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. (the "Applicants")

FACTUM OF THE CATALYST CAPITAL GROUP INC.
(returnable June 4, 2010)

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TO: SERVICE LIST

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PART I - OVERVIEW

1. The Catalyst Capital Group Inc., on behalf of the funds managed by it and its permitted assigns ("Catalyst"), files this factum in support of the Applicants' motion for, *inter alia*, an Order approving the proposed acquisition by Catalyst of substantially all of the assets of the Applicants pursuant to an acquisition agreement dated May 19, 2010 between the Applicants and Catalyst (the "Acquisition Agreement") and providing a vesting order in connection therewith in the form of the draft approval and vesting order included in the Motion Record at tab 4 (the "Approval and Vesting Order"). Catalyst is both the principal secured creditor of the Applicants and the acquiring party under the Acquisition Agreement.

2. As set out in the Applicants' Factum, the proposed acquisition of the Applicants' assets by Catalyst (the "Proposed Acquisition") is the result of the Applicants' efforts over many months to restructure in the face of significant financial difficulties. These efforts culminated in the Proposed Acquisition. Like the Applicants, Catalyst submits that the Proposed Acquisition should be approved on the grounds that:

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

(b) 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;

(c) 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;

(d) the Acquisition Agreement is supported by Catalyst, which has the principal economic interest in the Applicants' assets and, most importantly, by the Monitor; and

(e) the Proposed Acquisition is in keeping with the principles set out in *Royal Bank v. Soundair Corp.* and satisfactorily addresses the factors set out in section 36(3) of the *Companies' Creditors Arrangement Act* (the "CCAA").

3. Accordingly, Catalyst requests that the Approval and Vesting Order be granted.

PART II - THE FACTS

4. Catalyst adopts and relies on the facts and law set out in the Applicants' factum, which it will not, for the most part, repeat here.

PART III - THE LAW

A. PROPOSED ACQUISITION SHOULD BE APPROVED

5. 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;

(b) the interests of all parties;

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

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

Royal Bank v. Soundair Corp., [1991] O.J. No. 1137 at para. 16 (C.A.).

6. CCAA Courts have on numerous occasions looked to the criteria in *Soundair* in determining whether to approve a sale of assets or other transaction by a CCAA debtor.

Re Intertan Canada Ltd. 2009 CarswellOnt 1489 at para 10 (S.C.J.) (WL).

Re Canwest Global Communications Corp, 2010 ONSC 1176 , 2010 CarswellOnt 1077 at para. 36 (S.C.J.) (WL).

7. Courts have also applied the *Soundair* principles in deciding whether to approve a sales transaction or acquisition arising from a sales process conducted prior to court proceedings. In such cases, courts have held that no further sales process is warranted if, as here, the *Soundair* test is met and the evidence before the Court is that a further process would not result in a better offer. As stated by the Monitor in its Third Report, there is no reasonable basis to conclude, or reasonable prospect, that any further marketing efforts or sales process would produce an offer that is higher or better than the Proposed Acquisition.

Tool-Plas Systems Inc., Re, 2008 CarswellOnt 6258 at para. 20 (S.C.J. [Commercial List] (WL).

Textron Financial Canada Ltd. v. Beta Ltee/Beta Brands Ltd., 2007 CarswellOnt 89 at para. 16 (S.C.J.) (WL).

Fund 321 Ltd. Partnership v. Samsys Technologies Inc., 2006 CarswellOnt 2541 at para. 36 (S.C.J. [Commercial List]) (WL).

Third Report, paras. 45, 52.

8. The Proposed Acquisition is in the best interests of the stakeholders. It allows Planet Organic's business to continue as a going concern, thereby preserving the jobs of approximately 90% of Planet Organic's 500 employees and almost all of Planet Organic's

leases, licenses and other contracts and ensuring payment of Planet Organic's trade creditors in the ordinary course. In addition, the Proposed Acquisition means that the Planet Organic business will be able to exit from CCAA proceedings on an expedited basis and that there will be no further disruption to Planet Organic's relationships with its customers, suppliers and landlords. The Proposed Acquisition is supported by Catalyst, Planet Organic's senior secured creditor, who holds the principal economic interest in Planet Organic's assets and business, and most importantly by the Monitor.

May 20 Krissie Affidavit, paras. 29, 36, Motion Record, Tab 2, pgs. 35, 40-41.

Re Canwest Global Communications Corp, 2010 ONSC 1176 , 2010 CarswellOnt 1077 at para. 36 (S.C.J.) (WL).

9. As stated by the Monitor, the relief sought on this motion will allow the Applicants to complete their restructuring in a manner that best maximizes value for their stakeholders. Indeed, in the absence of the Acquisition Agreement, Planet Organic could be faced with possible liquidation and cessation of its business in the very near term. In a liquidation, there would be significantly lower realization for these stakeholders than the treatment offered under the Acquisition Agreement; indeed those stakeholders would likely receive no recoveries.

Third Report, paras. 47, 53-59, 70, 71.

10. It is true that as part of the Proposed Acquisition, the Planet Organic store in Vaughan will be shut down and the Vaughan lease will not be assumed. However, the trade payables associated with that store will be paid and the employees of the store will be paid any amounts due to them in respect of termination payments and claims under subsection 6(5)(a) of the CCAA either directly or through the operation of a cash reserve.

Third Report, paras. 47(c), 56-57, 70.

May 20 Krissie Affidavit, paras. 29, 34, Motion Record, Tab 2, pg. 35, 38-39

11. The landlord of the Vaughan store has disputed Catalyst's right not to assume the Vaughan lease. As indicated in the affidavit of Mr. Krissie filed by the Applicants, the Vaughan lease, which has a larger footprint and higher rent per square foot than most Planet Organic stores, is not being assumed by Catalyst as it is not producing sufficient customer

traffic to be profitable and Planet Organic has not been able to negotiate any rent concessions from the landlord.

Third Report, paras. 54, 56-57, 70.

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

12. There is no basis in law for the landlord's complaint. The law is clear that a purchaser can choose which contracts it wishes to assume and is entitled not to assume those contracts which are not profitable. As stated by this Court in *Re Nexient Learning Inc.:*

> "ESI argues that a Court should not permit a purchaser under a "liquidating CCAA" to "cherry pick" the contracts it wishes to assume.
>
> Insofar as the result would be to prevent a debtor subject to CCAA proceedings from selling only profitable business divisions or would prevent a purchaser from deciding which business divisions it wishes to purchase, I do not think that ESI's proposition is either correct or practical. The purpose of the CCAA is to further the continuity of the business of the debtor to the extent feasible. It does not, however, mandate the continuity of unprofitable businesses.

Re Nexient Learning Inc. (2009), 62 C.B.R. (5th) 248 at paras. 60-61 (S.C.J.) (WL).

B. ORDER REQUESTED

13. Catalyst respectfully supports the Applicants' request for an order approving the Acquisition Agreement and vesting the assets of the Applicants in Catalyst pursuant to the Approval and Vesting Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of June, 2010.

Hilary Clarke
McMillan LLP

Lawyer for The Catalyst Capital Group Inc., on behalf of funds managed by it

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Canwest Global Communications Corp., Re*, 2010 ONSC 1176, 2010 CarswellOnt 1077 (S.C.J. [Commercial List]) (WL).

2. *Fund 321 Ltd. Partnership v. Samsys Technologies Inc.* (2006), 21 C.B.R. (5th) 1, 2006 CarswellOnt 2541 (S.C.J. [Commercial List]) (WL).

3. *Intertan Canada Ltd., Re*, 2009 CarswellOnt 1489 (S.C.J. [Commercial List]) (WL)

4. *Nexient Learning Inc., Re* (2009), 62 C.B.R. (5th) 248, 2009 CarswellOnt 8071 (S.C.J.) (WL).

5. *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (C.A.).

6. *Textron Financial Canada Ltd. v. Beta Brands Ltd.* (2007), 27 C.B.R. (5th) 1, 2007 CarswellOnt 89 (S.C.J.) (WL).

7. *Tool-Plas Systems Inc., Re* (2008), 48 C.B.R. (5th) 91, 2008 CarswellOnt 6258 (S.C.J. [Commercial List]) (WL).

SCHEDULE "B"
RELEVANT STATUTES

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

Assignment of agreements

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

(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; or
(c) a collective agreement.
Factors to be considered

(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

(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

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

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 29, s. 107, c. 36, ss. 65, 112.

Restriction on disposition of business assets

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

(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

(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

(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

(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

(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

(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.

2005, c. 47, s. 131; 2007, c. 36, s. 78.

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