facilities**”).

**Nguyen Affidavit, para 8, MR, Tab 1, p. 2.**

**Loan Agreement, Exhibit “B” to Nguyen Affidavit, MR, Tab 1B.**

- 8. As a condition of granting these Credit Facilities to Viafoura, the Loan Agreement provided for the following security, *inter alia*:
  - a. A General Security Agreement from Viafoura (the “**GSA**”) in favour of the Bank providing a first-ranking security interest over Viafoura’s assets, including intellectual property.
  - b. A subordination by Espresso.

(collectively the “**Security**”).

**Nguyen Affidavit, para 9, MR, Tab 1, p. 3.**

**General Security Agreement, Exhibit “C” to Nguyen Affidavit, MR, Tab 1C.**

**Priority Agreement, Exhibit “D” to Nguyen Affidavit, MR, Tab 1D.**

- 9. Prior to the granting of the DIP Facility, the Bank and Espresso were the first-ranking and second-ranking, respectively, secured creditors of Viafoura. The Toronto-Dominion Bank also has a subsequent ranking security registration over accounts. Intercap also registered a security registration on or about December 6, 2019 (with respect to the DIP Facility).

**Nguyen Affidavit, para 10, MR, Tab 1, p. 3.**

**Personal Property Security Registration System Search, Exhibit “E” to Nguyen Affidavit, MR, Tab 1E.**

- 10. As of January 30, 2020, the total amount of Viafoura’s indebtedness to the Bank pursuant to the above noted Credit Facilities was approximately \$2,281,979.45 plus accruing interest and costs.

**Nguyen Affidavit, para 11, MR, Tab 1, p. 3.**

11. Based on the preliminary list of creditors prepared by Viafoura, as appended to KSV's First Report dated December 2, 2019, the total indebtedness owed by Viafoura to Espresso was approximately \$865,000. The indebtedness owing to unsecured creditors at that time was approximately \$720,000. This means that when taking into account the indebtedness owed by Viafoura to the Bank, the indebtedness owing to the Bank by Viafoura represents approximately 57% of its total debt (prior to the DIP Facility being granted). The combined indebtedness owing to the Bank and Espresso represents approximately 80% of Viafoura's total debt (prior to the DIP Facility being granted).

**Nguyen Affidavit, para 12, MR, Tab 1, p. 3.**

**C. Defaults under the Credit Facilities and Security and Demand for Payment by the Bank**

12. As of October 2019, Viafoura was in breach of various obligations set out in the Credit Facilities and Security. Viafoura informed the Bank that it was experiencing financial difficulties and requested that the Bank provide it with various accommodations including increased financing and/or that the Bank agree to subordinate its security in favour of other lenders.

**Nguyen Affidavit, para 13, MR, Tab 1, p. 4.**

13. Starting in approximately the end of October, the Bank engaged in discussions with Viafoura, InterCap and Espresso in order to explore various options and solutions that could assist Viafoura. One such option was the possibility that the Bank, InterCap and Espresso extend additional financing to Viafoura. The Bank expressed that it had concerns with this proposal as it was not prepared to subordinate its first-ranking security interest over Viafoura's assets.

**Nguyen Affidavit, para 14, MR, Tab 1, p. 4.**

14. In early and mid November 2019, Viafoura was also trying to seek additional funding and/or financing from its shareholders and other lenders. The purpose of this funding was to permit Viafoura to maintain its operations, including meeting its payroll obligations. Notwithstanding the foregoing, on or about November 12, 2019, Viafoura informed the Bank that it had a shortfall of approximately \$54,000 to meet its payroll for November 15<sup>th</sup>, and requested that



the Bank provide Viafoura with an increase of its Credit Facilities in order to cover the shortfall. In order to accommodate Viafoura and enable it to meet this payroll, the Bank agreed to increase Viafoura's borrowing base (therefore extending additional financing to Viafoura).

**Nguyen Affidavit, para 15, MR, Tab 1, p. 4.**

15. On or about November 8, 2019, Espresso sent a demand letter to Viafoura. On or about November 11, 2019, Intercap also sent a letter to Viafoura expressing its dissatisfaction with respect to various obligations owing to it by Viafoura.

**Nguyen Affidavit, para 16, MR, Tab 1, p. 4.**

16. On November 15, 2019, the Bank had a discussion with Viafoura and Intercap's principals. During the call, the Bank raised the following: a) Viafoura met payroll because of the Bank's increase in the Credit Facilities; b) the Bank inquired as to why Intercap was seemingly not willing to approve loans/investments with other lenders/investors that Viafoura had apparently secured; and, c) the Bank was not prepared to provide Viafoura with further funding but it remained prepared to explore other options to assist Viafoura.

**Nguyen Affidavit, para 17, MR, Tab 1, pp. 4-5.**

17. On November 18, 2019, the Bank delivered a demand letter, wherein it advised that the Bank and Viafoura had agreed to end their relationship, along with a Notice of Intention to Enforce Security (the "NITES"). Viafoura acknowledged acceptance of the Bank's demand letter on November 20, 2019. On the same day, Viafoura also provided its consent to taking possession and earlier enforcement of the Security.

**Nguyen Affidavit, para 18, MR, Tab 1, p. 5.**

**Demand Letter, NITES, and Executed Consent to Early Enforcement, Exhibit "F" to Nguyen Affidavit, MR, Tab 1F.**

18. Continuing through mid-November to the end of November 2019, the Bank continued to have various discussions and exchanges with Intercap, Espresso and Viafoura in order to explore potential solutions that could assist Viafoura. This included various funding scenarios by the

Bank, Intercap and Espresso as well as a potential buyout of the Bank's indebtedness by Intercap and Espresso at a discount.

**Nguyen Affidavit, para 19, MR, Tab 1, p. 5.**

19. In order for the Bank to consider these options, the Bank requested a restructuring and/or business plan for Viafoura. On November 21, 2019, a proposed business and restructuring plan for Viafoura was sent to the Bank, along with an excel spreadsheet containing projections and cash flows to support the proposed plan and restructuring. Pursuant to the plan, Intercap indicated that:

- a. Viafoura would reduce its cash burn from approximately \$250,000-300,000 a month to \$100,000;
- b. Reduce its headcount by 10-15 employees;
- c. It estimated that Viafoura's SR & ED credits would be approximately \$600,000 for 2019; and,
- d. It indicated that various exit alternatives would be explored with respect to current lenders, including the Bank.

**Nguyen Affidavit, para 20, MR, Tab 1, pp. 5-6.**

**Email from Jake Barkin to Annie Nguyen dated November 21, 2019, Exhibit "G" to Nguyen Affidavit, MR, Tab 1G.**

20. Throughout all of the discussions with representatives from Intercap and Viafoura, any proposed restructuring plan for Viafoura contemplated that the Bank's indebtedness would be paid in full.

**Nguyen Affidavit, para 21, MR, Tab 1, p. 6.**

21. On or about November 28, 2019, Intercap informed the Bank that Espresso was no longer part of the potential financing strategy.

**Nguyen Affidavit, para 22, MR, Tab 1, p. 6.**

22. As a result, the Bank also decided that it was no longer prepared to provide additional financing to Viafoura or to subordinate its first-ranking security.

**Nguyen Affidavit, para 23, MR, Tab 1, p. 6.**

23. On November 29, 2019, the Bank spoke to Mr. Merkur from InterCap. He advised that given the Bank's refusal to provide additional financing and/or to subordinate its security, the Bank would not receive a penny in payment of its indebtedness.

**Nguyen Affidavit, para 24, MR, Tab 1, p. 6.**

**D. The Filing of the NOI and First Motion to the Court**

24. On December 1, 2019, Viafoura filed its NOI and appointed KSV as the Proposal Trustee.

**Nguyen Affidavit, para 25, MR, Tab 1, p. 6.**

25. On December 2, 2019, Viafoura brought a motion, returnable the following day, seeking the approval of DIP financing from InterCap and granting a DIP Charge and Administration Charge totaling \$1,200,000 over all of Viafoura's assets, properties and undertakings. Viafoura's motion also sought an extension of time to file its proposal to February 13, 2020.

**Nguyen Affidavit, para 26, MR, Tab 1, pp. 6-7.**

26. At the time, Viafoura was represented by Edmond Lamek of DLA Piper (Canada) LLP. Mr. Lamek was also indicated as the counsel of record for InterCap.

**Nguyen Affidavit, para 27, MR, Tab 1, p. 7.**

27. Notwithstanding that Viafoura sought a DIP Charge for up to \$1,000,000, the cash flows filed in support of the motion, for the period ending January 17, 2020, provided that Viafoura would require DIP advances of \$450,000.

**Nguyen Affidavit, para 28, MR, Tab 1, p. 7.**

**Cashflow Projections, Exhibit "H" to Nguyen Affidavit, MR, Tab 1H.**

28. In reliance on: a) the information set out in the Motion Record; b) the Bank's previous discussions with InterCap in which InterCap would restructure Viafoura's affairs and explore various options to payout the indebtedness owing to the Bank; and, c) in view of the short service of the motion and the apparent urgency to fund Viafoura's payroll, the Bank ultimately did not oppose the relief sought by Viafoura. However, the Bank did request that all reporting to be provided by Viafoura to InterCap during the proposal proceedings also be provided to the Bank. The Court granted the relief sought along with the Bank's request for the financial disclosure.

**Nguyen Affidavit, para 29, MR, Tab 1, p. 7.**

**E. Communications Arising from Financial Disclosure**

29. Throughout December 2019 and into early January 2020, the Bank received the financial reporting from KSV. In response to certain issues arising from the financial disclosure, and concerns that the Bank had with respect to the information, the Bank sent various communications, through its solicitor, Karen Perron of Borden Ladner Gervais LLP. These communications included the following:

**Nguyen Affidavit, para 30, MR, Tab 1, p. 7.**

- a. An email from Ms. Perron to Mr. Lamek dated December 16, 2019 asking, among other things, why the DIP advance was approximately \$75,000 higher (at that time) than the cash flow projections attached to KSV's First Report. In her email, Ms. Perron also suggested that the DIP financing would be much higher than originally anticipated. She also requested an explanation as to what steps Viafoura was taking to restructure its affairs in order to minimize the DIP and reduce its cash burn.

**Nguyen Affidavit, para 30(a), MR, Tab 1, pp. 7-8.**

**Email from Karen Perron to Edmond Lamek dated December 16, 2019, Exhibit "I" to Nguyen Affidavit, MR, Tab 11.**

- b. On December 16, 2019, KSV sent an email to Ms. Perron responding to her email wherein it indicated that no other immediate steps were being taken to reduce expenses as any further reductions could impair the business. The email also

indicated that the increase in the DIP advance was due to payroll and related expenses from prior periods but that the increase “does not imply that the total DIP to mid-January will be much higher than what was projected in the motion materials, although it is possible that actual funding required could exceed that projection”.

**Nguyen Affidavit, para 30(b), MR, Tab 1, p. 8.**

**Email from KSV Kofman Inc. to Karen Perron dated December 16, 2019, Exhibit “J” to Nguyen Affidavit, MR, Tab 1J.**

- c. On December 24, 2019, Ms. Perron sent an email to KSV asking if the company was paying any pre-filing amounts to its suppliers. KSV responded by saying that the company was required to make certain payments to critical vendors, that it did so with consent of the DIP lender and the Proposal Trustee “and the court will be advised in due course”.

**Nguyen Affidavit, para 30(c), MR, Tab 1, p. 8.**

**Email Exchange between Karen Perron and KSV Kofman Inc. dated December 24, 2019, Exhibit “K” to Nguyen Affidavit, MR, Tab 1K.**

- d. On January 9, 2020, Ms. Perron sent an email to KSV inquiring about the status of the (late) financial disclosure and also indicating that the Bank had several concerns in respect of which Ms. Perron would be writing to Mr. Lamek. KSV responded by saying that the company lacks resources, that this was “a small matter with limited resources and practicality needs to prevail”.

**Nguyen Affidavit, para 30(d), MR, Tab 1, p. 8.**

**Email Exchange between KSV Kofman Inc. and Karen Perron dated January 9, 2020, Exhibit “L” to Nguyen Affidavit, MR, Tab 1L.**

- e. On January 14, 2020, Ms. Perron sent a letter to Mr. Lamek outlining the Bank’s concerns and asking various questions of him as counsel for Viafoura and for Intercap. The concerns raised by Ms. Perron, on behalf of the Bank, included:
  - i. The DIP advance had reached \$723,947 by January 3, 2020, compared to the original projection of \$450,000 (up to January 17, 2020);

- ii. The company had not taken significant steps to reduce its cash burn;
- iii. The additional advances were being explained, in part, by significant pre-filing and year-end payments made to critical suppliers but this had not been disclosed in the motion materials and had not been projected in the cash flows; and,
- iv. She requested clarity on Viafoura's plan for restructuring in view of Intercap's and Mr. Lamek's previous advice that the company would undergo a quick restructuring that would see the Bank paid out in full.

**Nguyen Affidavit, para 30(e), MR, Tab 1, pp. 8-9.**

**Letter from Karen Perron to Edmond Lamek dated January 14, 2020, Exhibit "M" to Nguyen Affidavit, MR, Tab 1M.**

- f. On January 15, 2020, KSV emailed Ms. Perron to seek the Bank's consent to move the reporting from Wednesday to Friday of each week and also to advise that Viafoura was preparing a motion to the Court to amend the reporting requirements under the interim credit facility. In response to an inquiry by Ms. Perron, KSV indicated that the scope of any other relief to be included in the motion was being discussed.

**Nguyen Affidavit, para 30(f), MR, Tab 1, p. 9.**

**Email Exchange between KSV Kofman Inc. and Karen Perron dated January 15, 2020, Exhibit "N" to Nguyen Affidavit, MR, Tab 1N.**

- g. In response to one of the questions raised by Ms. Perron in her letter dated January 14<sup>th</sup> (as to costs regarding "moderators"), Mr. Lamek sent her an email on January 24<sup>th</sup> and advised that a letter would be coming on the rest of the questions posed.

**Nguyen Affidavit, para 30(g), MR, Tab 1, p. 9.**

**Email Exchange between Edmond Lamek and Karen Perron dated January 24, 2020, Exhibit "O" to Nguyen Affidavit, MR, Tab 1O.**

- h. On January 28, 2020, (the same day that KSV served the within motion to the service list) Mr. Lamek sent Ms. Perron a letter wherein he indicated, among other things:

- i. That he was not counsel for Viafoura;
- ii. He denied various representations made to the Bank by InterCap (and by him to Ms. Perron);
- iii. He directed Ms. Perron to send her inquiries to Viafoura; and,
- iv. “Given the current levels of indebtedness to secured and unsecured creditors a proposal to creditors was determined to be impracticable” [emphasis added].

**Nguyen Affidavit, para 30(h), MR, Tab 1, pp. 9-10.**

**Letter from Edmond Lamek to Karen Perron dated January 28, 2020, Exhibit “P” to Nguyen Affidavit, MR, Tab 1P.**

- i. On January 30, 2020, Ms. Perron wrote to Jennifer Stam, whom KSV indicated was counsel for Viafoura. Ms. Perron provided Ms. Stam with a copy of her letter to Mr. Lamek dated January 14<sup>th</sup>, his response dated January 28<sup>th</sup> and requested that Ms. Stam provide responses to the questions directed therein at Viafoura.

**Nguyen Affidavit, para 30(i), MR, Tab 1, p. 10.**

**Email from Karen Perron to Jennifer Stam dated January 30, 2020, Exhibit “Q” to Nguyen Affidavit, MR, Tab 1Q.**

**Email from Jennifer Stam to Karen Perron, Exhibit “R” to Nguyen Affidavit, MR, Tab 1R.**

30. At the time of this motion, no proposal has been made by Viafoura to its creditors.

**Nguyen Affidavit, para 32, MR, Tab 1, p. 10.**

#### **F. Position of the Bank in Respect of the Within Motion**

31. Despite an assertion by KSV in its Second Report to the Court dated January 28, 2020 that the extension is required to file a proposal, no evidence has been filed in support of this assertion by Viafoura. The motion materials do not explain what funds, if any, might be available to the company to make a viable proposal nor the source of such funds. In addition, the motion materials do not describe what this eventual proposal may look like or which class of creditors the proposal would be made to. [REDACTED]

[REDACTED]

**Nguyen Affidavit, para 33, MR, Tab 1, pp. 10-11.**

32. In addition, as set out above, in his letter to Ms. Perron dated January 28th, Mr. Lamek admits that: “Given the current levels of indebtedness to secured and unsecured creditors a proposal to creditors was determined to be impracticable”.

**Nguyen Affidavit, para 34, MR, Tab 1, p. 11.**

33. Moreover, the proposed Stalking Horse Purchase Price provides that the price would include “the costs of administration of a bankruptcy”. This suggests that a bankruptcy is pending with respect to Viafoura’s affairs as opposed to a proposal.

**Nguyen Affidavit, para 35, MR, Tab 1, p. 11.**

34. It also appears that Intercap and the company have been working together from the outset of the proposal proceedings to defeat the interests of its pre-filing secured creditors and move forward with a stalking horse sales process [REDACTED]

[REDACTED]

[REDACTED] It is the Bank’s position that Intercap and the company are not acting in good faith.

**Nguyen Affidavit, para 36, MR, Tab 1, p. 11.**

35. Neither Viafoura, Intercap or KSV consulted the Bank or its counsel in respect of the increase of the DIP Financing or the stalking horse sales process prior to delivering the within motion material.

**Nguyen Affidavit, para 37, MR, Tab 1, p. 11**

36. There is no consideration in KSV’s report of the prejudice that will be sustained by the Bank, and the company’s other creditors, if the relief sought by the motion is granted. With respect to the Sale Process (which includes a stalking horse process) and the Stalking Horse Agreement, the Bank’s concerns include the following:



- a. There is no evidence that the company or KSV have canvassed the market prior to selecting Intercap as the Stalking Horse bidder;
- b. The Stalking Horse Bidder is not arm's length and has a considerable interest in the company;
- c. [REDACTED]
- d. The Stalking Horse Bidder is receiving a break fee of \$25,000 [REDACTED]. As a non-arm's length party who is already heavily invested in Viafoura's affairs, and has been from the time it became a shareholder, there is no justification for the granting of such a break fee;
- e. There is no evidence of the expenses incurred by the Stalking Horse Bidder in support of its request for Bid Protections of an amount of \$45 000 in addition to the break fee in the context of the Stalking Horse Bid;
- f. In the event of an auction, bids are to be opened at Intercap's counsel's office;
- g. The Stalking Horse Purchase Price includes payment of the costs of administration of a bankruptcy which would prime the Bank's indebtedness;
- h. The Purchased Assets and the Assumed Obligations included in the Stalking Horse Purchase Agreement do not include the Bank's indebtedness (or any other credit agreements); and,
- i. There is no mechanism that provides that competing bids will remain confidential from the Stalking Horse Bidder.

37. It is the Bank's position that the company and its stakeholders would benefit from an open sales process and that an open sales process will maximize the value of potential bids. The Bank is not opposed to the use of a stalking horse bid to drive the best offer in the event an auction is required. However, without an open sales and tendering process at the outset, it is premature to select Intercap as the Stalking Horse Bidder.

**Nguyen Affidavit, para 39, MR, Tab 1, p. 12**

38. In other words, the Bank is prepared to accept the sales process outlined in Stages 1 to 3 of the Phase 2 - Marketing at page 4 of KSV's Second Report to the Court dated January 28, 2020 without reference to the Stalking Horse Agreement and the Qualified Bid and with a timeline to be agreed upon.

**Nguyen Affidavit, para 40, MR, Tab 1, pp. 12-13.**

### **PART III – THE ISSUES**

39. The issues to be determined on this motion include the following:

- a. Whether the Sale Process and the Stalking Horse Agreement should be approved, and if so, on what terms; and,
- b. Whether an additional charge in the amount of \$70,000 (Break Fee/Bid Protections) should be granted in favour of Intercap and if so, on what terms.

### **PART IV – THE LAW AND ARGUMENT**

#### **A. The Sale Process and Stalking Horse Agreement will Prejudice the Bank and the company's creditors**

40. As set out in the Nguyen Affidavit, the circumstances surrounding Intercap's selection as the Stalking Horse Bidder, and the complete absence of consulting the Bank with respect to the sales process, suggests that the company and Intercap have been working together from the outset to defeat the Bank's interests. At the very least, the company and Intercap have worked together to outline a Sale Process and conclude a Stalking Horse Agreement that will ensure that if Intercap is successful, [REDACTED]. If the Sale

Process is approved in its current form, the Bank submits that this would lead to a manifestly unjust result not only to the detriment of the Bank's interests but also those of Viafoura's other creditors.

41. Pursuant to recent amendments to the *Bankruptcy and Insolvency Act*, all interested parties involved in a proceeding under the BIA act in good faith. If an interested person is not acting in good faith, the court may make any order it considers appropriate in the circumstances. As described in the Nguyen Affidavit, the Bank's position is the Intercap and Viafoura have not been acting in good faith in these proceedings.

***Bankruptcy and Insolvency Act, RSC, 1985, c B-3, s 4.2, Schedule "B".***

42. The implementation of a stalking horse bid as part of a sales process requires serious consideration given that it will set the floor by which all other interested bidders will make their offers. "The premise is that the stalking horse has undertaken considerable due diligence for determining the value of the assets and other bidders can then rely, at least to some extent, on the value attached by the stalking horse to those assets". The accuracy of the stalking horse bid is "key to the integrity of the stalking horse bid process".

***Leslie & Irene Dube Foundation Inc. v P218 Enterprises Ltd., 2014 BCSC 1855 at paras 15 and 34 [Leslie], Book of Authorities, Tab 1.***

43. The factors to be considered when approving a stalking horse sale process and the reasonableness of a stalking horse bid are follows:

- 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?

***Brainhunter Inc., Re, 2009 CarswellOnt 8207, 183 ACWS (3d) 905 [Commercial List] at para 13, Book of Authorities, Tab 1; Boutique Euphoria Inc., Re, 2007 QCCS 7129 at paras 37 and 56 [Euphoria], Book of Authorities, Tab 3.***

44. In addition to the foregoing criteria, the court should also consider the factors set out in *Royal Bank v. Soundair Corp.* which include:

- a. Whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- b. The efficacy and integrity of the receiver's sale process by which offers were obtained;
- c. Whether there has been unfairness in the working out of the process; and,
- d. The interest of all parties.

***Leslie, supra* at para 21, Book of Authorities, Tab 1; *Royal Bank v Soundair Corp.*, 1991 CarswellOnt 205, [1991] OJ No. 1137 (Ont. CA) at para 16, Book of Authorities, Tab 4.**

45. Courts have rejected a stalking horse process in circumstances where: a) no other course of action other than a stalking horse process appears to have been considered, including a traditional tendering process; b) in the absence of evidence that the receiver/monitor has attempted to market the company or canvass the market and identify prospective bidders; c) in the absence of evidence as to why the stalking horse bidder was selected; and, d) in the absence of evidence of any alternative marketing steps being considered or taken or why, if any were considered or taken, they were rejected.

***Leslie, supra* at paras 26, 27 and 33, Book of Authorities, Tab 1; *Euphoria, supra* at paras 41, 42 and 60, Book of Authorities, Tab 3; *Trident Exploration Corp., Re*, 2010 ABQB 88 at para 11, Book of Authorities, Tab 5.**

46. Courts have also rejected a stalking horse process and/or a stalking horse bid where the receiver has not properly considered the interests of stakeholders who may "lose everything" if the stalking horse bid is successful.

***Leslie, supra* at para 29, Book of Authorities, Tab 1.**

47. Courts have also rejected a stalking horse process and/or a stalking horse bid even in cases where the stalking horse bid set a floor price that was sufficient to pay a portion or the majority of claims of a company's major creditors. When a transaction will lead to minimal recovery

if any for creditors, “it is even more important to ensure that the process followed is beyond reproach”.

*Leslie, supra at para 24, Book of Authorities, Tab 1; Euphoria, supra at paras 16 and 75, Book of Authorities, Tab 3.*

48. Courts have approved a sales process whereby an open sale process was first initiated and then the best offer was then chosen to become the stalking horse bid for the remainder of the sales process.

*Euphoria, supra at para 59, Book of Authorities, Tab 3; Tiger Brand Knitting Co., Re, 2005 CarswellOnt 1240, [2005] OJ No. 1259 at para 11, Book of Authorities, Tab 6.*

49. In the present case, there is no evidence that the company or KSV considered any other sale process or canvassed the market with respect to other potential stalking horse bidders, prior to selecting Intercap as the stalking horse bidder. The Bank was not consulted in respect of the sale process or the selection of the stalking horse bid.

50. In addition, there is a complete absence in the motion material of the impact that the foregoing sale process and Stalking Horse Agreement will have on the Bank and on the company’s other creditors. There is no evidence that the company considered the interests of the Bank, or other processes or transactions that could minimize the Bank’s and its other creditors’ prejudice.

51. Moreover, it is clear that Intercap has been controlling the company’s attempts to restructure its affairs from the outset, and even prior to the filing of the NOI, [REDACTED]

52. In the circumstances, the Bank submits that an open sales process is the reasonable next step to be followed. This will provide the company’s creditors and other stakeholders with comfort that the market has been openly canvassed, [REDACTED]

[REDACTED] This will also maximize the potential to receive bids valuing the company at market value.

**B. No Break Fee should be Granted to Intercap**

53. In *Boutique Euphoria inc. (Arrangement relatif à)*, the Court endorsed the approach taken in the United States decision of *Re Hupp Industries* in assessing whether a break-up fee was fair and reasonable. Factors to be considered include:

- a. whether the fee requested co-relates with a maximization of value to the debtor's estate;
- b. whether the request is arm's-length;
- c. whether the principal stakeholders are supportive;
- d. whether the break-up fee constitutes a fair and reasonable percentage of the proposed purchase price;
- e. whether the dollar amount of the break-up fee would have a "chilling effect" on the market;
- f. The existence of available safeguards; and
- g. whether there exists a substantial adverse impact upon unsecured creditors where such creditors are in opposition.

54. The Court further added that case law suggests that break up fees of 1 to 3 percent are generally considered to be reasonable, but may vary depending upon the circumstances.

*Euphoria, supra* at paras 64-66, Book of Authorities, Tab 3.

55. In the present case, Intercap is not an arm's length party. It is the largest shareholder of Viafoura. The Bank does not support the break-up fee in the circumstances. In addition, the amount of the break-up fee is above the amounts deemed to be reasonable pursuant to the caselaw.

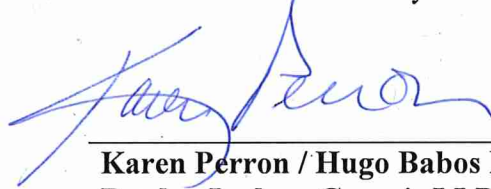
**PART V – ORDER REQUESTED**

56. The Bank respectfully requests an Order:

- a. Directing an open sales process, without a stalking horse process (or providing for use of a stalking horse bid only if an auction is required);

- b. Dismissing the proposal trustee's motion for an order approving the Sale Process and the Stalking Horse Agreement;
- c. Dismissing the proposal trustee's motion for an order granting an additional charge in the amount of \$70,000 in favour of InterCap;
- d. Costs on a substantial indemnity basis; or alternatively, on a partial indemnity basis; and,
- e. Such further and other relief as the Bank's counsel may advise and this Court may deem just and appropriate.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 7th day of February, 2020.



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**Karen Perron / Hugo Babos Marchand  
Borden Ladner Gervais LLP**

Lawyers for the National Bank of Canada

**SCHEDULE “A”****LIST OF AUTHORITIES**

1. *Leslie & Irene Dube Foundation Inc. v P218 Enterprises Ltd.*, 2014 BCSC 1855.
2. *Brainhunter Inc., Re*, 2009 CarswellOnt 8207, 183 ACWS (3d) 905 [Commercial List].
3. *Boutique Euphoria Inc., Re*, 2007 QCCS 7129.
4. *Royal Bank v Soundair Corp.*, 1991 CarswellOnt 205, [1991] OJ No. 1137 (Ont. CA).
5. *Trident Exploration Corp., Re*, 2010 ABQB 88.
6. *Tiger Brand Knitting Co., Re*, 2005 CarswellOnt 1240, [2005] OJ No. 1259.

**SCHEDULE “B”****Statute and Regulations*****Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3*****Duty of Good Faith****Good faith**

**4.2 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

**Good faith — powers of court**

**(2)** If the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances.



IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF VIAFOURA INC.,  
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Court File No. 31-2590182

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

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**STATEMENT OF LAW OF NATIONAL BANK  
OF CANADA**

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**BORDEN LADNER GERVAIS LLP**  
World Exchange Plaza  
100 Queen Street, Suite 1300  
Ottawa, ON K1P 1J9

**Karen Perron**  
E: kperron@blg.com  
T: 613.369.4795

**Hugo Babos Marchand**  
E: hbabosmarchand@blg.com  
T: 514.954.2556

Lawyers for National Bank of Canada