Court File No.: CV-20-00641220-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN GROWTH BRANDS INC., GGB CANADA INC., GREEN GROWTH BRANDS REALTY LTD. AND XANTHIC BIOPHARMA LIMITED

Applicants

FACTUM OF THE RESPONDENT ALL JS GREENSPACE LLC
(Comeback Motion)
(returnable May 29, 2020)

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TO: **THE EMAIL SERVICE LIST**

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PART I - LEGAL ARGUMENTS

1. The respondent, All Js Greenspace LLC ("**All Js**") supports the Applicants' motion for approval of the SISP[1] and the Stalking Horse APA and related relief. All Js agrees with and adopts the submissions of the Applicants in their factum.

2. In this factum, All Js responds to objections raised on this motion by Michael D. Horvitz, an owner of a $5 million May Debenture. The Stalking Horse Credit Bid was approved by over 80% of the May Debentureholders and by over 86% of the Backstop Debentureholders. No other debentureholder is objecting to the relief sought. Mr. Horvitz's complaints should not block the stalking horse bid and SISP from proceeding.

Horvitz Agreed to Credit Bidding

3. Mr. Horvitz objects to the May Debenture debt and the Backstop Debenture debt being included in the Stalking Horse Credit Bid. There is no basis for this objection, as Mr. Horvitz purchased his debenture pursuant to an indenture that expressly permitted this arrangement. The credit bid is properly tendered in accordance with the debenture indentures governing the May Debentures and Backstop Debentures and the extraordinary resolutions signed by the necessary majority of debenture holders under each indenture.

> Factum of the Respondent (and Moving Party by Cross-Motion), Michael D. Horvitz as Grantor and Trustee for the Michael D. Horvitz Recovable Trust [Horvitz Factum]

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[1] Unless otherwise defined herein, capitalized terms have the same meaning as in the Applicants' Motion Materials.

4. The May Debenture Security Agreement, which secures the May debenture debt, expressly contemplates the use of credit bidding to enforce such debt. Section 12(i) of the May Security Agreement provides as follows:

> In addition to the remedies set forth in Section 11 and elsewhere in this Agreement, the **Debenture Trustee may**, whenever the Security Interest is enforceable: …
>
> > …at any public sale, and to the extent permitted by law on any private sale, **bid for and purchase any or all of the Collateral offered for sale** and upon compliance with the terms of such sale, hold, retain and dispose of such Collateral without any further accountability to the Obligor or any other Person with respect to such holding, retention or disposition, except as required by law. **In any such sale to the Debenture Trustee, the Debenture Trustee may, for the purpose of making payment for all or any part of the Collateral so purchased, use any claim for Secured Obligations then due and payable to it as a credit against the purchase price**.
> >
> > May Security Agreement, Exhibit "F" to the Affidavit of Raymond C. Whittaker III, sworn May 19, 2020 [Initial Affidavit], Application Record, Tab 2F [Emphasis added]

5. Section 7.10 of the May Indenture sets out the powers that may be exercised by extraordinary resolution of a requisite majority of May Debentureholders. They include the power to "*agree to any modification, abrogation, alteration, **compromise or arrangement of the rights of Registered Debentureholders**… against the Corporation…"* as well as the power "*to assent to any compromise or arrangement **with any creditor or creditors or any class of creditors, whether secured or otherwise**…*". The relevant text of Section 7.10 is reproduced here:

> **Section 7.10 Powers Exercisable by Extraordinary Resolution**
>
> (1) In addition to all other powers conferred upon them by any other provisions of this Indenture or by law, **the Registered Debentureholders** at a meeting shall, subject to the provisions of Section 7.11, **have the power** exercisable from time to time **by Extraordinary Resolution**:

> (a) to **agree to any modification, abrogation, alteration, compromise or arrangement of the rights of Registered Debentureholders** or the Debenture Trustee in its capacity as debenture trustee hereunder (subject to the Debenture Trustee's prior consent, acting reasonably) or on behalf of the Registered Debentureholders against the Corporation whether such rights arise under this Indenture or otherwise; …
>
> and,
>
> (i) to **assent to any compromise or arrangement with any creditor or creditors or any class or classes of creditors**, whether secured or otherwise, and with holders of any shares or other securities of the Corporation.

The Backstop Indenture includes an identical provision.

> May Debenture Indenture dated May 17, 2020, Exhibits "D" and "I", Application Record, Tabs 2D and 2I [Emphasis added]

6. Mr. Horvitz's motion material cites selectively from the May Indenture's provisions to create the impression that a meeting was required in order to exercise powers thereunder. He ignores entirely Sections 7.14 and 7.15, which expressly provide that the relevant powers can be exercised in writing and without a meeting, and are binding on all debentureholderrs. The relevant text of Sections 7.14 and 7.15 is reproduced here:

> **Section 7.14 Instruments in Writing.**
>
> All actions which may be taken and **all powers that may be exercised by the Registered Debentureholders at a meeting** held as provided in this Article 7 **may also be taken and exercised by Registered Debentureholders holding at least 66 2/3% of the aggregate principal amount of Debentures then outstanding by an instrument in writing signed** in one or more counterparts by such Registered Debentureholders in person or by attorney duly appointed in writing, and **the expression "Extraordinary Resolution" when used in this Indenture shall include an instrument so signed**.

> **Section 7.15 Binding Effect of Resolutions.**
>
> Every resolution and every Extraordinary Resolution passed in accordance with the provisions of this Article 7 at a meeting of Registered Debentureholders shall be binding upon all the Debentureholders, whether present at or absent from such meeting, and **every instrument in writing signed by Registered Debentureholders in accordance with Section 7.14 shall be binding upon all the Debentureholders, whether signatories thereto or not, and each and every Debentureholder and the Debenture Trustee** (subject to the provisions for indemnity herein contained) shall be bound to give effect accordingly to every such resolution and instrument in writing.
>
> Horvitz' Factum, paragraph 18, citing Horvitz Affidavit, paras. 75-76, Motion Record of Michael D. Horvitz, Tab 2.
>
> May Debenture Indenture dated May 17, 2020, Application Record, Tab 2D [Emphasis added]

7. The May Indenture does not require, for any purpose, the unanimous consent of all debentureholders, nor does it require the consent of any particular debentureholder for any purpose.

8. Mr. Horvitz is a sophisticated business person - he styles himself "an American investor and entrepreneur". His affidavit describes his business acumen and success as an investor. Mr. Horvitz has no basis on which to ask that this Court relieve him from the terms of his agreements.

> Affidavit of Michael D. Horvitz, sworn May 28, 2020, Motion Record and Cross-Motion Record of Michael D. Horvits, Tab 2, page 8, paras. 32-34

9. Accordingly, in assenting to the terms of the May Indenture (by purchasing debentures), Mr. Horvitz agreed that his minority holding of the May Debenture debt could be used to make a credit bid (including in cooperation with other classes of creditors, including the holder of the GAOC Note and holders of the Backstop Debentures) at the direction of a two-thirds majority of the debenture holders. Such a direction was given in the Extraordinary Resolution.

The Case Law Supports This Credit Bid

10. Courts in CCAA proceedings have approved credit bids that use debt under multiple debt instruments, as well as credit bidding by an agent or trustee of syndicated debt. Where the parties' credit documents permit, the full face value of the relevant debt is available to credit bid, even over the objections of a dissenting minority creditor.

> *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (CanLii)
>
> *In re METALDYNE CORPORATION, et al*., 2009 Bankr. LEXIS 2131 (online)
>
> *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd*., 2012 ONSC 1750 at 11-12 (CanLii)

11. In *White Birch Paper Holding Co., Re*, a leading Canadian authority on credit bidding, the Court held that credit bidding should be permitted up to the face value of the debt rather than impose any requirement to determine fair market value of the relevant assets. The Court held:

> 34 Furthermore, many comments were made today with respect to the dollar value of a credit bid versus the dollar value of a cash bid. I think that it is appropriate to conclude that if credit bidding is to take place, **it goes without saying that the amount of the credit bid should not exceed, but should be allowed to go as, high as the face value amount of the credit instrument upon which the credit bidder is allowed to rely. The credit bid should not be limited to the fair market value of the corresponding encumbered assets**. It would then be just impossible to function otherwise because it would require an evaluation of such encumbered assets, a difficult, complex and costly exercise.
>
> *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 at 51-52 (Canlii) [Emphasis added]

12. In *Canwest Publishing Inc. / Publications Canwest Inc., Re*, this Court observed that "**insolvency proceedings typically involve what is feasible, not what is flawless**". The Court approved a stalking horse sale process despite having concerns about the possibility of superior offers being precluded. Similarly, in *Brainhunter Inc., Re*, this

Court considered objections to the structure of a stalking horse credit bid (which included a break fee) by an insider of the debtor. Acknowledging the complications posed by an insider bid, the Court approved the stalking horse transaction because, among other things, it would benefit the overall "economic community", no better alternative had been put forward and the monitor endorsed the process.

> *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222 at 5, 24, 27 (CanLii) [Emphasis added]
>
> *Brainhunter Inc., Re,* [2009] 183 A.C.W.S. (3d) 905 at 11, 19-20 (CanLii)

Mr. Horvitz's Objections are Inter-Creditor Issues

13. The substantive objections that Mr. Horvitz raises on this motion are inter-creditor issues and are not matters for this Court to resolve on a motion to approve a sale process.

14. CCAA courts generally do not adjudicate or prosecute disputes between a debtor's stakeholders. In *Stelco Inc., Re*, the Ontario Court of Appeal considered the intended scope of the CCAA:

> First, as the supervising judge noted, the CCAA itself is more compendiously styled "An act to facilitate compromises and arrangements between companies and their creditors". There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (B.C. S.C.) at para. 24 (after referring to the full style of the legislation):

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, **it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company**.

Stelco Inc., Re, [2005] O.J. No. 4883 at 32 (CanLii) [Emphasis added]

15. The objections raised by Mr. Horvitz all constitute inter-creditor disputes. Any matters related to the capitalization of Acquire Co do not involve the Applicants. This CCAA proceeding is not the proper venue for Mr. Horvitz to seek the remedies (or extraordinary rights of discovery) that he requests on this motion.

16. Mr. Horvitz's complaints are unfounded. The terms of the Debentures that he purchased are clear. The Stalking Horse Bid and its terms were all duly authorized by the contracts that govern the rights of the debentureholders as among themselves and grant the power to the requisite majority of debentureholders to reach compromises with other creditors and classes of creditors.

PART II - ORDER REQUESTED

17. For the foregoing reasons, All Js respectfully supports the relief sought on the Applicants' motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of May, 2020.

Wael Rostom / Stephen Brown-Okruhlik
McMillan LLP

Lawyers for the Respondent All Js Greenspace LLC, a Debenture Holder, the DIP Lender and a Credit Bid Party

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Stelco Inc., Re*, [2005] O.J. No. 4883

2. *White Birch Paper Holding Co., Re*, 2010 QCCS 4915

3. *In re METALDYNE CORPORATION, et al*., 2009 Bankr. LEXIS 2131

4. *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd*., 2012 ONSC 1750

5. *Brainhunter Inc., Re,* [2009] 183 A.C.W.S. (3d) 905

6. *Canwest Publishing Inc. / Publications Canwest Inc., Re,* 2010 ONSC 222

SCHEDULE "B"
RELEVANT STATUTES

1. N/A

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN GROWTH BRANDS INC., GGB CANADA INC., GREEN GROWTH BRANDS REALTY LTD. AND XANTHIC BIOPHARMA LIMITED

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Proceeding commenced at Toronto

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