

Court No. BK-23-02975175-0031

Estate File No. 31-2975175

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE
A PROPOSAL UNDER THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED OF
DATATAX BUSINESS SERVICES LIMITED, A
CORPORATION FORMED UNDER THE LAWS OF ONTARIO**

FACTUM OF DATATAX BUSINESS SERVICES LIMITED

August 16, 2023

Tyr LLP
488 Wellington Street West
Suite 300-302
Toronto, ON M5V 1E3
Fax: 416-987-2370

Jason Wadden (LSO# 46757M)
Tel: 416.627.9815
Email: jwadden@tyrllp.com

Shimon Sherrington (LSO# 83607B)
Tel: 587.777.0367
Email: ssherrington@tyrllp.com

Lawyers for the Applicant

TO: THE SERVICE LIST

TABLE OF CONTENTS

Part I - INTRODUCTION	1
Part II - SUMMARY OF FACTS	3
A. Background	3
B. Sale Of Datatax to the Murads and the Fiera Loan Agreement.....	4
C. Ibbotson Promissory Note and BMO Loan Agreement.....	5
D. Events of Default and November 2022 Order.....	5
E. Continuing Events of Default Under the Fiera Loan Agreement and Interim Financing	7
F. The Stalking Horse APA and DIP Financing	8
G. The SSP	11
H. NOI Proceeding Commenced.....	12
Part III - SUMMARY OF ISSUES	12
Part IV - LAW AND ARGUMENT	12
A. The SSP Should Be Approved	12
B. The DIP Facility and DIP Charge Should Be Approved.....	18
C. The Administration Charge Should Be Approved	20
D. The D&O Charge Should Be Approved.....	22
E. The Stay Should Be Extended To Subsidiaries and Until End of October.....	24
Part V - ORDER REQUESTED	25
Schedule “A” List of Authorities	i
Schedule “B” Text of Statutes, Regulations & By-Laws	i

PART I - INTRODUCTION

1. This motion is brought by Datatax Business Services Limited (“**Datatax**” or the “**Company**”) seeking an order substantially in the form of the draft order (the “**Order**”) located at Tab 3 of Datatax’s Motion Record, providing for:

- (a) abridging the time for service of the Notice of Motion and Motion Record in respect of this motion and dispensing with further service thereof;
- (b) approving the SSP (as defined below) and authorizing and directing KPMG Inc. in its capacity as proposal trustee of Datatax (“**KPMG**” or the “**Proposal Trustee**”), in consultation with Datatax and its advisors, to carry out the SSP and to take such steps and execute such documentation as may be necessary or incidental to the SSP;
- (c) authority for Datatax and the Proposal Trustee to immediately commence the SSP;
- (d) approving the asset purchase agreement (the “**Stalking Horse APA**”) between Datatax and 2872802 Ontario Inc. (the “**Stalking Horse Bidder**”) solely for the purpose of constituting the “**Stalking Horse Bid**” under the SSP;
- (e) approving the DIP Facility and the DIP Charge (as defined below);
- (f) approving the Administration Charge (as defined below);
- (g) approving the D&O Charge (as defined below);

- (h) extending the stay of proceedings to the Datatax Subsidiaries (as defined below);
- (i) extending the time for Datatax to file a proposal and corresponding stay of proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”) for forty-five days after the initial automatic stay under the BIA (that day being October 28, 2023); and
- (j) such further and other relief as the Court may deem just.

2. Datatax and its subsidiaries have maintained a persistently negative cash flow business and have been unable to develop positive cash flow or an actionable refinancing or sale transaction outside of an insolvency proceeding. Due to its current liquidity situation, Datatax filed a Notice of Intention to Make a Proposal (the “**NOI**”) under the BIA on August 14, 2023. In contemplation of the filing of the NOI, Datatax entered into the Stalking Horse APA that is proposed to be used as the Stalking Horse Bid in the proposed SSP. The relief in the SSP and proposed Order is appropriate as:

- (a) the SSP is a reasonable process in the circumstances and the best option for the realization of the Company’s assets and to preserve the interests of Datatax’s stakeholders, including employees, vendors and customers;
- (b) the Administration Charge, the DIP Charge and D&O Charge are reasonable and appropriate; and
- (c) the extension of the stay of proceedings (including extending the stay for the benefit of the Datatax Subsidiaries, as defined below) will allow Datatax to

implement the SSP and stabilize Datatax's business during these proposal proceedings.

PART II - SUMMARY OF FACTS

A. Background

3. Datatax, through its subsidiaries, carries on the business of providing certain bookkeeping, income tax and consulting services. Datatax holds all of the issued shares in Farm Business Consultants Inc. ("**Farm**"), FBC Financial & Estate Planning Services Inc. ("**FBC Financial**") and Wheatland Accounting Services Ltd. ("**Wheatland**", together with Farm and FBC Financial, the "**Datatax Subsidiaries**", and the Datatax Subsidiaries together with Datatax, the "**Datatax Companies**").

Affidavit of Brent Houlden affirmed on August 15, 2023 (the "Houlden Affidavit") at paras. 4, 5; Motion Record of Datatax, Tab 2.

4. As of August 14, 2023, Datatax has liabilities totalling approximately \$33,886,840.14, including, but not limited to the following:

- \$31,929,010 (as of July 15) plus accumulating interest is owed to Fiera (as defined below) under the Fiera Loan Agreement (as defined below), such amount owing constituting the "**Fiera Debt**";
- \$1,633,531.84 owed to Bank of Montreal ("**BMO**") under the BMO Loan Agreement (as defined below).

An additional liability (not included in the above total) is \$3,500,000 owed to Steven Ibbotson ("**Ibbotson**") under the Ibbotson Promissory Note (as defined below).

Houlden Affidavit at para. 7; Motion Record of Datatax, Tab 2.

B. Sale Of Datatax to the Murads and the Fiera Loan Agreement

5. Datatax, as borrower, and Fiera Private Debt Fund VI L.P. ("**Fiera**"), as lender, entered into a credit agreement dated June 22, 2022 (the "**Fiera Loan Agreement**"). The purpose of the Fiera Loan Agreement was to finance the sale of Datatax from the previous owner of the Company, Ibbotson, to the Murad Holding Companies (as defined below) (the "**Murad Sale**"). The closing of the Murad Sale transaction occurred concurrently with the entering into of the Fiera Loan Agreement. The Fiera Loan Agreement provides for a secured term facility up to \$34,300,000 to Datatax. The total amount currently owed by Datatax to Fiera under the Fiera Loan Agreement is the Fiera Debt.

Houlden Affidavit at para. 8; Motion Record of Datatax, Tab 2.

6. The obligations of Datatax to Fiera under the Fiera Loan Agreement were secured by, among other things, three securities pledge agreements granted by the holding companies controlled by members of the Murad family:

- A securities pledge agreement dated June 22, 2022 granted by 997322 Ontario Inc. ("**997 Ontario**") in favour of Fiera.
- A securities pledge agreement dated June 22, 2022 by 2394419 Ontario Limited ("**239 Ontario**") in favour of Fiera.
- A securities pledge agreement dated June 22, 2022 by 2774118 Ontario Inc. ("**277 Ontario**", together with 997 Ontario and 239 Ontario, the "**Murad Holding Companies**"), in favour of Fiera.

(Each of the foregoing securities pledge agreements, collectively, the "**Securities Pledge Agreements**".)

Houlden Affidavit at para. 9; Motion Record of Datatax, Tab 2.

7. At the time the Fiera Loan Agreement was entered into, each of the Murad Holding Companies was controlled by members of the Murad family.

Houlden Affidavit at paras. 10, 11; Motion Record of Datatax, Tab 2.

8. Each of the Securities Pledge Agreements provides Fiera certain rights upon the occurrence and continuance of a default under the Fiera Loan Agreement, including:

- section 7(1): suspending each of the Shareholders' rights to vote Datatax's Shares, with all such rights being vested solely and absolutely in Fiera;
- section 10(b): enforcing all other rights and remedies of a holder of the Datatax's Shares and other investment property; and
- section 13: having power of attorney over the Shareholders such that Fiera and its nominees are empowered to exercise all rights and powers of the Shareholders in and to the Collateral.

Houlden Affidavit at para. 12; Motion Record of Datatax, Tab 2.

C. Ibbotson Promissory Note and BMO Loan Agreement

9. As part of the sale of the Murad Sale, Datatax also issued a promissory note on June 22, 2022, in favour of Ibbotson in the amount of \$3,500,000 (the "**Ibbotson Promissory Note**"). Additionally, Datatax, as borrower, and BMO, as lender, entered into a credit agreement dated July 14, 2022 (the "**BMO Loan Agreement**"). The BMO Loan Agreement provides a revolving credit facility up to \$2,000,000 to Datatax.

Houlden Affidavit at paras. 13, 14; Motion Record of Datatax, Tab 2.

D. Events of Default and November 2022 Order

10. Following the closing of the Murad Sale in June 2022, it was determined that a number of defaults had quickly arisen under the Fiera Loan Agreement. As a result of the various defaults and issues, Fiera issued demands and section 244 BIA notices to

Datatax and the Murad Holding Companies. Subsequently, on October 21, 2022, Fiera, in accordance with its rights under the Securities Pledge Agreements, passed a shareholder resolution naming Brent Houlden (“**Houlden**”) as the sole Director of Datatax and removing Noah and Jacob Murad as directors.

Houlden Affidavit at paras. 20, 21; Motion Record of Datatax, Tab 2.

11. In his capacity as sole director of Datatax, Houlden then passed a number of shareholder resolutions on October 21, 2022, naming himself as the sole director of each of the Datatax Subsidiaries. On October 31, 2022, Houlden also appointed Naveed Manzoor (“**Manzoor**”) of FAAN Advisors Group Inc. as Interim Chief Executive Officer of Datatax to assist in restructuring and overseeing the Datatax Companies.

Houlden Affidavit at paras. 22, 23; Motion Record of Datatax, Tab 2.

12. Despite Fiera’s clear rights under the Securities Pledge Agreements to appoint and remove directors on events of default, Noah, Jacob and Monica Murad signed a shareholders’ resolution on October 31, 2022, purporting to remove Houlden as the sole director and purporting to name Noah and Jacob Murad as the directors of Datatax (the “**Murad Resolution**”)

Houlden Affidavit at para. 24; Motion Record of Datatax, Tab 2.

13. In response, on November 9, 2022, Fiera filed a Notice of Application under the *Personal Property and Security Act*, seeking: (a) a declaration that Fiera’s exercise of its rights, pursuant to the Securities Pledge Agreements, to appoint Houlden as sole director of Datatax was valid and enforceable; and (b) a declaration that the Murad Resolution

was of no force and effect. Ultimately, Noah and Jacob Murad consented to an order granting this relief.

Houlden Affidavit at paras. 25, 26; Motion Record of Datatax, Tab 2.

E. Continuing Events of Default Under the Fiera Loan Agreement and Interim Financing

14. Since the November 2022 Order, Houlden and Manzoor made the operational changes necessary to regularize the Company's business. Refinancing and/or a sale of Datatax was pursued.

Houlden Affidavit at paras. 30, 31; Motion Record of Datatax, Tab 2.

15. However, despite the regularization of the business affairs of the Datatax Companies, the defaults under the Fiera Loan Agreement have not been cured or resolved. At present, the Fiera Debt is due and owing.

Houlden Affidavit at para. 27; Motion Record of Datatax, Tab 2.

16. Datatax has maintained a persistently negative cash flow business since at least the granting of the November 2022 Order. Through three deferral and acknowledgment agreements by Fiera, Datatax was able to continue operations, until cash flow issues came to a head during the week of July 31, 2023. The Datatax Companies were suffering a critical cash flow deficit resulting in insufficient funds for payroll and other payments.

Houlden Affidavit at para. 18; Motion Record of Datatax, Tab 2.

17. Accordingly, in order to ensure the continuity of the Datatax Companies' business, and to facilitate and orderly restructuring process under the BIA through the filing of a

NOI, Datatax negotiated and was able to secure interim financing (the “**Interim Facility**”) from an affiliate of Fiera, Fiera FP Business Financing Fund, L.P. The Interim Facility is for a maximum principal amount of \$3,000,000, which included an initial tranche of \$750,000 (the “**Initial Tranche**”) that was paid by Fiera prior to the commencement of the NOI proceedings. The Initial Tranche was used to pay for, among other things, payroll and other critical expenses.

Houlden Affidavit at para. 33; Motion Record of Datatax, Tab 2.

18. The Interim Facility contemplated that Datatax would enter into a Stalking Horse APA with Ibbotson and proceed forthwith with filing for NOI proceedings for the approval of the Stalking Horse APA and public Sales Solicitation Process (“**SSP**”) to determine whether or not a superior bid to the Stalking Horse APA could be obtained.

Houlden Affidavit at para. 34; Motion Record of Datatax, Tab 2.

F. The Stalking Horse APA and DIP Financing

19. Datatax and a company controlled by Ibbotson, the Stalking Horse Bidder, entered into the Stalking Horse APA on August 11, 2023. That agreement provides for the purchase of substantially all of Datatax’s assets or business, including the shares of the Datatax Subsidiaries on an ‘as is, where is’ basis.

Houlden Affidavit at para. 36; Motion Record of Datatax, Tab 2.

20. The Stalking Horse APA contemplates that upon Datatax commencing NOI proceedings, it will seek court approval of the SSP, pursuant to which potential

purchasers could express interest in, conduct due diligence on, and submit bids for, Datatax's assets.

Houlden Affidavit at para. 37; Motion Record of Datatax, Tab 2.

21. As part of the Stalking Horse APA, the Stalking Horse Bidder has paid a non-refundable deposit, a refundable deposit and has offered DIP financing as follows:

- a non-refundable deposit amount of \$200,000 (the "**Non-Refundable Deposit**"), which has been paid to Datatax's counsel upon the signing of the Stalking Horse APA and is available immediately to be used as a contribution to the Datatax's restructuring costs;
- a refundable deposit in the amount of \$3,400,000, which has been paid to Datatax's counsel in escrow (the "**Refundable Deposit**");
- a portion of the Refundable Deposit, up to a maximum of \$2,500,000, will be used for interim/DIP financing (the "**DIP Facility**") upon Court approval. If the stalking-horse transaction is the successful bidder, the amounts advanced under the DIP Facility will not be refunded or repaid.

Houlden Affidavit at para. 38; Motion Record of Datatax, Tab 2.

22. The DIP Facility is to be secured by way of court-ordered priority charge granted to the Stalking Horse Bidder to all present and future assets, properties and undertakings of Datatax (the "**DIP Charge**"). Upon the court approving the DIP Charge, a portion (\$650,000) of the DIP Facility will be used to repay the Initial Tranche advanced by Fiera Business. The remainder amount of the DIP Facility (up to \$2,500,000 in total) will be

available to Datatax by way of weekly draws to be made in accordance with an agreed-to cash-flow statement.

Houlden Affidavit at para. 39; Motion Record of Datatax, Tab 2.

23. The purchase price (the “**Purchase Price**”) to be paid by the Stalking Horse Bidder to Datatax under the Stalking Horse APA consists of the cash purchase price, the non-cash purchase price and the DIP Facility amount (see section 3.1 of the Stalking Horse APA). The elements of the total consideration to be paid include:

- (a) The DIP Facility;
- (b) the Non-Refundable Deposit of \$200,000;
- (c) an amount equal to the Fiera Debt (\$31,929,010 as of July 15, 2023 plus accumulating interest and fees), plus interest calculated on a 7% per annum basis from July 15, 2023, until the closing date of the transaction;
- (d) an amount up to \$2,000,000 and any BMO fees or costs greater than \$25,000 in connection with the full repayment of the BMO Loan Agreement; and
- (e) the assumption by the Stalking Horse Bidder of the Ibbotson Promissory Note in the amount of \$3,500,000.

Houlden Affidavit at para. 40; Motion Record of Datatax, Tab 2.

24. The Stalking Horse APA also provides for a \$400,000 break fee (the “**Break Fee**”), in recognition for the Stalking Horse Bidder’s expenditure of time and money in acting as

the initial bidder for Datatax, in the event a different bidder is selected as a result of the SSP.

Houlden Affidavit at para. 41; Motion Record of Datatax, Tab 2.

G. The SSP

25. The proposed SSP, which will be carried out by the Proposal Trustee in consultation with Datatax, provides for the following steps.

26. Within five (5) days after the granting of the Order, the Proposal Trustee, in consultation with Datatax, will prepare a list of potential bidders. These potential bidders will receive a process summary document describing the opportunity to purchase Datatax and inviting recipients to participate in the SSP. The deadline to submit a Qualified Bid (as that term is defined in the SSP) under the proposed SSP is September 29, 2023.

Houlden Affidavit at para. 43; Motion Record of Datatax, Tab 2.

27. In order to be classified as a Qualified Bid a bid must meet certain minimum criteria, including that:

- i. The bid amount in aggregate equals at least (i) the Purchase Price; (ii) the Break Fee; and (iii) a minimum overbid amount of \$150,000.
- ii. The form of consideration for the proposed sale is in cash.
- iii. There is an irrevocable period for the bid, which must be last until at least the outside date of October 16, 2023.
- iv. The bid is submitted on an 'as is, where is' basis.
- v. The form of the final bid is a final and binding transaction agreement based upon the Stalking Horse APA form.
- vi. The bid provides for a cash deposit of 10% of the purchase price offered.

Houlden Affidavit at para. 44; Motion Record of Datatax, Tab 2.

28. The Stalking Horse Bidder's bid is automatically a Qualified Bid. To the extent that more than one Qualified Bid is submitted, the SSP provides for an auction to be conducted by the Proposal Trustee at which bidders would have the opportunity to continue bidding on the Datatax's assets until the best bid is selected.

Houlden Affidavit at paras. 42, 45, 46; Motion Record of Datatax, Tab 2.

H. NOI Proceeding Commenced

29. On August 14, 2023, Datatax filed a NOI under the BIA and commenced proposal proceedings and KPMG was appointed as Proposal Trustee.

Houlden Affidavit at paras. 48, 49; Motion Record of Datatax, Tab 2.

PART III - SUMMARY OF ISSUES

30. The issue on this motion is whether the Court should grant the relief sought to give effect to the proposed SSP process.

PART IV - LAW AND ARGUMENT

A. The SSP Should Be Approved

31. The SSP is a court-supervised sale process in respect of the business and assets of Datatax. Pursuant to section 65.13 of the BIA, the Court is authorized to approve a sale of assets in a proposal proceeding under the BIA. Though the section only addresses the approval of the sale of assets rather than approval of a process, the non-exhaustive factors set out in subsection 65.13(4) of BIA can be helpful in determining whether to approve a sale process:

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.

32. In *Nortel Networks Inc. (Re)*, this Court also set out the following factors when determining if a proposed sale process should be approved in a CCAA proceeding, criteria which have also been applied in the context of a sale proposal proceeding under the BIA:

- (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 the sale of the business?
- (d) Is there a better viable alternative?

Nortel Networks Corp. (Re) ["*Nortel*"], 2009 CarswellOnt 4467 ["*Nortel Networks*"] at para. 49; Datatex Book of Authorities ["BOA"] at Tab 1.

Mustang GP Ltd. (Re) ["*Mustang*"], 2015 ONSC 6562 at paras. 37, 38; Datatex BOA at Tab 2.

33. In the present case, the SSP is consistent with the requirements of subsection 65.13(4) of the BIA and *Nortel* and should be approved:

- (a) A sale process and resulting sale transaction is warranted at this time. Datatax and the Datatax Subsidiaries are not self-sustaining enterprises and are cash flow negative. If any value is to be preserved in the Datatax business for the benefit of its stakeholders, a sale to the Stalking Horse Bidder (or another bidder that emerges through the SSP) is necessary.

Houlden Affidavit at paras. 31, 32; Motion Record of Datatax, Tab 2.

- (b) A sale process and resulting sale transaction would benefit the whole economic community. The SSP and the Stalking Horse APA would benefit the whole economic community as going concern operations will be maintained for the benefit of stakeholders, including employees, vendors and customers of the Datatax Companies.

Houlden Affidavit at paras. 31, 35, 47; Motion Record of Datatax, Tab 2.

- (c) No creditor has a bona fide reason to object to the SSP. As confirmed by the November 2022 Order, Fiera, the largest secured debtor of Datatax, has the right to exercise any powers of the Datatax shares pursuant to the exercise of Fiera's rights under the Securities Pledge Agreements. The SSP will also allow for the full (or near full) recuperation of the Fiera Debt. Datatax's obligations to BMO under the BMO Loan Agreement will also be fully satisfied by proceeds of the sale of Datatax. The Stalking Horse Bidder is a company controlled by Ibbotson, so the assumption of the Ibbotson Promissory Note causes no

prejudice and has been consented to by Ibbotson. Finally, other stakeholders of the Datatax Companies will benefit from the continuation of existing commercial relationships that will occur through the realization of the SSP.

Houlden Affidavit at paras. 28, 35, 40, 47; Motion Record of Datatax, Tab 2.

- (d) There is no current better alternative. Efforts to explore alternative refinancing, restructuring, or sale options have been pursued since the November 2022 Order, including discussions with Fiera and others (including Noah Murad) about the resolution of Fiera's claims under the Fiera Loan Agreement, and canvassing alternative lenders or potential buyers for Datatax's business. No firm offer has been received as a result of these efforts to date. The failure to find any viable alternatives to the SSP, and Datatax's present acutely negative financial position, mean that the SSP is the best option to maintain operations of Datatax on a going concern basis, and provide for a final opportunity to determine if a better alternative is available and can be completed.

Houlden Affidavit at paras. 31, 32; Motion Record of Datatax, Tab 2.

- (e) The SSP is reasonable. The SSP will be fair and transparent and will be brought before the Court for approval.
- (f) The SSP will be conducted by the Proposal Trustee. The First Report confirms the Proposal Trustee's view that the Stalking Horse Bidder, if the successful bid under the SSP, provides a solution which is beneficial to the Datatax Companies' stakeholders and maximizes the value of Datatax.

First Report of KPMG dated August 16, 2023 (“First Report”) at para. 86.

- (g) The consideration to be received for the assets under the Stalking Horse APA is reasonable and fair. Considering the acute cash flow crisis facing Datatax, the sale of the business to Datatax’s former owner for an amount sufficient to satisfy Datatax’s principal liabilities is reasonable and fair as it will allow the ongoing operation of Datatax on a going concern basis.

34. In *Boutique Euphoria Inc. (Re)*, the Quebec Superior Court set out the following non-exhaustive factors as important considerations in assessing whether a stalking horse bid process in particular should be followed:

- (a) Has there been some control exercised at the first stage of the competition (namely that to become the stalking horse bidder) and to what extent? In other words, some assurances should exist that the horse chosen is indeed the right one.
- (b) Is there a need for stability within a very short time frame for the debtor to continue operations and the restructuring contemplated to be successful?
- (c) Are the economic incentives for the stalking horse bidder, in terms of break up fee, topping fee and overbid increments protection, fair and reasonable?
- (d) Are the time lines contemplated reasonable to ensure a fair process at the second stage of the competition, namely that to become the successful over bidder?

Boutique Euphoria Inc. (Re), 2007 QCCS 7129 at paras. 37; Datatax BOA at Tab 3.

35. Courts have also recognized the benefits of stalking horse bids as being useful for establishing a baseline price and transactional structure for interested parties, while also providing certainty that a business will continue as a going concern.

CCM Master Qualified Fund v. blutip Power Technologies, 2012 ONSC 1750 [“CCM”] at para. 7, Datatax BOA at Tab 4.

Danier Leather Inc. (Re), 2016 ONSC 1044 at [“Danier”] at para. 20; Datatax BOA at Tab 5.

Cannapiece Group Inc v. Marzili, 2022 ONSC 6379 at para. 4; Datatax BOA at Tab 6.

36. In the present case, the unsuccessful pre-filing alternative efforts to the SSP as well, and the fact that the Stalking Horse Bidder is the former owner of Datatax, support the conclusion that the Stalking Horse APA should be approved, and that the Stalking Horse Bidder is indeed the right horse. The sale of Datatax to the Stalking Horse Bidder allows secured creditors to recoup their funds while maintaining the operations of the Datatax Companies for the benefit of all stakeholders. Because the former owner of Datatax, Ibbotson, controls the Stalking Horse Bidder, disruptions to the commercial arrangements of the Datatax Companies will be minimized.

37. There is a need for stability in the short term to maintain the operations of Datatax. The Company faces an acute cash flow crisis so there is a need to conclude the SSP (and if applicable the Stalking Horse APA) on an expedited basis. The Interim Facility and DIP Facility will provide Datatax with temporary liquidity to maintain operations, but the conclusion of the SSP is necessary to ensure the viability of Datatax on a going concern basis.

38. Considering the time and expenditure of money incurred by the Stalking Horse Bidder (including the non-refundable deposit), the break fee (being \$400,000) to be payable if another bid emerges under the SSP is reasonable and should not be prohibitive to any other potential bidder in the context of a transaction that would be in excess of \$34,000,000 (considering the Purchase Price to be paid by the Stalking Horse Bidder). Similarly, the additional qualified bid consideration (being \$150,000) is sufficient to offset the cost of proceeding with a competitive process without being prohibitive to other potential bidders. In *CCM* the court stated that a break fee between 1.8% and 5% of the

transaction price is generally reasonable. The break fee in this instance is a little over 1% of a likely transaction price.

CCM at para. 13, *Datatax BOA* at Tab 4.

39. The timeline for the approval of the SSP, including if applicable the Stalking Horse APA, is expedited but reasonable under the circumstances. Prior to the filing of the NOI, *Datatax* was given opportunities, prior to and since the November 2022 Order, to seek alternatives to the SSP and the entry into of the Stalking Horse APA. Within five (5) days of the granting of the Order, potential bidders who have previously been contacted will be offered the opportunity to participate in the SSP by the Proposal Trustee. In view of the limited liquidity remaining available to *Datatax* (which only comes from the Interim Facility and DIP Facility and will be exhausted shortly), the expedited SSP is reasonable and necessary in the circumstances of this case.

B. The DIP Facility and DIP Charge Should Be Approved

40. *Datatax* seeks the approval of the DIP Facility subject to the DIP Charge. The Court has the authority to authorize the DIP Facility and DIP Charge under section 50.6(1) of the BIA:

50.6(1) Order — interim financing

On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

The Court's ability to authorize the DIP Facility is subject to the considerations under 50.6(5) of the BIA:

50.6(5) Factors to be considered

In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the debtor is expected to be subject to proceedings under this Act;
- (b) how the debtor's business and financial affairs are to be managed during the proceedings;
- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

41. In *Colossus Minerals Inc. (Re)*, this Court approved a debtor-in-possession facility and charge in circumstances similar to the present one. The factors the court considered in authorizing the debtor in possession facility and charge included:

- (a) that the DIP loan was to last during the currency of the sale and investment solicitation process;
- (b) that the debtor faced an imminent liquidity crisis;
- (c) that the DIP is required to allow the sales and solicitation process to proceed;
and
- (d) that the proposal trustee has approved of the DIP loan and charge.

Colossus Minerals Inc. (Re), 2014 ONSC 514 [*Colossus*] at paras. 3 – 10; Datatx BOA at Tab 7.

42. These circumstances exist in the present case. The DIP Facility will provide crucial short term crucial liquidity to Datatax. At the conclusion of the SSP, the DIP Charge will be discharged. The DIP Facility is being used to alleviate the liquidity crisis currently impacting Datatax, the causes of which have been developing for some time, but which became acute during the week of July 31, 2023. Without the DIP, Datatax would have insufficient liquidity to maintain its operations through the conclusion of SSP. The Proposal Trustee also supports the use of the DIP Facility and DIP Charge as necessary.

Houlden Affidavit at paras. 18, 40, 41; Motion Record of Datatax, Tab 2.

First Report at paras. 76-78.

C. The Administration Charge Should Be Approved

43. Datatax seeks the Administration Charge in the maximum amount of \$500,000 (the “**Administration Charge**”) to secure the fees and disbursements of the Proposal Trustee, counsel to the Proposal Trustee, and counsel to Datatax that are incurred in connection with services rendered to the Datatax both before and after the commencement of BIA proposal proceedings. The Administration Charge is needed to facilitate the NOI proceedings and the SSP.

44. Pursuant to section 64.2 of the BIA, the Court is authorized to grant a charge on property of a debtor in proposal proceedings to secure professional fees:

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 Administration charges have previously been granted in proceedings under the BIA.

Colossus at paras. 11 - 15; Datatax BOA at Tab 7.

Danier at para. 57; Datatax BOA at Tab 5.

45. In *Canwest Publishing Inc. (Re)*, in the context of a CCAA proceeding, the Court considered the following factors when addressing the analogous section of the CCAA:

- (a) size and complexity of the business being restructured;
- (b) proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears fair and reasonable;
- (e) position of the secured creditors likely to be affected by the charge; and
- (f) The position of the [court officer].

Canwest Publishing Inc. (Re) ["*Canwest*"], 2010 ONSC 222 at para. 54; Datatax BOA at Tab 8.

46. The following factors support the granting of the Administration Charge:

- (a) The quantum of the Administration Charge reflects the size of the operations of Datatax, as reflected in the Purchase Price of the business being in excess of \$34,000,000.
- (b) The beneficiaries of the Administration Charge, namely the Proposal Trustee, the Proposal Trustee's counsel and the Company's Counsel, all have vital

roles in the NOI proceeding and the SSP. There is no unwarranted duplication of roles as each of the proposed beneficiaries have distinct and critical responsibilities.

- (c) Due to liquidity constraints, Datatax was not able to provide the beneficiaries of the Administration Charge with retainers, other than retainers that will flow from the Non-Refundable Deposit.
- (d) The Proposal Trustee supports the Administration Charge.

First Report at paras 72-75.

D. The D&O Charge Should Be Approved

47. Datatax seeks a directors and officers charge in the maximum amount of \$200,000 (the “**D&O Charge**”) to secure the liabilities that the Datatax Companies may incur during the NOI proceedings, which are or may become personal liabilities of the directors and officers of the Datatax Companies.

48. Pursuant to section 64.1(1) of the BIA, the Court is authorized to grant a charge on property of a debtor in proposal proceedings to indemnify directors:

Security or charge relating to director’s indemnification

64.1 (1) On application by 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) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

49. In *Mustang*, *Colossus* and *Danier*, this Court granted D&O charges in circumstances where there was uncertainty regarding whether existing insurance to cover all potential claims, so as to ensure the continued participation of the directors and officers through the sales process. Given the lack of insurance in the present case, the same considerations apply in favour of granting director and officer insurance here.

Houlden Affidavit at para. 53; Motion Record of Datatax, Tab 2.

Mustang at paras. 34, 35; Datatax BOA at Tab 2.

Colossus at paras. 16 - 21; Datatax BOA Tab 7.

Danier at paras. 59-71; Datatax BOA at Tab 5.

50. Similarly, in the *Canwest* CCAA proceedings, the court granted a D&O charge on the basis that the charge was essential to the restructuring of the entities, including that the continued participation of the board of directors and management was critical to avoid destabilization of the business.

Canwest at para. 56; Datatax BOA at Tab 8.

51. In this case the D&O Charge is particularly appropriate given that the current director (Houlden) and officer (Manzoor) were appointed by the Court to such roles pursuant to the November 2022 Order and were so appointed to stabilize the operations and affairs of the Datatax Companies and, if necessary, implement such restructuring process as may be desirable or necessary. Additionally, there is no D&O insurance – making the D&O charge necessary to ensure their continued participation to maintain the stability of Datatax through the SSP. The DIP Charge amount has considered the amount of potential liabilities of the Datatax Companies.

Houlden Affidavit at para. 53; Motion Record of Datatax, Tab 2.

First Report at paras. 79-81.

E. The Stay Should Be Extended To Subsidiaries and Until End of October

52. The Court has the authority to grant the extension of the proposal period under section 50.4(9) of the BIA, which states that such an extension may be granted where the Court is satisfied 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.

53. Datatax submits that each of the factors have been met in this instance and the extension of the proposal period is appropriate as:

- (a) The extension will allow Datatax to complete the SSP, negotiate any transaction resulting from the SSP and seek Court approval;
- (b) The extension will prevent an additional motion before the Court, reducing professional fees incurred by Datatax;
- (c) The Proposal Trustee supports the extension of the proposal period; and
- (d) There is no known prejudice that will be suffered by any creditors or other Datatax stakeholders by the proposed extension which is necessary to give

effect to the SSP. Datatax is projected to have sufficient cash to continue operating through October 28, 2023 (that being the date that an extension of the proposal period is being sought until).

54. Further, as most of the actual operations of Datatax occur through the Datatax Subsidiaries, Datatax seeks the stay of proceedings to encompass the Datatax Subsidiaries. This will allow for the orderly completion of the SSP and minimize disruption to Datatax's stakeholders that would jeopardize the completion of the SSP. In *Convergix Inc., Re* the New Brunswick Court of Queen's Bench extended the stay of proceedings in similar circumstances, where closely related corporations sought a stay of proceedings.

Convergix Inc. Re, 2006 NBBR 288 at paras 35-43; Datatax BOA at Tab 9.

55. The Datatax Companies have acted and will continue to act in accordance with the SSP in good faith and with due diligence toward completion of a transaction. And the Proposal Trustee has noted that the extension is appropriate for the orderly conclusion of the SSP.

Houlden Affidavit at para. 56; Motion Record of Datatax, Tab 2

First Report at paras. 82-85.

PART V - ORDER REQUESTED

56. Datatax therefore requests that the Court grant the proposed Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of August, 2023.

Tyr LLP
Lawyers for the Datatax Companies

SCHEDULE "A"
LIST OF AUTHORITIES

Case Name	Citation	Tab
<i>Nortel Networks Corp. (Re)</i>	2009 CarswellOnt 4467	1
<i>Mustang GP Ltd. (Re)</i>	2015 ONSC 6562	2
<i>Boutique Euphoria Inc. (Re)</i>	2007 QCCS 7129	3
<i>CCM Master Qualified Fund v. blutip Power Technologies</i>	2012 ONSC 1750	4
<i>Danier Leather Inc. (Re)</i>	2016 ONSC 1044	5
<i>Cannapiece Group Inc v. Marzili</i>	2022 ONSC 6379	6
<i>Colossus Minerals Inc. (Re)</i>	2014 ONSC 514	7
<i>Canwest Publishing Inc. (Re)</i>	2010 ONSC 222	8
<i>Convergix Inc. Re</i>	2006 NBBR 288	9

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, RSC 1985, c B-3, as amended

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.

Order — interim financing

50.6(1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

50.6(5) Factors to be considered

In deciding whether to make an order, the court is to consider, among other things,

- (a)** the period during which the debtor is expected to be subject to proceedings under this Act;
- (b)** how the debtor's business and financial affairs are to be managed during the proceedings;
- (c)** whether the debtor's management has the confidence of its major creditors;
- (d)** whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e)** the nature and value of the debtor's property;
- (f)** whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g)** the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Security or charge relating to director's indemnification

64.1 (1) On application by 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) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

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 Administration charges have previously been granted in proceedings under the BIA.

Restriction on disposition of assets

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.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A
PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY*
ACT, R.S.C. 1985, c. B-3, AS AMENDED OF DATATAX BUSINESS
SERVICES LIMITED, A CORPORATION FORMED UNDER THE
LAWS OF ONTARIO

Court No. BK-23-02975175-0031
Estate File No. 31-2975175

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at TORONTO

**FACTUM OF DATATAX BUSINESS SERVICES
LIMITED**

Tyr LLP
488 Wellington Street West
Suite 300-302
Toronto, ON M5V 1E3
Fax: 416-987-2370

Jason Wadden (LSO# 46757M)
Email: jwadden@tyrllp.com
Tel: 416.627.9815

Shimon Sherrington (LSO# 83607B)
Email: ssherrington@tyrllp.com
Tel: 587.777.0367

Lawyers for the Applicant