

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

PILLAR CAPITAL CORP.

Applicant

– and –

TURUSS (CANADA) INDUSTRY CO., LTD.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C-43, AS AMENDED

FACTUM OF THE RECEIVER

April 13, 2021

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TO: SERVICE LIST

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FACTUM OF THE RECEIVER

PART I – OVERVIEW

1. On September 18, 2020, pursuant to an order (the “**Receivership Order**”) of this Honourable Court (the “**Court**”), MNP Ltd. was appointed receiver (the “**Receiver**”), under section 243(1) of the *Bankruptcy & Insolvency Act*, R.S.C. 1985, c. B-3 and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, over all of the assets, undertakings and properties (the “**Property**”) of Turuss (Canada) Industry Co., Ltd. (the “**Turuss**”).
2. This Factum is filed in support of the Receiver’s motion returnable April 14, 2021, seeking an Order approving the stalking horse agreement between the Receiver and Westmount Park Investments Inc. (“**Westmount**”) dated April 13, 2021 (the “**Stalking**”).

Horse Bid”), and the accompanying stalking horse procedures (the “**Stalking Horse Bidding Procedures**”).

PART II – THE FACTS

3. Turuss is a federally incorporated entity that manufactures, imports and distributes hardwood flooring. The Property primarily consists of a commercial property located at 60 Industrial Park Road, Chesley, Ontario (the “**Chesley Property**”), with a majority portion of the Chesley Property being leased to Bruce Power L.P.

Fifth Report to the Court of MNP Ltd. in its capacity as Court Appointed Receiver of Turuss (Canada) Industry Co., Ltd., dated April 13, 2021, para 3, Tab 2 of Receiver’s Motion Record [Fifth Report].

4. Pursuant to the Receivership Order, the Receiver is authorized to sell, convey, transfer, lease or assign the Property, including the Chesley Property.

Order of the Honourable Justice Hainey, dated September 18, 2020, para 2.

5. On October 29, 2020, the Court issued an Order (the “**Sale Process Order**”) authorizing the Receiver to complete a sale process for the Chesley Property (the “**Sale Process**”). On January 11, 2021, the Court issued an Order (the “**Deadline Extension Order**”) which, among other things, approved and authorized an extension to the offer deadline contemplated in the Sale Process (the “**Deadline**”) from January 11, 2021 to February 26, 2021. The Deadline was further extended by Court Order dated March 26, 2021 (the “**Auction Approval Order**”) to April 16, 2021.

Order of the Honourable Justice Cavanagh, dated October 29, 2020, paras 3 and 4 [Sale Process Order]; Order of the Honourable Justice Gilmore, dated January 11, 2021, paras 8 and 9; Fifth Report, para 6, 7; Order of the Honourable Justice Hainey, dated March 26, 2021, para 3.

6. The extensions to the Deadline were required, in part, to facilitate the completion of the Lease Expansion Agreement (as defined herein).
7. The Receiver recently completed the Lease Expansion, Extending, and Amendment Agreement between Turuss and Bruce Power L.P. (the “**Lease Expansion Agreement**”). Based upon a Colliers International Realty Advisors Inc. appraisal dated December 31, 2020, the conclusion of the Lease Expansion Agreement would increase the value of the Chesley Property.

Fifth Report, para 21 and accompanying confidential supplement [Confidential Supplement], para 7.

8. Following the granting of the Auction Approval Order, the Receiver received an unsolicited stalking horse offer from Westmount. Westmount has agreed to act as the Stalking Horse Bidder and, if Westmount is selected as the Successful Offeror in accordance with the Stalking Horse Bidding Procedures, Westmount would acquire the Chesley Property. The Stalking Horse Bid is conditional on this Court approving and authorizing each of the Stalking Horse Bid and the Stalking Horse Bidding Procedures.
9. In summary, the Stalking Horse Bid contains the following key deal points:
 - (a) **Purchased Assets:** Those assets listed in Section 2.01 of the Stalking Horse Bid, primarily the Chesley Property.
 - (b) **Purchase Price:** \$6,500,000.
 - (c) **Deposit:** \$650,000 (10% of Purchase Price).
 - (d) **Break Fee and Expense Reimbursement:** \$175,000 (2.69% of Purchase Price) (the “**Break Fee**”).

Stalking Horse Bid at s. 2.01, 2.03, 2.10, and 6.02.

10. Accompanying the Stalking Horse Bid is the Stalking Horse Bidding Procedures. As a brief summary, the Stalking Horse Bidding Procedures provide for the following:
 - (a) the Stalking Horse Bidding Procedures is to be employed with respect to the sale of the Chesley Property. The Receiver will be responsible for conducting the Stalking Horse Bidding Procedures and Auction Procedures (if applicable);
 - (b) only a bid for the Chesley Property, in whole and not in part, can be eligible to be a Qualified Offer, as contemplated in the Stalking Horse Bidding Procedures. For clarity, a “**Qualified Offeror**” is a Prospective Offeror who submits a binding bid and accompanying materials (other than the Stalking Horse Bid) (a “**Binding Offer**”) in substantially the same form as the Stalking Horse Bid submitted in the form of the template APS, for a purchase price of at least \$6,675,000 and satisfies the Bid Requirements (as defined in the Stalking Horse Bidding Procedures), as determined by the Receiver in its sole discretion. Any bid meeting these criteria that is received by the Receiver not later than 5:00 p.m. (local Toronto time) on April 30, 2021 is a qualified bid (“**Qualified Offer**”). The Stalking Horse Bid shall be deemed to be a Qualified Offer;
 - (c) the Receiver shall have the right to adopt, modify and implement such further and other rules and procedures. The Receiver also has the right to enter into an exclusive transaction outside the Stalking Horse Bidding Procedures or Auction Procedures prior to the selection of a Successful Offeror;
 - (d) the Receiver shall pay, under the conditions outlined in the Stalking Horse Bidding Procedures and in the Stalking Horse Bid, the Break Fee (as defined herein), in each case payable by the Receiver to the Stalking Horse Bidder only in the event that a Successful Offer other than the Stalking Horse Bid is accepted by the Receiver, approved by the Court and the associated transaction is completed;

- (e) the Stalking Horse Bidding Procedures provides for limitations on withdrawing, modifying, and amending a Binding Offer, and the Receiver may determine whether to entertain Binding Offers for the Property that do not conform to one or more of the requirements and deem such Binding Offers to be a Qualified Offer;
- (f) if one or more Qualified Offers (other than that submitted by the Stalking Horse Bidder) have been received by the Receiver on or before April 30, 2021, the Receiver may implement the Auction (as defined in the Auction Procedures). In the event the Receiver elects, in its discretion, to implement the Auction, the Receiver shall advise all Qualified Offerors of the Lead Bid (as defined in the Stalking Horse Bidding Procedures) and invite all Qualified Offerors (including the Stalking Horse Bidder) to attend the Auction to be conducted by the Receiver in accordance with the Auction Procedures;
- (g) the Auction shall be governed by the terms set out in the Auction Procedures. In the event there is any conflict between any provision in the Sale Process, Auction Procedures and the Stalking Horse Bidding Procedures, the terms of this Stalking Horse Bidding Procedures shall govern and prevail;
- (h) the Receiver is not required to select the bid with the highest purchase price amount and may, exercising its reasonable business judgment, select another bidder on the basis that it is the best bid even though not the highest purchase price;
- (i) the sale of the Property to any Successful Offeror by the Receiver is expressly conditional upon the approval of the Successful Offer by the Court at the hearing of an approval motion;
- (j) the Receiver has the ability to terminate the Stalking Horse Bidding Procedures and reject bids; and
- (k) the Receiver has limited liability pursuant to the Stalking Horse Bidding Procedures.

Stalking Horse Bidding Procedures [Stalking Horse Bidding Procedures] attached to the Stalking Horse Asset Purchase Agreement between Turuss (Canada) Industry Co., Ltd. and Westmount Park Investments Inc. dated April 13, 2021 [Stalking Horse Bid].

11. In connection with the Stalking Horse Bidding Procedures, the Receiver is also requesting an extension to the bid Deadline from April 16, 2021 to April 30, 2021.

PART III – THE ISSUE

12. The issues before this Court are whether the Stalking Horse Bidding Procedures and Break Fee should be approved, and if the Receiver shall be authorized to execute the Stalking Horse Bid.

PART IV – THE LAW AND ARGUMENT

13. Stalking horse agreements are commonly used in insolvencies to facilitate sales of businesses and assets by establishing a baseline price and transactional structure for superior bids from interested parties. The use of a stalking horse agreement in a sale process assists in maximizing the value of a business for the benefit of its stakeholders and can enhance the fairness of the sale process. In particular, stalking horse agreements have commonly been used in receivership cases.

Danier Leather Inc., Re, [2016 ONSC 1044](#), at para 20 [Danier]; See also *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, [2012 ONSC 1750](#) [CCM].

14. Authorizing the execution of the Stalking Horse Bid is only being sought at this stage for the purpose of approving it in connection to Stalking Horse Bidding Procedures, and approving the Break Fee. If the Stalking Horse Bid is ultimately the successful bid, further approval from this Court will be sought.

15. In *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (“*CCM*”), the Court approved a stalking horse agreement and sale procedures. *CCM* states that the “reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale”, namely, the principles discussed in *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205 (“*Soundair*”). These principles are to be applied to the Stalking Horse Bidding Procedures and Stalking Horse Bid. The principles are the following:

- (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 process by which offers are obtained;
- (c) whether there has been unfairness in the working out of the process; and
- (d) the interests of all parties.

Royal Bank v. Soundair Corp., [1991 CarswellOnt 205](#) para 16, in [CCM](#), para 6.

16. The Court in *CCM* also provides the following factors to assess a sales and marketing process, which seeks to align with *Soundair*:

- (a) the fairness, transparency and integrity of the proposed process;
- (b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and

- (c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

Ibid.

17. Finally, the Court in *Nortel Networks Corp. (Re)* provides additional criteria to consider when approving a stalking horse sale process. This additional criteria is the following:

- (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?

Nortel Networks Corp. (Re), [2009 CarswellOnt 4467](#) (S.C.J.) at para 49 [Nortel]

18. While the summary of the law from *Nortel* set out above considers a process proposed in the CCAA context, it has been adopted as being equally applicable when approving a stalking horse sale process in the context of a receivership.

[Nortel](#), para 49 in *Brainhunter Inc., Re (2009)*, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]) para 13, as discussed in *Crate Marine Sales Ltd., Re*, [2015 ONSC 1062](#) para 14.

The Stalking Horse Bid and Break Fee

19. The Receiver continues to implement the Sale Process and the market has been sufficiently. The Receiver has engaged in numerous discussions with Prospective

Offerors, and has gained an understanding of the anticipated value that will be presented by the bid Deadline pursuant to the Sale Process and the market has been canvassed sufficiently.

20. The Stalking Horse Bid reflects an unconditional, reasonable offer for the Chesley Property and a superior proposal at this time, as discussed in the Confidential Supplement to the Fifth Report of the Receiver dated April 13, 2021.

Confidential Supplement, paras 3-6.

21. The Stalking Horse Bid will provide for a number of benefits to the Sale Process, as supplemented and modified (where necessary) by the Stalking Horse Bidding Procedures, including:

- (a) a baseline purchase price for the Chesley Property;
- (b) an unconditional offer creating certainty in concluding a transaction;
- (c) reasonable consideration for the Chesley Property which will maximize secured creditor recovery and a potential pool of funds for proven unsecured creditors;
and
- (d) a short timeline to closing the transaction which is beneficial when balanced against the unknown market conditions due to COVID-19 and the impact on the implementation of the Sale Process.

22. The Stalking Horse Bidding Procedures is designed to facilitate a competitive bidding process in which all potential bidders are encouraged to participate and submit competing

bids pursuant to a transparent process. The Stalking Horse Bidding Procedures also maintains the fairness, transparency and integrity of the current Sale Process.

23. The Stalking Horse Bid contains a Break Fee of 2.69% of purchase price. The Court in *Danier Leather Inc., Re*, 2016 ONSC 1044 provides that break fees in the range of 3% and expense reimbursements in the range of 2% have been approved, with a combined range from between 1.8% to 5% of the value of the bid. The Break Fee represents the combined break fee and expense reimbursement, and falls on the lower end of the combined range. We submit that the Break Fee is reasonable in the circumstances and the quantum of such fee will not impact potential bidders from submitting a bid.

[Danier](#), paras 41-42; [CCM](#) at paras 13.

24. Accordingly, the Receiver submits that the evidence before this Honourable Court establishes that the Stalking Horse Bid and Stalking Horse Procedures are reasonable in the circumstances, and should be approved.

PART V – ORDER SOUGHT

25. For the reasons set forth herein, and in the Receiver's Fifth Report to this Honourable Court dated April 13, 2021, the Receiver respectfully requests an Order approving, among other things, the Stalking Horse Bidding Procedures and Stalking Horse Bid.

DATE: April 13, 2021



DENTONS CANADA LLP

Lawyers for MNP Ltd. in its capacity as Court-appointed Receiver of Turuss (Canada) Industry Co., Ltd.

**Schedule “A”
List of Authorities**

1. *Danier Leather Inc., Re*, [2016 ONSC 1044](#)
2. *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, [2012 ONSC 1750](#)
3. *Royal Bank v. Soundair Corp.*, [1991 CarswellOnt 205](#)
4. *Nortel Networks Corp. (Re)*, [2009 CarswellOnt 4467](#) (S.C.J.)
5. *Brainhunter Inc., Re (2009)*, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List])
6. *Crate Marine Sales Ltd., Re*, [2015 ONSC 1062](#)

Court File No.: CV-20-00646729-00CL

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