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

SUPPLEMENT FACTUM OF THE RESPONDENT ALL JS GREENSPACE LLC
(Comeback Motion)
(returnable June 1, 2020)

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TO: **THE EMAIL SERVICE LIST**

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PART I - OVERVIEW

1. This factum of All Js Greenspace LLC ("**All Js**") is supplementary to its factum filed on Friday, May 29, 2020 (the "**All Js May 29 Factum**"). This motion has been adjourned following an appearance before the Honourable Justice McEwen on May 29, 2020 (the "**May 29 Hearing**"). This factum sets out All Js' further responses to Michael Horvitz's objections and cross-motion, including the submissions of his counsel during the May 29 Hearing. This factum should be read in conjunction with the All Js May 29 Factum.

2. Over 80% of the holders of the May Debenture debt approved the Stalking Horse Bid in accordance with the express terms and requirements of the May Debenture Indenture. Creditors representing over USD$80 million of GGB's secured debt support the Stalking Horse Bid.

3. The Applicants and the Monitor support the SISP and the Stalking Horse Bid.

4. Mr. Horvitz is a holder of a USD$5 million May Debenture and is bound by the terms of May Debenture Indenture.

5. All of the following are true under the express terms of the May Debenture Indenture:

   (a) The holders of 66 2/3% of the May Debentures have the power to authorize and approve the Stalking Horse Bid on behalf of all May Debenture holders.

(b) Mr. Horvitz was not entitled to notice or any consultation rights regarding the negotiation or completion of the terms of any credit bid or the capitalization of the resulting purchasing entity.

(c) Mr. Horvitz does not have an independent consent or approval right relating to the manner in which the security for the May Debentures is enforced or the terms of any credit bid (including the terms of the Confidential Term Sheet).

(d) Mr. Horvitz does not have a veto.

All Js May 29 Factum, paras. 4-7

6. Mr. Horvitz was provided with a copy of the Acquire Co Confidential Term Sheet subject to a confidentiality undertaking. He has now filed the Confidential Term Sheet with the Court, presumably to argue about its terms. He has no right or standing under the May Debenure Indenture to do so. The terms of the Confidential Term Sheet are matters exclusively between debenture holders, determined by the will of a requisite majority. The contents of the Confidential Term Sheet are irrelevant to the motion before the Court and should not be used in a further delay tactic by Mr. Horvitz.

7. Mr. Horvitz's entire motion rests on the assertion of rights that he simply does not have under the terms of the May Debenture Indenture or under the CCAA.

8. Commercial certainty and the sanctity of contracts are fundamental principles of our law that must be preserved. They are at risk if Courts read non-existent terms into contracts *ex post facto*.

9. Mr. Horivtz' counsel conceded in open court during the May 29 Hearing that the requisite majority of May Debenture holders had the power to approve the Stalking Horse Bid. However, he seeks to have this Court read in new contractual rights by trying to weaponize the duty of good faith.

10. According to Mr. Horvitz, the Schottenstein's financial backing of GGB and business acumen *is the reason he invested* in the May Debentures. Mr. Horvitz, however, now attempts to recast a history of significant investment in and financial support for the Applicants by All Js and the Schottenstein family as creating some mischief in the CCAA process. This narrative is misguided.

Horvitz Affidavit, para. 46, Horvitz Record, p. 31

11. There is no doubt that All Js and the Schottensteins are important and longstanding stakeholders of the Applicants. This has been spelled out clearly in the Applicants' materials and in a letter sent to counsel to Mr. Horvitz describing, among other things, the Schottenstein family's financial interest in the Applicants. These significant investments and assistance to GGB do not prevent them from participating in this CCAA proceeding or from enhancing creditor recoveries through the DIP Loan and the Stalking Horse Bid. In fact, it would be highly unusual if they were not involved in the CCAA proceeding.

Letter from W. Rostom to L. Brzezinski dated May 28, 2020, Affidavit of Janis Belvers, sworn May 28, 2020, Exhibit "1", Supplemental Responding Motion Record of Michael Horvitz, Tab 1

12. In the end, Mr. Horvitz's goal as the sole dissenting debentureholder is to use procedural tactics to force other stakeholders to buy out his debt on terms that are favourable to him. He should be held to the terms of his contracts and not permitted to

destroy value and derail a process that is supported by the Monitor and the vast majority of the Applicant's secured creditors.

PART II - LEGAL ARGUMENTS

A. Mr. Horvitz Cannot Resile from his Agreements

13. The All Js May 29 Factum sets out the provisions of the May Indenture and the May Security Agreement that permit the entirety of the May Debenture debt to be used in the Stalking Horse credit bid, notwithstanding Mr. Horvitz's dissent (see paragraphs 4-7 of the All Js May 29 Factum). At the May 29 Hearing, Mr. Horvitz's counsel agreed that this is permitted under the May Indenture. Mr. Horvitz is a sophisticated investor. He should not be allowed to resile from the terms of his agreements.

All Js May 29 Factum, paras. 4-7

Oral submissions of Lou Brzezinski at May 29 Hearing

Horvitz Affidavit, paras. 32-34, Horvitz Record, Tab 2, p. 28

14. The sanctity of contracts is a cornerstone of Canadian common law that is routinely upheld by courts, including in CCAA proceedings. The Court will not rewrite parties' contracts nor relieve one party against the consequences of an improvident contract. The "actual wording of the Indenture" will govern its construction.

Jedfro Investments (USA) Ltd v. Jacyk Estate, 2007 SCC 55 at 34 (CanLII)

Catalyst Capital Group Inc. v. Data & Audio-Visual Enterprises Wireless Inc., 2013 ONSC 2170 at 22 (CanLII)

15. A central theme of Mr. Horvitz's objections and cross-motion is the duty of good faith. He alleges that All Js and the Applicants have not met the statutory duty of good faith set out in Section 18.6 of the CCAA. As Mr. Horvitz acknowledges in his factum,

this recent amendment to the CCAA codified the longstanding common law duty of good faith attendant on all participants in CCAA proceedings.

Horvitz Factum, para. 46 and 56

Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 at 70 (CanLII)

16. Mr. Horvitz invokes the duty of good faith in an effort to gain consent rights that he does not have under the May Debenture Indenture. He relies on the decision of the Supreme Court of Canada ("**SCC**") in *Bhasin v. Hrynew*, which articulated a general 'organizing principle' of good faith in the law of contracts as well as a specific duty of good faith contractual performance. Notably, the SCC held in *Bhasin* that good faith is not a platform for "palm tree justice".

Horvitz Factum, para. 57

Janis Sarra, "Requiring Nothing Less than Good Faith in Insolvency Law Proceedings", in Annual Review of Insolvency Law 2014 (Toronto: Carswell, 2015), pp. 6-8

Bhasin v Hrynew, 2014 SCC 71 at 70 (CanLII)

17. Importantly, the duty of good faith does not imply better terms or stronger protections for contracting parties than exist in their written agreements. In *Maxam Opportunity Fund Limited Partnership v. 729171 Alberta Inc.*, the British Columbia Supreme Court held that *Bhasin* "did not alter the principles for contract interpretation nor did it permit the reading in of terms into [the parties' credit agreement] of obligations that do not exist".

Maxam Opportunities Fund Limited Partnership v. 729171 Alberta Inc., 2015 BCSC 271 at 168. (CanLII)

B. The History of Investment by All Js and the Schottensteins in GGB

18. Mr. Horvitz attempts to cast All Js and the Schottensteins in a negative light by describing their historic involvement with GGB as debt and equity investors. This narrative is misguided. All Js's significant contributions to GGB give it a legitimate interest in the success of this CCAA proceeding and the optimization of creditor recoveries.

19. The Schottenstein family and All Js have made significant investments in the business and provided other value to GGB, including as follows:

(i) Trusts belonging to members of the Schottenstein family made considerable investments of equity in GGB;

(ii) All Jays, Delancey Financial LLC and LS Green Investments, LLC provided $30 million of $45.5 million of debt financing to GGB under the May Debentures;

(iii) All Js provided over $18 million of working capital financing to GGB pursuant to the Backstop Commitment;

(iv) All Js provided additional working capital under the USD$2.7 million All Js Bridge Note and two recent secured bridge notes in the aggregate amount of $800,000;

(v) All Js agreed to defer interest payments due under the May Debentures while other debenturehodlers, including Mr. Horvitz, received their interest payments;

(vi) All Js is providing DIP financing for this CCAA proceeding in the absence of any other available DIP lender.

Letter from W. Rostom to L. Brzezinski dated May 28, 2020, Affidavit of Janis Belvers, sworn May 28, 2020, Exhibit "1", Supplemental Responding Motion Record of Michael Horvitz, Tab 1

20. What is the extent of Mr. Horvitz' contribution to the go forward restructuring of GGB? He offers none.

21. Notably, the statutory duty of good faith in the CCAA was added by Parliament following committee submissions by Professors Janis Sarra and Ronald Davis. In an influential article, Professor Sarra observed that one reason to adopt an explicit duty of good faith was to deter the bad faith conduct of "creditors that have limited or no relational ties to the debtor company or to the communities in which the debtor operates". All Js is in the opposite of position of such actors.

Janis Sarra, "Requiring Nothing Less than Good Faith", *Annual Review of Insolvency Law*, 2014 ANNREVINSOLV 6, p. 2

C. Mr. Horvitz's Motion is a Tactical Abuse of Process

22. Mr. Horvitz holds a very small portion of GGB's outstanding debt - a single $5 million May Debenture.

Whitaker Affidavit, Exhibit "E", Application Record, Tab 2E

23. Mr. Horvitz is the only dissenting debentureholder (or stakeholder) in this proceeding. He has not proposed or even mentioned the existence of an alternative DIP loan or stalking horse bid to those offered by All Js. He has not explained what relief he may have or seek if he is granted the extraordinary discovery rights he requests, apart from a vague reference to the oppression remedy. The inescapable inference is that his

sole purpose in objecting to the SISP and the Stalking Horse Bid is to exert pressure on other stakeholders to payout his small debenture debt so that the CCAA proceeding, and the value preservation that it entails, are not imperilled or wasted by delays and professional fees.

> Horvitz Affidavit, para. 85, Horvitz Record, Tab B, p. 48
>
> Letter from L. Brzezinski to Stikeman Elliott LLP and McMillan LLP dated May 26, 2020, Exhibit "18" to the Horvitz Affidavit, Horvitz Record, Tab B-18, p.163
>
> Horvitz Factum, para. 81

24. The duty of good faith should operate to prevent Mr. Horvitz from delaying or obstructing this proceeding. His motion is precisely the type of tactical step that commentators have suggested might be overcome by the statutory duty of good faith. Posturing by frivolous claimants is often used to extract settlement with other stakeholder who are keen to avoid the depletion of estate resources. The curative powers of the Court under Section 18.6 of the CCAA should be used where creditors "hold hostage the collective gains to be made by other parties in order to create an individual gain by the party using the tactic".

> Jules Monteyne, "The New Duty of Good Faith and How it Applies to Insolvency Proceedings", *Annual Review of Insolvency Law*, (ed. Janis Sarra), 2019 ANNREVINSOL 16, p. 6 "The Late Entrant" and "The Smoke and Mirrors Priority"

D. There is No Bar to All Js Acting As DIP Lender and Stalking Horse Bidder

25. Mr. Horvitz's alleges that All Js is a related party to the Applicants through the Schottenstein family. This is both incorrect and a red herring. The Schottensteins and All Js do *not* control the Applicants.

26. Even if All Js were related to GGB, there is no bar to a related party acting as DIP lender in a CCAA proceeding or as stalking horse bidder in a sale process. Courts have permitted both.

> *Target Canada Co., Re*, CV-15-10832-00CL, Order of Regional Senior Justice Morawetz, dated January 15, 2015 (Online)
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> *PCAS Patient Care Automation Services Inc., Re*, 2012 ONSC 2423 at 3 (CanLII)
>
> *Futura Loyalty Group Inc., Re* at 2012 ONSC 5896 at 16 (CanLII)
>
> *iMarketing Solutions Group Inc., Re*, 2013 ONSC 2223 at 8 and 17 (CanLII)
>
> *Brainhunter Inc., Re,* [2009] 183 A.C.W.S. (3d) 905 at 11, 19-20 (CanLII)
>
> *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, s. 36(4) (CanLII)

27. Section 36(4) of the CCAA expressly contemplates related parties purchasing a debtor's assets in a Court-approved sale, and sets out special considerations that apply in such cases:

> **36(4)** If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that:
>
> > (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
> >
> > (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.
>
> *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, s. 36(4) (CanLII)

28. The SISP will achieve the requirements of Section 36(4). The purpose of the SISP is to canvass the market for the universe of potential buyers, which obviously includes non-related parties. The bidding process in the SISP was designed to obtain the best consideration for the disposition of GGB's assets. The Monitor supports the Stalking Horse Bid and the SISP and will oversee the process under this court's supervision. It can report to the Court as to whether sufficient efforts were made and consideration received as required by Section 36(4). There is no mischief resulting from All Js' roles as DIP lender and stalking horse bidder.

SISP, Motion Record of the Applicants returnable May 29, 2020, Tab 2E

Second Report of the Monitor dated May 31, 2020, para. 90

E. The Duty of Good Faith Does Not Require All Js to Disclose Irrelevant Information or Documents

29. The duty of good faith recently codified in Section 18.6(1) of the CCAA provides that "[a]ny interested person in any proceedings under this Act shall act in good faith *with respect to those proceedings*". Noting in this provision purports to affect the rights, interests or obligations of creditors as among themselves outside of the CCAA proceeding. In this sense, Section 18.6 is consistent with the principle articulated in *Stelco, Re* that the CCAA does not deal "with issues that would change the nature of the relationships as between the creditors themselves".

Companies' Creditors Arrangement Act, RSC 1985, c. C-36, s. 18.6 (CanLII) [Emphasis added]

All Js May 29 Factum, paras. 13-16

30. It would be dangerous to adopt an interpretation of Section 18.6 of the CCAA that is excessively burdensome or imprecise. This could bring uncertainty and "paralyze the efficient and expeditious administration of insolvency proceedings".

McElcheran, Kevin: *Commercial Insolvency in Canada* (3d), Section 4.621., p. 230

31. Commentators have noted the significant risk posed to the integrity of CCAA proceedings if the general duty of good faith is invoked tactically. Raj Sahni observes:

> Applications alleging bad faith could conceivably be launched out of **self-interest by participants clamoring for priority or seeking to discredit the claims of other creditors to maximize their own recoveries** or even by "social creditors" who do not have an economic interest in proceedings. **This may in turn lead to increased uncertainty and costs to the detriment of all participants** in an insolvency proceeding as a participant's intent and good faith (or lack thereof) becomes an issue to be considered by the courts in addition to the legal priorities of its claims.
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> [Emphasis added]

R. Sahni, "The New Duty of Good Faith in Canadian Insolvency Proceedings", *National Creditor Debtor Review*, Vol. 35, No. 1, March 2020

PART III - ORDER REQUESTED

32. For the foregoing reasons and the reasons set out in the May 29 Factum and during the May 29 Hearing, All Js respectfully supports the relief sought on the Applicants' motion.

33. For the foregoing reasons and the reasons set out in the May 29 Factum and during the May 29 Hearing, All Js respectfully supports the relief sought on the Applicants' motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st 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. *Jedfro Investments (USA) Ltd v. Jacyk Estate*, 2007 SCC 55

2. *Catalyst Capital Group Inc. v. Data & Audio-Visual Enterprises Wireless Inc.*, 2013 ONSC 2170

3. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60

4. Janis Sarra, "Requiring Nothing Less than Good Faith in Insolvency Law Proceedings", in Annual Review of Insolvency Law 2014 (Toronto: Carswell, 2015)

5. Jules Monteyne, "The New Duty of Good Faith and How it Applies to Insolvency Proceedings", *Annual Review of Insolvency Law*, (ed. Janis Sarra), 2019 ANNREVINSOL 16

6. *Target Canada Co., Re*, CV-15-10832-00CL, Order of Regional Senior Justice Morawetz, dated January 15, 2015

7. *PCAS Patient Care Automation Services Inc., Re*, 2012 ONSC 2423

8. *Futura Loyalty Group Inc., Re* at 2012 ONSC 5896

9. *iMarketing Solutions Group Inc., Re*, 2013 ONSC 2223

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

11. McElcheran, Kevin: *Commercial Insolvency in Canada* (3d)

12. R. Sahni, "The New Duty of Good Faith in Canadian Insolvency Proceedings", *National Creditor Debtor Review*, Vol. 35, No. 1, March 2020

SCHEDULE "B"
RELEVANT STATUTES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

18.6(1) Good faith

Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

18.6(2) Good faith — powers of court

If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

36(1) Restriction on disposition of business assets

A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

36(2) Notice to creditors

A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

36(3) Factors to be considered

In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor 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.

36(4) Additional factors — related persons

If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

36(5) Related persons

For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

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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(returnable June 1, 2020)

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