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November 16, 2016

Honourable Justice Glen G. McDougall
Supreme Court of Nova Scotia (Halifax)
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

Dear My Lord:

Re: Motion of Victory Farms Inc. ("VFI") and Jonathan Mullen Mink Ranch Limited ("JMMR") for Stay Extension pursuant to section 11.02(2) of the Companies' Creditors Arrangement Act ("CCAA")

We represent VFI and JMMR ("the Applicants"). An application for an Initial Order under the CCAA was granted by the Court on August 31, 2016. An extension was granted until November 25, 2016. The Applicants now move for a further extension of the stay until January 31, 2016.

Filed with the Court on the Motion are the following:

- A. Notice of Motion;
- B. 4th Affidavit of Jonathan Mullen;
- C. This memorandum;
- D. A draft Extension Order;
- E. 3rd Report of the Monitor (which will be filed by Deloitte Restructuring Inc. ["the Monitor"]).

We refer the court to our memorandum of September 21, 2016, which summarized the factual situation of the Applicants giving rise to the grant of the Initial Order, noted the Applicants' activities since that grant, and referred to the statutory requirements of the CCAA when the Court considers a motion of this nature.



FACTS TO DATE

Since the grant of the first extension the Applicants have been engaged in the business of growing the mink to maturity. The mink will be culled shortly and the pelts harvested.

The Applicants have continued to work to to decrease production costs and have achieved a 20% reduction in feed expenditures. This combined with a lower than forecast feed consumption has resulted in significant savings. That in turn has resulted in a lower than forecast reliance on DIP advances.

The Applicants have very recently received appraisals arranged by the Monitor, and are now in a position to move forward with the development of a plan of arrangement.

As part of that process, the Applicants now intend to engage with ALC, which is the largest creditor of the Applicants, and with the other secured creditors, in determining what such a plan should look like.

REQUIREMENTS OF THE CCAA

In our submission of Septembers 21st, we drew the attention of the court to the following points. We have not attached the cases cited again, as they remain in the court file.

Section 11.02(2) of the CCAA, reads:

11.02(2) Stays, etc. — other than initial application

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.



The prerequisites for the making of such an order are set out in section 11.02(3):

11.02(3) Burden of proof on application

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.

The Court's attention is respectfully drawn to the following extracts from *Re San Francisco Gifts Ltd.*¹, which summarize the approach taken to the issues raised in section 11.02(3) (although it is noted that the sections are renumbered as a result of the 2009 amendments):

Fundamentals

11 The well established remedial purpose of the *CCAA* is to facilitate the making of a compromise or arrangement by an insolvent company with its creditors to the end that the company is able to stay in business. The premise is that this will result in a benefit to the company, its creditors and employees. The Act is to be given a large and liberal interpretation.

12 The court's jurisdiction under s. 11(6) to extend a stay of proceedings (beyond the initial 30 days of a *CCAA* order) is preconditioned on the applicant satisfying it that:

- (a) circumstances exist that make such an order appropriate; and
- (b) the applicant has acted, and is acting, in good faith and with due diligence.

13 Whether it is "appropriate" to make the order is not dependant on finding "due diligence" and "good faith." Indeed, refusal on that basis can be the result of an independent or interconnected finding. Stays of proceedings have been refused where the company is hopelessly insolvent; has acted in bad faith; or where the plan of arrangement is unworkable,

¹ 2005 ABQB 91



impractical or essentially doomed to failure.

Meaning of “Good Faith”

14 The term “good faith” is not defined in the *CCAA* and there is a paucity of judicial consideration about its meaning in the context of stay extension applications. The opposing landlords on this application rely on the following definition of “good faith” found in *Black’s Law Dictionary* to support the proposition that good faith encompasses general commercial fairness and honesty:

A state of mind consisting of: (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealings in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage. [Emphasis added]

15 “Good faith” is defined as “honesty of intention” in the *Concise Oxford Dictionary*.

16 Regardless of which definition is used, honesty is at the core. ...

Supervising Court’s Role

28 The court’s role during the stay period has been described as a supervisory one, meant to: “...preserve the *status quo* and to move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure.” That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling of creditors’ meetings and the like. On the contrary, this role requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interests is maintained.

29 Although the supervising judge’s main concern centres on actions affecting stakeholders in the proceeding, she is also responsible for protecting the institutional integrity of the *CCAA* courts, preserving their public esteem, and doing equity. She



cannot turn a blind eye to corporate conduct that could affect the public's confidence in the CCAA process but must be alive to concerns of offensive business practices that are of such gravity that the interests of stakeholders in the proceeding must yield to those of the public at large.

To summarize, the Court is vested with a great deal of discretion on a motion such as this. Throughout its inquiry the Court will bear in mind the "well established remedial purpose of the CCAA", which is "to facilitate the making of a compromise or arrangement by an insolvent company with its creditors to the end that the company is able to stay in business".

In reaching a decision on the motion the Court is informed by its appreciation of the honesty of the intentions of the debtor, the effect of an extension on the stakeholders in the business (which may include equity owners, employees and creditors, amongst others), and the integrity of the CCAA process.

In the case at bar, there is no suggestion that the applicants lack integrity in their operations or approach to the CCAA process, or that the process is doomed to failure. This is a patently honest attempt to save the business by ultimately reaching a realistic compromise with the creditors. The business is perhaps peculiar, in that in common with many "farming" operations, there is one sale of a crop each year. Thus the outputs are spread over the year, with one input coming when the crop goes to market on an annual basis. The excess proceeds of the crop will form an integral part of any compromise. This extension allows a plan of arrangement to be discussed with key creditors with a view to putting the compromise to the creditors as a whole.

In this regard, the Court's attention is drawn to *Re Federal Gypsum Co.*², and the comments of Justice MacAdam:

34 In view of the preliminary approval of the Plan and the calling of a meeting of creditors to consider and vote on the Plan, it necessarily follows that there should be an extension of the stay to enable the Company to present the Plan to the creditors, to conduct the claims process as previously ordered and to determine whether the creditors have voted in favour or against the Plan. In *Cansugar Inc., Re*, 2004 NBQB 7 (N.B. Q.B.), Justice Glennie, in referencing s.11(6) of the CCAA, noted:

In my opinion, the requirements of section 11(6) of the C.C.A.A.

² 2007 NSSC 384



have been satisfied in this case. The continuation of the stay is supported by the overriding purpose of the C.C.A.A., which is to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the Court, and to prevent maneuvers for positioning among creditors in the interim. [emphasis added by counsel]

35 To similar effect, Topolniski J. in *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 (Alta. Q.B.), at para. 28 observed:

The court's role during the stay period has been described as a supervisory one, meant to: '...preserve the status quo and to move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure.' That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling of creditors' meetings and the like. On the contrary, this role requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interests is maintained. [emphasis added by counsel]

36 Notwithstanding the objection by the Royal Bank, including the potential prejudice as outlined by counsel in the event there is a deterioration in the value of the assets securing its operating loan, continuation of the stay is to be supported in view of the overriding purpose of the CCAA "...to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the court...".

This sought after extension has not given rise to deterioration in the value of the assets. The mink have grown, and they will shortly be pelted.

The extension now sought will "preserve the status quo and move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure."



SUMMARY

It is respectfully submitted that this is an appropriate case in which the Court may exercise its discretion to grant an extension for the period sought. The Applicants have acted, and continue to act, in good faith and with due diligence in all the circumstances.

All of which is respectfully submitted.

BOYNECLARKE LLP

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