Court File No. CV-24-00712687-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF 9869247 CANADA LIMITED (d.b.a. SAFARI FLOWER COMPANY) AND GN VENTURES LTD.

Applicants

FACTUM OF THE APPLICANTS

August 16, 2024

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TO THE SERVICE LIST

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FACTUM OF THE APPLICANTS

PART I - INTRODUCTION

1. The Applicants, 9869247 Canada Limited (d.b.a. Safari Flower Company) (the "**Company**") and GN Ventures Ltd. (the "**Vendor**", and together with the Company, the "**Applicants**" or the "**Safari Flower Group**"), obtained relief from the Ontario Superior Court of Justice (Commercial List) (the "**Court**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") by an Initial Order dated January 12, 2024, which was amended and restated on January 22, 2024 (the "**ARIO**").[1]

2. The Applicants file this factum in support of a motion for relief under the CCAA to approve an Order (the "**Stay Extension Order**") to, *inter alia*,

   (a) extend the stay of proceedings (the "**Stay Period**") in favour of the Applicants *nunc pro tunc* from August 9, 2024 up to and including the earlier of: (1) the delivery of the Monitor's certificate (the "**Monitor's Certificate**") substantially in the form

[1] Ninth Simons Affidavit, at para 3; Exhibit "A" to the Ninth Simons Affidavit

attached as Schedule "A" to the Approval and Reverse Vesting Order dated May 7, 2024 (the "**Approval and Reverse Vesting Order**"); and (2) September 27, 2024; and

(b) approve the Eighth Report of Ernst & Young Inc. ("**EY**"), in its capacity as monitor of the Applicants (the "**Monitor**").

3. The Purchaser and the Applicants, with the assistance of the Monitor, have been diligently working towards closing the Transaction.

4. The only outstanding issue preventing the closing of the Transaction is the purchase of the indebtedness (the "**GJ Debt**") owing by the Applicants to one *pari passu* secured lender, namely Gray Jay Estates Inc. ("**Gray Jay**"), by the other *pari passu* secured lender, NE SPC II LP's ("**Blacksail**" and together with Gray Jay, the "**Lenders**"), pursuant to an assignment agreement between the Lenders dated April 25, 2024 (the "**Lenders' Assignment Agreement**").[2]

5. The purchase of the GJ Debt under the Lenders' Assignment Agreement is a condition precedent to the closing of the Transaction, and contemplated in the Share Purchase Agreement.[3]

6. Prior to the expected closing date and the expiry of the prior Stay Period (or about August 9th), the Applicants were advised that a dispute had arisen between the Lenders in respect to the amount payable to GJ under the Lenders' Assignment Agreement.

7. The Lenders are currently at an impasse, which is preventing the closing of the

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[2] Ninth Simons Affidavit, at paras 14, 19, 24.
[3] Ninth Simons Affidavit, at para 13.

Transaction.[4]

8. The Applicants understand that Blacksail intends to bring a concurrent motion to this Court to seek an order in relation to the Lenders' dispute so that the Transaction can be closed in short order.

9. As such, the Applicants require an extension of the Stay Period *nunc pro tunc* to the earlier of the closing of the Transaction or September 27, 2024.[5]

PART II - SUMMARY OF FACTS

10. The facts supporting this motion are set out in the affidavit of Brigitte Simons sworn August 15, 2024 (the "**Ninth Simons Affidavit**") or the Eighth Report.

11. Capitalized terms used herein and not defined shall have the meanings set out in the Ninth Simons Affidavit or the Eighth Report.

12. Since the Approval and Reverse Vesting Order and related relief was granted by this Court, Blacksail was determined to be the ultimate purchaser under the Share Purchase Agreement pursuant to the terms of the Lenders' Assignment Agreement.[6]

13. Blacksail has incorporated 1000914263 Ontario Limited and has decided to assign the Share Purchase Agreement to that newly incorporated entity.[7]

14. On July 26, 2024, this Court granted an order (the "**July Stay Extension Order**"),

[4] Ninth Simons Affidavit, at para
[5] Ninth Simons Affidavit, at para 22.
[6] Ninth Simons Affidavit, at para 14.
[7] Ninth Simons Affidavit, at para 15.

extending the Stay Period from July 26, 2024 to and including August 9, 2024, in order to facilitate the closing of the Transaction.[8]

15. Substantially all of the closing documents have been prepared and agreed upon by the parties.[9] The Applicants have continued to lead communications with Health Canada and, since the July Stay Extension Order was granted, all conditions under the Share Purchase Agreement with respect to Health Canada have been satisfied.[10]

16. The only outstanding issue is the resolution of the amount to be paid to Gray Jay pursuant to the Lenders' Assignment Agreement.[11]

17. The parties require an extension of the Stay Period *nunc pro tunc* to provide the Applicants with time, stability and certainty to the closing of the Transaction should the Lenders either reach an agreement or obtain an order from the Court.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

18. The issues to be determined on this Motion are whether:

(a) The stay of proceedings should be extended; and

(b) The Eighth Report of the Monitor and the conduct and activities therein should be approved.

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[8] Ninth Simons Affidavit, at para 17; Exhibit "I" to the Ninth Simons Affidavit.
[9] Ninth Simons Affidavit, at para 18.
[10] Ninth Simons Affidavit, at para 23.
[11] Ninth Simons Affidavit, at para 24.

A. The Stay Should Be Extended

19. The Stay Period expired on August 9, 2024 and the Applicants seek to extend the Stay Period *nunc pro tunc* from August 9, 2024 to and including the earlier of: (i) the delivery of the Monitor's Certificate; and (ii) September 27, 2024 (the "**Extended Stay Period**").

(i) The Court Has Authority to Render an Order Nunc Pro Tunc

20. The Court's authority to make an order *nunc pro tunc* arises from the Court's inherent jurisdiction and is provided in Rule 59.01 of the *Rules of Civil* Procedure.[12]

21. Rule 59.01(1) provides, "[a]n order of the court is effective from the date on which it is made, unless it provides otherwise."[13] The Court has the authority under this Rule to give the order a retroactive effect.[14] Such jurisdiction allows for justice in accordance with the facts of the particular case, and avoids exalting form over substance, which could result in increased costs and injustice.[15]

22. Section 11 of the CCAA grants the Court broad jurisdiction to "make any order that it considers appropriate in the circumstances.".[16] There is no prohibition on granting an order *nunc pro tunc* with respect to the stay of proceedings in the CCAA.

23. The Supreme Court of Canada set out a non-exhaustive list of factors for courts to consider when exercising their inherent jurisdiction to grant such an order:

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[12] *Rules of Civil Procedure*, R.R.O. 1990, Reg 194; *McKenna Estate v Marshall*, 2005 CarswellOnt 5028 (SCJ) at para 12.
[13] Rule 59.01, *Rules of Civil Procedure*, R.R.O. 1990, Reg 194.
[14] *Silver v. IMAX*, 2012 ONSC 4881 (CanLII), at para 43.
[15]
[16] s. 11, CCAA.

(a) whether the case is one where the opposing party will not be prejudiced by the order sought;

(b) where the order sought would have been granted had it been sought at the appropriate time, so that the timing of the order is an irregularity;

(c) that the irregularity is not intentional;

(d) that the order will effectively achieve the result sought;

(e) that the delay has been caused by the act of the court; and

(f) the order would facilitate access to justice.[17]

24. The circumstances here justify the exercise of the Court's inherent jurisdiction to extend the Stay Period *nunc pro tunc*, including, *inter alia*:

(a) the Monitor and the Lenders consent to the Applicants' request, and the Lenders advised that they would not take any enforcement steps on the expiry of the Stay Period;[18]

(b) the Stay Period has been extended numerous times throughout these CCAA proceedings in accordance with section 11.02 of the CCAA, in order to provide the Applicants with time to close the Court-approved Transaction, and would likely

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[17] *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 (CanLII), at para 90; *Wilson v. Gooden-Allen*, 2017 ONSC 3197 (CanLII), at para 70.
[18] Ninth Simons Affidavit, at para 20.

have been granted if the Applicants appeared before the Court prior to August 9, 2024;[19]

(c) the expiry of the Stay Period was not intentional by the Applicants, as they understood, based on conversations with the Lenders, that the dispute could be resolved and the Transaction would close;[20]

(d) the Applicants acted swiftly in contacting the Court immediately upon understanding the Transaction was not going to close;[21] and

(e) the purpose of the extension of the Stay Period *nunc pro tunc* is to ensure and provide the Applicants with certainty that there is no gap or lapse in the Stay Period. This is consistent with the purpose and intent of the CCAA proceedings.

25. The Applicants are of the view that it is reasonable in the circumstances to extend the Stay Period *nunc pro tunc* and is consistent with the purpose of these CCAA proceedings, namely, to facilitate compromises and arrangements between the Applicants and their creditors.

(ii) The Stay Period Should be Extended

26. A Court is empowered to extend the stay of proceedings granted to a debtor company under section 11.02(2) of the CCAA. The Court must consider whether: (a) the order sought is appropriate in the circumstances; and (b) the applicant has been acting in good faith and with due diligence.[22]

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[19] Ninth Simons Affidavit, at paras 12, 16, 17; Exhibits "G", "H", and "I" to the Ninth Simons Affidavit.
[20] Ninth Simons Affidavit, at para 20.
[21] Ninth Simons Affidavit, at para 22.
[22] s 11.02(2)-(3), CCAA.

27. The Applicants submit that the test to extend a stay of proceedings is met.

28. The updated cash flow forecast for the period August 19, 2024 to September 29, 2024 (the "**Updated Cash Flow Forecast**") demonstrates that the Applicants have sufficient cash, during the Extended Stay Period, without the need for additional DIP financing.[23]

29. Throughout these proceedings, the Applicants have acted and continue to act in good faith and with due diligence to communicate with stakeholders and employees.[24]

30. The delay in the closing of the Transaction is not attributed to any fault of the Applicants, whom have been diligently working towards closing. The expiry of the Stay Period on August 9, 2024 occurred as a result of numerous discussions with, and the approval from, the Monitor and the Lenders.[25]

31. The extended Stay Period is reasonable, necessary and appropriate in light of the Updated Cash Flow Forecast, and provides the Applicants with time to close the Transaction should the Lenders either reach an agreement or obtain an order from the Court to close the Transaction.[26]

32. The Applicants believe that no creditor will be materially prejudiced as a result of the extension,[27] and the Monitor and the Lenders support the extension of the Stay Period.

33. For the foregoing reasons, the Applicants seek an Order to extend the Stay Period to the earlier of: (i) the delivery of the Monitor's Certificate; or (ii) September 27, 2024.

[23] Ninth Simons Affidavit, at para 27; Exhibit "J" to the Ninth Simons Affidavit.
[24] Ninth Simons Affidavit, at para 26.
[25] Ninth Simons Affidavit, at para 26.
[26] Ninth Simons Affidavit, at para 29.
[27] Ninth Simons Affidavit, at para 28.

B. The Monitor's Eighth Report, Conduct and Activities Should be Approved

34. As part of the Stay Extension Order, the Applicants are seeking the approval of the Monitor's activities as detailed in the Eighth Report, filed in these CCAA proceedings.

35. This Court has previously approved the Monitor's prior reports, and the conduct and activities therein.[28]

36. In *Target Canada Co. (Re)*, the Court wrote that a request to approve a monitor's report "is not unusual" and that "there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process."[29]

37. In this case, the Monitor's activities and conduct as described in its reports should be approved. The Monitor carried out its activities in a manner consistent with the provisions of the CCAA and in compliance with all Orders of the Court issued in the CCAA proceedings, including by assisting the Applicants in the preparation of the Updated Cash Flow Forecast and working towards closing the Transaction.[30]

PART IV - ORDER REQUESTED

38. For the foregoing reasons, the Safari Flower Group respectfully requests the granting of the Stay Extension Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of August, 2024.

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[28] *See* Exhibits "C" (at para 11), "G" (at para 6), "H" (at para 3), "I" (at para 3) to the Ninth Simons Affidavit.
[29] *Target Canada Co. (Re)*, 2015 ONSC 7574 at paras 2 and 22; *Laurentian University of Sudbury*, 2022 ONSC 5850 at para 17.
[30] Ninth Simons Affidavit, at para 27.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *McKenna Estate v Marshall*, 2005 CarswellOnt 5028 (SCJ).

2. *Silver v. IMAX*, 2012 ONSC 4881 (CanLII).

3. *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 (CanLII).

4. *Wilson v. Gooden-Allen*, 2017 ONSC 3197 (CanLII).

5. *Target Canada Co. (Re)*, 2015 ONSC 7574.

6. *Laurentian University of Sudbury*, 2022 ONSC 5850.

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

General power of court

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

Stays, etc. — other than initial application

11.02(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

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.

***Rules of Civil Procedure*, R.R.O. 1990, Reg 194, as amended**

Effective Date

59.01 An order is effective from the date on which it is made, unless it provides otherwise.

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