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COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
	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 NORTH AMERICAN LAMB COMPANY LTD., CANADA SHEEP AND LAMB FARMS LTD., CANADA SHEEP HOLDINGS LTD., LAMB CLUB MARKETING LIMITED, CANADA LAMB GROWERS LTD., CANADA LAMB PROCESSORS LTD. and CANINE FAIR LTD.	
PARTY FILING THIS DOCUMENT	ERNST & YOUNG INC., IN ITS CAPACITY AS COURT-APPOINTED MONITOR OF THE DEBTOR COMPANIES	
DOCUMENT	**BENCH BRIEF** **Re: Amended and Restated Initial Order, Sale and Investment Solicitation Process Order**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Norton Rose Fulbright Canada LLP 400 3rd Avenue SW, Suite 3700 Calgary, Alberta T2P 4H2 CANADA Howard A. Gorman, Q.C. / Meghan L. Parker howard.gorman@nortonrosefulbright.com meghan.parker@nortonrosefulbright.com Tel: +1 403.267.8222 Fax: +1 403.264.5973 Lawyers for the Monitor, Ernst & Young Inc. File no.: 1001221818	

INTRODUCTION

1. This Bench Brief is submitted on behalf of Ernst & Young Inc., in its capacity as Court-appointed Monitor (the **Monitor**) of North American Lamb Company Ltd., Canada Sheep and Lamb Farms Ltd., Canada Sheep Holdings Ltd., Lamb Club Marketing Limited, Canada Lamb Growers Ltd., Canada Lamb Processors Ltd., and Canine Fair Ltd. (the **Debtor Companies** or the **NALCO Group**) in support of its application for an amended and restated initial order (the **Amended and Restated Initial Order**), a sale and

investment solicitation process order (the **SISP Order**), and a restricted court access order (the **Sealing Order**).

2. The Monitor relies on the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the **CCAA**)[1] in support of the relief sought in this application, which is scheduled to be heard on August 17, 2022 (the **Comeback Hearing**).

3. Capitalized terms used herein and not otherwise defined have the same meanings as indicated in the Initial Order, granted by the Honourable Madam Justice K.M Horner on August 8, 2022 (the **Initial Order**).

FACTS

4. The NALCO Group is a privately held lamb producer and processor carrying on business at six separate facilities located in Alberta and Manitoba. Its shareholders are Fresh Canada Meats Ltd. (58.6%) (**FCM**), who was the applicant for the Initial Order, and 2079468 Alberta Ltd. (41.4%).[2]

5. The assets and operations of the NALCO Group are vertically integrated, and include the operation of accelerated sheep breeding facilities, lamb growing facilities, a lamb feedlot, and a lamb processing plant.[3] Currently, the assets of the NALCO Group include approximately 57,000 live lambs, ewes, or rams, in various locations, in addition to its property, business and operations.

6. The NALCO Group incurred losses since its establishment in 2018, and by May 2022 faced a severe liquidity crisis. As a consequence, FCM, in consultation with the primary secured creditors the NALCO Group, the Bank of Nova Scotia (**BNS**) and Farm Credit Canada (**FCC**), commenced these proceedings.[4]

7. Ernst & Young Inc. was appointed Monitor of the NALCO Group pursuant to the Initial Order.[5] Among other things, the Initial Order granted the Monitor enhanced powers to ensure the Debtor Companies could continue to operate during the course of the CCAA proceedings and to ensure that a restructuring could be pursued.[6]

8. Since the Initial Order, the Monitor's activities have included:

   i. coordinating the mailing or publication of notices of the proceedings;

   ii. attending at certain NALCO Group facilities and meeting with employees, holding a virtual town hall with employees to discuss the proceedings, and finalizing a Key Employee Incentive Plan (the **KEIP**);

   iii. securing $1,250,000 in financing under an Interim Lending Facility with BNS as Interim Lender, obtaining a $1,000,000 advance thereunder to fund payroll,

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[1] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (**CCAA**) [**Tab 1**].
[2] Pre-Filing Report of the Monitor, dated August 5, 2022, at paras 11-12 (**Pre-Filing Report**).
[3] First Report of the Monitor, dated August 15, 2022, at para 7 (**First Report**).
[4] Pre-Filing Report at paras 14-15.
[5] Initial Order, pronounced August 8, 2022, by the Honourable Justice K.M. Horner (**Initial Order**).
[6] Initial Order at para 22; First Report at para 3.

insurance premiums, and certain critical supplies, and negotiating a further Amended Interim Term Sheet;

iv. establishing reporting protocols with NALCO Group management and working with finance and operations of the company to develop the revised cash flow statement presented at Appendix "A" of the First Report;

v. participating in discussions with key creditors and suppliers to ensure continuity of supplies and services during the proceedings;

vi. identifying and selecting a Selling Agent, subject to the Court's approval, to assist in the sale of the NALCO Group's non-livestock assets (**SISP Assets**);

vii. updating BNS and FCC on the proceedings, the financing requirements of the NALCO Group, and certain opportunities to realize assets of the company.[7]

9. This Application seeks an Amended and Restated Initial Order that, among other things:

i. extends the Stay Period up to and including December 9, 2022;

ii. increases the Interim Lender Facility from $1,250,000 to $1,500,000, and increases the Interim Lender's Charge to $1,800,000;

iii. grants a charge on the SISP Assets in favour of the Selling Agent in the amount of $500,000, as security for the fees and expenses payable to the Selling Agent;

iv. removes the obligation of the Monitor to seek Court approval prior to completing a transaction in respect of livestock, meat from processed livestock, and livestock feed (the **Livestock Assets**) to a third party, with the Monitor taking into account key considerations on terms provided for in the Amended and Restated Initial Order.

10. The Application also seeks the SISP Order, which, among other things, approves of the engagement of the Selling Agent, approves of the Engagement Letter, and approves of the Procedures for the Sale and Investment Solicitation Process, attached as Schedule "A" to the SISP Order.

11. Lastly, the Application seeks the Sealing Order in respect of the Confidential Supplement to the First Report, which attaches an unredacted copy of the Engagement Letter.

12. The issues before the Court are whether the Amended and Restated Initial Order, the SISP Order, and the Restricted Court Access Order should be granted.

[7] First Report at para 14.

LAW AND ARGUMENT

i. Amended and Restated Initial Order

13. The Amended and Restated Initial Order seeks various relief to support the ongoing proceedings of the NALCO Group and should be granted

14. A stay of proceedings granted in an initial order may not exceed a period of 10 days.[8] However, the CCAA provides the Court with the discretion to extend a stay of proceedings for any period that the Court considers necessary[9] upon: (a) the applicants satisfying the Court that circumstances exist that make the order appropriate; and (b) the applicants each satisfying the Court that it has acted, and is acting, in good faith and with due diligence.[10]

15. The Courts have considered a number of factors in determining whether the extension of a stay of proceedings is appropriate and such a determination is discretionary. It has been held that when exercising this discretion, flexibility to the parties should be considered and an order should be made based on what the Court deems appropriate in the circumstances.[11] The costs of making further applications for stay extensions and the prejudice that additional stay extension applications will have on various stakeholders are valid considerations.[12]

16. As noted above, the Monitor has undertaken a number of key steps in the first 10 days of the within proceedings. The proposed stay extension through to December 9, 2022 would provide an adequate amount of time to complete the proposed SISP without the necessity of making additional Court applications until a sales transaction is to be presented. It is submitted that the Monitor has acted, and is continuing to act, in good faith and with due diligence, and that an extension of the stay is warranted.

17. The Application also seeks approval of an increase to the Interim Lender Facility and corresponding charge to the amounts of $1,500,000 and $1,800,000, respectively. This represents a minimal increase in the previously approved borrowing amount and charge, and is consistent with the requirements of 11.2(1) through (4) of the CCAA. As such, the Monitor submits this relief ought to be granted.

18. To secure the compensation of the proposed Selling Agent, the Monitor is seeking that a Selling Agent Charge be granted against the SISP Assets of the NALCO Group, in priority to all other charges and encumbrances except for the Administration Charge, the Interim Lender's Charge, and the KEIP Charge.[13] The authority to grant a charge for "any financial, legal, or other experts engaged by the company" is provided for in section 11.52(1) of the CCAA.

19. The proposed Selling Agent Charge will be limited to a maximum amount of $500,000. In determining whether to grant such a charge, Courts have considered the following non-exhaustive list of factors:

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[8] CCAA, s 11.02(1) [**Tab 1**].
[9] *Ibid,* s 11.02(2) [**Tab 1**].
[10] *Ibid*, s 11.02(3) [**Tab 1**].
[11] *Sunrise/Saskatoon Apartments Limited Partnership, Re*, 2017 BCSC 808 at para 21 (***Sunrise***) [**Tab 2**].
[12] *Ibid* at para 23 [**Tab 2**].
[13] Amended and Restated Initial Order at para 40.

i. the size and complexity of the businesses being restructured;

ii. the proposed role of the beneficiaries of the charge;

iii. whether there is an unwarranted duplication of roles;

iv. whether the quantum of the proposed charge appears to be fair and reasonable;

v. the position of the secured creditors likely to be affected by the charge; and

vi. the position of the Monitor.[14]

20. With respect to the above noted factors, the SISP contemplates the marketing of the SISP Assets. The beneficiaries of the charge, the Selling Agent, will be responsible for: publishing notices in national and local papers, preparing lists of potential bidders, preparing a teaser letter, establishing and maintaining a data room, reviewing letters of intent, assessing each letter of intent to ensure that it is a Qualified Bid and that each bidder is a Qualified Bidder, advising and seeking input from key stakeholders of the proceedings (provided that such stakeholders are not participating in the SISP) and negotiating and finalizing binding sale agreements. The role of the Selling Agent is extensive and crucial to the success of the SISP and there will be no duplication of the role of the Selling Agent with any other party. Further, it is the Monitor's view that the Selling Agent's compensation is competitive, and that the corresponding Selling Agent Charge is appropriate in the circumstances.

21. Lastly, the Monitor seeks to amend and restate section 10(a) of the Initial Order so as to remove the obligation to seek Court approval prior to completing a transaction in respect of Livestock Assets to a third party. The Amended and Restated Initial Order would require the Monitor to take into account key interests and considerations prior to making such a decision. These factors, which are provided for in section 10(a)(i) through (vii) of the proposed Amended and Restated Initial Order, are:

i. the views of BNS and FCC, including any guarantors of the NALCO Group's secured loans, if those guarantors confirm to the Monitor that they have no intention of participating as potential buyers in the SISP or livestock sales;

ii. the health and welfare of the livestock;

iii. the reasonably foreseeable cost of feeding and caring for the livestock if the livestock is not disposed of on such terms and conditions;

iv. the reasonably foreseeable availability of labour, feed, veterinary care and transportation if the livestock is not disposed of on such terms and conditions;

v. the recommendations of the NALCO Group's management;

vi. prevailing Canadian market prices based on recent lamb and sheep auctions, recent lamb and sheep sale transactions and market offers for finished lambs from Canadian lamb processing plants; and

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[14] *Canwest Publishing Inc., Re*, 2010 ONSC 222 at para 54 (***Canwest***) [**Tab 3**].

vii. the Monitor's solicitation of parties for offers to acquire livestock.

22. The purpose of the proposed amendment and restatement of paragraph 10(a) of the Initial Order is to increase the efficiency and efficacy of the process of closing transactions in respect of Livestock Assets and reduce the overall costs of the CCAA proceedings, while prioritizing the health and welfare of the livestock and the interests of the NALCO Group's key lenders.

23. As of August 15, 2022, the specific factors to be included at section 10(a) of the Amended and Restated Initial Order were still under discussion between the Monitor, BNS and FCC, the primary parties to be affected by the amendment. Since then, however, the Monitor, BNS and FCC have come to a consensus on the terms. The Monitor therefore confirms that the version of the Amended and Restated Initial Order included with its Application filed on August 15, 2022 reflects that consensus.

24. The Monitor submits that the relief sought at section 10(a) of the Amended and Restated Initial Order is consistent with the best interests of the NALCO Group and its stakeholders, and is reasonable and fair in the circumstances.

ii. Sale Process

25. As detailed in the First Report, the proposed SISP provides for the engagement of the Selling Agent to implement the SISP and market the SISP Assets of the NALCO Group with a view to maximizing value for the stakeholders. The proposed SISP contemplates a pre-marketing period followed by a single-phase bidding process and the development and finalization of purchase and sale agreements with the selected bidder(s).

26. The CCAA provides broad powers upon courts to facilitate the successful restructuring of a debtor company, including the power to authorize a sale under the CCAA in the absence of a plan.[15]

27. SISPs are commonly used in CCAA proceedings to market and potentially sell certain assets owned by debtor companies or to seek out opportunities for investment in a debtor company's business. Courts will generally consider the following when determining whether or not to approve a proposed SISP:

    i. the fairness, transparency and integrity of the proposed process;

    ii. the commercial efficacy of the proposed process in light of the specific circumstances facing the applicant debtors; and

    iii. whether the sales process will optimize the chances, in particular circumstances, of securing the best possible price for the assets.[16]

28. The terms of the proposed SISP have been developed in consultation with the proposed Selling Agent.[17] A single-phase SISP process is considered an efficient and effective process for the NALCO Group, and is consistent with similar sales processes approved

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[15] *Re Nortel Networks Corp*, [2009] OJ No 3169, 2009 CanLII 39492 (ON SC), at paras 47-48 [**Tab 4**].
[16] *Re Walter Energy Canada Holdings, Inc*, 2016 BCSC 107 at paras 18-21 [**Tab 5**].
[17] First Report at para 51.

of by this Court in the recent past.[18] As such, the Monitor submits that the SISP Order and attached procedure are fair and reasonable, and ought to be approved by this Court.

iii. *Sealing Order*

29. The Monitor also seeks a Sealing Order in respect of certain terms of the Engagement Letter, which is attached in unredacted form to the Confidential Supplement to the First Report.

30. The redactions to the Engagement Letter are required to enhance the Selling Agent's ability to negotiate with other brokers.[19]

31. The leading authority for restricted court access orders is *Sierra Club*,[20] as recently reviewed by the Supreme Court of Canada in *Sherman Estate.*[21] The two-fold test is as follows:

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

    ii. the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its 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.[22]

32. With respect to the first branch of the test, the following elements are to be considered:

    i. the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question;

    ii. the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake; and

    iii. the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.[23]

33. Based on a discussion with the Selling Agent, the Monitor understands that redacting certain aspects of the Engagement Agreement is necessary to allow the Selling Agent to negotiate with any co-operating brokers representing prospective purchasers in the SISP.[24] As such, the Sealing Order as proposed is intended to maintain the integrity and efficacy of the SISP process and, without it, the process could be compromised to the detriment of the NALCO Group and its stakeholders. The reach of the proposed Order

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[18] See, for example, the SISP approval order and attached SISP procedure, filed May 10, 2022, in the Jam Hospitality receivership proceedings.
[19] First Report at para 48.
[20] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 (***Sierra Club***) [**Tab 6**].
[21] *Sherman Estate v Donovan*, 2021 SCC 25 (***Sherman Estate***) [**Tab 7**].
[22] *Sierra Club* at para 53 [**Tab 6**].
[23] *Ibid* at paras 54-57 [**Tab 6**].
[24] First Report at para 48.

is itself restricted,[25] in that it only seeks to seal one clause of the Engagement Letter for a period of one year, or until all SISP Assets have been sold, or pending further Order of the Court. In these circumstances, the Monitor submits that the Sealing Order as proposed is reasonable and appropriate.

CONCLUSION

34. The Monitor seeks an Amended and Restated Initial Order, SISP Order and Sealing Order substantially in the forms attached to the within Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16TH DAY OF AUGUST, 2022

Norton Rose Fulbright Canada LLP

Per: ___________________________________
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Counsel for the Applicant, Ernst & Young Inc.

[25] See *Sierra Club*, para 57 [**Tab 6**], and *Sherman Estate*, para 105 [**Tab 7**], which both emphasize that the order granted should be as narrow and restricted as possible.

TABLE OF AUTHORITIES