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., WORLDWIDE BEVERAGE INNOVATIONS INC., UNIQUE BEVERAGES (USA) INC., and ESEELA INC.**
(each an **"Applicant"** and collectively, the **"Applicants"**)

Applicants

AMENDED NOTICE OF MOTION
(Philipp Late Payment Interest Claim)

The Applicants will make a motion to a Judge presiding over the Commercial List on Thursday, September 10, 2020 at 11:00 a.m. (EST), to be heard by Zoom judicial video conference due to the COVID-19 pandemic.

PROPOSED METHOD OF HEARING:

This motion is to be heard orally.

THIS MOTION IS FOR:

1. An Order, among other things:

   (a) declaring that the revised value of the Pre-Filing Claim (the "**Philipp Claim**") of Kathleen Glynn Philipp ("**Philipp**") against AgMedica Bioscience Inc. ("**AgMedica**") and 2472602 Ontario Inc. ("**247**") is CAD $4,073,579 ~~$4,077,027~~, which claim is comprised of a Secured Claim in the amount of CAD $3,834,865 ~~$3,841,477~~ and an unsecured Claim of CAD $238,714 ~~$235,550~~;

(b) declaring that the initial order issued on December 2, 2019 (as amended, the "**Initial Order**") and the application of the interest stops rule prohibited the Applicants from making any payments to Philipp on account of interest after December 2, 2019 (the "**Filing Date**");

(c) declaring that the payments of CAD $700,826 and CAD ~~$423,239~~ $429,850 made by AgMedica to Philipp (described herein) shall be accounted as partial payments on the Secured Claim portion of Philipp's initial Pre-Filing Claim; and

(d) authorizing and directing the Applicants to make no further payments to Philipp on account of interest after the Filing Date;

2. In the alternative, an Order, among other things:

(a) declaring that the value and status of the Pre-Filing Claim of Philipp is as set out in the Notice of Revision and Disallowance issued by the Monitor (defined below) dated April 14, 2020 (the "**NORD**"); and

(b) declaring that the Default Interest Clause (defined below) in the Loan Agreement (defined below) violates section 8 of the *Interest Act* (Canada) and is unenforceable against AgMedica, 2477602 or the Individual Guarantors (defined below);

3. An order granting the Applicants their costs of this motion on a substantial indemnity basis; and

4. Such further and other relief as this Court deems just.

THE GROUNDS FOR THIS MOTION ARE:

Capitalized Terms

1. All capitalized terms not expressly defined herein have the meanings ascribed to them in the Claims Procedure Order granted by Mr. Justice McEwen dated February 4, 2020 (the "**Claims Procedure Order**").

Background of the Proceedings

2. The Applicants obtained the Initial Order on December 2, 2019 pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**"). The Initial Order, among other things, appointed Ernst & Young Inc. to act as the Court-appointed monitor of the Applicants (in such capacity, the "**Monitor**").

3. On January 3, 2020, the Applicants obtained an Order approving a sale and investment solicitation process (the "**SISP**"), whereby the Applicants sought to find either a purchaser of the business or an investor to recapitalize the Applicants.

4. On February 4, 2020, the Applicants obtained the Claims Procedure Order setting out the process by which creditor claims would be submitted, reviewed and adjudicated. Paragraph 33 of the Claims Procedure Order set out the applicable process if a claim was disputed:

> **THIS COURT ORDERS** that in the event that the Applicants and the Monitor are unable to resolve a dispute with a Claimant regarding any Pre-Filing Claim or Restructuring Claim, such Claim shall be adjudicated by the Court or by a claims officer to be appointed by the Court if considered appropriate by the Monitor at that time.

The Philipp Loan

5. Pursuant to the Loan Agreement, Philipp provided AgMedica with a credit facility in the principal amount of US$3,816,000 (the "**Loan**") which was fully advanced to AgMedica. The Loan Agreement provided that the Loan would mature on January 23, 2020 and AgMedica was required to repay all principal, accrued interest, fees and other unpaid amounts on that date.

6. The Loan was guaranteed by 247 pursuant to a guarantee dated October 23, 2019 (the "**Guarantee**"). The Loan was also guaranteed by certain individual guarantors (the "**Individual Guarantors**"). The Loan was secured by, among other things:

   (a) a general security agreement from AgMedica granting a first-priority security interest in all present and after-acquired personal property of AgMedica; and

   (b) a second mortgage on a property owned by 247 located at 1095 Wilton Grove Road, London, Ontario (the "**London Property**").

7. The Loan Agreement provided that the Loan would bear interest at 24% per annum (the "**Regular Rate**") payable monthly in arrears on the last day of each month. The Loan Agreement contained the following clause (the "**Default Interest Clause**") which escalates the interest rate to 60% per annum (the "**Default Rate**") on overdue amounts:

> Interest on overdue amounts payable by the Borrower to the Lender hereunder shall accrue at an interest rate equal to 60% per annum until repaid (the "Late Payment Rate") calculated daily, before and after demand, default, maturity and judgment.

8. The Guarantee provided that the interest payable by the Guarantor would be as set out in the Loan Agreement.

Philipp's Claim is Disallowed in Part

9. Philipp submitted a proof of claim dated March 16, 2020 (the "**Proof of Claim**") in accordance with the Claims Procedure Order. In the Proof of Claim, Philipp asserted a secured Pre-Filing Claim in the amount of US$4,072,728.64 (approximately CAD$5,415,507.27). Philipp claimed interest on the Loan at the Regular Rate to January 23, 2020 and interest at the Default Rate thereafter.

10. The Monitor delivered the NORD to Philipp dated April 14, 2020 in accordance with the Claims Procedure Order, which accepted Philipp's claim, including interest at the Regular Rate after the Filing Date, except for the portion attributable to the difference between the Default Rate and the Regular Rate after January 23, 2020. Based on the status of the SISP at that time, the Applicants and the Monitor believed that the Secured Claims were fully secured by their collateral.

11. Philipp delivered a Notice of Dispute dated April 28, 2020 in accordance with the Claims Procedure Order, disputing the disallowance of her claim to interest at the Default Rate after January 23, 2020.

Events following the NORD and the Notice of Dispute

12. The SISP suffered as a result of COVID-19, and ultimately, on June 19, 2020, the Applicants, in consultation with the Monitor, terminated the SISP. The Court approved this termination on June 26, 2020.

13. Following the termination of the SISP, the Applicants, in consultation with and with support of the Monitor, sought an alternative recapitalization transaction. This

recapitalization transaction has been presented as a plan of compromise and arrangement (the "**Plan**"). As described below, as part of its analysis of the Plan, the Monitor undertook a liquidation analysis of the Applicants.

14. On August 4, 2020, the Court granted a meeting order (the "**Meeting Order**"), among other things, (i) accepting the Plan for filing, and (ii) authorizing the Applicants to call a meeting of their creditors for the purpose of considering and voting on the Plan (the "**Meeting**"). The Meeting was held on August 25, 2020 at 11:00 a.m. The Plan was approved by the Requisite Majority of Affected Creditors (as each term is defined in the Plan) at the Meeting.

15. The Court scheduled a hearing for September 1, 2020 at 12:00 p.m. (the "**Sanction Hearing**") to hear a motion by the Applicants to sanction the Plan. The Sanction Hearing was adjourned to allow for the hearing of this motion as the Equity Subscribers and the Exit Financier require the adjudication of this issue to be resolved to their satisfaction to close on the funding for the Plan.

16. Subject to receiving the approval of the Court, the Applicants intend to implement the Plan as soon as possible after the Sanction Hearing.

Amount Owing Under the Loan

17. As of the Filing Date, the following would have been the principal and interest owing to Philipp under the Loan:

	Amount (CAD)[1]
Principal	$5,074,135
Interest[2] (~~Nov~~ Oct. 23-Dec. 1, 2019)	~~$126,956~~ $130,120
Total	**~~$5,201,091~~ $5,204,255**

18. After the Filing Date, the Applicants paid the interest that had accrued under the Loan prior to the Filing Date to Philipp in the amount of USD $97,857 (CAD ~~$126,956~~ $130,120). The Applicants also paid interest for the months of December 2019, and January and February 2020 at the Regular Rate in the amount of USD $225,412 (CAD ~~$296,283~~ $299,730). The total payments on account of interest paid to Philipp during the CCAA proceeding was CAD ~~$423,239~~ $429,850.

19. With the uncertainty of the extensive impact of COVID-19 and the uncertainty of the SISP, the Applicants notified Philipp in March 2020 that payment of interest under the Loan would be deferred until further notice. AgMedica has not made any further payments of interest under the Loan.

20. The Applicants entered into an agreement of purchase and sale with respect to the London Property dated December 2, 2019, as amended by an amendment dated March 6, 2020, which was approved by the Court on March 9, 2020 and closed on May 29, 2020. On closing, CAD $700,826 was distributed to Philipp on account of her second-ranking collateral mortgage.

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[1] The Loan is denominated in USD. The USD amounts have been converted to CAD using the Bank of Canada's average daily exchange rate for December 2, 2019 of $1.00 USD = $1.3297 CAD and rounded to the nearest dollar.

[2] Interest on the Principal amount during this period accrued at a rate of 24 percent per annum.

Value of Collateral Secured by the Loan

21. Subject to the charges granted in the Initial Order, as of the Filing Date, Philipp was the first secured creditor on the personal property of AgMedica and held a second collateral mortgage on the London Property.

22. In connection with the Applicants' motion for the Meeting Order, the Monitor performed an illustrative analysis of a hypothetical liquidation of the assets of the Applicants and the anticipated recovery to creditors in that scenario (the "**Liquidation Analysis**"). The Monitor estimated in the Liquidation Analysis that the personal property of AgMedica would have a net liquidation value ranging from $2,498,811 to $4,264,716 (the "**Estimated Liquidation Range**").

23. The value of Philipp's security over the London Property is $700,826 being the amount that was actually distributed to Philipp on account of the sale of the London Property.

24. The following is a comparison of the amount owing under the Loan and the value of the security held by Philipp at the Low Realization Estimate and the High Realization Estimate (each as defined in the Eighth Report), each as of the Filing Date:

	Low Realization Estimate (CAD)	**High Realization Estimate (CAD)**
Amount Owing at the Filing Date **(A)**	~~$5,201,091~~ $5,204,255	~~$5,201,091~~ $5,204,255
Value of Security – Personal Property of AgMedica	$2,498,811	$4,264,716

Value of Security – London Property	$700,826	$700,826
Value of Security – Total **(B)**	$3,199,637	$4,965,541
Deficiency in Security (A – B)	**~~$2,001,454~~ $2,004,618**	**~~$235,550~~ $238,714**

25. Accordingly, as of the Filing Date, the amount owing to Philipp under the Loan exceeded the value of the security over the property of the Applicants held by Philipp, regardless of whether the low or high end of the Estimated Liquidation Range is used.

Interest Stops Rule

26. Interest on secured claims continues to accrue upon the commencement of proceedings under the CCAA or the *Bankruptcy and Insolvency Act* (Canada) and is a secured claim up to the value of the security held by the secured creditor. If the indebtedness of the debtor company to the secured creditor exceeds the value of the security held by the secured creditor as of the date proceedings are commenced, the interest stops rule applies to prohibit the accrual of further interest by the creditor (as there is no collateral for the interest to attach to such that the interest could be a secured claim).

27. As the amount owing to Philipp under the Loan exceeded the value of the security held by Philipp against the Applicants as of the Filing Date, no further interest accrued under the Loan after the Filing Date.

28. At all times after the Filing Date, the payments made to Philipp should be characterized as repayments of principal and reduction of the Secured Claim portion of the Philipp Claim. The following chart indicates the Applicants' accounting of the Philipp Claim (secured vs

unsecured) using the high realization estimate for the AgMedica assets and the application of the payments made to Philipp, which calculations are supported by the Monitor:

	Secured Claim	**Unsecured Claim**
Filing Date	$4,965,541	~~$235,500~~ $238,714
Partial Payments – Recharacterized Interest Payments	~~($423,239)~~ ($429,850)	$0
Partial Payment – London Property	($700,826)	0
Total Current Claim Amount	**~~$3,841,477~~ $3,834,865**	**~~$235,550~~ $238,714**

29. Accordingly, using the high realization estimate, the Philipp Claim should be revised and valued at CAD ~~$4,077,027~~ $4,073,579, which amount is comprised of a Secured Claim of CAD ~~$3,841,477~~ $3,834,865 and an unsecured Claim of CAD ~~$235,550~~ $238,714.

Alternatively, Interest at the Default Rate Should Be Disallowed

30. Pursuant to paragraph 33 of the Claims Procedure Order, the Applicants submit the dispute with Philipp regarding the legality of charging interest at the Default Rate following January 23, 2020 to the Court for adjudication.

31. Section 8 of the *Interest Act* (Canada) provides as follows:

> **No fine, etc., allowed on payments in arrears**
>
> **8 (1)** No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

> **Interest on arrears**
>
> **(2)** Nothing in this section has the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrears.

32. The Default Interest Clause in the Loan Agreement provides that interest is escalated from 24% to 60% on amounts in arrears. If the Default Interest Clause applies, an additional amount of CAD $1,200,118 in interest would have accrued on the Loan from January 23, 2020 to September 1, 2020.

33. The Default Interest Clause is incorporated into the Guarantee by reference. The Loan was secured against the London Property. Accordingly, section 8 of the *Interest Act* (Canada) renders the Default Interest Clause of no force or effect and the Default Rate does not apply to the Loan.

34. Instead, the Regular Rate of 24% per annum under the Loan Agreement applies to all indebtedness owed to Philipp in connection with the Loan, subject to the application of the interest stops rule, noted above.

35. In the alternative, it would be inequitable to permit Philipp to enforce the Default Rate. Permitting Philipp, who advanced the Loan with a two-month term at an already-generous Regular Rate of 24% per annum, to collect the Default Rate of 60% for over seven months following the maturity date, would give Philipp an unfair advantage over other creditors, who would be prejudiced by the enforcement of an unreasonable rate of interest.

36. In the further alternative, the stay of proceedings in the Initial Order bars Philipp from enforcing the Default Rate of interest on the Loan.

37. The Court should exercise its discretion and decline to sanction an unreasonable rate of interest in favour of Philipp.

General

38. The provisions of the *Interest Act*, R.S.C. 1985, c. I-15, as amended, including section 8.

39. The provisions of the *Companies' Creditors Arrangement Act*, 1985, c. C-36, including sections 11, 20(1)(a)(iii), and 20(1)(b).

40. The provisions of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, including sections 127 and 128.

41. The inherent and equitable jurisdiction of this Court.

42. Such further and other grounds as counsel may advise and this Court my permit.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE MOTION:

1. The Affidavit of Trevor Henry sworn August 31, 2020.

2. The Eighth Report of the Monitor, dated July 31, 2020.

3. The Tenth Report of the Monitor, ~~to be filed~~ dated September 2, 2020.

4. Such further and other materials and evidence as counsel may advise and this Court may permit.

~~August 31, 2020~~
September 3, 2020

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Proceedings commenced at Toronto

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