

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY & INSOLVENCY)

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY*
ACT, R.S.C., 1985, C. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION
TO MAKE A PROPOSAL OF
PIONEER BALLOON CANADA LIMITED

FACTUM OF PIONEER BALLOON CANADA LIMITED
(Returnable July 2, 2024 at 10:00am via videoconference)

June 27, 2024

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INDEX

INDEX

PART I – NATURE OF MOTION	1
PART II – THE FACTS	1
<i>The Companies’ Business and Operations</i>	1
<i>Financial Difficulties</i>	2
<i>Creditors</i>	3
<i>Stalking Horse Sale Process</i>	4
<i>Administration Charge</i>	4
PART III – THE ISSUES	5
PART IV – LAW AND ARGUMENT	5
(a) <i>Discretion Extend Time to File Proposal</i>	5
(b) <i>Discretion to Approve Stalking Horse Sale Process and Stalking Horse Agreement</i>	6
(c) <i>Discretion to Grant the Administration Charge</i>	9
PART V – ORDER SOUGHT	11
SCHEDULE “A” – LIST OF AUTHORITIES	12
SCHEDULE “B” – RELEVANT LEGISLATION	13

I – NATURE OF MOTION

1. On June 12, 2024, Pioneer Balloon Company Limited (“**Pioneer**” or the “**Company**”) filed a Notice of Intention to Make a Proposal (“**NOI**”) pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “**BIA**”). KPMG Inc. (“**KPMG**”) was named proposal trustee in the Company’s proposal proceedings (in such capacity, the “**Proposal Trustee**”).
2. This factum is filed in support of a motion by the Companies for an order, *inter alia*:
 - (a) granting the Companies an extension of time to make a proposal under the NOI proceedings by 35 days up to and including August 16, 2024;
 - (b) approving the stalking horse sale process and procedures (the “**Sale Process**”), including the stalking horse asset purchase agreement between the Company and 1488108 B.C. LTD. dated June 20, 2024 (the “**Stalking Horse Agreement**”); and,
 - (c) granting a super-priority charge (the “**Administration Charge**”) against the Company’s assets, undertakings and properties in an amount not to exceed \$150,000 in favour of the Companies’ legal counsel, the Proposal Trustee and the Proposal Trustee’s legal counsel (the “**Administration Professionals**”)

II – FACTS

Background

3. The Company is a subsidiary of Pioneer National Latex (the “**Parent**”), a US-based balloon manufacturer. The Company is headquartered out of Hamilton, Ontario.

Affidavit of Marylynn Borondy, sworn June 21, 2024 (the “Borondy Affidavit”), Motion Record of Pioneer Balloon Canada Limited dated June 21, 2024 (the “Motion Record”), TAB 2, p. 46 at para. 4.

4. In October 2023, the Parent entered into restructuring proceedings under chapter 11 of title 11 (“**Chapter 11**”) of the United States Code (the “**US Proceedings**”). The Company was not an applicant in the US Proceedings. The US Proceedings resulted in an US Court-approved sale of the US assets but did not result in any disposition of the Canadian business or assets.
5. Pioneer is insolvent. It is indebted to Royal Bank of Canada (“**RBC**”) in the approximate amount of \$2,300,000 on a secured basis. RBC has issued demand and the Company is unable to

satisfy its obligations to RBC. Moreover without the continued support of the Parent – both operationally and with the Parent a its major customer – Pioneer is unable to continue regular operations.

Borondy Affidavit, Motion Record, TAB 2, p. 47 at para 5.

Financial Difficulties

6. The Company has heavily relied on the Parent for operational and business support, and is unable to continue operations without it. The US Proceedings did not result in a purchaser that would continue a relationship with Pioneer, or any of the Parent’s international subsidiaries, and the Company has suffered a liquidity crisis as a result.

Borondy Affidavit, Motion Record, TAB 2, p. 49 at para. 1.

First Report of the Proposal Trustee dated June 24, 2024 (“First Report”), p. 4 at para 16.

7. The liquidity crisis stemming from the US Proceedings and sale of US assets, as well as reduced sales, resulted in Pioneer breaching its borrowing base covenants under the RBC Credit Agreement (as defined herein). The Company is now in excess of its borrowing base limit by more than \$1,000,000.

Borondy Affidavit, Motion Record, TAB 2, p. 50 at para. 20.

First Report, p. 4 at para 20.

8. On May 30, 2024, RBC made formal demand for repayment. The Company is unable to issue repayment in response to the same. Following discussions with RBC, the Proposal Trustee, and counsel, it was agreed that these proceedings, would be a preferred means by which to preserve and realize value for all stakeholders.

Borondy Affidavit, Motion Record, TAB 2, p. 50 at para 21

Creditors

Secured Creditors

9. RBC is Pioneer’s senior secured lender. RBC established certain credit facilities in favour of the Company pursuant to a letter agreement dated February 9, 2022, as amended March 31, 2023 (the “**RBC Credit Agreement**”). In connection with the same, the Company granted a

general security agreement in favour of RBC, re-executed on June 11, 2024. Pioneer is indebted to RBC under the RBC Credit Agreement and the associated security, in an amount in excess of \$2,300,000.

Borondy Affidavit, Motion Record, TAB 2, p. 48 at para. 11.

RBC Credit Agreement, Exhibit C to the Borondy Affidavit, Motion Record, TAB 2C.

10. There are other parties with registered security interests against Pioneer. Such registrations rank behind RBC's, other than in respect of validly registered purchase-money security interest leases in respect of leased and financed equipment and any priority claims that may exist in law.

Borondy Affidavit, Motion Record, TAB 2, p. 48 at para. 13.

Personal Property Security Act Search Report, Exhibit E to the Borondy Affidavit, Motion Record, TAB 2E

Unsecured Creditors

11. As at June 12, 2024, the Company is indebted to its unsecured trade creditors in the approximate aggregate amount of \$1,200,000.

Borondy Affidavit, Motion Record, TAB 2, p. 49 at para. 14.

The Company Creditor Lists filed with NOI, Exhibit F to the Borondy Affidavit, Motion Record, TAB 2F.

Government Remittances

12. The Company is current with all government remittances for source deductions. As of June 21, 2024, Pioneer is in default of its HST payment obligations for April, May and June 2024, totalling \$42,267.97.

Borondy Affidavit, Motion Record, TAB 2, p. 49 at paras 15-16.

Employees

13. Prior to these proceedings, Pioneer had employed approximately 125 full time employees. Substantially all of these employees have been laid off. The Company is current on all wages payable to employees.

First Report, p. 4 at para 17.

14. The Company administers a deferred profit-sharing plan, which has been paused. It is one month in arrears on employer contributions to the plan, amounting to approximately \$5,000.

First Report, p. 7 at para 33.

Stalking Horse Sale Process

15. The Company, in conjunction with the Proposal Trustee and RBC, and subject to the approval of this Court, has developed the Sale Process to be administered by the Proposal Trustee centered on a stalking horse agreement between the Company and 1488108 B.C. LTD.

Borondy Affidavit, Motion Record, TAB 2, p. 51 at paras 24-25.

Administration Charge

16. In order to protect the fees and expenses of the Companies' legal counsel, the Proposal Trustee and their legal counsel, and any fee incurred by the Sales Agent engaged by the Proposal Trustee (collectively, the "**Administration Professionals**") throughout the proposal proceedings, the Companies seek the Administration Charge ranking in priority to claims of all secured and unsecured creditors as security for the reasonable fees and disbursements of the Administration Professionals.

Borondy Affidavit, Motion Record, TAB 2, p. 54 at para. 31.

III - ISSUES

17. The issues on this motion are as follows:

- (a) Should the Court approve the extension of time for the Company to file a proposal?
- (b) Should the Court approve the Sale Process and Stalking Horse Agreement?

(c) Should the Court approve the Administration Charge?

18. The Company respectfully submits that the answer to each of the foregoing questions is – *yes*.

IV – LAW AND ARGUMENT

(a) Discretion to extend the time for the Company to file a proposal

19. The Company seeks an extension of time to file a proposal. The stay of proceedings will expire on July 12, 2024.

20. Subsection 50.4(9) of the *BIA* confers on the Court the statutory jurisdiction to extend the time within which the Company may file a proposal to their creditors:

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.

BIA s. 50.4(9)

21. In the present case, it is submitted that the Court should grant an extension of time for the Company to file a proposal by 35 days up to and including August 16, 2024, because:

- (a) the Company requires the extension to implement the Sale Process (should it be approved);
- (b) the Company has acted in good faith and with diligence in these proceedings, including consulting with RBC as its senior creditor, working diligently to negotiate the Stalking Horse Agreement and to structure the Sale Process and to work with the Trustee to immediately identify and approach potential purchasers of the business assets;
- (c) without the extension, Pioneer will not be in a position to conclude the Sale Process, close any ultimate transaction arising therefrom or make a viable proposal to their creditors, and will become bankrupt to the detriment of their stakeholders; and
- (d) none of the Company's creditors would be materially prejudiced if the extension being applied is granted.

Borondy Affidavit, Motion Record, TAB 2, p. 55 at para 31.

First Report, p. 18 at para 62.

22. Accordingly, Pioneer submits that the Court should exercise its discretion to grant the Companies an extension to file a proposal to and including August 16, 2024.

(b) Discretion to approve the Sale Process and Stalking Horse Agreement

The Sale Process Should Be Approved

23. The Court has jurisdiction to approve a sale process pursuant to the CJA and the BIA. Stalking horse sale processes are common in Canadian insolvency proceedings and have been recognized as reasonable and useful elements of a sale process.

BIA s. 65.13

Nortel Networks Corporation (Re) 2009 CanLII 39492 (ONSC)

CCM Master Qualified Fund v. blutip Power Technologies, 2012 ONSC 1750 (CanLII), at para 7

24. A decision to approve a form of sales process is distinct from the approval of a proposed sale. However, where a Court is to determine the approval of a stalking horse sale process, such process should align with the factors outlined in *Soundair*, namely: whether the receiver has made sufficient effort to get the best price and has not acted improvidently; the efficacy and integrity of the process by which offers are obtained; whether there has been unfairness in the working out of the process; and, the interests of all parties.

CCM Master Qualified Fund v. blutip Power Technologies, 2012 ONSC 1750
(CanLII), at para 6

Royal Bank of Canada v Soundair Corp., 1991 CanLII 2727 (ONCA)

25. The Courts should therefore consider the following factors when reviewing a proposed sale process:

- (a) the fairness, transparency and integrity of the proposed process;
- (b) the commercial efficiency of the proposed process in light of the specific circumstances of the case; and,
- (c) whether the sale process will optimize the chances of securing the best possible price for the assets up for sale.

CCM Master Qualified Fund v. blutip Power Technologies, 2012 ONSC 1750
(CanLII), at para 6

26. Each of these factors support the Court's approval of the proposed Sale Process and Stalking Horse Agreement:

- (a) Fairness, transparency and integrity of the process. The Company and its counsel have worked closely with the Proposal Trustee to develop the proposed sale process. All stakeholders, including any parties with security registrations, have been served with copies of the motion materials. The Proposal Trustee has started the solicitation of interest parties who will be provided an update on this motion. While the Sale Process contemplates a compressed timeline, such expediency is necessary and reasonable in the circumstances, as further detailed below.

**Borondy Affidavit, Motion Record, TAB 2, p. 51 at para 24.
First Report, p. 7 at para 35.**

- (b) The commercial efficiency of the proposed process. The Company is experiencing significant liquidity issues and will be unable to continue operations without the continued support of RBC, which underscores the necessity for a sale as fast as possible. There is no reasonable alternative to a sale process, and it is necessary to realize and maximize the value of the Company and its assets for the benefit of all stakeholders. The sale process further contains specific criteria for bidders to comply with in order to create a commercially efficient process, which are usual and commercially reasonable.

**Borondy Affidavit, Motion Record, TAB 2, p. 50 at para 20.
First Report, p. 11 at paras 40, 41.**

- (c) Optimizing the chances of securing the best price for the assets. The Sale Process has been developed with and is supported by the Proposal Trustee. As further detailed below, the Stalking Horse Agreement will establish a floor price for the sale of the Company and will guarantee some recovery for the Company's stakeholders.

**Borondy Affidavit, Motion Record, Tab 2, p. 51 at para 24.
First Report, p. 11 at para 30.**

27. A sale process with an abbreviated timeline is not usual – however, it is sometimes the best or only option in the circumstances. Where a compressed sale process is contemplated, the Court should consider the impact on various parties and stakeholders and assess whether their positions and treatment would be any different than if an extended sales process were followed.

***Tool-Plas Systems Inc. (Re)*, 2008 CanLII 54791 (ON SC) at para 15**

28. The Company is experiencing a liquidity crisis, and does not have the funds to continue past August 16, 2024. It is sitting idle, and an extended sales process may result in the loss or erosion of value. No stakeholders would be unduly prejudiced or be in a different position than they would be if an extended sales process were followed. In fact, an expedited process will preserve the assets of the Company for the benefit of all stakeholders. Additionally, the process

was developed consultation with, is supported by and is funded by the senior secured creditor, RBC. In such case, consistent with the reasoning of Morawetz J. (as he then was) in *Tool-Plas Systems Inc. (Re)*, supra, an expedited sale process is appropriate.

First Report, p. 11 at para 41.

29. The Court has jurisdiction to approve a stalking horse bid. These bids are supported by the Courts as they stimulate market interest and competition and ensures that there will be a successful outcome to the sale process.

CCM Master Qualified Fund v. blutip Power Technologies, 2012 ONSC 1750 (CanLII), at para 7

30. As discussed above, in determining whether to approve a stalking horse bid, the Courts consider whether the bid is fair, reasonable, and in the best interests of the stakeholders. When assessing whether the purchase price of a stalking horse bid is fair and reasonable, the court considers whether the bid represents a fair and reasonable benchmark for all other bids.

Danier Leather Inc. (Re), 2016 ONSC 1044 (CanLII), at para 40

31. All of these standards are met, including that the Trustee has recommended the Stalking Horse Agreement as a fair and reasonable benchmark. The Company submits the terms of the Stalking Horse Agreement are fair and reasonable in the circumstances. The Stalking Horse Agreement “floor price” would likely exceed the realizations that would be achieved in a liquidation. The Sale Process will stimulate market interest and competition for the Company as it will demonstrate there is already a committed buyer.

First Report, p. 10 at para 39.

(c) Discretion to grant Administration Charge

32. The Companies seek the Administration Charge to secure the fees and disbursements of the Administration Professionals, whose services are critical to the successful restructuring of the Companies. The Administration Charge is to rank in priority to all other claims and encumbrances in the Companies’ property.

33. Section 64.2 of the *BIA* confers on the Court the statutory jurisdiction to grant the Administration Charge:

64.2(1) *Court may order security or charge to cover certain costs:*

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

64.2(2) *Priority:* The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

34. It is unlikely that the Administration Professionals will participate in these proceedings without benefit of the Administration Charge to secure their fees and disbursements.

35. The following additional factors support the granting of the Administration Charge:

(e) the legal and financial advice to be provided by the Administration Professionals is essential to the Companies throughout the proposal proceedings;

(f) the roles of each of the Administration Professionals are distinct and there is no anticipated unwarranted duplication;

(g) the Administration Charge does not purport to prime any secured party who has not received notice of the Companies' motion;

- (h) the Companies' senior secured creditor supports the Administration Charge; and
- (i) and none of the Companies' creditors will be materially prejudiced as a result of the Administration Charge.

36. Accordingly, the Companies submit that this is an appropriate circumstance for the Court to exercise its discretion and grant the Administration Charge over the Property. Each of the Administration Professionals whose fees and disbursements are to be secured by the Administration Charge have played, and will continue to play, a critical role in these proposal proceedings.

V – ORDER SOUGHT

37. The Company seeks an order of the Court approving the relief set out in paragraph 2 of this Factum.

38. All of which is respectfully submitted this 27th day of June, 2024.



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TAB A

SCHEDULE “A”

LIST OF AUTHORITIES

1. *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 (CanLII)
2. *Danier Leather Inc. (Re)*, 2016 ONSC 1044 (CanLII)
3. *Nortel Networks Corporation (Re)* 2009 CanLII 39492 (ONSC)
4. *Royal Bank of Canada v. Soundair Corp.* 1991 CanLII 2727 (ONCA)
5. *Tool-Plas Systems Inc. (Re)*, 2008 CanLII 54791 (ON SC)

TAB B

SCHEDULE “B”

RELEVANT LEGISLATION

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

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

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.

Factors to be considered

- (4)** In deciding whether to grant the authorization, the court is to consider, among other things,
- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

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

Bankruptcy and Insolvency General Rules, CRC, c 368

General

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 the procedure is not inconsistent with the Act or these Rules.

Ontario Rules of Civil Procedure, RRO 1990, Reg 194

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merit

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AMENDED**

**AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
PIONEER BALLOON CANADA LIMITED**

Court File No. BK-24-03091796-0032
Bankruptcy Estate File No. 32-3091796

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY & INSOLVENCY)

Proceedings commenced at Hamilton

FACTUM
(returnable July 2, 2024 at 10:00am
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