Court File No. 31-1932502
Court File No. 31-1932534
Court File No. 31-1932548
Court File No. 31-1932557
Court File No. 31-1932540
Court File No. 31-1932555
Court File No. 31-1932553

ONTARIO
SUPERIOR COURT OF JUSTICE
BANKRUPTCY AND INSOLVENCY
(COMMERCIAL LIST)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CRATE MARINE SALES LIMITED, F.S. CRATE & SONS LIMITED, 1330732 ONTARIO LTD., 1328559 ONTARIO LTD., 1282648 ONTARIO LTD., 1382416 ONTARIO LTD. AND 1382415 ONTARIO LTD.

FACTUM OF THE RESPONDENTS

December 1, 2014

DICKINSON WRIGHT LLP
Barristers & Solicitors
P.O. Box 124, 18th Floor
222 Bay Street
Toronto Ontario, M5K 1H1
Fax: (416) 865-1398

MICHAEL A. WEINCZOK
(LSUC# 33113d)
Tel: (416) 777-4026

LISA S. CORNE (LSUC# 27974M)
Tel: (416) 646-4608

Lawyers for the Respondents

Court File No. 31-1932502
Court File No. 31-1932534
Court File No. 31-1932548
Court File No. 31-1932557
Court File No. 31-1932540
Court File No. 31-1932555
Court File No. 31-1932553

ONTARIO
SUPERIOR COURT OF JUSTICE
BANKRUPTCY AND INSOLVENCY
(COMMERCIAL LIST)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CRATE MARINE SALES LIMITED, F.S. CRATE & SONS LIMITED, 1330732 ONTARIO LTD., 1328559 ONTARIO LTD., 1282648 ONTARIO LTD., 1382416 ONTARIO LTD. AND 1382415 ONTARIO LTD.

FACTUM OF THE RESPONDENTS

PART I - INTRODUCTION

1. Crate Marine Sales Limited, F.S. Crate & Sons Limited, 1282638 Ontario Limited, 1330732 Ontario Ltd., 1328559 Ontario Ltd., 1282648 Ontario Ltd., 1382416 Ontario Ltd. and 1382415 Ontario Ltd. (collectively, the "**Debtors**") file this factum in opposition to the motion by Crawmet Corp. ("**Crawmet**") for an order terminating the stay of proceedings in respect of the Debtors pursuant to the provisions of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, C. B-3, as amended ("***BIA***") and appointing A. Farber & Partners Inc. as receiver over the properties, assets and undertakings of the Debtors.

2. The Debtors respectfully submit that this application by Crawmet is premature and that the Debtors should be allowed to formulate a proposal. There is no urgency to appoint a receiver and terminate the proposal proceedings at this time. A. Farber & Partners Inc. is in place as

interim receiver in order to protect creditors from any prejudice and there is also a court appointed proposal trustee with an obligation to report any material change in the Debtors' circumstances during the proposal proceedings.

PART II - LAW AND ARGUMENT

3. Crawmet moves pursuant to Section 50.4(11) of the *BIA* for a termination of the stay of proceeding in respect of the Debtors. Section 50.4(11) of the *BIA* provides that the court may grant such an order if the court is satisfied that:

> (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
>
> (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
>
> (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected, and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

4. In assessing whether the moving party has satisfied the conditions for terminating the stay set out in section 50.4(11) of the *BIA*, the court should be guided by the purpose and objective of the *BIA*, which favours restructurings over liquidations. The *BIA*, particularly the proposal sections, are intended to give insolvent companies an opportunity to put forward a plan. The intention of the legislation is towards rehabilitation, not liquidation.

> *N.T.W. Management Group Ltd., supra,* at para 22; *Re Raymor Industries Inc. (2009) CarswellQue 3207,* at para 39; *Re Enirgi Group Corp. v. Andover Mining Corp. (2013)* CarswellBC 3026 at para. 50.

5. The courts have described the remedy under Section 50.4(11) of the *BIA* as "an unusual remedy and a serious one" which requires a person moving to invoke it to establish one of the four conditions set out in Subsections (a) through (d). Suspicion is not sufficient.

> *Re Quality Meat Packers Ltd.* (2014) ONSC 2296 at para. 17

6. The onus is therefore on Crawmet to prove on a balance of probabilities that the conditions set out in Section 50.4(11) above have been satisfied.

> *N.T.W. Management Group Ltd.* (1993) 19CBR(3rd) 162, at para 18

Good Faith and Due Diligence

7. Typically, courts have focused upon conduct following the filing of the notice of intention, in assessing whether an insolvent company is acting in good faith. Where the only evidence of alleged bad faith occurred prior to the filing of the notice of intention, the courts have refused to make a finding that the debtor has failed to act in good faith.

> *Enirgi Group Corp. v. Andover Mining Corp.* (2013) CarswellBC 3026 at para 64.

8. For example, in *Quality Meat Packers Ltd., supra,* Justice Brown concluded that the moving party had not produced sufficient evidence to establish that the debtor had failed to act in good faith and with due diligence. He rejected the allegation that the debtor's acceptance of millions of dollars in inventory less than a week prior to filing its NOI was evidence of a failure to act in good faith.

9. In the case at bar, all of the misconduct relied upon by Crawmet is alleged to have occurred prior to the filing of the NOIs, and there is no evidence that the Debtors have acted in bad faith in connection with these proceedings. Moreover, Crawmet has raised serious

allegations of fraud against the Debtors which the Debtors vigorously deny. The Debtors have not had the opportunity to cross-examine on the affidavits relied upon by Crawmet. Given the conflicting affidavit evidence, it is not appropriate to make a finding of bad faith on the part of the Debtors in the absence of a trial or at a minimum a full factual record.

10. The Debtors are acting with due diligence, and are in discussions with potential lenders and purchasers in an effort to obtain financing to fund a proposal. In such circumstances, even though no firm commitment is in hand, due diligence is established.

> *N.T.W. Management Group Ltd., supra*, at para. 18.

Likely Able to Make A Viable Proposal

11. The courts have recognized that insolvent companies have a difficult task in attempting to arrange new financing, and that is not something that can be accomplished overnight. Accordingly, it is difficult to make a determination as to the viability of a proposal early in the proceedings. Even where a majority of creditors indicate at the outset that they will not vote for any proposal, the courts have concluded that it is inappropriate to reach a conclusion on that issue before a proposal has been filed, and the insolvent company should have the opportunity of putting forth a proposal.

> *N.T.W. Management Group Ltd., supra,* at para 29; *Re Quality Meat Packers Ltd.* at para. 40 and 41; *Re Enirgi Group Corp.* at paras. 47-49, and 56 and 58

12. A creditor's assertion that it has lost faith in the debtor is not determinative. In *Re Enirgi*, the court preferred to permit the debtor with the opportunity to present a proposal, at which point in time the creditors would have an opportunity to decide what their position on it would be. The court noted that the success of a proposal should be a business decision, rather than a matter under Section 50.4(11) of the *BIA*.

Re Enirgi, supra, at paras. 66 and 75

13. In proceedings under the *Companies' Creditors' Arrangement Act,* R.S.C. 1984, c. C-36 (the "***CCAA***"), the debtor must apply to the court under section 11 of the *CCAA* for a stay of proceeding and the onus is on the debtor to show that it has a likelihood of success. In contrast, under section 69(1) of the *BIA,* a stay of proceedings is granted automatically upon the filing of a notice of intention and the onus is on a creditor who seeks to terminate the stay to prove that the statutory conditions are met. Therefore, it is respectfully submitted that cases under the *CCAA* are not applicable to the circumstances before the court in the case at bar.

14. Even in *CCAA* cases, where the onus is in the debtor to establish the circumstances warranting a stay of proceedings, Courts do not refuse to grant an application for a stay simply because secured creditors assert a refusal to vote in favour of any plan. As stated by Madam Justice Fitzpatrick, in *Azure Dynamics Corp*, 2012 Carswell BC, 1545 at para. 9:

> "This position is easily met by the comments of Madam Justice Newbury in *Forrest & Marine Financial Corp., Re*, 2009 BCCA 319 (BCCA):
>
>> "As for AE's insistence that it will refuse to vote in favour of any plan brought to a meeting of creditors under Section 6 of the CCAA, I am not aware of any authority that permits a creditor to forestall an Application under the Act on this basis and I doubt Parliament intended that the Court's exercise of its statutory jurisdiction could be neutralized in this manner. When the Act is invoked, the Court properly considers the interests of many stakeholders, not simply those of the creditor and debtor…
>>
>> I have recently rejected a similar argument in Pacific Shores Resort & Spa Ltd. Re, 2011 BCSC 1775 (BCSC) at para. 41."

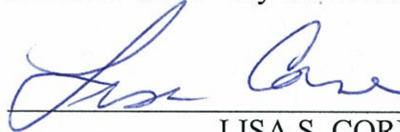
15. Moreover, as stated by Mr. Justice Gouin in *Homburg Invest Inc., Re*, a restructuring file is complex, kind of a "legal quilt, and one should never lose sight of the global picture", and give in to the interests of particular secured creditors in being paid immediately.

Reference: *Homburg Invest Inc., Re 2012* CarswellQue 245 (Que.S.C.) affirmed 2012 CarswellQue 3446 (Que. C.A.)

16. In the case at bar, the court ought to consider the broader constituency of interests: Crate is an 80-year old institution in Keswick which has obligations to suppliers and customers, who have property valued at $70-85 million in the possession of Crate , and have no readily available alternative of sourcing the services and storage provided by Crate. Moreover, Crate is an important employer of more than 70 people.

17. In conclusion, the Debtors respectfully request that the motion by Crawmet be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of December, 2014.



LISA S. CORNE

DICKINSON WRIGHT LLP
Barristers & Solicitors
P.O. Box 124, 18th Floor
222 Bay Street
Toronto Ontario, M5K 1H1

MICHAEL A. WEINCZOK
LSUC Registration No. 33113D
Tel: (416) 777-4026

LISA S. CORNE
LSUC Registration No. 27974M
Tel: (416) 646-4608

Fax: (416) 865-1398

Lawyers for Respondents

SCHEDULE A

LIST OF AUTHORITIES

1. 2014-2015 *Annotated* Bankruptcy and Insolvency Act, Houlden, Morawetz, and Sarra
2. *N.T.W. Management Group Ltd.* (1993) 19CBR (3rd)
3. *Re Raymor Industries Inc.* (2009) CarswellQue 3207
4. *Re Enirgi Group Corp. v. Andover Mining Corp.* (2013) CarswellBC 3026
5. *Quality Meat Packers Ltd. (2014) ONSC 2296*
6. *Homburg Invest Inc., Re 2012 CarswellQue 245 (Que.S.C.) affirmed 2012 CarswellQue 3446 (Que. C.A.)*

SCHEDULE B

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Court may terminate period for making proposal

50.4(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(*a*) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(*b*) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(*c*) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(*d*) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period had expired.

Stay of Proceedings – Notice of Intention

69. (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(*a*) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(*b*) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

(*c*) Her Majesty in right of Canada may not exercise Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*, or

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that

(A) refers to subsection 224(1.2) of the *Income Tax Act*, and

(B) provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts,

in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

(*d*) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

Court may appoint receiver

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(*a*) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(*b*) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(*c*) take any other action that the court considers advisable.

Courts of Justice Act, R.S.O. 1990

Injunctions and receivers

101.(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2)An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

Companies' Creditors' Arrangement Act, (R.S.C., 1985, c. C-36)

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Marginal note: Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Marginal note: Burden of proof on application

(3) The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Marginal note: Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CRATE MARINE SALES LIMITED ET AL

Court File No. 31-1932502
Court File No. 31-1932534
Court File No. 31-1932548
Court File No. 31-1932557
Court File No. 31-1932540
Court File No. 31-1932555
Court File No. 31-1932553

ONTARIO
SUPERIOR COURT OF JUSTICE
BANKRUPTCY AND INSOLVENCY

PROCEEDING COMMENCED AT **TORONTO**

FACTUM OF RESPONDENTS

DICKINSON WRIGHT LLP
Barrister & Solicitor
Toronto-Dominion Centre
18th Floor, P.O. Box 124
222 Bay Street
Toronto, Ontario, M5K 1H1

MICHAEL A. WEINCZOK
(LSUC# 33113d)
Tel: (416) 777-4026

LISA S. CORNE (LSUC# 27974M)
Tel: (416) 646-4608
Fax: (416) 865-1398

Lawyers for the Debtors

TORONTO 63105-1 994745v1