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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

Applicants

FACTUM OF THE APPLICANTS
(Re: Sale Approval)
(Returnable August 13, 2020)

August 11, 2020

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PART I - OVERVIEW

1. The Applicants are part of a corporate group (the "**GGB Group**") that is in the business of growing, processing and selling cannabis primarily in Nevada, Massachusetts and Florida. Green Growth Brands Inc. ("**GGB**") is the parent entity of the GGB Group.

2. On May 20, 2020, the Applicants sought and this Court issued the Initial Order granting the Applicants protection under the *Companies' Creditors Arrangement Act*.[1] Among other things, the Initial Order appointed Ernst & Young Inc. as Monitor of the Applicants, approved limited borrowing under the DIP Agreement, and granted certain charges over the Applicants' property.

3. On June 2, 2020, the Applicants sought and this Court issued the Amended and Restated Initial Order that, among other things, expanded the Applicants' restructuring abilities, increased their borrowing capabilities under the DIP Agreement, and extended the

[1] R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

Stay Period to August 15, 2020. Also on June 2, 2020, the Applicants sought and obtained the SISP Order that, among other things, approved the SISP and the Stalking Horse APA.

4. This factum is filed in support of a motion by the Applicants seeking:

(a) an order (the "**Approval and Vesting Order**"), substantially in the form of the draft order attached as Tab 3 of the Motion Record:

(i) approving the Transaction contemplated by the Stalking Horse APA, as amended and restated by the Amended and Restated Stalking Horse APA, between GGB and the Purchaser; and

(ii) vesting in Acquireco all of GGB's right, title and interest in and to all of the Purchased Assets; and

(b) An order (the "**Stay Extension Order**"), substantially in the form of the draft order attached as Tab 4 of the Motion Record:

(i) approving the DIP Amendment dated August 10, 2020; and

(ii) extending the Stay Period to December 18, 2020.

PART II - THE FACTS

5. The facts with respect to this motion are more fully set out in the Affidavit of Raymond C. Whitaker III sworn August 10, 2020 (the "**Sale Affidavit**"). Capitalized terms used in this factum but not otherwise defined have the meaning ascribed to them in the Sale Affidavit.

6. All references to currency in this factum are references to Canadian dollars, unless otherwise indicated.

A. UPDATE ON THE CCAA PROCEEDINGS

7. Since the granting of the Amended and Restated Initial Order and the SISP Order, the Applicants have primarily focused on carrying out the SISP with the assistance and oversight of the Monitor while continuing to maintain the stability of their business operations.

Sale Affidavit at para 10, Applicants' Motion Record, Tab 2.

i. Expiration of the Spring Oaks Forbearance Agreement

8. The Applicants' Multi-State Operator Business (the "**MSO Business**") was carried out in Florida through the Florida Subsidiaries. On May 13, 2020, GGB received the Florida Letter of Intent from an interested party setting forth a proposal for the potential acquisition of the shares and assets of GGB Florida, including the shares of Spring Oaks and the leases, licences and intellectual property held by GGB Florida LLC (the "**Florida Sale**").

Sale Affidavit at para 11, Applicants' Motion Record, Tab 2.

9. On May 19, 2020, GGB executed the Spring Oaks Forbearance Agreement, pursuant to which Green Ops, a party related to one of GGB's secured lenders, WMB Resources LLC, agreed to forbear from exercising its rights and remedies under the Spring Oaks Notes and security agreement until June 15, 2020 (the "**Forbearance Period**"), subject to certain conditions and the payment of a US$50,000 forbearance fee. In conjunction with the execution of the Spring Oaks Forbearance Agreement, the parties executed a Voluntary Surrender of Collateral in Satisfaction of Debt and Release Agreement (the "**VCSRA**") that became effective upon a breach of the Spring Oaks Forbearance Agreement or in the event that the Forbearance Period terminated other than in the case of the closing of the Florida Sale.

Sale Affidavit at para 12, Applicants' Motion Record, Tab 2.

10. As a result of the Florida Sale not proceeding, the Forbearance Period expired on June 15, 2020. On June 26, 2020, Green Ops delivered a Notice of Acceleration and Reservation of Rights to the Borrower Parties confirming the expiration of the Forbearance Period and confirming that Green Ops intended to enforce its rights under the VCSRA and enforce on the Surrendered Collateral. GGB understands that Green Ops intends to take enforcement steps with respect to the cannabis licence held by Spring Oaks, and has begun the process to obtain approval for the transfer of the cannabis licence from the State of Florida, which process is expected to take approximately four to six weeks.

Sale Affidavit at paras 14-15, Applicants' Motion Record, Tab 2.

ii. The Nevada License Litigation

11. NOR is currently participating in the Licence Litigation, brought by certain cannabis companies that were not granted provisional licences by the State of Nevada in December 2018, to challenge the method by which the Department of Taxation in Nevada (the "**DOT**") reviewed and awarded applications for provisional retail cannabis dispensary licences (the "**Provisional Licences**").

Sale Affidavit at paras 19-20, Applicants' Motion Record, Tab 2.

12. NOR received seven Provisional Licences pursuant to the application process in December 2018, but was prevented from receiving final approval pursuant to an August 2019 preliminary injunction issued in the Licence Litigation (the "**Preliminary Injunction**"). On July 29, 2020, NOR reached a partial settlement (the "**Settlement**") in the Licence Litigation. Under the terms of the Settlement, NOR and a number of the other successful applicants have agreed to assign certain Provisional Licences to certain of the unsuccessful

parties in exchange for, among other things, dismissal with prejudice of the relevant actions brought by the settling plaintiffs, removal of NOR and the other settling defendant-intervenors from the scope of the Preliminary Injunction, and expedited approval by the State of Nevada for any transfers of ownership required as part of the ongoing CCAA process.

Sale Affidavit at paras 21-22, Applicants' Motion Record, Tab 2.

13. On July 1, 2020, regulatory oversight of the cannabis industry in Nevada was transferred from the DOT to the Cannabis Compliance Board (the "**CCB**"). On August 7, 2020, the CCB approved the Settlement. The DOT filed a notice on August 11, 2020 to remove NOR from the scope of the Preliminary Injunction, which will allow NOR to expedite the opening of its Reno location, and will allow for the Company to continue to pursue the future opening of dispensary locations in the City of Las Vegas, the City of North Las Vegas, the City of Henderson, and Nye County.

Sale Affidavit at para 23, Applicants' Motion Record, Tab 2.

iii. Receivership of CBD Subsidiaries and Sale of CBD Business

14. The GGB Group's CBD Business was severely negatively impacted by the onset of the COVID-19 pandemic, and GGB was forced to indefinitely suspend its CBD Business on March 19, 2020. On May 3, 2020, the Ohio Court granted an order appointing A.C. Strip as the receiver of the CBD Subsidiaries' property and assets to distribute the assets of the CBD Subsidiaries and wind down their operations. On June 10, 2020, the Ohio Court granted an order approving the sale of 195 of the kiosks operated by the CBD Subsidiaries, associated inventory and certain intellectual property to the BRN Group, Inc. The sale closed on July 16, 2020. The proceeds of the sale will be distributed on a *pro rata* basis to the unsecured

creditors of the CBD Subsidiaries. The Applicants will not receive any recovery from the proceeds of sale.

Sale Affidavit at paras 17-18, Applicants' Motion Record, Tab 2.

B. THE SISP AND THE AMENDED AND RESTATED STALKING HORSE APA

15. The SISP was designed as a two-phase process to sell the Applicants' MSO Business, its business division that cultivates, processes, brands and sells THC-based cannabis products. To facilitate the SISP, GGB entered into the Stalking Horse APA on May 19, 2020 with the Purchaser. The terms of the Stalking Horse APA are summarized in the Sale Affidavit starting at paragraph 32. The Stalking Horse APA provides that the Purchaser will buy the Purchased Assets, which consist of all of the equity of GGB Canada and Xanthic Biopharma Limited, and all intercompany indebtedness owed by the GGB Acquired Entities to GGB. The Stalking Horse APA was intended to establish a baseline price and deal structure that could then be used to solicit superior bids from interested parties.

Sale Affidavit at paras 25-27 and 32, Applicants' Motion Record, Tab 2.

Third Report of the Monitor dated August 10, 2020 (the "**Third Report**") at paras 39-40.

i. Status of the SISP

16. The Applicants, with the assistance of the Monitor, began Phase I of the SISP forthwith following the issuance of the SISP Order. A notice was published in The Globe and Main (National Edition) and a press release was issued on Canada Newswire and major financial centres in the United States. The Applicants and the Monitor thoroughly canvassed the market and known universe of potential purchasers to generate interest in the MSO Business. The Monitor identified 258 potentially interested parties, 256 of which were

contacted by the Monitor. 191 of the potentially interested parties were sent Teasers and a draft NDA (the other contacted parties declined to participate or did not respond). 16 potentially interested parties returned markups of the draft NDA. Of these parties, 13 executed non-disclosure agreements with the Applicants to begin a due diligence process and potentially develop a bid for the Purchased Assets.

Sale Affidavit at paras 27-29, Applicants' Motion Record, Tab 2.

Third Report at paras 42-46.

17. The Phase I Bid Deadline was July 6, 2020. Only one interested party submitted a Qualified Non-Binding LOI. The Monitor, in consultation with the Applicants, determined that there was no reasonable prospect that the Qualified Non-Binding LOI could result in a Superior Offer. In accordance with the terms of the SISP, the Monitor recommended that the SISP be terminated. GGB issued a press release on July 22, 2020, announcing the termination of the SISP.

Sale Affidavit at paras 29-31, Applicants' Motion Record, Tab 2.

Third Report at paras 49-50.

ii. The Amended and Restated Stalking Horse APA

18. On August 10, 2020, GGB and the Purchaser entered into the Amended and Restated Stalking Horse APA. The Amended and Restated Stalking Horse APA incorporates certain minor revisions to the Stalking Horse APA, including:

(a) adding the Florida Subsidiaries to list of Excluded Subsidiaries;

(b) extending the deadline for the Purchaser to file any registrations or other documents as may be necessary to obtain any required orders and authorizations for the Cannabis Licenses or other transactions contemplated by the Amended and Restated Stalking Horse APA, from five days after the entry of the Approval and Vesting Order, to 30 days after the entry of the Approval and Vesting Order; and

(c) extending the Outside Date by which the Amended and Restated Stalking Horse APA can be terminated from 120 days from the date of the entry of the SISP Order (which occurred on June 2, 2020), to 120 days from the date of the entry of the Approval and Vesting Order.

Blackline comparing the Stalking Horse APA to the Amended and Restated Stalking Horse APA, Applicants' Motion Record, Tab 2 – Exhibit I.

Sale Affidavit at paras 33-34, Applicants' Motion Record, Tab 2.

Third Report at paras 52-57.

19. As a result of the termination of the SISP, the Applicants are now seeking approval of the Transaction contemplated by the Amended and Restated Stalking Horse APA.

20. The aggregate purchase price payable by the Purchaser to the Applicants is the total of the Credit Bid Amount, the Administration Amounts, and the dollar amount of the Assumed Liabilities (excluding the Administration Amounts), as those terms are defined in the Amended and Restated Stalking Horse APA. GGB and the Monitor estimate that the Purchase Price amounts to approximately US$106.4 million, for a transaction excluding the Florida Subsidiaries.

Amended and Restated Stalking Horse APA at s. 2.4, Applicants' Motion Record, Tab – Exhibit H.

Third Report at paras 53 and 58.

21. The Amended and Restated Stalking Horse APA contains customary conditions to closing, which remain outstanding, including the granting of the Approval and Vesting

Order substantially in the form requested and the transfer of the Cannabis Licenses, authorizations and/or exemptions required to be obtained in connection with consummation of the transactions shall have been obtained and be in full force and effect. In light of the approval of the Settlement of the Licence Litigation, it is expected that the transfer of the Cannabis Licenses can be completed in the next few months. The Outside Date in the Amended and Restated Stalking Horse APA has been extended accordingly.

> Amended and Restated Stalking Horse APA at art 5, Applicants' Motion Record, Tab – Exhibit H.
>
> Sale Affidavit at para 35, Applicants' Motion Record, Tab 2.

22. The Closing Date is anticipated to be two days following the day on which the last of the closing conditions in the Amended and Restated Stalking Horse APA are satisfied or waived, other than those conditions which by their nature can only be satisfied as of the Closing Date.

> Sale Affidavit at para 36, Applicants' Motion Record, Tab 2.

PART III - ISSUES

23. The issues before this Court, as addressed below, are whether:

    (a) the Approval and Vesting Order should be granted;

    (b) the DIP Amendment should be approved; and

    (c) the Stay Period should be extended.

PART IV - THE LAW

A. THE APPROVAL AND VESTING ORDER SHOULD BE GRANTED

24. Section 36 of the CCAA sets out the applicable legal test for obtaining court approval where a debtor company seeks to sell assets outside the ordinary course of business during a CCAA proceeding. In particular, s. 36(3) outlines certain factors that the Court may consider when deciding whether to approve a sale:

> **Factors to be considered**
>
> **36 (3)** 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.
>
> CCAA, s. 36(3).

25. The factors enumerated in s. 36(3) are not intended to be exhaustive, nor are they intended to be a checklist that must be followed in every CCAA sale transaction.

> *Re Target Canada Co*, 2015 ONSC 1487 at para 16 [***Target***].

26. Courts have noted that the s. 36(3) criteria largely corresponds with the principles articulated in *Soundair* for the approval of the sale of assets in an insolvency scenario, those being:

(a) whether sufficient effort has been made to obtain the best price and that 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 the working out of the process.

Target, *supra* (CanLII) at paras 14-17.

Royal Bank v Soundair Corp, 1991 CanLII 2727 (ONCA) [***Soundair***].

27. CCAA courts have previously noted in the context of approving a sale transaction that the informed business judgement of a debtor and the opinion of the monitor are entitled to deference.

Target, *supra* (CanLII) at para 18.

28. If the Court approves a sale, then it may issue a vesting order that disposes of assets free and clear of any security, charge or other restriction.

CCAA, s. 36(6).

29. For the reasons that follow, the Transaction satisfies each of the factors set out in s. 36(3) of the CCAA and the *Soundair* principles:

(a) **The sale process was reasonable**: The sale process was carried out by the Applicants, under the oversight of the Monitor and under the ultimate oversight and supervision of this Court, as contemplated by the SISP. Ample notice of the Applicants' efforts to sell the MSO Business was provided to potential bidders, as demonstrated by the Monitor reaching out to 258 potentially interested parties during the course of the SISP. The Monitor has filed its Third Report stating that the SISP was fair and reasonable to all who participated in it, included extensive marketing of GGB's business and assets, and constituted good faith efforts to seek the highest and best offer for the business and assets;

(b) **The purchase price payable is fair and reasonable**: The SISP did not generate any offers that were superior to the Stalking Horse APA, making the Stalking Horse APA, with the minor revisions contemplated by the Amended and Restated Stalking Horse APA, the best offer that the Applicants have received;

(c) **The Monitor approves of the Transaction**: The Monitor states in the Third Report that there is no reasonable prospect of a Qualified Non-Binding LOI resulting in an offer superior to the Amended and Restated Stalking Horse Agreement. The Third Report further states that any liquidation of the Applicants' assets outside of a going concern sale would likely result in no or minimal recovery to the Applicants, such that the Monitor is of the view that the transaction contemplated by the Amended Stalking Horse APA is more beneficial to the Applicants' secured creditors and neutral to the Applicants' unsecured creditors than any other alternative, including a bankruptcy;

(d) **The majority of the Applicants' secured creditors supported the SISP**: The majority of the holders of GGB's secured debt supported the Stalking Horse APA and the SISP at the time of its approval; and

(e) **The Transaction benefits the whole economic community**: The Transaction has the potential to maintain the Applicants' MSO Business as a going concern.

Sale Affidavit at paras 25-31, Applicants' Motion Record, Tab 2.

First Report of the Monitor dated May 26, 2020 at paras 63 and 65.

Third Report at paras 41-50 and 75-79.

30. For the reasons above, the Applicants are of the view that the Transaction represents the best option under the circumstances to maximize value for the Applicants' stakeholders.

B. THE DIP AMENDMENT SHOULD BE APPROVED

31. In connection with their request to extend the Stay Period to December 18, 2020, the Applicants and their counsel, in consultation with the Monitor, negotiated the DIP Amendment, which is expected to provide the Applicants with sufficient liquidity to pay for obligations incurred and scheduled to be paid through to the requested extension of the Stay Period. The DIP Amendment increases the DIP Facility to a maximum amount of US$7.8 million, and extends the maturity date of the DIP Facility to December 31, 2020. Advances under the DIP Amendment will have the benefit of the DIP Lender's Charge set out in the Amended and Restated Initial Order, which DIP Lender's Charge will be increased to a maximum of US$7.8 million.

Sale Affidavit at paras 37-38, Applicants' Motion Record, Tab 2.

32. As was submitted in the Applicants' factum in connection with the Initial Order, this Court has the jurisdiction to authorize funding in the context of a CCAA restructuring pursuant to s. 11.2(1) and 11.2(2) of the CCAA. In considering whether to approve DIP financing, the Court is to consider the non-exhaustive list of factors set out in s. 11.2(4) of the

CCAA. These same provisions of the CCAA provide this Court with the authority to approve amendments to a DIP agreement and secure all obligations arising from the amended DIP loans with an increased DIP charge.

> CCAA, s. 11.2(1), 11.2(2) and 11.2(4).
>
> *Lydian International Limited (Re)*, 2020 ONSC 4006 (CanLII) at paras 65 to 68 [***Lydian***].

33. In *Lydian*, Morawetz C.J. approved an amended DIP agreement that was intended to provide the debtors with adequate financing to implement their CCAA plan of arrangement. All obligations arising from the amended DIP facility were secured by the DIP charge. In approving that amended DIP agreement, Morawetz C.J. noted that:

(a) the DIP amendment was necessary to enable the debtors to implement their plan;

(b) the Monitor was supportive of the DIP amendment;

(c) the DIP amendment was not anticipated to give rise to any material financial prejudice; and

(d) the DIP lenders were the majority of the debtors' existing senior secured lenders.

> *Lydian*, *supra* (CanLII) at para 67.

34. Based on the following factors, the DIP Amendment and the increase to the DIP Lender's Charge in the present matter should be approved:

(a) the DIP Amendment is necessary to enable the Applicants to implement the Transaction;

(b) the Monitor is supportive of the DIP Amendment;

(c) the DIP Amendment is not anticipated to give rise to any material financial prejudice; and

(d) the DIP lender is All Js, one of GGB's existing secured lenders and one of the parties to the Amended and Restated Stalking Horse APA.

Sale Affidavit at paras 37-38, Applicants' Motion Record, Tab 2.

Third Report at paras 73-74 and 82.

C. THE STAY PERIOD SHOULD BE EXTENDED

35. The Stay Period expires on August 15, 2020. Pursuant to s. 11.02 of the CCAA, the Court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the Court that it has acted, and is acting, in good faith and with due diligence.

CCAA, s. 11.02(2) and (3).

36. The Applicants are seeking to extend the Stay Period to and including December 18, 2020. This will provide the Applicants with stability and allow them to take the necessary steps to close the Transaction contemplated by the Amended and Restated Stalking Horse APA.

Sale Affidavit at para 40, Applicants' Motion Record, Tab 2.

37. No creditors are expected to suffer material prejudice as a result of the extension of the Stay Period. The Applicants are acting in good faith and with due diligence in pursuing their restructuring strategy and will continue to do so during the proposed extension of the Stay Period through to December 18, 2020.

Sale Affidavit at para 41, Applicants' Motion Record, Tab 2.

Third Report at para 81.

38. The Monitor has filed the Third Report confirming that, subject to this Court approving the DIP Amendment, the Applicants should have access to sufficient liquidity to continue current operations and close the Transaction during the extension of the Stay Period.

Third Report at para 82.

Sale Affidavit at para 41, Applicants' Motion Record, Tab 2.

39. The Monitor supports extending the Stay Period to and including December 18, 2020.

Third Report at paras 80-82.

40. For the reasons described above, the Stay Period should be extended to and including December 18, 2020.

PART V - ORDER SOUGHT

41. For the foregoing reasons, the Applicants respectfully request that this Court grant the Approval and Vesting Order substantially in the form of the draft order attached at Tab 3 to the Applicants' motion record, and the Stay Extension Order substantially in the form of the draft order attached at Tab 4 to the Applicants' motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of August, 2020.

Stikeman Elliott LLP

Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Re Target Canada Co*, 2015 ONSC 1487

2. *Royal Bank v Soundair Corp*, 1991 CanLII 2727 (ONCA)

3. *Lydian International Limited (Re)*, 2020 ONSC 4006 (CanLII)

SCHEDULE "B"
RELEVANT STATUTES

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36**

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[…]

Stays, etc. — other than initial application

11.02 (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.

[...]

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

11.2 (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

11.2 (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

11.2 (4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

11.2 (5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[…]

Restriction on disposition of business assets

36 (1) 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.

Notice to creditors

36 (2) 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.

Factors to be considered

36 (3) 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.

Additional factors — related persons

(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.

Related persons

(5) 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).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

NOTICE OF MOTION
(Re: Sale Approval)

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