Court File No. 10-8699-00CL

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 PLANET ORGANIC HEALTH CORP. AND DARWEN HOLDINGS LTD.

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FACTUM OF THE APPLICANTS

June 3, 2010

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Court File No.: 10-8699-00CL

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

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APPLICANTS

FACTUM OF THE APPLICANTS

PART I - NATURE OF MOTION

1. The Applicants, Planet Organic Health Corp. ("Planet Organic") and Darwen Holdings Ltd. ("Darwen") make a motion for Orders, *inter alia*:

(a) approving the acquisition of substantially all of the assets of the Applicants pursuant to an Acquisition Agreement, dated May 19, 2010 (the "Acquisition Agreement") between the Applicants and The Catalyst Capital Group Inc. on behalf of funds managed by it ("Catalyst") and providing a vesting order in connection therewith;

(b) authorizing the Applicants to downsize/shut down the parts of its business operation as contemplated by the Acquisition Agreement;

(c) sealing a confidential summary prepared by Planet Organic's financial advisor of all the offers received by the Applicants (the "Bid Summary")

until after the closing of the transaction between the Applicants and Catalyst or further order of the Court; and

(d) establishing a process for the filing of claims against the Applicants' current and former officers and directors, and setting a claims bar date 21 days after the closing of the acquisition by Catalyst.

2. The Acquisition Agreement is the culmination of the Applicants' efforts over many months to restructure in the face of significant financial difficulties. The Applicants seek approval of the Acquisition Agreement on the grounds that:

(i) it was preceded by an extensive and fair sales process aimed at maximizing value for all stakeholders;

(ii) the Acquisition Agreement is the best offer that emerged from the sales process and is fair and reasonable, taking into account the market value of the Applicants' assets;

(iii) the Acquisition Agreement, which allows the Applicants' business to continue as a going concern, is in the best interest of all stakeholders, including the Applicants' employees, suppliers, customers and creditors; and

(iv) the Acquisition Agreement is supported by the Monitor and by Catalyst, the Applicants' secured creditor, who has the principal economic interest in the Applicants' assets.

PART II - THE FACTS

Background

3. Planet Organic is incorporated under the Business Corporations Act (Alberta) and is a leading Canadian/US retailer of organic products. Planet Organic has retail operations in Ontario, British Columbia, Nova Scotia and Alberta which operate under the brand name Planet Organic Market ("POM") and retail operations in the United States (in New York State and Connecticut), which operate through its wholly owned subsidiary, Planet Organic Holding Corp. (the "Holding Corp"), doing business as Mrs. Green's Natural Markets ("Mrs. Green's").

> Affidavit of Darren Krissie, sworn May 20, 2010 ("May 20 Krissie Affidavit"), paras. 6-7, Motion Record, Tab 2, page 29.

4. Darwen is a wholly owned subsidiary of Planet Organic incorporated in the Province of Saskatchewan and which operated the "Sangster's" division of the Applicants' business until it was sold as part of the non-core asset sales, which took place prior the commencement of these proceedings. As a result, Darwen is a non-operating shell company with significant liabilities (as it guaranteed the liabilities of Planet Organic) and only a few assets, mainly being accounts receivable.

> Affidavit of Darren Krissie, sworn April 29, 2010 ("April 29 Krissie Affidavit"), para. 10, Motion Record, Tab 2A, pg. 49.

5. In early 2009, Planet Organic breached certain financial covenants under the loan agreements with its secured lenders. After the expiry of a forbearance period in November 2009, the then secured lenders were in a position to declare all the loans in default and demand payment. Planet Organic repaid one of the secured lenders in full through the sale of certain non-core assets on or about March 17, 2010.

May 20 Krissie Affidavit, para. 9, Motion Record, Tab 2, pg. 29.

6. Catalyst acquired by way of assignment all of the secured indebtedness owed by Planet Organic on or about April 20, 2010. Catalyst is now Planet Organic's senior secured lender. On April 28, 2010, Catalyst made demand for repayment of the outstanding indebtedness and Planet Organic was and is unable to repay said debt. As at the date of the granting of the Initial Order, Catalyst is owed approximately US$32.6 million.

May 20 Krissie Affidavit, paras. 10-11, Motion Record, Tab 2, pgs. 29-30.

7. On April 29, 2010, Planet Organic and Darwen commenced an application under the *Companies' Creditors Arrangement Act* (*CCAA*) with the support of Catalyst and were granted the Initial Order which provided, *inter alia*, a stay of proceedings in favour of the Applicants until May 27, 2010. By further court order, the stay of proceedings was extended to June 18, 2010.

May 20 Krissie Affidavit, para. 12, Motion Record, Tab 2, pg. 30.

8. Pursuant to the Initial Order, Deloitte & Touche Inc. was appointed the monitor ("Monitor") of the Applicants.

May 20 Krissie Affidavit, para. 14, Motion Record, Tab 2, pg. 30.

Restructuring

9. In an effort to address its financial difficulties, Planet Organic explored a number of different options for the business prior to seeking court protection under the *CCAA*. Planet Organic formally engaged PCG Capital Growth LLC ("PCG") in March of 2009 to act as its restructuring advisor. The subsequent marketing efforts undertaken by Planet Organic in conjunction with PCG can be broken down into three (3) distinct phases:

(i) attempts to raise additional equity and/or refinance the business which were ultimately unsuccessful;

(ii) the sale of Planet Organic's non-core divisions (Trophic, Sangster's and Healthy's) prior to the *CCAA* filing, the proceeds of which were used to reduce the outstanding indebtedness and cover transaction costs; and

(iii) the efforts to market and sell core business (consisting of the POM and Mrs. Green's stores) either as a whole or as separately, which is discussed in greater detail below.

Affidavit of Tripp Baird, sworn May 20, 2010 ("Baird Affidavit"), paras. 12-14, 18-19, Motion Record, Tab 3, pg. 172-174.

Sale of Core Assets

10. Between December 2009 and April 2010, one hundred and thirty (130) parties were contacted to determine their interest in POM and/or Mrs Green's. Of that group, fifty-one (51) parties signed non-disclosure agreement and were given access to a confidential online data room containing information that would be pertinent to potential purchasers including: financial, operational, leasehold, and other relevant information in January 2010.

Baird Affidavit, paras. 18 & 22, Motion Record, Tab 3, pgs. 174-175.

11. Eleven (11) parties submitted indications of interest and ultimately there were six (6) formal bids received for POM and/or Mrs Green's on or about January 8, 2010. An independent committee of the Board of Directors was created to review the bids and make a recommendation (the "Committee").

Baird Affidavit, paras. 23-24, Motion Record, Tab 3, pgs. 175-176.

12. The Committee requested additional information from the six (6) interested bidders and advised bidders that the following factors would be considered in making their recommendation:

(a) valuation and ability to satisfy secured lenders, stakeholders, employees and management;

(b) availability of funds and ability to close quickly;

(c) strong financial support to facilitate growth and proposed capital available for future growth post sale;

(d) proposed treatment of employees post sale;

(e) demonstrable expertise in operation matters;

(f) an adequate exit strategy for all stakeholders and shareholders; and

(g) ongoing support and/or incentives for employees and management.

Baird Affidavit, para. 25, Motion Record, Tab 3, pgs. 176-177.

13. Upon review of the revised bids, the Committee recommended that the Board of Directors move forward with further due diligence by Catalyst. Notwithstanding the Board of Directors' determination that the Catalyst offer was the best one in hand, all bidders were asked to resubmit their bids in early March and again in early April, 2010. This was done to confirm whether the other bidders, including the majority shareholder, were prepared to better their offers.

Baird Affidavit, paras. 28-31, Motion Record, Tab 3, pgs. 177-178.

14. Ultimately, the Catalyst bid was accepted by the Board of Directors' as the best overall bid received, in terms of the proposed purchase price, its ability to satisfy the claims of

stakeholders (including secured lenders, most unsecured creditors and employees) and with respect to the ability of Catalyst to close the transaction.

May 20 Krissie Affidavit, para. 19, Motion Record, Tab 2, pg. 31.

Benefits of the Acquisition Agreement

15. The proposed transaction with Catalyst represents the best overall offer received by Planet Organic in its pre-CCAA sales process. Both, the POM stores in Canada and the Mrs. Green's stores in the US will continue as going concerns.

May 20 Krissie Affidavit, para. 24, Motion Record, Tab 2, pg. 33.

16. Broadly speaking, the proposed transaction contemplates the acquisition of substantially all of the assets and business operations of the Applicants in consideration for Catalyst assuming substantially all of the liabilities of the Applicants, and in consequence of the failure to pay approximately US$19.2 million in respect of principal and interest owing by the Applicants under the Note Purchase Agreement, dated July 3, 2007, as amended. On closing, there will be no further obligations owing under the Note Purchase Agreement. Catalyst is in effect offering $35,767,544 for the assets and assumed liabilities.

May 20 Krissie Affidavit, paras. 22 & 39, Exhibit "E", Motion Record, Tab 2, pgs. 32, 42 & 167.
Third Report of the Monitor, dated May 28, 2010 ("Third Report"), para. 45.

17. On closing, Catalyst will deliver a release to Planet Organic of its guarantee obligations under a Guarantee Agreement, dated July 3, 2007 in respect of the Amended and Restated Term Loan Agreement, dated November 30, 2007, as amended. Thus, following the closing of the Acquisition Agreement, Planet Organic will no longer have any senior secured debt.

May 20 Krissie Affidavit, para. 23, Motion Record, Tab 2, pg. 32.
Third Report, para. 51(b).

18. Under the Acquisition Agreement, Catalyst has agreed to offer employment to the vast majority of Planet Organic's 500 current employees (over 90%), to acquire substantially all of Planet Organic's contracts and leases and to assume substantially all of the obligations thereunder, and to assume all liabilities to Planet Organic's trade creditors, with a view to continuing the business as a going concern.

May 20 Krissie Affidavit, para. 24, Motion Record, Tab 2, pg. 33.

19. Under the Acquisition Agreement, Catalyst will not be acquiring liabilities under the following excluded contracts:

(a) a lease between Planet Organic and 8000 Bathurst Street Realty Inc. in respect of a leased property at 8020 Bathurst Street in Vaughan, Ontario, (the "Vaughan Lease");

(b) obligations of Darwen under a lease between S-5 Holdings Ltd., Shape Properties (Nanaimo) Corp. and Mancal Commercial Properties BC (Rutherford Mall) Inc. in respect of premises located at 243-4750 Rutherford Road, Nanaimo, British Columbia leftover after the sale of its operating business and which is currently the subject of a commercial dispute;

(c) the Note Purchase Agreement, the Amended and Restated Term Loan Agreement and certain documents executed in connection with the two agreements;

(d) the contracts relating to the retainer of PCG; and

(e) certain guarantees and indemnities granted by Planet Organic in favour of landlords under certain leases that were assigned pursuant to Planet Organic's prior sale of the Healthy's division.

May 20 Krissie Affidavit, para. 33(f), Motion Record, Tab 2, pg. 38.

20. The Vaughan Lease will not be acquired because the location, which has a larger footprint and higher rent per square foot than most other Planet Organic stores, is not producing sufficient customer traffic to be profitable and Planet Organic has been unable to negotiate any concessions with the landlord.

May 20 Krissie Affidavit, para. 34, Motion Record, Tab 2, pgs. 38-39.

21. Because Catalyst will not be acquiring the Vaughan Lease, Catalyst will not be offering employment to the 27 part-time and 18 full-time employees currently employed at the Planet Organic's Vaughan store, which employees will be terminated prior to closing (the "Excluded Employees"). However, the Excluded Employees will have a claim against the cash reserve which is to be established on the closing of the Proposed Acquisition for claims under subsection 6(5) of the *CCAA* and Catalyst will assume Planet Organic's liability to each Excluded Employee for termination payments. It is therefore expected that the Excluded Employees shall receive full payment of (i) any termination payments owed to them and (ii) any employee priority claims that they may have as set out in subsection 6(5)(a) of the CCAA. Also, Catalyst has agreed to assume all trade payable obligations related to the Vaughan store.

May 20 Krissie Affidavit, para. 29, Motion Record, Tab 2, pg. 35.

Monitor's supports approval of Acquisition Agreement

22. The Monitor supports the approval of the Acquisition Agreement on the basis that:

(a) the sales process undertaken by PCG and Planet Organic for the sale of POM and/or Mrs. Green's was extensive;

(b) the sales process was conducted with the objective of maximizing value for all stakeholders and the offer made by Catalyst is the best offer that emerged from that process;

(c) the sales process was fair and reasonable in the circumstances and was conducted in a fair and reasonable manner by the Applicants and their advisors;

(d) the consideration being offered by Catalyst under the Acquisition Agreement is reasonable and fair taking into account the market value of the assets, as evidenced by the extensive marketing and sale process that has been undertaken and the value or level of the offers made by several market participants for the assets in that process;

(e) under the circumstances, there is no reasonable basis on which to conclude or realistic prospect that further marketing and sale efforts would produce an executable offer superior to the Acquisition Agreement or that would return value to the shareholders of the Applicants.

Third Report, paras. 28 & 52.

The Monitor's Liquidation Analysis

23. In the event that the Acquisition Agreement is not implemented, Catalyst would have the right to request immediate repayment of amounts owed under the Applicants' senior secured debt. The Applicants would not be in a position to meet those obligations and may be forced into liquidation.

May 20 Krissie Affidavit, para. 11, Motion Record, Tab 2, pg. 30.
Third Report, para. 53.

24. Based on the Monitor's estimated liquidation analysis using information provided by Planet Organic as at March 31, 2010, the liquidation value of Planet Organic would be in the range of $24.7 million to $27.6 million, substantially below the book value of the assets. The Applicants had total liabilities of approximately $38.9 million as at March 31, 2010. Consequently, in the event of liquidation, the Applicants' unsecured creditors would be significantly worse off as they would receive no recovery on their claims and its shareholders would no receive any recovery on their equity interests.

Third Report, paras. 54, 56-57.

25. Liquidation would also put at risk the Applicants' over 500 employees and would have a significant impact on its customers and suppliers. Accordingly, the Monitor is of the opinion that the Proposed Acquisition would be more beneficial to the Applicants' creditors than a sale or disposition under bankruptcy.

Third Report, paras. 58-59.

PART III - THE LAW

Approval of Acquisition Agreement

26. Under the newly proclaimed section 36 of the *CCAA,* on an application by a CCAA debtor for approval to sell assets outside the ordinary course of business, the court is to consider:

(a) *whether the process leading to the proposed sale or disposition was reasonable in the circumstances;*

For the reasons set out above, the sales process directed by the Applicants in conjunction with PCG was fair, reasonable, extensive and effective.

Third Report, para. 66

(b) *whether the Monitor approved the process leading to the proposed sale or disposition;*

The Monitor has reviewed the sales process conducted and concluded that the process was extensive, conducted with the objective of maximizing value for all stakeholders, was fair and reasonable in the circumstances and was conducted in a fair and reasonable manner.

Third Report, para. 67

(c) *whether the Monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;*

The Monitor has concluded that all stakeholders will benefit from the proposed transaction in comparison to a sale or disposition under a liquidation scenario which would result in significantly lower realizations and no recovery for unsecured creditors.

Third Report, para. 70

(d) *the extent to which the creditors were consulted;*

The senior secured lenders (initially Ares, and then Catalyst), were consulted throughout the process.

Third Report, paras. 29

(e) *the effects of the proposed sale or disposition on the creditors and other interested parties; and*

As discussed above, the Proposed Acquisition, which is supported by Catalyst, the senior secured creditor, provides for a going concern outcome which will preserve jobs for substantially all of the employees, and will ensure that trade creditors are paid in the ordinary course and that substantially all of Planet Organic's contracts and lease counterparties will remain unaffected.

Third Report, paras. 47

(f) *whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.*

The Monitor is of the opinion that the consideration being offered by Catalyst is reasonable and fair, taking into account the market value of the assets, as evidenced by the extensive marketing and sale process and the value or level of offers made by several market participants for the assets in that process.

Third Report, paras. 52

27. In *Nortel,* this Court held that, in order for an sales process under the CCAA to be considered appropriate in the absence of a plan, the court should consider:

(a) Is a sale transaction warranted at this time?

(b) Will the sale benefit 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 Networks Corp. Re 2009 CarswellOnt 4467 (Ont. S.C.J [Commercial List]) ("*Nortel*") at para 39

28. In this case, the whole economic community benefits by the continuation of the business as a going concern and avoiding the reduced realizations that would result in a liquidation scenario.

29. In *Royal Bank v. Soundair Corp.* ("*Soundair*") the Ontario Court of Appeal held that, in deciding whether to approve the receiver's sale of property, the court has a duty to consider:

(a) whether the receiver has made sufficient effort to get the best price and has not acted improvidently;

(a) the interests of all parties;

(b) the efficacy and integrity of the process by which offers are obtained; and

(c) whether there has been unfairness in the working out of the process.

Royal Bank v. Soundair Corp., [1991] O.J. No. 1137 (C.A.) at para. 16.
Canwest Publishing Inc./Publications Canwest Inc., Re . 2010 CarswellOnt 3509 (S.C.J. [Commercial List])

30. A court should make the same inquires to determine whether it should approve a sales transaction or acquisition arising from a sales process conducted outside of court proceedings. No further sales process is warranted if, as here, the evidence is that a further process would not result in a better offer.

Fund 321 Ltd. Partnership v. Samsys Technologies Inc., 2006 CarswellOnt 2541 (S.C.J. [Commercial List]) at para. 36.
Textron Financial Canada Ltd. v. Beta Ltee/Beta Brands Ltd., 2007 CarswellOnt 89 (S.C.J.) at para. 16.
Tool-Plas Systems Inc., Re, 2008 CarswellOnt 6258 (S.C.J. [Commercial List] at para. 20.

31. This Court should approve the Acquisition Agreement in light of the following uncontroverted facts:

(i) the jobs of the vast majority (over 90%) of Planet Organic's employees will be preserved;

(ii) the obligations owed to trade creditors will be paid in full which is significant in that these unsecured creditors would see likely have no recoveries in a liquidation scenario;

(iii) the obligations under all but one of Planet Organic's operating leases (i.e. the Vaughan Lease) will be assumed by Catalyst;

(iv) the Planet Organic business will be able to exit from its CCAA proceeding on an expedited basis, with no further disruption to its relationships with customers, suppliers and landlords;

(v) the business will emerge from CCAA with a significantly reduced debt load, which will in turn, support a healthier and more sustainable business in the future for the benefit of customers, suppliers and landlords; and

(vi) the preservation of an organic and natural foods retailer for the benefit of Canadian and US consumers.

May 20 Krissie Affidavit, para. 36, Motion Record, Tab 2, pgs. 40-41.

32. In *Re Air Canada*, the Court held that, in *CCAA* proceedings, an agreement should be approved if the agreement is consistent with the purposes and spirit of the *CCAA* and the

proposed transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally. To determine what is "fair and reasonable", the Court should look to the stakeholders as a whole and the objecting stakeholders specifically, to see if rights are compromised in an attempt to balance interests as opposed to the confiscation of rights.

Re Air Canada, [2004] O.J. No. 303 (S.C.J.) at para. 9

33. Catalyst supports the approval of the Acquisition Agreement, and as Planet Organic's senior secured lender, has the primary economic interest in the proceedings.

May 20 Krissie Affidavit, para. 37, Motion Record, Tab 2, pg. 41.

Assignment of Rights

34. Subsection 11.3(1) of the *CCAA* provides that on application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment. Pursuant to ss.11.3(3) of the CCAA, in deciding whether to make such an order the court is to consider certain factors set out therein. The factors and relevant considerations under the circumstances are as follows:

(a) whether the Monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

CCAA, ss.11.3

35. The agreements are to be assigned to Catalyst, which is to cure all financial defaults and is able to perform the obligations thereunder. The contracts, licenses and leases to be assigned are essential for the continued operation of the Planet Organic business and are an important part of the Acquisition Agreement, which will enable the Applicants to complete their restructuring in a manner that best maximizes value for their various stakeholders. The counterparties to the contracts to be assigned have been served with the motion herein.

May 20 Krissie Affidavit, para.32, Motion Record, Tab 2, pg. 36

Sealing of Bid Summary

36. The Bid Summary was submitted to the Court on a sealed basis and is subject to request for a sealing order. The Bid Summary was intended to assist the Board of Directors in its consideration of the bids which were submitted on a confidential basis and could have a negative effect on further sale efforts by Planet Organic in the event that the transaction with Catalyst is not completed since it contains the purchase price and other relevant terms of the respective bids.

Baird Affidavit, paras. 28-29, Motion Record, Tab 3, pg. 177.

37. In the circumstances, it is appropriate to grant a sealing order until the closing of the Acquisition Agreement. The Monitor supports the Applicants' request that the summary be sealed.

Sierra Club of Canada v. Canada (Minister of Finance) 2002 CarswellNat 822 (S.C.C)
Third Report, para 27

Directors' and Officers' Claims Process

38. Upon closing of the Acquisition Agreement, the parties have agreed to a cash reserve that would cover certain liabilities including claims that fall under the Directors' and Officers' Charge as defined by the Initial Order. A claims process is required to definitively determine all

claims against the officers and directors that would be subject to the Directors' and Officers' Charge in order to address those claims in a timely fashion and eventually release the cash reserve.

May 20 Krissie Affidavit, paras. 40-41, Motion Record, Tab 2, pg. 42.

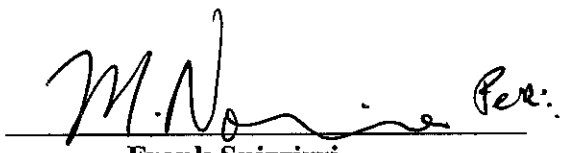
39. The Monitor is of the view that the proposed method of notification, the claims bar date and the time periods contemplated in the claims process are appropriate and recommends approval of the claims process.

Third Report, para 65

PART IV - ORDER REQUESTED

40. The Applicants respectfully request Orders substantially in the form attached to the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of June, 2010.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Nortel Networks Corp. Re,* 2009 CarswellOnt 4467 (Ont. S.C.J [Commercial List])
2. *Re Air Canada*, [2004] O.J. No. 303 (S.C.J.)
3. *Royal Bank v. Soundair Corp.,* [1991] O.J. No. 1137 (C.A.).
4. *Canwest Publishing Inc./Publications Canwest Inc. Re*, 2010 CarswellOnt 3509 (S.C.J. [Commercial List])
5. *Fund 321 Ltd. Partnership v. Samsys Technologies Inc.,* 2006 CarswellOnt 2541 36 (S.C.J. [Commercial List])
6. *Textron Financial Canada Ltd. v. Beta Ltee/Beta Brands Ltd.*, 2007 CarswellOnt 89 (S.C.J.)
7. *Tool-Plas Systems Inc., Re*, 2008 CarswellOnt 6258 (S.C.J. [Commercial List]
8. *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 CarswellNat 822 (S.C.C)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions -- s. 11.3(2)

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract within the meaning of subsection 11.05(3); or

(c) a collective agreement.

Factors to be considered -- s. 11.3(3)

(3) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction -- s. 11.3(4)

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order -- s. 11.3(5)

(5) The applicant is to send a copy of the order to every party to the agreement.

...

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors -- s. 36(2)

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered -- s. 36(3)

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons -- s. 36(4)

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons -- s. 36(5)

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear -- s. 36(6)

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers -- s. 36(7)

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

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 PLANET ORGANIC HEALTH CORP. AND DARWEN HOLDINGS LTD.

Court File No.: 10-8699-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

PROCEEDING COMMENCED AT
TORONTO, ONTARIO

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