

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
(application returnable July 25, 2024 at 10:00am via videoconference)

July 23, 2024

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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 Company for:
 - (a) an approval and vesting order (“**AVO**”), *inter alia*, approving the transaction (the “**Transaction**”) contemplated by the stalking horse asset purchase agreement dated June 20, 2024 (the “**Stalking Horse Agreement**”) between the Company, as vendor, and 1488108 B.C. Ltd. as purchaser (the “**Purchaser**”); and authorizing the Company to complete the Transaction;
 - (b) an ancillary order (“**Ancillary Order**”), *inter alia*:
 - i. approving the first report of the Proposal Trustee dated June 24, 2024 (the “**First Report**”) and the second report of the Proposal Trustee dated July 17, 2024 (the “**Second Report**”); and, together with the First Report, the “**Reports**”);
 - ii. approving the fees and disbursements of the Proposal Trustee and of its counsel, Borden Ladner Gervais LLP (the “**Professional Fees**”);
 - iii. authorizing and directing the Proposal Trustee to distribute the proceeds of the Transaction to the Company’s senior secured creditor – Royal Bank of Canada (“**RBC**”) – up to the amount of the secured indebtedness owing to RBC net of payment of transaction costs, the Court-approved Professional Fees and payment of any other amounts legally payable by the Company in priority to the secured indebtedness owing by the Company to RBC;
 - iv. upon delivery of the Proposal Trustee’s Vesting Certificate, releasing and forever discharging any and all liability that KPMG, RBC, their respective counsel, and each of their respective affiliates, officers, directors, partners, employees, and agents, as applicable (the “**Released Parties**”) in respect of these NOI proceedings.

II – FACTS

Background

3. The Company is a subsidiary of Pioneer National Latex (the “**Parent**”), a US-based balloon manufacturer, and is headquartered out of Hamilton, Ontario. The Parent entered into restructuring proceedings under chapter 11 of title 11 of the United States code, after which Pioneer experienced significant liquidity issues. It is now insolvent¹.

4. In consultation with RBC and the Proposal Trustee, the Company filed an NOI and named KPMG as Proposal Trustee. On July 2, 2024, the Court issued an order, *inter alia*:

- (a) granting the Company an extension of time to make a proposal under the NOI;
- (b) approving the Stalking Horse Agreement and the stalking horse sales process and procedures (the “**Sale Process**”); and
- (c) granting a super-priority administration charge in an amount not to exceed \$150,000 for the fees of the Company’s legal counsel, the Proposal Trustee, and the Proposal Trustee’s counsel (the “**Administrative Charge**”)².

The Sale Process

5. The Proposal Trustee administered the Sale Process in accordance with the Sale Process Order, with the help of representatives from the Company³. With the assistance of Marylynn Borondy, the Proposal Trustee reached out to potential strategic parties with information on the bidding opportunity, including non-confidential overviews of the Company and key dates pursuant to the Sale Process⁴.

¹ Affidavit of Marylynn Borondy dated July 2, 2024 (the “**Affidavit**”) at paras 4-5.

² Affidavit at para. 8

³ Affidavit at paras 10-11.

⁴ Second report at para 30.

6. Thirteen (13) potential strategic parties were identified and contacted. Only four (4) signed a non-disclosure agreement and accessed to the virtual dataroom⁵. None of these parties submitted a Binding Offer (as defined in the Sale Process) by the deadline.

7. As a result of the lack of Binding Offers, pursuant to the Sale Process Order, the Purchaser, as stalking horse bidder, was declared the successful bidder, subject to Court approval⁶.

The Transaction

8. The Transaction is the only viable alternative to a liquidation of the Company's assets. A summary of the salient points of the Transaction is as follows⁷:

- (a) Purchase Price: the total purchase price is \$2,300,000, plus the Assumed Liabilities. The "Cure Costs" associated with any assigned contracts are to be paid out of the purchase price and are estimated to be approximately \$50,000.
- (b) Assigned Contracts: includes the lease agreement to the Premises.
- (c) Payment of Purchase Price: on the Closing Date, the Purchaser shall pay to the Proposal Trustee the sum of: (a) the Cash Purchase Price; less (b) the Deposit of \$230,000 which was previously provided to the Proposal Trustee.
- (d) Closing Date: closing of the Transaction is scheduled to occur on the date (the "**Closing Date**") that is no sooner than two business days after the date on which the Court enters the Ancillary Order and not later than the July 31, 2024 (the "**Outside Date**").
- (e) Employees: the Company shall terminate, in writing, the employment of all of its employees immediately prior to Closing. At least two (2) business days prior to Closing, the Purchaser intends to make new offers of employment to the majority of the Company's employees on substantially the same terms⁸.

⁵ Second Report at para 30(a).

⁶ Second Report at para 30(h).

⁷ All capitalized terms not herein defined shall have the meaning ascribed in the Stalking Horse Agreement.

⁸ Second Report at para 32.

Distribution to RBC

9. The Proposal Trustee retained independent counsel to perform a security review of RBC's security. Such counsel confirmed that, subject to the usual assumptions and qualifications, the security documents granted by the Company to RBC are valid and enforceable⁹. This sentiment is echoed by the Company¹⁰. RBC's security is ranked behind the Administration Charge and any statutory claims pursuant to the BIA¹¹.

10. The Proposal Trustee estimates net cash proceeds of the Transaction will equal approximately \$2.25 million. Based on this estimation, and after payment of amounts owing under the Administration Charge, RBC will suffer a shortfall on its advances to Pioneer¹².

11. The Proposal Trustee proposes to distribution \$2,195,000 to RBC upon closing of the Transaction and retain a holdback of \$55,000 (the "**Holdback**") to address accrued post-filing obligations, if any. Upon satisfaction of those obligations, the remaining Holdback (if any) will be distributed to RBC, provided the aggregate distributions do not exceed the secured indebtedness owed to RBC by the Company.

III – ISSUES

12. The issues on this motion are as follows:

- (a) Should the Court approve the AVO?
- (b) Should the Court approve the Ancillary Order?

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

⁹ Second Report at para 35.

¹⁰ Affidavit at para 23.

¹¹ Second Report at para 37.

¹² Second Report at para 44.

IV – LAW AND ARGUMENT

(a) The Transaction should be approved and the AVO granted

14. The Company is requesting the Transaction be approved and the AVO granted.

15. The Court has jurisdiction to grant a vesting order in proceedings under the *Courts of Justice Act*, R.S.O. c. C.43 (“CJA”) and the BIA¹³, and may authorize a sale or disposition of assets outside the ordinary course of business¹⁴. When doing so, the court is to consider the following non-exhaustive factors:

- (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 value¹⁵.

16. Similar factors are outlined in *Royal Bank of Canada v Soundair Corp*, in the context of a receivership: whether the receiver has made sufficient effort to get the best price and has not acted

¹³ CJA s. 100 and BIA 65.13.

¹⁴ BIA s. 65.13(1) and (7)

¹⁵ BIA s. 65.13(4)

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 parties¹⁶.

17. Each of these factors support the Court's approval of the Transaction:

- (a) The Sale Process was reasonable. The Sale Process was Court-approved, and was followed by the Proposal Trustee. The Sale Process was the result of early and decisive collaboration between the Company, the Proposal Trustee, and RBC as senior secured lender, as well as counsel for each¹⁷. All stakeholders were served with materials for the hearing on the Sale Process Order, and none expressed any reservations prior to that motion, or since.
- (b) The Proposal Trustee supported and conducted the Court-approved Sale Process. The Proposal Trustee diligently marketed the Company as per the Court-approved Sale Process – 13 strategic partners were identified and contacted with the opportunity, four (4) of whom executed non-disclosure agreements to obtain access to the virtual dataroom. Various parties toured the business premises. None of these parties submitted an offer by the bidding offer deadline¹⁸. Further details of the Proposal Trustee's activities and marketing strategy in this regard are more specifically detailed in the First Report.
- (c) Effects of the Transaction on the creditors. The Sale Process was developed with the support of RBC, who remains cooperative and supportive of the process and the Transaction¹⁹. While the anticipated proceeds are not sufficient to fully pay out RBC, the Transaction represents the greatest possible realization on the assets of the Company²⁰. All creditors have been served with notice of the within motion, and none have objected to any of the relief sought herein. No stakeholder will be materially prejudice by the relief sought herein.

¹⁶ *Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 (ONCA)

¹⁷ First Report at para 40.

¹⁸ Second Report at para 30.

¹⁹ Second Report at para 56.

²⁰ Second Report at para 39.

- (d) The Transaction will be more beneficial to creditors than a liquidation. The Transaction was the only binding offer received by the Proposal Trustee despite best efforts to solicit further offers through the Sale Process. It is the only viable alternative to a liquidation of the Company's assets, and will exceed the realizations that would be achieved in a liquidation scenario²¹.
- (e) The consideration is fair and reasonable. As further detailed in the Second Report, the consideration payable under the Transaction is fair and reasonable and represents the highest or otherwise best offer for the business. It would be more beneficial for creditors than a sale or disposition in a bankruptcy context²².

18. The Transaction is therefore reasonable in the circumstances, and the AVO should be granted.

(b) The Ancillary Order should be Approved

Approval of the Proposal Trustee's Activities and the Professional Fees

19. The Company requests the Reports, and the activities of the Proposal Trustee described therein be approved. The Company also requests that the Professional Fees be approved.

20. Requests to approve a court-appointed officer's reports are not unusual in insolvency proceedings²³. The Reports fairly and accurately represent the circumstances of Pioneer²⁴. All activities of the Proposal Trustee outlined in the Reports were necessary, undertaken in good faith, and in accordance with the court-approved Sale Process.

21. The Sale Process Order requires the fees and disbursements of the Proposal Trustee and its counsel be approved by the Court. The Professional Fees are reasonable within the circumstances, and both the Company and RBC, as senior secured creditor, are supportive of their approval²⁵.

²¹ First Report at para 39.

²² Second Report at para 59(c).

²³ *Target Canada Co. (Re)*, [2015 ONSC 7574](#) at para 2.

²⁴ Affidavit at para 18.

²⁵ Second Report at para 56.

Approval of the Releases

This Court has Jurisdiction to Approve the Releases

22. The Ancillary Order includes releases (the “**Releases**”) in favour of (a) the Proposal Trustee and its legal counsel; (b) RBC and its legal counsel; and (c) each of their respective affiliates, officers, directors, employees, and agents, as applicable (collectively, the “**Released Parties**”).

23. The Releases cover any and all present and future claims against the Released Parties based upon any fact or matter of occurrence in respect of the NOI proceedings, the Stalking Horse Agreement, the Sale Process, including in carrying out any incidental matters, save and except for any gross negligence or wilful misconduct.

24. In the context of proposal proceedings under the BIA, Courts have granted releases in favour of third parties, including a proposal trustee. For example, in *Kitchener Frame Limited*, Justice Morawetz (as he then was) granted broad releases in favour of, among others, the proposal trustee, the escrow agent, shareholders and affiliates of the debtor companies, and counsel for each of the released parties.²⁶

25. Justice Morawetz further held that section 62(3) of the BIA²⁷ does not intend to prohibit such releases, stating:

Further, I agree with counsel’s submissions that a more flexible purposive interpretation [of section 62(3)] is in keeping with modern statutory principles and the need to give purposive interpretation to insolvency legislation must start from the proposition that there is no express prohibition in the *BIA* against including third-party releases in a proposal. [...]²⁸

26. In approving the releases, Justice Morawetz concluded that:

(a) the released parties contributed to the proposal in a “tangible and realistic way”;

²⁶ *Kitchener Frame Limited (Re)*, [2012 ONSC 234](#) at para. 40. [*Kitchener Frame*]

²⁷ BIA, s. 62(3): “The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.”

²⁸ *Kitchener Frame* at para. 54.

(b) but for the promise of the release, it is unlikely that certain of the released parties would have supported the proposal;

(c) the release was to the benefit of the applicants and creditors, as the recovery under the proposal was greater than what would have been received in a bankruptcy.²⁹

27. Third-party releases are also commonly granted in proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"). In *Harte Gold*, a release was granted as part of an approval and vesting order in respect of a reverse vesting transaction, in favour of (a) the current and former directors and officers of the debtor company and the new companies to be incorporated pursuant to the reverse vesting order, (b) the monitor and its counsel, and (c) the purchaser and its directors and officers.³⁰

28. The Court evaluated the requested release with reference to the following non-exhaustive factors:

(a) whether the claims to be released are rationally connected to the purpose of the plan;

(b) whether the plan can succeed without the releases;

(c) whether the parties being released contributed to the plan;

(d) whether the releases benefit the debtors as well as the creditors generally;

(e) whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) whether the releases are fair, reasonable and not overly broad.³¹

²⁹ *Kitchener Frame* at para. 86-88.

³⁰ *Harte Gold Corp. (Re)*, [2022 ONSC 653](#) at para. 80. [*Harte Gold*]

³¹ *Harte Gold* at paras. 80-86; *Lydian International Limited (Re)*, [2020 ONSC 4006](#) at para. 54.

29. It is not necessary for each of the above factors to apply in order for a release to be granted.³²

30. The Releases are reasonable and appropriate in the circumstances and should be granted for the following reasons:

(a) The claims to be released are rationally connected to the purpose of the restructuring. The claims released are rationally connected to the NOI Proceedings and the Transaction. The Release will have the effect of diminishing claims against the Released Parties, which in turn will diminish indemnification claims by the Released Parties against court-ordered charges. Given that a purpose of an insolvency proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the NOI Proceedings.

(b) The releasees contributed to the Transaction. The Released Parties made significant contributions to the Company's efforts in the NOI Proceedings. Among other things:

- i. The Proposal Trustee facilitated the Sales Process in accordance with the Sales Process Order, assisted the Company with preparation of financial statements, including a cash flow forecast, and implemented procedures for monitoring the Company's receipts and disbursements; and
- ii. RBC agreed to not to exercise its rights to enforce security and extended additional credit during the NOI Proceedings, which effectively provided interim financing that allowed the Company to carry out the Sales Process and enter into the Transaction.

The Released Parties have contributed time, energy and resources to achieve this outcome and accordingly, are deserving of the Release.

³² *Harte Gold* at para. 81.

(c) The Release is fair, reasonable and not overly broad. The Release is fair and reasonable. The Company is unaware of any statutory liabilities in respect of the Released Parties and, to date, no stakeholder has made the Company or the Proposal Trustee aware that they intend to assert a claim against any of the Released Parties in respect of any claims covered by the Release.

Further, the Release is sufficiently narrow in circumstances as the Release carves out and preserves claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced to allow the Company and the Released Parties to move forward with the Transaction and work to conclude these NOI Proceedings.

(d) The Company's restructuring may be jeopardized without the Release. The Release will bring certainty and finality for the Released Parties. But for the Proposal Trustee's assistance in the Sales Process and RBC's financing during the NOI Proceedings, the Company's most likely alternative would have been a bankruptcy.

(e) The Release benefits the Company as well as the creditors generally. The Release benefits the Company's creditors and other stakeholders by reducing the potential for the Released Parties to seek indemnification from the Company, thus minimizing further claims against the Company.

(f) Creditors had knowledge of the nature and effect of the Release. All creditors on the Service List were served with materials relating to this motion. To date, no creditor has objected to the Release. A specific claims process for claims against the Released Parties in these circumstances would only result in additional costs and delay without any corresponding benefit.

V – ORDER SOUGHT

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

32. All of which is respectfully submitted this 23rd day of July, 2024.



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TAB 1A

SCHEDULE “A”

LIST OF AUTHORITIES

1. [*Harte Gold Corp. \(Re\)*, 2022 ONSC 653](#)
2. [*Kitchener Frame Limited \(Re\)*, 2012 ONSC 234](#)
3. [*Lydian International Limited \(Re\)*, 2020 ONSC 4006](#)
4. [*Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 \(ONCA\)](#)
5. [*Target Canada Co. \(Re\)*, 2015 ONSC 7574](#)

TAB 1B

SCHEDULE “B”

RELEVANT LEGISLATION

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.

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.

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.

Certain persons not released

62(3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

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.

Courts of Justice Act, R.S.O. 1990, c. C. 43

Vesting orders

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

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

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

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