Court File No. CV-21-00657098-00CL

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 TGF ACQUISITION PARENT LTD., SUN RICH FRESH FOODS INC. & TIFFANY GATE FOODS INC.

(Applicants)

FACTUM OF THE APPLICANTS
(Re: Comeback Motion)
(Returnable February 26, 2021)

February 24, 2021

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PART I - OVERVIEW

1. On February 17, 2021, TGF Acquisition Parent Ltd. ("**TGF**"), Sun Rich Fresh Foods Inc. ("**Sun Rich Canada**"), Tiffany Gate Foods Inc. ("**Tiffany Gate**") (collectively, the "**Applicants**" or the "**CCAA Entities**") sought and obtained creditor protection and certain other ancillary relief pursuant to an order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") granted by this Court (the "**Canadian Court**").

2. Previously, on February 15, 2021, certain US affiliates of the Applicants (the "**Chapter 11 Entities**", together with the Applicants, "**FFG**" or the "**Company**") had filed voluntary petitions commencing parallel insolvency proceedings before the United States Bankruptcy Court for the Southern District of Texas, Houston Division (the "**US Court**") under chapter 11 of title 11 of the United States Code (the "**Chapter 11 Proceedings**" and together with the CCAA Proceedings, the "**Restructuring Proceedings**").

3. The Restructuring Proceedings were commenced in a context where FFG has been experiencing significant negative economic pressures arising from the COVID-19 pandemic over the last year, resulting in near-term liquidity and capital structure challenges throughout 2020. As a result of these pressures and FFG's liquidity situation, the Company engaged in a process to evaluate strategic alternatives, including exploring additional financing and potential sale

transactions, and has been soliciting interest from various parties with the assistance of its advisors. These efforts culminated in the Company entering into a stalking horse asset purchase agreement (the "**Stellex APA**") with affiliates of Stellex Capital Management ("**Stellex**") to complete a going concern sale transaction in respect of its business. The Company also obtained a new debtor-in-possession financing facility (the "**DIP Facility**") from its existing lenders (the "**DIP Lenders**") to finance the Company's operations during the Restructuring Proceedings.

4. This factum is filed in support of the relief set out in the draft amended and restated initial order (the "**Amended and Restated Initial Order**") included as part of the Applicants' original application record, which draft was revised and served to the parties on the service list on February 24, 2021, in advance of the comeback hearing scheduled on February 26, 2021, after consultation with various stakeholders..

5. It should be noted that the US Court has scheduled a hearing for February 25, 2021 to consider the approval of the Stellex APA and the Bidding and Sale Procedures (as defined below).

PART II - THE FACTS

6. The facts with respect to this motion are more fully set out in the affidavit of Stephen Marotta sworn February 16, 2021 (the "**Marotta Affidavit**"). Capitalized terms used within this Factum but not otherwise defined have the meanings ascribed to them in the Marotta Affidavit.

A. Overview

7. FFG is a leading provider of branded and private-label offerings of fresh-cut fruits and vegetables, ready-to-go meals and meal kits, behind-the-glass salads, snacks, and ingredients/bulk food components to supermarkets, club stores, convenience stores, industrial, and food-service customers in the United States and Canada.

Marotta Affidavit at para. 10, Application Record, Tab 2.

8. FFG has three separate brands:

(a) Country Fresh: Country Fresh provides and distributes in the US fresh-cut fruit, apple slices, vegetable and snacking solutions on a variety of blends, sizes and packaging options. Its product offering includes, *inter alia*, cut fruit and vegetables, snaking solutions, side dishes, parfaits, meal kits and sous-vide proteins and vegetable and its customers include retail and foodservice companies;

(b) Sun Rich: Sun Rich provides and distributes both in Canada (through Sun Rich Canada) and in the US (through Sun Rich USA) ready-to-serve fresh-cut fruits. Its product offering includes*, inter alia*, pails filled with a single type of precision-cut fruit, fresh fruit salads, meal kits that are ready to mix and serve and other snacking solutions, and its customers include retail and foodservice companies; and

(c) Tiffany Gate: Tiffany Gate creates, packages and delivers fresh-prepared food products to customers across Canada and the U.S. By combining state-of-the-art technology and food science with artisanal cooking techniques, Tiffany Gate is able to create homemade recipes on a commercial scale. Its product offering includes, *inter alia*, meal kits, pasta kits, soup and stew kits, deli salads, sauces, smoothies, butters and sous-vide proteins, vegetables and starches. Its customers include some of the largest retail food service companies and fresh-cut processors in Canada.

Marotta Affidavit at para. 11, Application Record, Tab 2.

9. The only debtors in the context of these CCAA Proceedings are the Canadian entities of FFG (i.e. TGF, Sun Rich Canada and Tiffany Gate). Each are incorporated under the British Columbia *Business Corporations Act* (the "**BCBCA**") and are wholly owned subsidiaries of Country Fresh LLC, a Chapter 11 Entity. A corporate chart outlining FFG's organization structure is contained in the Marotta Affidavit.

Marotta Affidavit at paras. 12, 17 - 18, Application Record, Tab 2.

10. The CCAA Entities' operations as part of FFG are detailed in the Marotta Affidavit. As a summary:

(a) The CCAA Entities have a total of 538 non-unionized employees on payroll, and, as at February 9, 2021, contracted for the services of 77 employees retained through various agencies. The majority of these employees are located in Ontario;

(b) The CCAA Entities have three primarily facilities, two of which are located in Ontario and one in British Columbia;

(c) The majority of the CCAA Entities suppliers are located in Canada; and

(d) A CCAA Entities have three primary sale channels: (i) retail; (ii) food service; (iii) club stores; and (iv) industrial and other. The CCAA Entities have a concentrated customer basis with 10 significant customer that accounted for approximately 86% of sales in 2020.

Marotta Affidavit at paras. 22 - 38, Application Record, Tab 2.

11. As described in the Marotta Affidavit, the Company has three primary secured credit facilities detailed below. Together, these secured credit facilities represent approximately US$119 million in outstanding secured debt. Each of the Applicants have fully guaranteed the amounts outstanding under the secured credit facilities.

Marotta Affidavit at paras. 51 - 67, Application Record, Tab 2.

B. The CCAA Entities' Financial Difficulties

12. In 2019, FFG faced significant liquidity and other economic pressures, which forced it to consider and implement certain strategic measures in order to deleverage its consolidated balance sheet. On April 29, 2019, FFG entered into an exchange transaction (the "**Exchange**

Transaction") with its then existing lenders, including the current First Lien Lenders and the Second Lien Lenders, pursuant to which FFG was able to restructure its indebtedness under the then-existing first lien loan and second lien loan. However, despite the Exchange Transaction, FFG has continued to face significant financial challenges in the context of its business operations, most recently due to economic pressures caused by the COVID-19 global pandemic.

Marotta Affidavit at paras. 68 - 71, Application Record, Tab 2.

13. In 2020, the demand for FFG's largest product segments, fruits and vegetable trays, significantly declined as consumer habits began to change, and as the various federal, provincial and state governments in both Canada and in the US began imposing various sanitary measures and restrictions to prevent or limit the spread of the COVID-19 virus, which measures and restrictions have included the temporary closure of restaurants, businesses and schools (with students being forced, at times, to attend classes virtually).

Marotta Affidavit at para. 72, Application Record, Tab 2.

14. FFG was also forced to temporarily close or idle several of its production facilities, which contributed to a significant reduction of FFG's production, and, in turn, FFG's revenues. FFG also faced supply-chain issues, which, for the most part, were caused by its suppliers also facing economic challenges as a result of the COVID-19 pandemic. These issues forced FFG to pay, at times, premiums for certain products as well as higher costs for the shipping of these products. Taken together, these challenges have significantly affected FFG liquidity position throughout 2020.

Marotta Affidavit at paras. 73 - 75, Application Record, Tab 2.

C. The Sale and Investment Solicitation Process

15. In response to the above challenges, FFG engaged in a strategic review of its alternatives with the advice and guidance of its legal and financial advisors. FFG held strategic discussions

with various parties which were either contacted by FFG, or which contacted FFG themselves with inquiries in connection with a potential sale transaction. In total, nine (9) parties submitted such inquiries to FFG, two (2) of which submitted offers to FFG.

Marotta Affidavit at paras. 76 - 79, Application Record, Tab 2.

16. Due to the interest in a potential transaction involving the business or its assets, FFG engaged Stout Capital, LLC ("**Stout**"), as investment banker, to conduct a formal sale and investment solicitation process. The process involved conducting various strategic and financial interested parties to gauge interest in a variety of potential transactions. The process resulted in FFG entering into a letter of intent for a sale of substantially all of the Company's business under which the interested party would act as a stalking horse bidder through in an insolvency process. However, in or around, January 7, 2021, the initial interested party withdrew the letter of intent.

Marotta Affidavit at paras. 80 - 84, Application Record, Tab 2.

17. This led the Company to recommence its efforts with Stout to solicit the interest of various parties and Stout launched a more comprehensive sale and investment solicitation process. Due to the Company's liquidity challenges, FFG also had to obtain additional emergency bridge financing under the Super Senior Term Loan Credit Agreement from an Ad Hoc Group of the First Lien Term Lenders, as described above.

Marotta Affidavit at para. 87, Application Record, Tab 2.

18. As at the date of hereof,:

(a) Stout has reached out to more than 210 potentially interested parties were solicited and received solicitation packages, including:

(i) 90 strategic parties;

(ii) 20 "*hybrid*" parties (meaning private equity firms with strategic portfolio companies in the food and beverage sector); and

(iii) More than 100 financial parties.

(b) 83 non-disclosure agreements were executed and given access to the virtual data room set up by Stout.

Marotta Affidavit at para. 89, Application Record, Tab 2.

19. On January 20, 2021, FFG received a letter of intent from Stellex, a global private equity firm dealing at arm's length with FFG, regarding a potential transaction whereby Stellex would acquire all or substantially all of FFG's assets and assume certain of its liabilities. After several weeks of negotiations, Stellex and FFG executed an asset purchase agreement (the Stellex APA), which contemplated Stellex acting as a stalking horse bidder through a sale process supervised by the US Court and the Canadian Court.

Marotta Affidavit at paras. 91 - 95, Application Record, Tab 2.

20. The key features of the Stellex APA include:

(a) A purchase price consisting of the following:

(i) $30 million in cash consideration;

(ii) $25 million in senior secured note secured against FFG's real estate to be sold and conveyed to Stellex as part of the Stellex APA;

(iii) Assumption of certain obligations and liabilities up to a total amount of $21.5 million; and

(iv) Payment or assumption of cure costs in connection with contracts to be assumed by and assigned to Stellex.

(b) Offers to continue the employment of certain of FFG's employees (including certain of the Applicants' employees) and continue the core operations of FFG (including the operations of the Applicants); and

(c) Certain bid protections in favour of Stellex which are only payable by the Chapter 11 Entities.

Marotta Affidavit at para. 93, Application Record, Tab 2.

First Report of the Monitor dated February 23, 2021 (the "**First Report**") at para. 62.

21. To finance the continued operation of FFG as a going-concern and these Restructuring Proceedings, the Company obtained a debtor-in-possession financing facility (the "**DIP Facility**") from the existing group of Ad Hoc First Lien Lenders. the DIP Lenders have agreed to provide the DIP Borrower with a DIP Facility of up to US$13,416,000, to fund the working capital requirements and other general corporate purposes of the Chapter 11 Entities during the pendency of the Restructuring Proceedings. The funds under the DIP Facility are available to the Applicants under intercompany advances from the Chapter 11 Entities (the "**Intercompany DIP Advances**") and the Applicants have granted a guarantee in respect of the DIP Facility secured by charges under the Initial Order which is limited to the amount of Intercompany DIP Advances outstanding.

Marotta Affidavit at paras. 130 – 131, Application Record, Tab 2.

D. Proposed Bidding and Sale Procedures

22. In connection with the Stellex APA, the Company negotiated bidding and sale procedures (the "**Bidding and Sale Procedures**") to permit Stout to continue running the sales process during the Restructuring Proceedings on an expediated time frame given FFG's liquidity constraints. The Bidding and Sale Procedures will allow the Company to determine whether there are any higher or better offers available for its business and assets compared to the Stellex APA.

23. Below are the contemplated milestones under the Bidding and Sale Procedures, which provides a deadline of March 31, 2021 for the closing of a transaction involving the assets of FFG:

Milestone	**Key Dates**
Issuance of Additional Solicitation Packages	As soon as reasonably possible following court approval
Due Diligence Period	Until March 19, 2021
Bid Deadline	March 19, 2021
Auction	March 22, 2021
US Sale Hearing	No later than March 26, 2021
Canadian Sale Hearing	No later than March 26, 2021
Closing	March 31, 2021

Marotta Affidavit at para. 97, Application Record, Tab 2.

PART III - ISSUES

24. The issues before the Canadian Court, as addressed below, are whether the Court should:

(a) Approve the execution by the Applicants of the Stellex APA, and approve the related Bidding and Sale Procedures (and related notices) setting out the process by which the Company will continue to market its assets and business during the Restructuring Proceedings;

(b) Approve the engagements of Ankura Consulting Group, LLC ("**Ankura**"), as chief restructuring organization of the Applicants, and Stout Capital LLC ("**Stout**"), as financial advisor for the Applicants and grant a Transaction Fee Charge (as defined below) in respect of the engagement of Stout;

(c) Amend the Initial Order to increase the quantum of the Administration Charge, increase the amount of Intercompany DIP Advances the Applicants are authorized to receive, and authorize the Applicants to advance certain amounts to the Chapter 11 Entities subject to certain approvals and protections;

(d) Approve the Judicial Insolvency Network Guidelines for communication and cooperation amongst courts (the "**JIN Guidelines**") for use in these CCAA Proceedings; and

(e) Extend the stay of proceedings until March 28, 2021.

PART IV - THE LAW

A. The Stellex APA and Bidding and Sale Procedures Should be Approved

25. The remedial nature of the CCAA confers broad powers on courts to facilitate restructuring, including the power to approve a sale process in relation to a CCAA debtor's business and assets, prior to or in the absence of a plan of compromise and arrangement.

> *Nortel Networks Corp (Re)*, [2009] OJ No 3169 at paras. 30 and 48 [*Nortel*] (CanLII);
>
> CCAA, ss. 11 and 36.

26. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and are intended to establish a baseline price and deal structure for any superior bids from interested parties. The use of a stalking horse agreement in a sales process assists in maximizing the value of a business for the benefit of the debtor's stakeholders and can enhance the fairness of the sales process. Stalking horse agreements have been approved concurrently with a sales process under the CCAA and in other insolvency proceedings.

> *Danier Leather Inc., Re,* 2016 ONSC 1044 at para. 20 (CanLII);
>
> *Nortel* at para. 17 (CanLII);

27. In *Nortel*, Justice Morawetz (as he then was) held a stalking horse sales process should be approved to allow for the debtor return at a later date to seek approval "of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Soundair*." In approving a stalking horse sale process, Justice Morawetz set out four factors which the court should consider in the exercise of its general statutory discretion to determine whether or not to approve a stalking horse agreement and related sale processes:

(a) Is a sale warranted at this time?

(b) Will the sale be of benefit to the whole "economic community"?

(c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) Is there a better viable alternative?

Nortel at paras. 49 and 53 (CanLII).

28. The *Nortel* criteria and applicable factors set out in s. 36(3) of the CCAA have been consistently applied in approving sales processes under the CCAA.

Danier at para. 23 (CanLII).

US Steel Canada Inc. (Re), 2015 ONSC 2523 at para. 3.

Brainhunter Inc. (Re), 2009 CanLII 67659 at para. 13 (CanLII).

29. In the case at bar, the Stellex APA represents the superior proposal at this time. The execution of the Stellex APA is the culmination of a competitive solicitation process commenced by Stout in November 2020. As set out above, Stout reached out to over 200 potential interested parties to express the Applicants were open to a wide-variety of restructuring transactions and 83 were given access to a virtual data room to perform due diligence. The Applicants received a bid

from another party, however, the bid was withdrawn following significant negotiation. The Stellex APA emerged following this process as superior bid and was the result of extensive discussions and negotiations among FFG, in consultation with the DIP Lenders, and Stellex, and their respective legal and financial advisors, over the course of a number of weeks.

Marotta Affidavit at para. 157 - 159, Application Record, Tab 2.

30. The Stellex APA is a fully committed and fully financed transaction that will provide a number of benefits to the Bidding and Sale Procedures, including:

(a) Provide a baseline of minimum consideration for FFG in connection with the Bidding and Sale Procedures and structure related to the process;

(b) A clear path to the maintenance of the operations of FFG as a going concern;

(c) A preservation of the employment of certain employees of FFG, including the CCAA Entities, if the Stellex is determined to be the Successful Bidder following the completion of the Bidding and Sale Procedures;

(d) Reasonable consideration for FFG’s assets, which will allow to maximize creditor recovery; and

(e) A short timeline to closing the transaction that takes into consideration the short runway imposed by the liquidity constraints of FFG.

Marotta Affidavit at para. 160, Application Record, Tab 2.

31. As for the Bidding and Sale Procedures, they form an integral part of these Restructuring Proceedings and were extensively negotiated between the Company, Stellex and the DIP Lenders in connection with the Stellex APA. The Bidding and Sale Procedures are designed to facilitate a competitive bidding process in which all potential bidders are encouraged to participate and submit competing bids for assets of FFG. The Bidding and Sales Procedures will provide a transparent

and efficient framework for the sales process to continue during the Restructuring Proceedings and obtain the best offer for the Company's assets and business.

32. The Applicants further submit that the Bidding and Sale Procedures should be approved after evaluating the specific *Nortel* criteria:

(a) *A sale transaction is warranted at this time*: The Company has experienced significant challenges during 2020 arising from its significant debt burden and operational challenges arising from COVID-19. The Company initiated a strategic review in 2020 which has been ongoing with the engagement of Stout since November 2020. Numerous strategic and financial parties have expressed interest in the Company's assets and 83 interested parties that have signed confidentiality agreements and conducted due diligence in the virtual data room. The Monitor has stated that the procedures and results of pre-filing process conducted by the Company and Stout "accord with its own experience when running similarly sized sale processes" and the scope and timeline of the process were "appropriate in the circumstances". The best option available to the Company is to allow the sales process to continue and determine the best bid for a going-concern sale through these Restructuring Proceedings. A sale will allow the business to emerge from creditor protection in a timely fashion which will preserve value for all stakeholders;

(b) *A sale will benefit the whole economic community*: As noted, a sale will allow the business of Company to continue as a going concern benefiting suppliers, employees and customers. Further, the Stellex APA sets a floor for other sale transactions and was the best transaction available to maximize recovery for creditors following the solicitation process conducted by the Company and Stout. Any other sale which is determined to be the successful bid in accordance with the Bidding and Sale Procedures will be higher or better than the Stellex APA.

(c) *Key creditors and the Monitor will be consulted during the Bidding and Sale Procedures*: No creditor has raised a *bona fide* objection to the Bidding and Sale Procedures. Further, the Bidding and Sale Procedures provide that FFG will consult the Monitor and the DIP Lenders (which are also the pre-filing secured lenders) during the sales process.

(d) *The Monitor supports the Bidding and Sale Procedures*: The Monitor supports the Canadian Court's approval of the Bidding and Sale Procedures and intends to participate throughout the sales process.

Marotta Affidavit at paras. 161 - 165, Application Record, Tab 2.

First Report of the Monitor at paras. 58 – 59 and 69.

B. The Engagements of Ankura and Stout Should be Approved

(i) Ankura Consulting, LLC as CRO

33. The jurisdiction of the Court to grant an order appointing a CRO is well established under section 11 of the CCAA and CROs have been appointed in various other proceedings under the CCAA. In certain situations, such as in *Northstar*, organizations or entities are appointed as the CRO rather than a specific individual.

Priszm Income Fund (Re), 2011 ONSC 2061 at paras. 40 – 41, 45 (CanLII).

Northstar Aerospace, Inc. (Re), 2012 ONSC 3974 at paras. 11 – 12 [*Northstar*] (CanLII).

34. The Applicants are seeking to appoint Ankura as the Chief Restructuring Organization (the "**CRO**") to continue assisting and advising them during the Restructuring Proceedings with respect to liquidity management and operational restructuring initiatives and strategic guidance related to the Bidding and Sale Procedures. Ankura was previously engaged as a financial advisor to the Company and has played a central role in advising FFG. Over the course of the past few months, Ankura has gained significant knowledge with respect to FFG's business, operations and finances.

Accordingly, Ankura is well-suited to assist the Applicants and will be instrumental to a successful completion of a going-concern restructuring transaction as part of the Restructuring Proceedings.

> Marotta Affidavit at paras. 111 - 114, Application Record, Tab 2.

35. It is also typical that CROs are granted certain protections from liability in the execution of their duties in a similar manner to court-appointed monitors. The protections ensure that capable people are willing accept such assignments and allow them fulfill their duties to the Company and stakeholders without specific concerns related to liability arising from actions taken in furtherance of their duties. The Amended and Restated Initial Order contemplates that Ankura would be granted these protections, including a stay in its favour and protection from liability resulting from the fulfillment of its duties except in the case of gross negligence or wilful misconduct.

> *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group, Ltd.*, 2007 SKQB 121 at para. 19 (CanLII).

36. Ankura is also contemplated to benefit form the administration charge (the "**Administration Charge**") previously granted by the Canadian Court. The Amended and Restated Initial Order provides that fees charged by Ankura will be allocated between the Applicants and the Chapter 11 Entities in a manner agreed between them, in consultation with the Monitor and the DIP Lenders.[1]

(ii) Stout Capital, LLC as Financial Advisor

37. Courts have also approved the engagement of financial advisors pursuant to section 11 of the CCAA. Section 11.52(1)(b) of the CCAA grants the jurisdiction to approve the fees and expenses of financial advisors and, in so doing, order a super-priority charge to secure them:

> 11.52 (1) ... [T]he court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of…

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[1] As set out at paragraph 115 of the Marotta Affidavit, it is expected that specific Canadian versus U.S. advice will be invoiced separately and general financial advisory services will be allocated 50/50.

> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act...
>
> CCAA, section 11 and 11.52(1)(b).
>
> *Canwest Publishing Inc. (Re)*, 2010 ONSC 222 at paras. 52 and 55 ["*Canwest Publishing*"] (CanLII).

38. The Applicants are seeking to seek the approval of their engagement of Stout as financial advisor in connection with the Bidding and Sale Procedures. The Amended and Restated Initial Order also contemplates that Stout's monthly fees will be secured by the Administration Charge and the transaction fees contemplated by its engagement letter will be secured by a separate charge up to US$2.5 million (the "**Transaction Fee Charge**"). Similar to the fees of Ankura, the fees of Stout will be allocated between the Applicants and the Chapter 11 Entities in a manner agreed between them, in consultation with the Monitor and the DIP Lenders.[2]

39. Stout was originally retained in November 2020 and has played a significant role in assisting FFG review its strategic options and developing and implementing its pre-filing sale and investment solicitation process, including the solicitation and negotiation of the Stellex APA.

> Marotta Affidavit at paras. 117 and 121, Application Record, Tab 2.

40. Stout has also gained significant knowledge with respect to the Company's business, operations and finances giving the capability to complete the Bidding and Sale Procedures in the timeline contemplated. Stout's knowledge of the business and continued efforts leading the sales process are critical to the successful completion of a restructuring transaction as part of the Restructuring Proceedings that will maximize value for stakeholders. The loss of Stout's information and expertise would be detrimental to the Company and the Bidding and Sale Procedures which is proposed to be implemented.

> Marotta Affidavit at paras. 121, Application Record, Tab 2.

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[2] As set out at paragraph 122 of the Marotta Affidavit, it is anticipated that Stout's monthly fees will be allocated 50/50 between the CCAA Entities and the Chapter 11 Entities and the transaction fees will be allocated in proportion to the sale proceeds payable to each of the estates.

41. The fee structure in the Stout engagement letter includes transaction fees which increase based the consideration received by the Company in any restructuring transaction. The fee structure reflects an appropriate incentive to secure a desirable offer that maximizes returns for the CCAA Entities' stakeholders. Given the complexity of the proposed Bidding and Sale Procedures, and the valuable insight Stout has acquired in the course of its engagement, approval of the fees payable to Stout and the granting of the Transaction Fee Charge securing the transaction fees is appropriate in the circumstances.

> *Canwest Publishing* at para. 55 (CanLII).
>
> Marotta Affidavit at para. 119 and Exhibit S, Application Record, Tab 2.

C. The Amendments to the Initial Order Should be Granted

(i) Increase of the Administration Charge

42. The factum of the Applicants filed in support of the Initial Order addresses the appropriateness of the Administration Charge. The Amended and Restated Initial Order contemplates that the Administration Charge will increase from C$400,000 to C$750,000. The increase is based upon additional fees that the professionals incur following the initial 10-day stay period and also the addition of Ankura and Stout to the Administration Charge. The Applicants worked in consultation with the Monitor to determine the appropriate quantum of the Administration Charge, which was based upon various professionals' previous history and experience with cross-border restructurings of similar scope and complexity. The DIP Lenders do not oppose the Administration Change.

> First Report at para. 75.

(ii) Authorization of Additional Intercompany DIP Advances

43. The factum of the Applicants filed in support of the Initial Order addresses approval of the DIP Credit Agreement, the DIP Guarantee granted by the Applicants and the granting of the Intercompany DIP Charge and DIP Lenders' Charge (collectively, the "**DIP Charges**") to secure the

Intercompany DIP Advances. In order to address sections 11.001 and 11.2(5) of the CCAA, the Initial Order provided that during the initial 10-day stay period the Intercompany DIP Advances could not exceed US$1 million. The Amended and Restated Initial Order contemplates the removal of that threshold.

44. The removal of the US$1 million limit on Intercompany DIP Advances will provide the Applicants with flexibility to manage their liquidity during the contemplated stay period and protect the Canadian business from unexpected variances to the cash flow forecast. The DIP Charges will continue to secure only Intercompany DIP Advances received by the Applicants and the CCAA Entities are not encumbered by the full amount of the DIP Facility. Accordingly, Canadian creditors should not be prejudiced by the removal of the limit and will likely be the direct beneficiaries from the Intercompany DIP Advances should the need to make such advances arise.

First Report at paras. 77 - 79.

45. The Monitor will continue to have oversight of the Applicants' receipts and disbursements to ensure Intercompany DIP Advances are made only as necessary and any funds are appropriately used.

(iii) Authorization of the Applicants to make advances to the Chapter 11 Entities

46. The Amended and Restated Initial Order contemplates that the CCAA Entities may make advances or payments to the Chapter 11 Entities, with approval of the Monitor and the DIP Lenders, and that the Applicants can receive certain protections for such advances from the US Court. In cross-border restructurings, courts have approved the Canadian debtors providing certain benefits to US debtors for the benefit of the overall organization. In analyzing whether to approve such arrangements, typically in the context of DIP financing, courts may analyze a number of factors, including (a) the practicality of establishing a stand-alone solution for the Canadian debtors; (b) any potential prejudice to the creditors of the entity if the request is approved; (c) the benefits that may accrue to the stakeholders if the request is approved and the prejudice to those

stakeholders if the request is denied; and (d) a balancing of the benefits accruing to stakeholders generally against any potential prejudice to creditors.

> *Indalex Limited (Re)*, 2009 CanLII 17351 at para. 9 (CanLII).

47. In this case, prior to the Restructuring Proceedings, the CCAA Entities and Chapter 11 Entities maintained relationships with each other that resulted in claims arising from various transactions, both operational and financial. The intercompany transactions allowed the Company to manage liquidity more efficiently and ensure the overall business was able to operate.

> Marotta Affidavit at para. 39, Application Record, Tab 2.

48. The CCAA Entities continued operations is, in part, dependent on continued existence of the Chapter 11 Entities, including managerial services and strategic decision making by the senior managerial team. Consistent with past practice, permitting any excess cash available to the CCAA Entities to be used in the operations of the Chapter 11 Entities, if required, will assist maximize the value of the entire enterprise and ensure FFG's entire business is able to operate during the Restructuring Proceedings.

> Marotta Affidavit at para. 44, Application Record, Tab 2.

49. Any advances by the Applicants to the Chapter 11 Entities will be subject to approval of the Monitor and the DIP Lenders and also require the US Court to grant appropriate security or protection to the Applicants for such advances. This oversight and specific approvals provide sufficient protections to Canadian stakeholders in cases where funds may be advances by the Applicants to the Chapter 11 Entities. Additionally, given the Applicants' primary secured lenders (e.g. the DIP Lenders) are also the secured lenders of the Chapter 11 Entities, advances by the Applicants to the Chapter 11 Entities are unlikely to prejudice any of their stakeholders.

> Marotta Affidavit at para. 44, Application Record, Tab 2.

50. For those reasons, the Applicants believe it would be appropriate in the circumstances for the Canadian Court to authorize advances to the Chapter 11 Entities, subject to approval of the Monitor and the DIP Lenders.

D. The JIN Guidelines Should be Approved

51. To facilitate the orderly administration of these Restructuring Proceedings, the proposed Amended and Restated Initial Order approves the JIN Guidelines to facilitate communication and joint hearings with the U.S. Court if necessary.

52. Cross-border protocols have been approved and implemented by courts across Canada in CCAA proceedings where parallel U.S. proceedings have been commenced under Chapter 11. In particular, cross-border protocols have been adopted where "it is clear that there are issues of over-lapping jurisdiction that would make a form of cross border protocol appropriate." A cross-border protocol is particularly desirable if debtors' cross-border operations are highly integrated and ongoing coordination between the Canadian and U.S. courts is necessary to facilitate an upcoming sales process.

> *Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2006 ABQB 743 at paras. 36 and 39 (CanLII) [*Calpine*]. See also *Northstar*, *supra* at para. 24 (CanLII). See generally, CCAA, section 11.
>
> *Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re)*, 2019 ONSC 1215 at paras. 35 to 37 (CanLII).

53. Cross-border protocols have been used to promote efficiency, fairness and consistency in cross-border insolvency proceedings. In *Nortel 2*, Justice Morawetz (as he then was) held that cross-border protocols provide "the basis for communication and cooperation between the Canadian and U.S. courts, while confirming their independence." In *Eddie Bauer*, Justice Morawetz noted some of the benefits of cross-border protocols, including ensuring that:

> […] (i) both the CCAA and Chapter 11 Proceedings are coordinated to avoid inconsistent, conflicting or duplicative rulings by the Courts; (ii) all parties of interest are provided with sufficient notice of key issues in both proceedings; (iii) the substantive rights of all parties in interest are protected; and (iv) the jurisdictional integrity of the Court is preserved.
>
> *Nortel Networks Corporation (Re)*, 2009 CanLII 726 (ONSC) at para. 42 (CanLII) [*Nortel 2*].
>
> *Eddie Bauer Of Canada, Inc. (Re)*, 2009 CanLII 32699 (ONSC) at para. 27 (CanLII) [*Eddie Bauer*].

54. The use of the JIN Guidelines in these Restructuring Proceedings meets these goals by establishing principles for issues arising out of the transnational nature of the Restructuring Proceedings and assist with court-to-court communications and the conducting of joint hearings if necessary. As such, it is in the best interests of FFG and its stakeholders that the JIN Guidelines be approved for use in these Restructuring Proceedings.

E. The Stay Period Should be Extended

55. The current stay period expires on February 26, 2021. 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).

56. The CCAA Entities are seeking to extend the stay period to and including March 28, 2021 to allow them to complete the Bidding and Sale Procedures. During the proposed extension of the stay of proceedings, the CCAA Entities will continue to advance the sales process as set out above and work towards achieving a value maximizing transaction for the benefit of their stakeholders.

57. As previously mentioned, the Bidding and Sale Procedures provide that the Bid Deadline is set on March 19, 2021, with the Auction to be held on March 22, 2021.

58. No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. The CCAA Entities are acting in good faith and will continue to pay their post-filing obligations in the ordinary course. As detailed in the Applicants' cash flow forecast, the CCAA Entities are expected to have sufficient liquidity to continue their operations during the contemplated extension of the stay.

First Report at paras. 82 - 83.

PART V - ORDER SOUGHT

59. The Applicants respectfully request that this Court grant the requested Amended and Restated Initial Order substantially in the form of the draft order attached at Tab 2 of the Supplementary Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of February, 2021.

Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Nortel Networks Corp (Re)*, [2009] OJ No 3169 (CanLII)
2. *Danier Leather Inc., Re, 2016* ONSC 1044 (CanLII)
3. *US Steel Canada Inc. (Re)*, 2015 ONSC 2523 at para. 3.
4. *Brainhunter Inc. (Re)*, 2009 CanLII 67659 (CanLII)
5. *Priszm Income Fund (Re)*, 2011 ONSC 2061 (CanLII)
6. *Northstar Aerospace, Inc. (Re),* 2012 ONSC 3974 (CanLII)
7. *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group, Ltd.*, 2007 SKQB 121 (CanLII)
8. *Canwest Publishing Inc. (Re)*, 2010 ONSC 222 (CanLII)
9. *Indalex Limited (Re)*, 2009 CanLII 17351 (CanLII)
10. *Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2006 ABQB 743 (CanLII)
11. *Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re)*, 2019 ONSC 1215 (CanLII)
12. *Nortel Networks Corporation (Re)*, 2009 CanLII 726 (ONSC) (CanLII)
13. *Eddie Bauer Of Canada, Inc. (Re)*, 2009 CanLII 32699 (ONSC) (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.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[…]

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.

Burden of proof on application

(3) The court shall not make the order unless

> **(a)** the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> **(b)** in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[...]

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

(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

(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

(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

(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.

[...]

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

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

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 TGF ACQUISITION PARENT LTD., SUN RICH FRESH FOODS INC. & TIFFANY GATE FOODS INC.

Court File No.: **CV-21-00657098-00CL**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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