

**SUPERIOR COURT**  
(Commercial Division)

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

NO : 500-11-057679-199

DATE : December 30, 2021

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**BY THE HONOURABLE MARIE-ANNE PAQUETTE, J.S.C.**

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IN THE MATTER OF THE RESTRUCTURING UNDER THE **COMPANIES CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36 OF:**

**FORTRESS GLOBAL ENTERPRISES INC.**

**FORTRESS SPECIALTY CELLULOSE INC.**

**FORTRESS BIOENERGY LTD.**

**FORTRESS XYLITOL INC.**

**9217-6536 QUÉBEC INC.**

Debtors

c.

**DELOITTE RESTRUCTURING INC**

Monitor / APPLICANT

**INVESTISSEMENT QUÉBEC**

**FIERA PRIVATE DEBT INC.**

Secured Creditors

**GOULDS PUMPS CANADA INC.**

**ITT GOULDS PUMPS INC.**

Mises-en-cause

**OMNI BRIDGEWAY (FUND 5) CANADA INVESTMENTS LIMITED**

Mise-en-cause

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**JUDGMENT**  
**ON THE APPLICATION OF THE MONITOR FOR THE ISSUANCE OF AN ORDER**  
**APPROVING A LITIGATION FUNDING AGREEMENT (LFA) AND A LITIGATION**  
**FINANCING CHARGE (LFC) (SEQ. 122)**

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**OVERVIEW**

[1] The Initial LFA Judgment<sup>1</sup> refused to approve the Initial LFA and \$6 million Litigation Financing Charge (**LFC**), based on the conclusion that the limits to Omni's obligation to fund an eventual adverse costs award against Fortress, as stipulated in the Initial LFA, discredited the administration of justice.

[2] The Monitor now seeks approval of the Amended LFA and of the same LFC. The Amended LFA would respond to the Court's preoccupations regarding Omni's limited obligation to fund legal fees and disbursements, as detailed in the Initial LFA Judgment.

[3] Goulds objects to the approval of the Amended LFA, which would still not meet the applicable requirements for approval.

[4] Goulds' objections relate to many issues which were already debated and disposed of in the Initial LFA Judgment. The Court will only address the question of the obligation to pay costs. This is the only point which precluded the approval of the Initial LFA and this is the only issue on which changes were made to the LFA.

[5] The Amended LFA increases the scope of Omni's obligation to pay costs, results in a slight 2% variation on the litigation proceeds, to account for the increased risk and leaves unchanged the terms and amount of the LFC Charge.

[6] As per the Amended LFA, Omni's obligation to cover an eventual costs award against Fortress in the Litigation Proceedings would now extend to costs incurred prior to the entry into of the Amended LFA. Omni's obligation to pay Court-Ordered Costs is also no longer dependent on the date on which the court order awarding such costs would be rendered.

**2.3.3. "Court-Ordered Costs"** Any legal fees and disbursements that, in respect of the Litigation, a Court orders pursuant to the Code of Civil Procedure, C.Q.L.R. c. C-25.01, ss. 339-344, to be paid by Plaintiff to Defendants or into Court.

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<sup>1</sup> *Restructuration de Fortress Global Enterprises Inc.*, 2021 QCCS 4613 (November 1, 2021), par. 74, 79-94.

[...]

**10.4.3** All obligations of Omni under the Agreement will cease on the date Termination becomes effective, other than obligations accrued prior to that date. Such accrued obligations include:

**10.4.3.1** payment of any outstanding Litigation Costs required to be paid by Omni pursuant to the Agreement incurred up to the date the notice of termination becomes effective; and

**10.4.3.2** payment of any Court-Ordered Costs incurred up to the date the notice of termination becomes effective. For the avoidance of doubt, Omni is obligated to pay the Court-Ordered Costs, if any, even if the court order awarding such costs is entered after the Agreement has been terminated.

[Emphasis added]

[7] The Court also notes that the definition of “Court Ordered Costs” includes costs awarded as per section 342 of the *Code of Civil Procedure*, dealing with orders to pay legal costs in the event of substantial breaches in the conduct of the proceedings.

[8] These amendments properly respond to the findings of the Initial LFA Judgment.

[9] However, as explained below, there is a remaining issue regarding information of termination of the LFA.

[10] More particularly, it is Omni and the Monitor’s prerogative to terminate the LFA, as per the terms and conditions set forth in article 10. It stipulates that the party terminating the LFA shall provide Omni or the Monitor, depending of the situation, a written notice to that effect.

[11] The Court agrees with Goulds’ argument that the notice of termination of the LFA should also be given to Goulds. However, Goulds should only be informed of the effective date of the termination of the LFA. Goulds should not receive the full detailed notice of termination, which includes information beyond the scope of appreciating the extent to which its costs may be paid. The conclusions of the Court in this regard rest on the following reasons.

[12] Firstly, as appears from the above provisions, the termination of the LFA would have an impact on Omni’s obligation to pay costs awarded to Goulds. Goulds therefore has an interest in receiving such information.

[13] Secondly, even if a party to a litigation is not generally entitled to information or reassurance on the ability of its opposing party to eventually pay for an adverse judgment or adverse costs award, the situation is different here.

[14] Admittedly, a plaintiff may pursue a litigation to assert a claim, while at the same time not having the funds to cover an eventual adverse costs award. Such is life. However, the involvement of a third party litigation funder, asset based lender, behind such a plaintiff adds a layer which shall not be disregarded. The competing preoccupations of, on the one hand, enhancing access to justice and, on the other hand, ensuring that our judicial system is not instrumented as a mere means of generating profits then come into play.<sup>2</sup>

[15] Thirdly, Goulds' entitlement to information of the termination of the LFA and of the effective date of termination derives from its quality as Fortress' opposing party in the Litigation Proceedings and not from its status as an unsecured creditor in the CCAA proceedings. Therefore, notice should be given to Goulds, even though the Court and distribution list would be informed of an Application which the Monitor would present to the court in such event.

[16] The Court cannot adjust the terms of the agreement which is submitted for approval and is left with one of the two following options: approve or refuse. Here, for the reasons above, the Court will refuse.

[17] Still, if the parties remain interested in presenting a LFA with the necessary adjustments to provide for proper notice of termination to Goulds, the Court would welcome further representations.

**FOR THESE REASONS, THE COURT:**

[18] **DISMISSES** the Application for the Issuance of an Order Approving a Litigation Funding Agreement and a Litigation Financing Charge.

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MARIE-ANNE PAQUETTE, J.S.C.

Me Guy Martel  
Me Danny Duy Vu  
**STIKEMAN ELLIOTT S.E.N.C.R.L., S.R.L.**  
For Investissement Québec

Me Alain Tardif  
Me François Alexandre Toupin  
**MCCARTHY TETRAULT S.E.N.C.R.L., S.R.L.**  
For Deloitte Restructuring inc.

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<sup>2</sup> Initial LFA Judgment, par. 28-45.

Me Neil Peden  
Me Pierre-Jérôme Bouchard  
**WOODS s.e.n.c.r.l.**  
For Omni Bridgeway (fund5)

Me Olivier Therrien  
Me Suzie Lanthier  
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Me Sonia Paquin  
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Hearing date: December 15, 2021