

**THE QUEEN'S BENCH
Winnipeg Centre
In Bankruptcy and Insolvency**

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

**AND IN THE MATTER OF THE PROPOSAL OF
5274398 MANITOBA LTD. O/A CROSS COUNTRY MANUFACTURING
of the City of Morden, in the Province of Manitoba**

**NOTICE OF MOTION
Before the Judge's Civil Uncontested List
HEARING DATE: Wednesday, November 14, 2018, at 10:00 a.m.**

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BELLHOP EXPRESS CORP. will make a motion before the Learned Motions Court Judge on the Civil Uncontested List on Wednesday the 14th day of November, 2018 at 10:00 a.m., or as soon after that time as the motion can be heard, at the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

THE MOTION IS FOR:

1. an Order extending the time in which to bring this appeal, if necessary;
2. an Order allowing the appeal of Bellhop Express Corp. ("**Bellhop**") from the notice of disallowance of claim ("**Notice of Disallowance**") by Lazer Grant Inc., in its capacity as proposal trustee ("**Trustee**") of 5274398 Manitoba Ltd. operating as Cross Country Manufacturing ("**Cross Country**"), on September 10, 2018, of Bellhop's proof of claim filed in Cross Country's proposal proceedings;
3. an Order setting aside the Notice of Disallowance and declaring that Bellhop's claim against Cross Country is a valid and subsisting claim;
4. Costs of this motion on a substantial indemnity basis; and
5. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

Parties

1. Cross Country is a manufacturer of specialty trailers that are sold through a North American dealer network.
2. Bellhop is an Ontario corporation that carries on business as a trucking company.

Agreement

3. On or about March 18, 2015, Bellhop entered into an agreement with Cervus Contractor Equipment LP ("**Cervus**"), a commercial equipment dealership, to purchase two new live bottom trailers manufactured by Cross Country for \$112,000 per trailer, plus HST (the "**Agreement**").
4. The Agreement provided that the trailers were to be delivered by May 18, 2015, and June 1, 2015.
5. The trailers included a manufacturer's warranty from Cross Country that the trailers were free of defects in material and workmanship. In particular, the warranty included a 5-year 100% manufacturer's warranty on the structure of the trailers and a 1-year warranty for parts and labour on the live bottom drive system.
6. Cross Country's manual for the trailer, which was provided to Bellhop made certain representations with respect to the quality and fitness for purpose of the trailers.

Cross Country Breaches the Agreement

7. In breach of the Agreement, the first trailer was delivered approximately 2 months late, and the second trailer was not delivered at all.
8. In further breach of the Agreement, when the first trailer was delivered to Bellhop it was not in good working order, free of defects, fit for purpose and/or of

merchantable quality. There were a myriad of defects in the trailer's workmanship and material.

9. As a result of these defects, the first trailer was continuously out of service and, on several occasions, needed emergency servicing. Cross Country never adequately addressed or fixed these defects.

Bellhop Incurred Significant Damages as a Result of Cross Country's Breach

10. As a result of Cross Country's breaches of the Agreement, Bellhop incurred costs and out-of-pocket expenses to complete necessary repairs to the trailer, including purchasing a replacement trailer to mitigate its damages.
11. As a direct result of the loss of revenue caused by Cross Country's breaches of the Agreement, the costs of trying to repair the trailer and the loss of productivity resulting from the trailer being out of service, Bellhop was no longer able to meet its liabilities. Bellhop's creditors seized its equipment, and on or about October 2016, Bellhop was forced to cease operating.
12. Accordingly, in addition to out-of-pocket expenses, Bellhop suffered loss of business opportunity and income, loss of goodwill and business reputation.
13. On March 17, 2017, Bellhop commenced an action against Cross Country, amongst others, claiming damages, jointly and severally, for breach of contract, breach of warranty, breach of the *Sale of Goods Act* (Ontario), breach of the duty of good faith, negligent misrepresentations, and negligent supply of shoddy or defective goods (the "**Bellhop Action**").
14. Although Cross Country served a notice of intent to defend, it did not serve a statement of defence.

Cross Country's Proposal Proceedings

15. On or about August 11, 2017, Cross Country filed a Notice of Intention to Make a Proposal, pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act* R.S.C., 1985, c. B-3, as amended (the "**BIA**").
16. On or about February 5, 2018, Bellhop filed a proof of claim with the Trustee.
17. Bellhop is owed \$3,270,684.00 by Cross Country.
18. Bellhop received the Notice of Disallowance disallowing Bellhop's proof of claim in full.
19. However, nowhere in the Notice of Disallowance does the Trustee deny that the trailer was defective. Further, the Trustee does not deny that Bellhop incurred certain costs as a result of the defective trailer, but takes issue with the calculation of the same.
20. The Trustee has erred in fact and law in its September 10, 2018 denial of Bellhop's claim by:
 - a. finding that Bellhop's claim is contingent and unliquidated, despite the fact that the Trustee does not dispute that the trailer was defective and that Bellhop incurred damages;
 - b. deciding that the "documents submitted" do not support a contract between Bellhop and Cross Country;
 - c. failing to consider whether any of Bellhop's other theories of liability support its damages claim;
 - d. failing to apply the *Sale of Goods Act* (Ontario);
 - e. failing to find that the sale of the trailers included certain warranties including,

without limitation, the warranty of merchantability, fitness for particular purpose;

- f. finding that the fact that Bellhop has sought to hold the defendants to the Bellhop Action jointly and severally liable precludes Bellhop from recovering against Cross Country for all or a portion of its claim against Cross Country; and
- g. finding that Bellhop had not adduced sufficient evidence of its damages claim including, without limitation that: (I) Bellhop did not adduce evidence of its lost profits; (II) Bellhop did not adduce evidence of its financial difficulties, including the cessation of operations, as a result of Cross Country's breach of the Agreement; and (III) to the extent that Bellhop submitted invoices for repairs unrelated to the first trailer, this somehow vitiated its claim for those costs it did incur in attempting to repair the trailer;

- 21. Although the Trustee takes issue with Bellhop's evidence of its damages in the Notice of Disallowance, at no point did the Trustee request that Bellhop provide further documentation to substantiate its damages claim.
- 22. The provisions of the *BIA* including, without limitation, sections 122, 135, 183, 192, and the inherent and equitable jurisdiction of this Honourable Court;
- 23. *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368, rules 3, 6, 9, 11, 13;
- 24. *Court of Queen's Bench Rules*, Manitoba Regulation 553/88, rules 1.04, 2.01, 2.03, 3.02, 37, and 39;
- 25. Such further and other grounds as counsel may advise and this Honourable Court may accept.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- 1. The proof of claim filed on or about February 5, 2018, and the corresponding

affidavit of James Crespi, sworn February 5, 2018;

2. Affidavit of John Crespi, with exhibits, to be sworn and filed;
3. Such further and other evidence as counsel may advise and this Honourable Court may permit.

DATED : October 10, 2018

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