Court File No.: CV-19-00632052-00CL

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 **AGMEDICA BIOSCIENCE INC. 2472602 ONTARIO INC., 2642466 ONTARIO INC., 8895309 CANADA INC., WELLWORTH HEALTH CORP., 8050678 CANADA INC., 8326851 CANADA INC., TAVIVAT NATURALS INC., WORLD WIDE BEVERAGE INNOVATIONS INC., and UNIQUE BEVERAGES (USA) INC., and ESEELA INC.**
(each an **"Applicant"** and collectively, the **"Applicants"**)

Applicants

FACTUM OF THE APPLICANTS

July 31, 2020

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PART I - OVERVIEW

1. The Applicants bring a motion for:

   (a) an Order (the "**Meeting Order**"):

      (i) accepting the filing of the Applicants' proposed Plan of Compromise and Arrangement dated July 29, 2020 (the "**Plan**");

      (ii) authorizing the Applicants to establish a single class of Affected Creditors for the purposes of considering and voting on the Plan;

      (iii) authorizing the Applicants to call, hold, and conduct a virtual meeting of the Affected Creditors (the "**Meeting**"), due to the COVID-19 pandemic, to consider and vote on a resolution to approve the Plan;

(iv) approving the procedures to be followed in connection with the Meeting; and

(v) setting the date for the hearing of the Applicants' motion seeking this Court's approval of the Plan in the event that the Plan is approved by the required majority of Affected Creditors at the Meeting;

(b) an Order (the "**Late Claims Order**") authorizing the Applicants and the Monitor to accept 10 late Pre-Filing Claims in the aggregate amount of $349,781.88 (collectively, the "**Late Claims**"); and

(c) an Order (the "**Sealing Order**") sealing Confidential Exhibit "B" to the Affidavit of Trevor Henry sworn July 29, 2020 (the "**Henry Affidavit**") until further Order of this Court.

PART II – FACTS

2. The relevant facts in connection with this factum are set out in the Henry Affidavit. All of the facts referenced in the following section are pinpointed to the relevant paragraphs of same. All capitalized terms not defined herein have the meanings given to them in the Henry Affidavit.

PART III – LAW & ANALYSIS

3. This factum addresses the following issues:

(a) whether the Plan should be accepted for filing and the Meeting be authorized to proceed;

(b) whether the proposed classification of Affected Creditors as a single class is appropriate;

(c) whether the Late Claims should be accepted; and

(d) whether this Court should grant the Sealing Order.

A. The Plan Should be Accepted for Filing and the Meeting Should be Authorized

4. If approved, sanctioned and implemented, the Plan will effect a compromise, settlement, and payment of all Affected Claims, and will complete the restructuring and capitalization of the Applicants. Unaffected Claims will be addressed and satisfied in full in accordance with the applicable agreements set out in the Plan.[1]

5. The Plan's implementation will permit the Applicants to exit these CCAA Proceedings and to continue operating their business as a going concern. It is anticipated that the Affected Creditors will derive a greater economic benefit from the implementation of the Plan than they would derive from a bankruptcy or liquidation of the Applicants.[2]

[1] Henry Affidavit, at paras 26 and 46.

[2] *Ibid* at para 27.

6. The Plan proposes payment in full of Affected Creditors with Proven Claims of $1,000 or less, and offers the following three options to Affected Creditors with Proven Claims exceeding $1,000 in full and final satisfaction of their Proven Claims (each option as more particularly described in the Henry Affidavit): (a) payment of $1,000; (b) a conversion of their Proven Claims into a *pro rata* share of 5,000,000 Class B Preferred Shares of AgMedica with certain dividend entitlements; and (c) a conversion of their Proven Claims into a *pro rata* share of a certain amount of new Common Shares to be issued pursuant to the Plan.[3]

7. The Plan is conditional upon, among other things, approval of the Required Majority of Affected Creditors, the granting of an Order of this Court sanctioning the Plan at a subsequent Plan Sanction Hearing and any and all required government approvals, all as more particularly set out at paragraph 52 of the Henry Affidavit.

8. The Plan as well as the liquidation alternative if the Plan is rejected will each be described in more detail in the Eighth Report of the Monitor, to be filed. The Monitor supports the Plan and believes it is in the best interests of the Applicants and the Affected Creditors.[4]

9. The Meeting Order provides that the Meeting of Affected Creditors will take place at 11:00am on August 25, 2020, to be held via video conference. The notification and voting procedures in respect of such Meeting are more particularly set out at paragraphs 56 through 59 of the Henry Affidavit and in the Eighth Report of the Monitor. The Meeting

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[3] *Ibid* at paras 32-44.

[4] *Ibid at para 28.*

will provide the Affected Creditors with an opportunity to ask questions, seek clarification and, ultimately, vote in respect of the Plan.

10. The CCAA provides that this Court may order a meeting of creditors, or class of creditors, to vote on a compromise or an arrangement.[5]

11. The Court is not required to address the fairness and reasonableness of the Plan at this stage in these CCAA proceedings. These issues are to be considered at the Sanction Hearing, only after the Plan has been approved by the Required Majority of the Affected Creditors at the Meeting.[6]

12. The Applicants submit that the Affected Creditors should be provided with the opportunity to consider and to vote upon the proposed Plan at the Meeting, in order to move these CCAA Proceedings towards a timely conclusion. The filing of the Plan creates an opportunity to efficiently resolve any remaining matters in these proceedings and creates no apparent prejudice to any Affected Creditors.

13. The Plan does not contain any provisions that would render it incapable of being approved by the creditors and implemented, if approved by the Court.

14. The provisions of the Meeting Order governing the noticing, calling and conduct of the meetings are reasonable and appropriate in the circumstances.

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[5] *Companies' Creditors Arrangement Act*, RSC 1985, c. C-26, section 4.

[6] *ScoZinc Ltd., Re*, 2009 NSSC 163, at paras 4-7; *Jaguar Mining Inc., Re*, 2014 ONSC 494, at para. 48.

B. The Proposed Classification of Creditors for Voting Purposes is Appropriate

15. All of the Applicants' creditors are either affected or unaffected by the Plan. The Plan provides for a single class of Affected Creditors, which class consists of all of the Applicants' creditors save and except for those creditors with Unaffected Claims. The claims constituting Unaffected Claims are more particularly described and set out at paragraph 29 of the Henry Affidavit. Such Unaffected Claims include, among other claims, all secured claims, all insured claims and all post-filing claims. The Affected Creditors class consists primarily of Creditors with proven general unsecured claims.[7]

16. Section 22(1) of the CCAA provides that:

> A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

17. Section 22(2) of the CCAA further provides that, for the purposes of Section 22(1), creditors with a "commonality of interest" may be included in the same class.

18. The factors to be considered in determining whether creditors have a "commonality of interest" are listed in Section 22(2) of the CCAA and are as follows:

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

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[7] Henry Affidavit at paras 29-30.

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c) that are prescribed.

19. Creditors must be classified with the underlying purpose of the CCAA in mind, which is to facilitate successful restructurings. A fragmentation of classes that would render it excessively difficult to obtain approval of a CCAA plan would be contrary to the purpose of the CCAA and ought to be avoided.[8]

20. The Affected Creditors class consists of unsecured creditors with proven unsecured claims. The commonality in the nature of the debts owed to these parties, the absence of security and the legal remedies available to these parties as unsecured creditors leads to the clear conclusion that these creditors should be classified as proposed in the Meeting Order. Any further stratification of the Affected Creditors would unnecessarily complicate any contemplated next steps.

C. The Late Claims Should be Accepted

21. The leading authority on the admission of late claims in the CCAA context is the Alberta Court of Appeal's decision in *Blue Range Resources.*[9] In that case, the Alberta Court of

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[8] *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, (1988), 72 C.B.R. (N.S.) 20 at para. 26.

[9] *Blue Range Resource Corp., Re*, 2000 ABCA 285.

Appeal cited the following four factors to be considered in determining whether a late claim should be admitted:[10]

(a) Was the delay caused by inadvertence and, if so, did the claimant act in good faith? For greater certainty, the Court specified that "inadvertence" includes carelessness, negligence, accident, and unintentionality.

(b) What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay? The timing of a late claim in a given proceeding is a key element in determining whether any prejudice will be suffered by either the debtor or other creditors if the late claim is admitted.

(c) If the relevant prejudice is found, can it be alleviated by appropriate conditions to an order permitting the late filing?

(d) If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

22. The Late Claims have satisfied the foregoing test and should be admitted for the following reasons:

(a) The Late Claims were the result of honest inadvertence. The Late Claims were all either submitted: (i) within one month after the Pre-Filing Claims Bar Date; or (ii) immediately following receipt by the Late Claimants of new material information,

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[10] *Ibid* at paras 26-27.

which information confirmed and substantiated the existence of such Late Claims; and

(b) The Late Claims consist of 10 pre-filing claims in the aggregate amount of $349,781.88, which represents approximately 1% of all Proven Claims and approximately 0.05% of all Claims that were filed in connection with the Claims Procedure. Given the small aggregate quantum of the Late Claims, and the nature and timing in which they arose, there is no "relevant prejudice" to the Applicants, the Affected Creditors, or any other stakeholders of the Applicants in admitting the Late Claims. Further, admitting the Late Claims provides the most efficient and convenient means to address the Late Claims, and does not hinder the timing of the Meeting in any way.

D. The Sealing Order Should Be Granted

23. The Applicants are seeking a sealing order with respect to Confidential Exhibit "B" of the Henry Affidavit.

24. Pursuant to section 137(2) of the *Courts of Justice Act* (Ontario), this Court has the jurisdiction and the discretion to order that any document filed in a civil proceeding be treated as "confidential, sealed and not form part of the public record."[11]

25. In *Sierra Club of Canada v. Canada (Minister of Finance)*, Justice Iacobucci held that a sealing order should only be granted when:[12]

[11] *Courts of Justice Act*, R.S.O. 1990, c C.43, section 137(2); see also: *Target Canada Corp (Re)*, 2015 ONSC 1487 at paras 28-30.
[12] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para 53.

(a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

26. Confidential Exhibit "B" to the Henry Affidavit contains the identities of the Equity Subscribers, which is commercially sensitive and personal information, the disclosure of which could adversely impact the Applicants, their stakeholders, and the Equity Subscribers. Revealing the Equity Subscribers' identities may jeopardize the Offering, which is a condition precedent to the Plan and the successful implementation of the restructuring.

27. No stakeholders will be materially prejudiced by sealing Confidential Exhibit "B" to the Henry Affidavit until further Order of the Court. The salutary effects of granting the Sealing Order outweigh any deleterious effects. The Monitor supports the Sealing Order.[13]

[13] Henry Affidavit at paras 69-72.

PART IV – RELIEF REQUESTED

28. For all of the foregoing reasons, the Applicants request that this Honourable Court grant the Orders, substantially in the form of the draft Orders located at Tabs 3 & 4 of its Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of July, 2020.

July 31, 2020

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *ScoZinc Ltd., Re*, 2009 NSSC 163

2. *Jaguar Mining Inc., Re*, 2014 ONSC 494

3. *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.,* (1988), 72 C.B.R. (N.S.) 20

4. *Blue Range Resources Corp., Re*, 2000 ABCA 285.

5. *Target Canada Corp (Re)*, 2015 ONSC 1487

6. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41

SCHEDULE "B"
RELEVANT STATUTES

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

Section 4: Compromise with unsecured creditors

Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Section 22: Classes of Creditors

Company may establish classes

22 (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

Class — creditors having equity claims

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

Courts of Justice Act, R.S.O. 1990, c. C.43

Section 137(2): Sealing documents

A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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