



District of British Columbia
Division No.: 02- Victoria
Court No.: B-240300
Estate No.: 11-3089419
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE NOTICE OF INTENTION
TO MAKE A PROPOSAL OF CLOUD DIAGNOSTIC CANADA ULC**

NOTICE OF MOTION – APPROVAL AND REVERSE VESTING ORDER

Name of applicant: Cloud Diagnostics Canada ULC (the “Applicant” or “Cloud DX”)

To: The Service List

TAKE NOTICE that an application will be made by the Applicant to the presiding judge or associate judge at the courthouse at the Vancouver Law Courts, 800 Smithe Street, Vancouver, British Columbia on November 5, 2024 at 9:45a.m. for the order set out in Part 1 below.

Part 1: ORDER SOUGHT

1. A reverse vesting order (the “Approval and Vesting Order”):
 - a) deeming service of notice of this Application and supporting materials thereof to be good and sufficient and, if necessary, abridging the time for service of this Notice of Application;
 - b) approving the Subscription Agreement (the “Subscription Agreement”), attached as an appendix to the Second Report of the Proposal Trustee filed herein, between Cloud DX and 1493907 B.C. Ltd. (the “Subscriber” or “907Co”) for the issue and sale by Cloud DX and the subscription and purchase by the Subscriber of common shares in Cloud DX (the “Shares”), effective as of the Closing Date (as defined in the Subscription Agreement) and approving the sale transaction (the “Transaction”) contemplated in the Subscription Agreement;

- c) declaring that the Transaction and the Subscription Agreement are commercially reasonable;
- d) authorizing and directing Cloud DX to execute and deliver the Subscription Agreement;
- e) authorizing Cloud DX to take such steps as are necessary to give effect to the Transaction, including incorporating a new subsidiary ("ResidualCo") prior to the Closing Date;
- f) upon closing the Transaction:
 - i) ordering that Cloud DX shall retain all of its right, title and interest in and to its retained assets free and clear of any and all encumbrances to be discharged;
 - ii) ordering that all encumbrances against the retained assets other than permitted encumbrances are discharged;
 - iii) ordering that all of the right, title and interest of Cloud DX in and to the excluded assets and excluded contracts shall vest absolutely in ResidualCo;
 - iv) ordering that all excluded liabilities shall be transferred to and vested absolutely in and be assumed by ResidualCo;
 - v) ordering that each excluded creditor is forever barred and stayed from commencing or continuing any proceedings against Cloud DX in respect of excluded liabilities and extinguishing any excluded liabilities as against Cloud DX and releasing Cloud DX therefrom;
 - vi) cancelling and terminating for nil consideration all existing shares and existing equity interests, ordering that the existing shareholders and existing equity interest holders shall have no further right, title or interest in Cloud DX under or pursuant to the existing shares or

- existing equity interests, and authorizing and directing Cloud DX to amend its share register to reflect such cancellation and termination;
- vii) issuing to the purchaser the subscribed shares free and clear of all encumbrances;
 - viii) providing full and final releases of any and all claims or causes of action, known or unknown, against all of: (a) the present and former directors, *de facto* directors, secured debenture holders, officers, employees, legal counsel and advisors of Cloud DX and ResidualCo (or any of them); and (b) the Proposal Trustee and its legal counsel, as such releases are further described in the Approval and Vesting Order;
- g) with such orders being effective forthwith following closing of the Transaction:
- i) authorizing the director of ResidualCo to assign it into bankruptcy;
 - ii) withdrawing, cancelling and/or annulling the Notice of Intention to Make a Proposal under the *Bankruptcy & Insolvency Act*, RSC 1985, c B-3, as amended (the "BIA"), filed by Cloud DX on June 5, 2024;
 - iii) terminating these proceedings, including the termination, release and discharge of the Administration Charge and the DIP Charges (as those terms are defined in orders made herein);
- h) approving the reports of the Proposal Trustee filed herein and the activities of the Proposal Trustee herein;
- i) a sealing order, ordering that the affidavit #7 of Robert Kaul be filed under seal;

- j) an extension of time within which to file a proposal, for such period of time as may be necessary to close the Transaction; and
 - k) further interim financing, in such amounts and on such terms as will be further particularized at the hearing hereof.
2. Cloud DX may also seek such further and other relief as counsel may advise this Honourable Court.

Part 2: FACTUAL BASIS

Overview

1. Cloud DX applies to Court for an approval and vesting order to approve the Subscription Agreement between Cloud DX and 1493907 B.C. Ltd., the Subscriber.
2. This application comes after five months during which Cloud DX has been subject to a notice of intention to file a proposal under the *Bankruptcy & Insolvency Act* (the "BIA") and has engaged in a court approved sales and solicitation process (the "SISP").
3. Following the SISP, there was only one viable offer that was made, which was made by the Subscriber.
4. The proposed offer contemplates a transaction in which the existing shares issued by the Applicant will be cancelled and new shares will be issued in the name of the Subscriber, and certain liabilities of the Applicant will be transferred to ResidualCo, a corporation that will be incorporated for the purpose of taking an assignment of those liabilities.
5. 907Co, the Subscriber, is a company incorporated under the laws of the Province of British Columbia. The investors in the buyer are a consortium of investors, many of whom have experience in the medical field, and all of whom have experience in the industry by the fact that they have been investors in the business for some time. The prospective president of Cloud DX, once the transaction takes place, is Dr. Constantine

Zachos, who is a practicing doctor and the prospective officer is Dr. Gaurav Puri, who is head of emergency medicine at Southlake Regional Health Centre, a hospital located in Newmarket, Ontario.

6. The Transaction benefits Cloud DX's many medical customers and clients and its patients, as it allows for Cloud DX to continue as a going concern and to be continued to be run by persons with knowledge of health matters.

7. As well, the Transaction will see the Administration and DIP Charges paid in full, and CRA will be paid in regard to its priority claim.

8. It is a condition precedent of the Transaction that the Court issue the Approval and Vesting Order.

9. It is anticipated that the closing of the Transaction will take place within 10 days of an order approving the sale, although that day may be extended by the agreement of Cloud DX and the Subscriber.

Parties and Business

10. On June 5, 2024 (the "Filing Date"), Cloud DX filed a notice of intention to file a proposal (the "NOI") under section 50.4 of the BIA. Crowe Mackay & Company Ltd. was appointed as the proposal trustee (the "Proposal Trustee").

11. Cloud DX is an unlimited liability company registered and in good standing under the laws of the Province of British Columbia. The shares in the capital of Cloud DX are owned by Cloud DX Inc., a corporation registered in Delaware.

Operations

12. Cloud DX is a technology company in the regulated field of Remote Patient Monitoring ("RPM").

13. Cloud DX developed a Connected Health Platform ("CHP"), which is a platform that provides for streamlined and effective RPM services.

14. Using its CHP, Cloud DX makes available medical devices and kits, intuitive mobile apps, smart notification systems and integration to electronic medical record systems (which are software platforms used by doctors and hospitals for care planning, record keeping and billing). Cloud DX supplied devices and apps are used to monitor patients at home whereby biometric data is collected and streamed back to clinical teams to monitor health and provide early warning signs to clinicians of deterioration of the patient's health when the patient is not in a clinical setting.

15. Cloud DX currently provides active care to approximately 1700 patients, including high risk patients, many of whom remain stable at home with late-stage chronic diseases, and that stability is assisted from the CHP and the feedback loops between the patients and their clinical team.

16. Cloud DX's platform is used to care for patients over set periods of time. In some cases, patients and medical professionals use it for 30 days after surgery. In other cases, patients could be on the Cloud DX system for many months or even years for chronic disease management.

17. Over the last 24 months Cloud DX has cared for over 11,000 total patients.

Significant Operating Agreements

18. Cloud DX's significant assets are its operating and licence agreements which include those described below. None of the counterparties to the agreements are creditors of Cloud DX.

Master Deployment Agreements

19. Cloud DX is party to approximately forty (40) Master Deployment Agreements ("MDA"). The counterparties are health authorities, municipalities, paramedical teams, hospital and research institutions, insurers and individual doctors. The MDAs set out the terms and conditions between Cloud DX and its customers with respect to connected health kits, fees for Cloud DX's product, subscription and professional services revenues.

20. All of the MDAs contain restrictions on assignment.

Software Licensing Agreements

21. Cloud DX has user license agreements with approximately 50 different software suppliers. The software provided by these suppliers is required by Cloud DX to deliver services to its customers, develop improvements to its main service digital platform and to provide electronic communications necessary for employees to work remotely.

22. The software license agreements contain restrictions on assignment.

Agreement with Bell Canada

23. Cloud DX's agreement with Bell Canada provides cellular connectivity to tablet computers deployed to patients as part of their Connected Health Kits.

Agreement with Invero

24. Invero is a reseller for Microsoft. Under this agreement, Cloud DX acquires Azure cloud-computing infrastructure that Cloud DX's software runs on.

Health Canada Medical Device Establishment License

25. A Health Canada Medical Device Establishment License is required by Health Canada for Cloud DX to supply medical devices and is necessary for Cloud DX to continue to run its operations. The licence does not deal with assignment, but requires an applicant to give notice to any change of information to that contained in the application for the licence.

26. Further details of the agreements are attached to the affidavits #1 and #7 of Robert Kaul, filed under seal herein.

Liabilities

Secured Creditors

27. Cloud DX's major secured creditor is Odyssey Trust Company, which is trustee

for seventy-two (72) debenture holders owed approximately \$9,711,000.00 in principal and \$1,945,520.88 in interest for a total of \$11,656,520.88.

28. RBC Bank is secured by a \$60,000 GIC against two (2) corporate credit cards, with balances of \$31,579 CAD and \$25,142 USD.

Government Creditors

29. Cloud DX owes \$921,775.47 as of October 15, 2024, to Canada Revenue Agency, for unremitted payroll deductions. This amount is a priority claim which will be paid out on closing. CRA also has an unsecured claim for employer deductions and penalties and interest. The order sought contemplates that unsecured liabilities owing to CRA will be assigned to ResidualCo. These are all pre-filing obligations. Cloud DX has paid to CRA its post-filing obligations.

30. In its initial application to Court, Cloud DX reported that it owed approximately \$92,500 to the Ontario Ministry of Finance for unremitted Employer Health Tax. This amount is being reassessed. Cloud DX believes that it has overpaid Employer Health Tax by \$35,000 but regardless, this matter will be settled and dealt with out of the proposed purchase price.

Unsecured Creditors

31. Cloud DX owes approximately \$4,022,000 to unsecured debenture holders, \$1,865,500 to suppliers and service providers and \$84,375 to the COO in unpaid bonuses. The order sought contemplates that these liabilities will be assigned to ResidualCo as unsecured claims.

Proceedings to date: June 11 order

32. Several orders have been made herein in chambers.

33. On June 11, 2024, Madam Justice Sharma made an order, among other things, extending time for filing a proposal until August 19, 2024, granting an administration charge in the amount of \$200,000.00 (the "Administration Charge"), and granting an

interim financing charge in the amount of \$120,000.00. Justice Sharma also approved the SISP, to be conducted by the Proposal Trustee and Cloud DX.

34. On June 14, 2024, Justice Kent made an order granting an interim financing charge of \$400,000 over the property of Cloud DX.

35. On June 28, 2024, Justice Jones made an order granting a second interim financing charge of \$700,000 over the property of Cloud DX.

36. On August 15, 2024, Justice Morellato made an order extending time to file a proposal until October 3, 2024.

37. On September 13, 2024, Justice Hoffman made an order granting a third interim financing charge of \$150,000 over the property of Cloud DX and extending time to file a proposal until November 5, 2024.

Activities of Cloud DX

38. Since the Filing Date, Cloud DX has engaged in, among other things, the following activities:

- a) attended meetings with the Proposal Trustee to discuss the affairs of Cloud DX, as well as the options available;
- b) prepared and filed cash flow statements;
- c) prepared and filed a court application for extensions of time, as well as for additional interim financing;
- d) engaged with individual lenders to seek to obtain interim financing to ensure sufficient liquidity during these proceedings; and,
- e) assisted the Proposal Trustee with the SISP, including the following:
 - i) preparing a list of potentially interested parties;

- ii) preparing marketing materials for the SISP, including a teaser letter;
- iii) preparing a virtual data room, and uploading numerous documents and information to same;
- iv) answering inquiries from interested parties; and,
- v) other various matters.

ACTIVITIES OF THE PROPOSAL TRUSTEE

39. Since the Filing Date, the Proposal Trustee has engaged in, among other things, the following activities:

- a) participated in various discussions, correspondence and meetings with Cloud DX and its legal counsel relating to matters relevant to the proposal proceedings including, but not limited to, the following:
 - i) various restructuring scenarios and options including, but not limited to, a, traditional SISP, reverse vesting order vs. traditional vesting order, and proposal filing;
 - ii) efforts made by Cloud DX to solicit interest from numerous parties to either invest in, or outright purchase Cloud DX or its assets;
 - iii) matters relating to various leases;
 - iv) communications with and concerns raised by various stakeholders;
 - v) variances in cash flow projections; and
 - vi) the SISP,
- b) assisted Cloud DX with the planning and execution of the SISP including, but not limited to, the following:

- i) prepared a list of prospective parties which includes companies in a same or similar industry;
 - ii) coordinated distribution of teaser letter outlining the opportunity to prospective purchasers;
 - iii) created a data room with various documents to assist interested parties in assessing the opportunity;
 - iv) numerous discussions and correspondence with prospective parties with respect of the opportunity, SISP process, and other matters;
 - v) prepared and coordinated the execution of non-disclosure agreements to parties wishing to access the data room;
 - vi) provided interested parties access to the data room, and assisted with any questions thereafter;
 - vii) preparation of the sealed bid package and distributing to interested parties who had signed the non-disclosure agreement;
 - viii) conducted follow-up telephone calls and emails to interested parties reminding them of the opportunity and deadline to submit a bid; and
 - ix) assessed the various bids received, and prepared an analysis of same,
- c) monitored Cloud DX's financial affairs and activities on a weekly basis and investigated any material variances;
 - d) prepared letters in support of the court applications for interim financing and extensions of time;
 - e) prepared reports to the Court; and

- f) other matters not otherwise referred to above.

SALES AND INVESTMENT SOLICITATION PROCESS

40. Pursuant to the order of Justice Sharma, the Proposal Trustee was authorized to, with the assistance of Cloud DX, market any and all of Cloud DX's assets, undertakings and properties which included, among other things, advertising and soliciting offers and negotiating such terms and conditions of sale as the Proposal Trustee considered appropriate.

41. The key dates for the SISP were:

The Proposal Trustee to create list of Known Potential Bidders and distribute Teaser Letter and Confidentiality Agreements to Known Potential Bidders	No later than June 25, 2024
The Proposal Trustee to prepare and have available for Potential Bidders the Data Room	No later than June 28, 2024
Bid Deadline	July 26, 2024

42. The Proposal Trustee worked with Cloud DX to plan and execute a comprehensive SISP. Below is a summary of the efforts made by the Proposal Trustee and Cloud DX:

- a) prepared an extensive list of prospective parties which included companies in a same or similar industry;
- b) advertised on a weekly basis, for a number of weeks, in the insolvency industry newsletter: Insolvency Insider;
- c) gathered and compiled documents relevant to the SISP and prepared a data room for prospective parties to gain access;
- d) prepared a non-disclosure agreement for prospective parties to execute in order to gain access into the data room;

- e) emailed a teaser letter with information regarding the SISP and the bidding process to at least 115 parties;
- f) followed up with emails to the various aforesaid parties reminding them of the opportunity and deadline to submit a bid/proposal;
- g) received at least 17 responses to the teaser and advertisement from various parties expressing an interest in the opportunity;
- h) coordinated the execution of non-disclosure agreements with at least 15 parties and provided them with access to the data room; and
- i) attended to numerous emails and telephone calls from prospective purchasers.

The bids

43. The Proposal Trustee received two (2) bids prior to the deadline. The first bid was a cash offer in the amount of \$50,000 for the purchase of the Assets.

44. The second bid received was from 1493907 B.C. Ltd. ("907Co").

45. 907Co is funded by the secured debenture holders of Cloud DX, by way of a secured facility assignment agreement and a private placement subscription agreement. The participating secured debenture holders represent in excess of 90% of the secured indebtedness of Cloud DX.

46. The bid included the following major terms, among others:

- a) 907Co would acquire 100% of the shares of Cloud DX through a transaction enabled, among other things, by a reverse vesting order ("RVO") issued by the Court;
- b) The price offered is comprised of the following:
 - i) a credit bid of 90% of the Debenture Indebtedness, being \$10,490,868.79; and,

- ii) cash in the amount of:
 - A) the amount required to pay to CRA the amount owing under its deemed trust;
 - B) the amount required to satisfy the amounts owing under the combined DIP charges herein;
 - C) the amount required to satisfy the amounts owing under the Administration Charge herein; and
- c) the bid is not subject to any conditions other than Court approval on the terms and conditions of the proposed Approval and Vesting Order.

47. The Subscription Agreement contemplates a transaction in which:

- a) 907Co subscribes for the common shares in the capital of Cloud DX;
- b) all existing shares in the capital of Cloud DX are cancelled for no consideration;
- c) the indebtedness of Cloud DX to its debenture holders is acquired by the 907Co;
- d) the debenture holders are issued common shares;
- e) the subscription price is paid by way of credit bid consisting of the debtor in possession ("DIP") indebtedness and 90% of the debenture indebtedness, the cash consideration in an amount to permit completion of the NOI process and payment of CRA for its priority claim, and the assumption of assumed liabilities;
- f) encumbrances, claims and liabilities shall be transferred to a corporation incorporated for the purpose of acquiring them,

all pursuant to an Approval and Vesting Order.

48. The offer contained in the Subscription Agreement:
- a) offers by far the highest gross recovery;
 - b) allows Cloud DX to continue as a going concern and preserve its contracts and agreements with many health authorities and medical practitioners;
 - c) allows Cloud DX to continue to provide uninterrupted care to the approximately 1700 patients which are currently under its care;
 - d) will repay CRA for the amount of its secured claim;
 - e) will satisfy the Court charges ordered herein;
 - f) will repay Ontario Ministry of Health the amount of the EHT balance, once determined;
 - g) maintains and maximizes going concern value associated with retaining certain leased premises;
 - h) retains the benefit of Cloud DX contracts;
 - i) retains the benefit of ownership of numerous patents and trademarks created and registered by Cloud DX;
 - j) retains the potential value and benefit associated with substantial accrued Scientific Research and Experimental Development ("SRED") tax credits in the approximate amount of \$679,257;
 - k) retains the potential value and benefit associated with accrued corporate tax losses in the approximate amount of \$34.8 million and other potential tax attributes.
49. In considering the Subscription Agreement, the Proposal Trustee notes that most of Cloud DX's value exists in the synergies created by intangible assets being maintained in the current corporate entity as a going concern.

50. Cloud DX's tangible and intangible assets would have little realizable value without Cloud DX continuing as a going concern.

51. Therefore, the Proposal Trustee believes that a liquidation process following bankruptcy would generate significantly less value than the offers received. In the event of bankruptcy, the Proposal Trustee does not anticipate any meaningful recovery for secured or unsecured creditors. The Proposal Trustee is of the view that a reverse vesting order, as set out in the Subscription Agreement, is necessary preserve the benefits of Cloud DX's continued services to its clients and patients, and to optimize the value to stakeholders.

52. Based on the foregoing, the Proposal Trustee is of the opinion that the Subscription Agreement, including the Approval and Vesting Order, offers greater recovery for customers, clients, patients and financially interested parties than an asset sale or bankruptcy. Accordingly, the Trustee recommends that the Honourable Court approve the Subscription Agreement, including the Approval and Vesting Order.

Extension of Stay of Proceedings

53. Cloud DX anticipates that the closing the transaction will take place several days following the hearing of the main application herein, and accordingly, it requires more time than under the current extension date, and thus seeks an extension of a further 45 days, as provided by section 50.4(9) of the BIA.

Further Interim financing

54. Cloud DX will require further financing in order to remain operating until the Closing Date. It has worked with the Proposal Trustee to prepare an amended cash flow extending to the Closing Date.

55. In accordance with the amended cash flow, Cloud DX reasonably requires further financing in the amount of \$275,000.00 in order to remain operating until the Closing Date. Any funds not drawn down on the proposed loan will remain in the possession of the lender.

56. The loan will be made by the contemplated purchaser, and Cloud DX seeks a court order charge subsequent in priority to the existing charges, including the amount owing to CRA.

Sealing order

57. The unredacted version of affidavit #1 of Robert Kaul, and the affidavit #7 of Robert Kaul, sworn herein, contains information about partners of Cloud DX, including health authorities, universities and hospitals.

58. It is the view of Cloud DX that there is little utility in making health information known in court proceedings, that no creditor of Cloud DX will be prejudiced by the making of a sealing order, and that by disclosing the health information in court proceedings, there is a potential to create uncertainty among patients and thus potential harm.

Releases

59. The Applicant seeks releases in favour of Cloud DX, the Proposal Trustee, Residualco, and their respective directors, *de facto* directors, secured debenture holders, officers, employees, legal counsel and advisors. Each of these parties have contributed to the transaction whereby the DIP charges, the Administration Charge and CRA's priority claim will be paid in full and Cloud DX is preserved as a going concern in these proceedings.

Withdrawal from the NOI process

60. Following the conclusion of the Transaction Cloud Dx proposes to withdraw, cancel or undo its filing of the NOI to permit the continued operation of the business in the ordinary course without filing a proposal. The withdrawal cancellation or annulment of the NOI will not prejudice any creditor, and this step will benefit all parties with an interest in Cloud DX, specifically its suppliers, clients, customers and employees that will be retained.

Bankruptcy of ResidualCo

61. The application seeks Court authorization for the director of ResidualCo to assign it into bankruptcy. Bankruptcy allows for a claims process, allows former employees access to the *Wage Earner Protection Act*, and allows for process to complete.

Conclusion

62. Cloud DX submits that it is appropriate for this Court to grant the Approval and Vesting Order as:

- a) the market was extensively and properly canvassed under the sale and investment solicitation process;
- b) the Transaction represents the best price obtainable by Cloud DX for the subject matter of the underlying Transaction;
- c) the Transaction preserves value that would not be attainable on an asset purchase; and
- d) the Proposal Trustee supports the Transaction.

Part 3: LEGAL BASIS

1. Cloud DX relies upon:

- a) BIA, Part III Division I and section 183;
- b) *Bankruptcy and Insolvency Rules*, C.R.C., c. 368, Rules 11 – 13;
- c) *Supreme Court Civil Rules*, B.C. Reg. 168/2009, as amended, Rule 8-5;
- d) the inherent jurisdiction of this Honourable Court; and
- e) such further and other legal basis as counsel may advise and this Honourable Court may allow.

Reverse vesting orders

2. The British Columbia Supreme Court has established, in the *PaySlate* decisions and elsewhere, that:
 - a) The Court has the authority to grant a reverse vesting order ("RVO") in NOI proceedings and the ancillary orders necessary to give effect to the RVO;
 - b) Principles of general application apply, *mutatis mutandis*, in NOI proceedings, receiverships, and the CCAA;
 - c) The *Harte Gold* and *Soundair* principles form the basis for RVO applications;
 - d) Regardless of the general principles, prejudice to affected parties is a crucial consideration, an RVO is an extraordinary order, each application for an RVO must be carefully scrutinized, and even in the absence of prejudice to any party, the onus is on the applicant to convince the court that it should assume jurisdiction and make the order sought.

Authority for Approval of a Reverse Vesting Order

3. This Court has authority under the *BIA* to approve the Agreement between Cloud DX and 907Co, and particularly the transactions contemplated thereby.
4. Although the *BIA* does not expressly provide for RVOs, section 183 confers the Court "with such jurisdiction at law and in equity as will enable [the Court] to exercise original, auxiliary, ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act". Pursuant to section 183, the Court retains statutory discretion to apply the *BIA* in accordance with legal and equitable principles to give effect to the purpose of the legislation.

Bankruptcy and Insolvency Act, RSC 1985, c B-3, as amended, s 183; *PaySlate Inc. (Re)*, 2023 BCSC 608 ("*PaySlate*"), at para. 85

5. Courts are also able to rely on inherent jurisdiction to grant RVOs.

Re Residential Warranty Company of Canada Inc. (Bankrupt), 2006 ABQB 236, *PaySlate*, *ibid*.

6. Accordingly, Cloud DX submits that this Court, as the supervising insolvency court, has jurisdiction to grant an RVO, and further submits that this is an appropriate case to do so. Approval of the Subscription Agreement and closing of the Transaction is necessary to the continuation of Cloud DX as a going concern. It is just and appropriate for the Court to exercise its statutory authority and inherent jurisdiction to grant the Approval and Vesting Order sought.

Principles of general application apply in receiverships, NOI proceedings and the CCAA

7. It is clear from a general reading of the case authorities that courts bring to bear similar general, equitable principles in all insolvency and restructuring proceedings. As the Court stated in *PaySlate*, although many of the case authorities discussing the circumstances in which RVOs may be issued are in the context of the CCAA, RVOs are available tools in other insolvency proceedings as well. Although the sale provisions in Division I proposals in the BIA do not specifically provide for RVO-type transactions, similar considerations apply in the context of the BIA as they do in CCAA proceedings.

PaySlate, para. 82;

MCAP Financial Corporation v QRD (Willoughby) Holdings Inc. ("Willoughby"), 2024 BCSC 1654, para. 7

The Harte Gold and Soundair principles form the basis for RVO applications

8. Canadian courts have approved RVO transactions where:
 - a) the RVO is necessary in the circumstances;
 - b) the RVO structure produces an economic result at least as favourable as any other viable alternative;
 - c) the general stakeholders are not worse off under the RVO structure than they would have been under any other viable alternative; and

- d) the consideration being paid for the debtor's business reflects the importance and value of the intangible assets being preserved under the RVO structure.

Re Harte Gold Corp, 2022 ONSC 653 [*Harte Gold*] at para 38

9. For asset sales in NOI proceedings, subsection 65.13(4) sets out a list of non-exhaustive factors this Court must consider:

- 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.

BIA, s 65.13(4); *Harte Gold*, para. 23; *Willoughby*, para. 12

10. The *Soundair* principles are:

- a) whether sufficient effort has been made to obtain the best price and the debtor has not acted improvidently;
- b) the interests of all parties;
- c) the efficacy and integrity of the process by which offers have been obtained; and

d) whether there has been unfairness in working out the process.

Royal Bank of Canada v Soundair Corp, [1991] OJ No 1137 (ONCA), at para 16;
PaySlate, para. 104

11. In *Just Energy*, the Court noted RVOs have been approved in specific circumstances:

[33] Reverse vesting orders are relatively new structures. I agree that reverse vesting orders should not be the "norm" and that a court should carefully consider whether a reverse vesting order is warranted in the circumstances... That said, reverse vesting orders have been deemed appropriate in a number of cases...

[34] The aforementioned cases approved reverse vesting orders in circumstances where:

- The debtor operated in a highly-regulated environment in which its existing permits, licenses or other rights were difficult or impossible to reassign to a purchaser.
- The debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser.
- Where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.

Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al., 2022 ONSC 6354, para. 33-34;
PaySlate, para. 88

An RVO is an extraordinary order and each application for an RVO must be carefully scrutinized

12. The RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore,

involve close scrutiny. The Proposal Trustee and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the BIA.

Willoughby, para. 11

The RVO Transaction Structure in this case should be Approved

13. The Transaction satisfies the test applicable to the assessment of a proposed RVO transaction. Among other things:
 - a) Cloud DX was insolvent, it recently failed to raise money to invest its business, and had the choice of either an assignment or filing an NOI. Under the NOI it has entered into a SISF, and subsequently received only one viable offer which is before the Court on this application. The Transaction is the only viable option available to Cloud DX to carry on business as a going concern. There are no other viable or potential options to Cloud DX.
 - b) Should this Transaction not be approved, Cloud DX does not have the cash flow necessary to fund a further SISF, seek alternative transactions, or to prepare and implement a proposal to its creditors, and as such would become bankrupt in accordance with the terms of the BIA.
 - c) The RVO structure is necessary in the circumstances and produces the best economic result for Cloud DX 's stakeholders. The Subscriber is prepared to close the Transaction as a RVO structure, which has been subject to extensive negotiation and discussion between the Subscriber, Cloud DX, and the Proposal Trustee.
 - d) The general body of stakeholders is no worse off under the RVO structure than it would have been under any other viable alternative, as there are no other viable alternatives. The value of Cloud DX's assets is rooted in its intellectual property and value of as a going concern. Should Cloud DX be assigned into bankruptcy, the value of Cloud DX's assets would erode

significantly and it is expected that no creditor would recover the indebtedness owing and all employees would see their employment terminated. In particular, given the amounts secured by the Administration Charge, the DIP Charge and the secured charge owing to Odyssey Trust Company, no other creditors of Cloud DX would receive distributions should Cloud DX be assigned into bankruptcy. The creditors are therefore not worse off under the Transaction and RVO, compared to the alternative.

- e) The consideration payable by the Subscriber reflects the importance of Cloud DX's intangible assets, namely, its non-transferrable tax attributes and value as a going concern. The Subscriber is providing the Cash Consideration to satisfy any amounts that remain owing on the Administration Charge and any cure costs necessary to remedy defaults under the Retained Contracts, and non-cash consideration (by way of retained liabilities). This consideration is in excess of the liquidation value of Cloud DX's assets and the best transaction which can be concluded following the, SISP.
- f) In this case, it is appropriate for the broad balancing of interests that are typically considered in CCAA proceedings be considered in the context of the RVO. The interested parties are not just those with a financial interest. Interested parties include Cloud DX's patients who use its services and medical practitioners who work with and for the counterparties to Cloud DX's key agreements. They rely on Cloud DX's services and would be severely disrupted if Cloud DX were to become bankrupt.

14. An assessment of the factors set out in subsection 65.13(4) of the BIA, and the Soundair. principles, favours the approval of the Transaction. Among other things:

- a) Cloud DX and the Proposal Trustee implemented a robust, transparent, and efficient sales process, in compliance with the terms of the SISP as

approved by the SISP Order. The steps taken by Cloud DX and the Proposal Trustee promoted the solicitation of offers and interest from the broader market, appropriately addressed feedback from Potential Bidders and Participating Bidders, and contained sufficient guardrails to avoid any actual or perceived unfairness in the process.

- b) Cloud DX and the Proposal Trustee invited 15 parties into the data room and ultimately received only one realistic bid from the SISP.
- c) The Proposal Trustee participated in Cloud DX's negotiation with the Subscriber, reviewed the Agreement, the Transaction and the various proposed forms of orders sought in this Application. The Proposal Trustee is supportive of the approval, and implementation of the Agreement and the Transaction, and has commented favourably upon the Transaction as the best option compared to the potential bankruptcy and liquidation of Cloud DX.
- d) The aggregate cash and non-cash consideration received by Cloud DX is reasonable and fair, taking into account Cloud DX's market value as a going concern and the liquidity value of its assets. Through the implementation of the SISP and extensive negotiations with the Subscriber, Cloud DX has undertaken sufficient effort to obtain the best price possible and has not acted improvidently.
- e) All secured creditors were provided notice of Cloud DX's prior applications, including its application for the SISP Order. Cloud DX's secured creditors have also been served with all affidavits and the Proposal Trustee's reports filed in these proceedings, which include information regarding the implementation of the SISP. Cloud DX and the Proposal Trustee have not received any complaints as to the fairness and efficiency of the SISP.

- f) It is in the interest of all stakeholders that the Agreement and the Transaction be approved, and the requested Order be granted, to enable Cloud DX to emergence from insolvency proceedings and carry on business as a going concern. The existing shareholder of Cloud DX is aware of these proceedings and takes no position. Although it will see its equity interest extinguished, courts have long held that "shareholders have no economic interest in an insolvent enterprise" and are accordingly denied a vote on proposed restructuring plans. The cancellation of existing shares in the circumstances confers benefits to the general body of stakeholders and should be approved.

Re Sino-Forest Corporation, 2012 ONSC 4377, [2012] OJ No 3627 at paras 23-29.

Termination of the NOI Proceedings

15. Canadian courts have permitted the termination of NOI proceedings following successful restructuring transactions that enable the debtor companies to become solvent, without the need for the debtor company to put forth a proposal to its creditors. Although the *BIA* possibly countenances such an order under subsection 50(4), it may be more correct to find jurisdiction under s. 183 and its original, auxiliary and ancillary jurisdiction in bankruptcy to make order which are necessary and give effect to an RVO.
- PaySlate*, para 57
16. Allowing a debtor company to emerge from NOI proceedings as a solvent entity fully accords with a key object of the *BIA*: to enable the debtor business to carry on as a going concern and maximize value for all stakeholders. Where, as in this case, the successful transaction does not require a proposal for the company to continue, withdrawal of the initial NOI and termination of the NOI proceedings is the most practical and efficient method of concluding the proceedings.
17. After the Transaction closes, Cloud DX will be able to meet its obligations as they come due, and the fair market value of its assets will be sufficient to satisfy its

obligations, due and accruing due, and will accordingly no longer constitute an "insolvent person" within the meaning of the *BIA*. The Transaction restores Cloud DX to a solvent position by providing the Cash Consideration to enable Cloud DX to satisfy amounts owing under the Administration Charge and to CRA and the assumption of certain liabilities. All other pre-filing obligations will be transferred to ResidualCo and subsequently extinguished.

18. Further to the foregoing, following the Transaction, Cloud DX will retain only those limited liabilities that it is in the position to satisfy, being:
 - a) all liabilities in respect of Cloud DX's remaining employees following Closing;
 - b) liabilities relating to any Retained Contracts, Permits, and Licenses or Permitted Encumbrances;
 - c) Cloud DX's obligations in respect of the amounts owing under the DIP Charge; and
 - d) amounts owing on account of unremitted federal and provincial taxes.
19. It is impractical in the circumstances to require Cloud DX to prepare and implement a proposal, or to convert the NOI proceedings to a different insolvency proceeding, to conclude its restructuring. Cloud DX does not have sufficient cash flow to engage in prolonged legal proceedings following closing of the Transaction.
20. On the basis of Cloud DX's expected solvency following closing of the Transaction, Cloud DX submits this Court ought to permit the withdrawal of the NOI, and the termination of the within NOI proceedings, following the filing of the Proposal Trustee's Certificate to effect closing.

PaySlate (Re), 2023 BCSC 608, para. 57

The Proposal Trustee's Activities and Reports should be Approved

21. As described by Justice Morawetz in *Re Target Canada Ca*, a CCAA matter, approval of a court officer's activities and reports is "routinely granted" by the courts. Although not expressly required by statute, court approval allows serves a number of important purposes, including, in this instance:

- a) to allow the Proposal Trustee to move forward with the next steps in the NOI proceedings;
- b) to bring the Proposal Trustee's activities before the Court;
- c) to provide an opportunity for the stakeholders' concerns to be addressed, and any problems to be rectified;
- d) to enable the Court to satisfy itself that the Proposal Trustee has acted in a prudent and diligent manner;
- e) to provide protections for the Proposal Trustee not otherwise provided by statute; and
- f) to protect the creditors from the delay in distribution that would be caused by re-litigation of steps taken and potential indemnity claims by the Proposal Trustee.

Re Target Canada Co., 2015 ONSC 7574, at paras 2, 23.

22. The Proposal Trustee has acted prudently and diligently in carrying out its mandate, and has tendered three prior reports to the Court and Cloud DX's stakeholders. There has been no objection raised as the propriety of the Proposal Trustee's conduct to date. The Proposal Trustee's activities have included, among other things:

- a) the review and evaluation of Cloud DX's business and financial affairs;
- b) conduct and attendance at numerous meetings with management and counsel throughout these proceedings;

- c) monitoring Cloud DX's business affairs and preparing cash flow forecasts, and evaluating pre-filing liabilities;
 - d) administering the SISP and evaluating the Bid;
 - e) communicating with Cloud DX's stakeholders throughout these proceedings; and
 - f) participating in the review and negotiation of the Agreement.
23. Approval of the Proposal Trustee's activities, particularly those set out in the Reports, provides the necessary protection and assurance for Cloud DX, 907Co and the Proposal Trustee to move forth with the closing of the Transaction, and the opportunity for any stakeholder concerns to be addressed. Given the expected termination of these NOI proceedings concurrent with Closing of the Transaction, the approval of the Trustee's activities and the Reports at this stage of the proceedings is timely.

Releases

24. The Court has the jurisdiction to grant the releases sought in connection with an RVO.

PaySlate (Re), 2023 BCSC 608, para. 143;
Tacora Resources Inc. (Re), 2024 ONSC 4436, at para. 17ff;
both citing *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54

25. In the *Lydian* case, the Court said:

While no single factor will be determinative, the courts have considered the following factors:

- a. whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
- b. whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
- c. whether the plan could succeed without the releases;

- d. whether the parties being released were contributing to the plan; and
- e. whether the release benefitted the debtors as well as the creditors generally.

Lydian, ibid.

26. In this case, the releases are an integral part of the sale order sought, and the parties for which releases are sought were integral to the restructuring and the ongoing management of Cloud DX during these proceedings, which, subject to the order of the Court, has culminated in a transaction which will result in CRA being paid in full the principal amount owing to it, and will permit Cloud DX to continue as a going concern and to continue to provide its services to its patient and customers.

Abridged Service

27. Pursuant to Rule 8-5 of the *Supreme Court Civil Rules*, the court may order that an application be heard on short notice, thereby abridging the time for service of the application.

Supreme Court Civil Rules, Rule 8-5.

28. Cloud DX has been working diligently to prepare for this application. In this case, there is no prejudice to any interested party by short notice.

Sealing Order

29. Cloud DX submits that it requires the unredacted version of the Affidavit #1 and the Affidavit #7 of Robert Kaul remain or be filed under seal in order to continue to protect the information about contracting parties which is of no interest to any party and could be harmful if disclosed.

30. The two-part test from *Sierra Club* applies when determining whether public access to a court document may be restricted:

- a) Is the order necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk?; and
- b) Do the salutary effects of the sealing order outweigh its deleterious effects, which in this context includes the public interest in open and accessible court proceedings?

Sierra Club of Canada v Canada (Minister of Finance),
2002 SCC 41; [2002] 2 SCR 522 at para 53.

31. The Supreme Court of Canada in *Sherman Estate* has further stated that the *Sierra Club* test is predicated upon the following core prerequisites:

- a) court openness poses a serious risk to an important public interest;
- b) the sealing order is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- c) as a matter of proportionality, the benefits of the sealing order outweigh its negative effects.

Sherman Estate v Donovan, 2021 SCC 25,
[2021] SCJ No 25 [*Sherman Estate*] at paras 38, 43.

32. In circumstances where these prerequisites have been met, the court has discretion to limit court openness by, among other things, granting a sealing order.

Sherman Estate at para 38.

33. In *Sherman Estate*, the Supreme Court of Canada recognized that aspects of privacy are "an important public interest for the purpose of the relevant test from *Sierra Club*" as proceedings in open court may:

- a) lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but an affront of the affected person's dignity; and

- b) where the public interest in protecting human dignity is shown to be at serious risk, an exception to the open court principal may be justified.

Sherman Estate at paras 7, 33, 97.

The Requested Increase to the Interim Financing should be Granted

34. Section 50.6 of the *BIA* authorizes this Court to approve interim financing and order a priority charge as security for amounts advanced pursuant to said interim financing. Subsection 50.6(4) of the *BIA*, in particular, identifies the following factors to be considered when approving interim financing and granting the corresponding priority charge:

- a) the period during which the debtor is expected to be subject to proceedings under the *BIA*;
- 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 Proposal Trustee's report.

s 50.6(4).

35. The following factors support the approval of the DIP Increase and proposed amendment to the DIP Loan Agreement:

- a) Cloud DX is working diligently to pursue the closing of the Transaction and the conclusion of these proceedings in a timely manner, reinforced by the limited additional funding provided by the amended interim facility;
 - b) management will continue to operate Cloud DX with a view to effecting the Transaction and maintaining the support of Cloud DX's secured creditors;
 - c) the DIP Lender is related to the Subscriber. The DIP Lender's willingness to advance the DIP Increase is demonstrative of its continued support of Cloud DX; and
 - d) the updated cash flow statement shows that the DIP Increase is necessary to continue operations and meet obligations over the forecast period, which is anticipated to include the closing of the Transaction and the termination of these NOI proceedings;
36. The approval by the court of DIP charge is a matter of discretion and is fact dependent: *Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd.*, 2021 ABCA 66, para. 19. Factors will include the risks inherent in the circumstances, relative prejudice and options available for further financing. The benefits of a restructuring relative to a bankruptcy are also relevant.
37. In this case, the order sought is for a reasonable amount. The prejudice to creditors of the orders sought is minimal. The prejudice to the clients and creditors of Cloud DX if it is required to suddenly cease operations is profound. There are no known options for other financing immediately available. On a bankruptcy, the value to creditors will be minimal, whereas there is a reasonable prospect of recovery if there is a successful restructuring. The fact that the financing is being made by the prospective purchaser is indicative of its support for the current process.
38. The Proposal Trustee is supportive of the DIP Increase and corresponding increase to the DIP Charge, in addition to the other relief sought in this Application.

Extension of Period for Filing Proposal

39. Section 50.4(9) of the BIA authorizes the Court to grant an extension of time for the debtor to file a proposal, up to 45 days.

*In the Matter of the Bankruptcy of Bear Creek Contracting Ltd.,
2021 BCSC 783, para. 25*

40. In the circumstances, it is unquestionably the case that Cloud DX will require more time to complete a sale of its assets. The time requested is hopefully more than is needed in order to obtain a court date and close the contemplated transaction, but more time is being requested out of an abundance of caution.

41. The evidence put forward by Cloud DX herein indicates that it has acted and will continue to act with due diligence, that it will be more likely to be able to make a viable proposal or otherwise restructure for the benefit of its creditors if an extension were granted, and that no creditor will be prejudiced if the extension being applied for were granted.

Conclusion

42. Cloud DX submits that the relief sought in the within Application should be granted; namely:

- a) approving the Agreement between Cloud DX and 907Co. and the Transaction to effect the restructuring of Cloud DX's capital structure and enable Cloud DX to carry on business as a going concern enterprise;
- b) permitting the withdrawal, cancellation and/or annulment of the NOI and the termination of these proceedings (including the termination, release and discharge of the Administration charge and the DIP Charge), concurrent with or following the closing of the Transaction;
- c) approving an extension of time; and

- d) approving the DIP Increase so as to increase the availability under the interim financing facility by a further \$275,000.
43. Cloud DX has acted diligently and in good faith during the course of these proceedings to pursue a viable path forward for the company to carry on its business as a going concern and to maximize value for all stakeholders. The Transaction, which follows the Court-ordered SISP and which is supported by the Proposal Trustee, represents the only option available for Cloud DX to carry on its business operations. Approval of the Transaction furthers the purpose and object of the *BIA* and is necessary to the successful restructuring of Cloud DX.


Part 4: MATERIAL TO BE RELIED ON

1. At the hearing of this motion, the applicant will rely on:
- a) Affidavit #1 of Robert Kaul, sworn June 7, 2024 (Redacted);
 - b) The First Report of the Proposal Trustee, filed June 10, 2024;
 - c) The Second Report of the Proposal Trustee, dated November ____, 2024;
 - d) Affidavit #1 of Kim MacDonald, sworn June 10, 2024;
 - e) Affidavit #5 of Kim MacDonald, sworn November 1, 2024;
 - f) Affidavit #6 of Robert Kaul, sworn November 1, 2024;
 - g) Affidavit #7 of Robert Kaul, sworn November 1, 2024, to be filed under seal;
 - h) Affidavit #8 of Robert Kaul, sworn November 1, 2024; and
 - i) such further and other materials as counsel may advise and this Honourable Court may allow.

The applicant estimates that the application will take 120 minutes.

- This matter is not within the jurisdiction of an associate judge.

Date: November 1, 2024



Signature of lawyer for applicant
Jonathan L. Williams

THIS NOTICE OF MOTION is prepared and delivered by Jonathan L. Williams of the firm Owen Bird Law Corporation, counsel for Cloud Diagnostics Canada ULC, whose place of business and address for delivery is 733 Seymour St #2900, Vancouver, BC V6B 0S6, Vancouver, British Columbia, Telephone: (604) 691-7562.