

**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**

**FACTUM OF THE PROPOSAL TRUSTEE
(Motion Returnable February 10, 2020)**

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

George Benchetrit
Tel: (416) 218-1141
Fax: (416) 218-1841
Email: george@chaitons.com

**Lawyers for KSV Kofman Inc., in its
capacity as Proposal Trustee**

TO: SERVICE LIST

**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**

FACTUM OF THE PROPOSAL TRUSTEE

I – NATURE OF THE MOTION

1. This factum is filed by KSV Kofman Inc. (“**KSV**”), in its capacity as proposal trustee (the “**Proposal Trustee**”) in connection with the NOI¹ filed by Viafoura Inc. (the “**Company**”), in support of its motion for an order, among other things:

- a) increasing the maximum amount available under the DIP Facility from \$1 million to \$1.7 million and approving amendments to the reporting requirements under the term sheet applicable to the DIP Facility;
- b) approving the Sale Process, including the Stalking Horse Agreement and the Bid Protections contained therein;
- c) sealing certain confidential information filed by the Proposal Trustee on this motion; and
- d) granting an extension of time for the Company to file a proposal from February 13, 2020 to March 30, 2020.

¹ Capitalized terms not defined in this Factum are used as defined in the Second Report of the Proposal Trustee dated January 28, 2019 (the “**Second Report**”).

2. Certain aspects of the Sale Process are opposed by National Bank of Canada (“NBC”) and Espresso Capital Ltd. (“Espresso”), secured creditors of the Company. They assert grievances principally in relation to the conduct of the Company and Intercap Equity Inc. (“Intercap”, a preferred shareholder of the Company and the DIP Lender), but they do not oppose the proposed increase to the DIP Facility, the extension of the time for the Company to file a proposal, nor the conduct of a process generally along the lines recommended by the Proposal Trustee for the sale of the Company’s business and assets. The objections by NBC and Espresso relate only to the proposed stalking horse offer and certain fees that may become payable if the stalking horse process results in a higher offer.²

3. In the view of the Proposal Trustee, the Sale Process, including the Stalking Horse Offer and the Bid Protections, is justified and appropriate based on the Company’s specific circumstances for the following reasons:

- a) the purpose of the Sale Process is to market the Company’s business for sale on a going concern basis while providing critical stakeholders, such as employees, customers and vendors, with certainty that a going-concern transaction will be completed. A primary benefit of a stalking horse process is to communicate to stakeholders that the business of the Company will continue regardless of the outcome of the sale process. Absent this certainty, it is reasonable to expect that stakeholders will make contingency plans: in the case of employees, this means looking for alternative employment; in the case of customers, it means finding alternative vendors; and in the case of future customers, it means working with other companies whose viability is not a critical consideration;

² This Factum addresses only the requested relief that appears to be in dispute on this motion.

- b) The Proposal Trustee disagrees with the contention by NBC and Espresso that a stalking horse process is prejudicial to the stakeholders. A stalking horse process preserves stakeholder confidence which is more likely to generate value than it is to impair it. KSV has used stalking horse sale processes on many occasions, resulting in going-concern transactions that generated recoveries far greater than anticipated. Based on its experience, the Proposal Trustee also believes that the auction contemplated by the Sale Process is a value maximizing feature as it allows for direct competition between bidders in real time on a transparent basis;
- c) Espresso has suggested that there could be a stalking horse process but that bidders not be told the offer price they needed to exceed. The Proposal Trustee does not believe this to be a viable alternative as bidders are not likely to participate in a process where they are not given that information;
- d) NBC and Espresso are critical that there was no process to identify a stalking horse other than Intercap. The Proposal Trustee's view based on its extensive experience in similar situations is that there was no realistic possibility that a third party with no prior knowledge of the business and no prior stake in the Company would submit an unconditional stalking horse bid within the time frame necessitated by the Company's financial exigencies and given other issues faced by the Company as described in the Second Report and Confidential Appendix "A" to the Supplement to the Second Report dated February 8, 2020 (the "**Supplement to the Second Report**"); and
- e) The Bid Protections consist of a break fee of \$25,000 and an expense reimbursement amount not to exceed \$45,000 (both inclusive of HST, if any). They

are reasonable and justified and well within the range, by percentage and quantum, of other fees approved by this Court in similar situations, and are not expected to discourage potential purchasers from participating in the Sale Process.

4. For these reasons and as explained in greater detail below, the Proposal Trustee respectfully submits that the Sale Process should be approved by the Court.

II - FACTS

Background

5. The Company is a software developer focused on helping media, broadcast and entertainment brands better build, manage and monetize their content, audience and data in real time.³

6. The Company operates from a single location in downtown Toronto. At the time of issuance of the Second Report, the Company still had 46 full-time employees.⁴ Headcount had declined by 11 employees since the filing of the NOI on December 1, 2019 (the “**Filing Date**”).⁵

7. As at the Filing Date, NBC and Espresso were respectively owed approximately \$2.17 million and \$864,000, and the Company owed approximately \$720,000 to trade and other unsecured creditors.⁶

8. The Proposal Trustee was engaged on an urgent basis on November 29, 2019. On December 1, 2019, the Company filed the NOI for the principal purpose of creating a stabilized

³ First Report of the Proposal Trustee dated December 2, 2019, Tab 2B to the Proposal Trustee’s Motion Record (the “**First Report**”) at section 2.0(2).

⁴ Second Report, at section 2.0(3).

⁵ First Report, at section 2.1.2.1.

⁶ *Ibid*, First Report at section 2.1.2(1).

environment to allow the Company the opportunity to complete a restructuring and to provide fresh capital to the business so that it could continue to operate on a going-concern basis.⁷

December 3 Motion

9. On December 3, 2019, this Court granted an Order, among other things:

- a) extending the time by which the Company is required to file a Proposal to February 13, 2020; and
- b) approving a debtor-in-possession loan of up to \$1 million (the “**DIP Facility**”) between the Company and Intercap.⁸

10. The financial circumstances of the Company leading to the aforesaid motion were summarized in the First Report⁹. Among other things:

- a) the Company had generated losses of approximately \$2.3 million for the year-to-date period ended September 30, 2019. Its monthly cash burn over that period averaged approximately \$325,000;
- b) the Company was without liquidity to continue to operate. It had a cash balance of approximately \$55,000. The Company could not fund payroll on November 29, 2019, and without an immediate cash injection, the business of the Company would be permanently discontinued;

⁷ First Report, at sections 1.0.2 and 1.0.3.

⁸ Appendix A to the Second Report.

⁹ First Report, at section 3.0.

- c) Espresso and NBC had notified the Company that they were not prepared to provide further funding to the business;
- d) InterCap was prepared to fund the Company by way of the DIP Facility for up to \$1 million; and
- e) Absent funding provided by InterCap pursuant to the DIP Facility:
 - i. the Company would have ceased operations in early December 2019;
 - ii. all of the Company's employees would have lost their jobs;
 - iii. the Company's customers would have been unable to access the services provided by the Company, which would have affected their businesses; and
 - iv. the Company would likely have to be liquidated generating little to no recovery for any of its stakeholders.¹⁰

11. NBC and Espresso did not oppose the relief sought by the Company on the motion heard December 3, 2019.

Sale Process¹¹

12. InterCap has agreed to act as a stalking horse bidder in a process for the sale of the Company's business and assets on a going-concern basis (the "**Sale Process**") pursuant to the terms of an Asset Purchase Agreement dated January 22, 2020 (the "**Stalking Horse Agreement**").

¹⁰ Supplement to Second Report, at section 2.0.3.

¹¹ The proposed sale process, bidding procedures and the stalking horse agreement are described in detail in Section 3 of the Second Report.

13. The purchase price under the Stalking Horse Agreement consists of: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

14. The Stalking Horse Agreement provides the following protections (the “**Bid Protections**”) to Intercap in the event that a superior transaction is completed with another party:

- a) a \$25,000 break fee (equal to [REDACTED] of the estimated amount set out in paragraph 13(a) above); and
- b) up to a \$45,000 (including HST) expense reimbursement in respect of actual legal, diligence and other costs incurred by Intercap in respect of the Sale Process, including drafting and negotiating the Stalking Horse Agreement.

15. To qualify for participation in an auction to be held by the Proposal Trustee, bidders are required to bid [REDACTED]

[REDACTED]

[REDACTED].

16. If no Qualified Bids are submitted by the Bid Deadline, Intercap will be the successful bidder, subject to further court approval. If one or more Qualified Bids are received by the Bid Deadline, the Proposal Trustee will conduct an auction on the terms outlined in its Second Report.

17. The Proposal Trustee is recommending approval of the Sale Process, including approval of the Stalking Horse Agreement and the Bid Protections, for the following reasons:¹²

- a) in light of the limited resources available to the Company, the lack of financing beyond March 30, 2020 and the need for stability in the Company's business, a sale process is warranted and necessary at this time. The Proposal Trustee's comments on the urgent issues affecting the Company's business and the reason the Sale Process should be commenced immediately is provided in Confidential Appendix "A" to the Supplement to the Second Report;
- b) stalking horse sale processes are a recognized mechanism in restructuring processes to maximize recoveries, while creating stability for the business;
- c) the Sale Process allows the Proposal Trustee to market the Company's business and assets for sale while the business continues to operate.¹³ The Stalking Horse Agreement provides all of the Company's stakeholders, including its employees, suppliers and customers, with the certainty that a transaction will ultimately be completed which will allow the business to emerge as a going concern, while creating a fair and transparent process for third parties to submit bids for amounts that would result in higher realizations for the benefit of the Companies' creditors;
- d) the duration of the Sale Process is sufficient to allow interested parties to perform due diligence and submit offers;

¹² Second Report at section 3.3 and Supplement to Second Report at section 3.0.

¹³ Espresso's CEO agrees that technology service businesses like the Company "**tend to have insignificant asset value and do not retain value if not operated as a going concern**" – see paragraph 48 of the Affidavit of Alkarim Jivraj sworn February 7, 2020.

- e) the Bidding Procedures allow a market test for the benefit of all stakeholders and provide an opportunity to complete a transaction with greater value than the Stalking Horse Agreement;
- f) the analysis filed by the Proposal Trustee indicates that the value to be generated from the transaction under the Stalking Horse Agreement exceeds the liquidation value of the business;
- g) the Sale Process will be run exclusively by the Proposal Trustee to ensure fairness and impartiality in the process; and
- h) the Bid Protections are reasonable in the circumstances, representing █████ of the estimated amount payable under the Stalking Horse offer. Bid protections in Canadian restructuring proceedings commonly range from 2% to 5% of a stalking horse bid. While the Bid Protections may be at the high end of the range on a percentage basis, in absolute dollars, the Bid Protection amounts are not significant, and are a reflection of the small size of the transaction and expenses incurred to prepare the agreement which will be used by prospective purchasers in the Sale Process. The Proposal Trustee does not believe that the Bid Protections will discourage potential purchasers from participating in the Sale Process.

February 4, 2020 Court Attendance

18. This motion was originally returnable on February 4, 2020 before Justice Dietrich. NBC and Espresso requested an adjournment of the hearing. The motion was ultimately adjourned to February 10, 2020.

19. The endorsement of Justice Dietrich issued on February 4, 2020, on consent of all parties in attendance in Court, states that NBC and Espresso “shall serve and file ... a firm executed Stalking Horse Agreement ... for consideration by the Court, the Proposal Trustee and the Company”, or responding materials, by noon on February 7, 2020.¹⁴

20. As of the time of delivery of this Factum, the secured lenders have not served or filed a stalking horse agreement.¹⁵

III – ISSUES

21. The contested issue on this motion is whether the Court should approve the Sale Process, including approval of the Stalking Horse Agreement and the Bid Protections.

IV – LAW AND ARGUMENT**Approval of a Sale Process and Stalking Horse Bid under the BIA**

22. This Court has authority and jurisdiction to approve the Sale Process pursuant to, among other things, Section 65.13 of the BIA.

¹⁴ Supplement to Second Report at section 5.0.2.

¹⁵ Supplement to Second Report at section 5.0.2.

23. Courts have routinely granted approval of stalking horse sales processes including sales processes both in the context of NOI proceedings and under the equivalent provision of the CCAA.¹⁶

24. In *Brainhunter Inc. (Re)*, Justice Morawetz (as he then was) expanded on his decision in *Nortel Networks Corporation (Re)* and identified a number of factors to be considered in determining whether to authorize a stalking horse sale process in the context of the CCAA. Those factors include:

- a) whether a sale is warranted at the given time;
- b) whether the sale is to benefit the whole “economic community”;
- c) whether any of the debtors’ creditors have a *bona fide* reason to object to the sale of the business; and
- d) whether there is a better viable alternative.¹⁷

25. These factors have also been applied and considered by this Court when determining whether to approve a sale process in the context of NOI proceedings.¹⁸

26. The Proposal Trustee recommends approval of the Sale Process, including the Stalking Horse Agreement and the Bid Protections, for the reasons summarized in paragraph 17 above.

¹⁶ *Brainhunter Inc. (Re)*, Ont. Sup. Ct. No. 09-8482-00CL (December 18, 2009) [[2009 CanLII 72333](#)] (“*Brainhunter*”); *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#) (“*Danier Leather*”); Ashley Taylor and Yannick Katirai, “*An Analysis of Stalking Horse Processes in Canadian Insolvency Proceedings*”, I.I.C. Art. Vol. 2-5.

¹⁷ *Brainhunter*, at para. 13.

¹⁸ *Danier Leather*, at paras. 20-40.

The Bid Protections

27. Break fees and expense reimbursements are commonplace in stalking horse sale transactions and have been approved by this Court provided that they are not so large as to jeopardize the ability of a competing bidder to make a bid.¹⁹

28. The Proposal Trustee is of the view that the Bid Protections are reasonable and justified and well within the range, by percentage and quantum, of other fees approved by this Court in similar situations, and are not expected to discourage potential purchasers from participating in the Sale Process.²⁰

Objections Raised by NBS and Espresso

29. On this motion, NBC and Espresso do not oppose the proposed increase to the DIP Facility, the extension of the time for the Company to file a proposal, nor the conduct of a process generally along the lines recommended by the Proposal Trustee for the sale of the Company's business and assets. The objections by NBC and Espresso relate only to the Stalking Horse Agreement and the Bid Protections, and specifically Intercap as the stalking horse bidder.

30. The Proposal Trustee has reviewed the positions and arguments of NBC and Espresso with respect to the Sale Process contained in their responding materials, and has provided the following comments by way of supplementary report to the Court:²¹

¹⁹ Taylor and Katirai, *supra*, fn 16.

²⁰ See Appendix 2 to the Supplement to the Second Report of the Proposal Trustee dated February 8, 2020 (the "**Supplement to the Second Report**") – "*Stalking Horse Break Fee and Expense Reimbursement Analysis*" published by Insolvency Insider as at January 6, 2020.

²¹ Supplement to Second Report at section 5.0.1.

- a) The purchase price in the Stalking Horse Agreement is a floor. The Sale Process provides the opportunity to achieve a better result.
- b) The Proposal Trustee disagrees with the argument that a stalking horse process is prejudicial to the stakeholders. A stalking horse process preserves stakeholder confidence which is more likely to generate value than it is to impair it. KSV has used stalking horse sale processes on many occasions, resulting in going-concern transactions that generated recoveries far greater than anticipated. Based on its experience, the Proposal Trustee also believes that the auction contemplated by the Sale Process is a value maximizing feature as it allows for direct competition between bidders in real time on a transparent basis.
- c) The Proposal Trustee disagrees with the suggestion that there could be a stalking horse process with bidders not being told the offer price they needed to exceed. The Proposal Trustee does not believe this to be a viable alternative as bidders are not likely to participate in a process where they are not given that information.
- d) NBC and Espresso are critical that there was no process to identify a stalking horse other than Intercap. The Proposal Trustee's view based on its extensive experience in similar situations is that there was no realistic possibility that a third party with no prior knowledge of the business and no prior stake in the Company would submit an unconditional stalking horse bid within the time frame necessitated by the Company's financial exigencies and given other issues faced by the Company as described in the Second Report and Confidential Appendix "A" to the Supplement to the Second Report.


- e) The Proposal Trustee understands from the Company that the “strategic” third party which was in discussions with the Company in November, as referenced in the Espresso materials, indicated it was not prepared to make an offer.
- f) Espresso states that the value of the stalking horse bid is “objectively low”, but does not provide any valuation evidence. Furthermore, even if no other bids are submitted, the Stalking Horse Agreement is still subject to further approval by the Court at the approval and vesting order stage.

31. The Proposal Trustee remains of the view that the Sale Process is the most viable alternative for the Company in the circumstances including with regard to its current financial situation.

V – RELIEF SOUGHT

32. For the reasons set out above, the Proposal Trustee recommends that this Court grant an order for the relief sought in its Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of February, 2020.



George Benchetrit, CHAITONS LLP

**Lawyers for KSV Kofman Inc., in its
capacity as Proposal Trustee**

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Brainhunter Inc. (Re)*, Ont. Sup. Ct. No. 09-8482-00CL (December 18, 2009), 2009 CanLII 72333
2. *Danier Leather Inc. (Re)*, 2016 ONSC 1044
3. Ashley Taylor and Yannick Katirai, “*An Analysis of Stalking Horse Processes in Canadian Insolvency Proceedings*”, I.I.C. Art. Vol. 2-5

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Restriction on disposition of assets

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

Individuals

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

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

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

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

Additional factors — related persons

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

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

- (a) a director or officer of the insolvent person;
- (b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and
- (c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

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

Restriction — intellectual property

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Notice of intention

Extension of time for filing proposal

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

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

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

Court File No: 31-2590812

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE PROPOSAL TRUSTEE

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

George Benchetrit
Tel: (416) 218-1141
Fax: (416) 222-8402
Email: george@chaitons.com

**Lawyers for KSV Kofman Inc., in its capacity as
Proposal Trustee**