

AUG 11 2017

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**BY HAND**

Our File: 142706  
August 11, 2017

The Honourable Justice Glen G. McDougall  
Supreme Court of Nova Scotia  
The Law Courts  
1815 Upper Water St.  
Halifax NS

My. Lord:

**Re: Victory Farms Inc. and Jonathan Mullen Mink Ranch Limited: Motion by the Monitor for a Distribution Order**

We are the solicitors for the Monitor, Deloitte Restructuring Inc. (the "**Monitor**"), in its capacity as Monitor of Victory Farms Inc. and Jonathan Mullen Mink Ranch Limited (the "**Applicants**") pursuant to the *Companies' Creditors Arrangement Act* ("**CCAA**").

The Monitor was appointed by way of an Initial Order issued by this Honourable Court on August 31, 2016 (the "**Initial Order**").

We have scheduled to be heard on Friday August 18, 2017 at 11:00 a.m. a Motion seeking an Order which:

- (a) validates service of this Notice of Motion and the supporting Report of the Monitor;
- (b) authorizes the interim distribution of \$1,148,755 out of funds held by the Monitor to certain of the Designated Creditors of the Applicants, in accordance with the interim distribution table contained within the Ninth Report of the Monitor and appended to the draft Distribution Order submitted herewith as Schedule "A";
- (c) approves the payment by Victory Farms Inc. to Royal Bank of Canada ("**RBC**") of \$8,000 from cash on hand, in full and final settlement of a set-off claim asserted by RBC;
- (d) approves of the Reports, conduct and activities of the Monitor in these proceedings to date, and
- (e) Such further and other relief as this Honourable Court deems just and equitable.

The Affidavit of Chris Lirette sworn on July 21, 2017, has been filed in support of the Monitor's Motion, and the Ninth Report of the Monitor (and its appendices) will be filed in advance of the scheduled Motion (we estimate such filing to be made on Monday August 14, 2017).

Copies of the Monitor's Motion materials and this pre-hearing memorandum have been served upon the full Service List maintained in this matter in accordance with the paragraph 32 of the Initial Order, notwithstanding that the distribution of sale proceeds in this matter affects only a very limited number of creditors, defined as "Designated Creditors" in the Claims Procedure Order of April 10, 2017.

Please accept the following as the Monitor's pre-hearing memorandum.

### Background

The Ninth Report, to be imminently filed, and the material on file with this Honourable Court set out the background facts of this matter in a comprehensive manner, such that the same need not be repeated at length herein.

Following this Honourable Court's issuance of the Sale Approval and Vesting Order on April 10, 2017, by which the Applicants were authorized to conclude the sale of certain of the Applicants' assets to North American Fur Auctions Inc., or its designate (the "**Purchaser**"), the Applicants worked diligently with the Purchaser to conclude that transaction.

Effectively on May 5, 2017, (though with the Monitor's Certificate formally delivered and filed on May 8, 2017) the sale transaction approved by the Sale Approval and Vesting Order was concluded, and the Monitor received from the Purchaser the agreed upon purchase price of \$4,000,000 (the "**Proceeds**").

During the week of May 15, 2017, pursuant to paragraph 7(b)(i) of the Sale Approval and Vesting Order, the Monitor made an interim refund of the DIP Facility (as defined in the Charging Orders of September 27, 2016 and February 16, 2017 respectively) in the amount of \$2,500,000, with a further sum held back for final reconciliation with the DIP lender, North American Fur Auctions Inc. (the "**DIP Lender**"). This final payment has subsequently been made, and the retirement of the DIP Loan shall be described in the Monitor's Ninth Report.

Pursuant to paragraph 7(b)(ii) of the Sale Approval and Vesting Order, the Monitor has utilized portions of the Applicants' cash on hand, together with portions of the Proceeds to satisfy the various liabilities incurred by the Applicants, following this Honourable Court's issuance of the Initial Order. Details of these post-filing liability payments are provided within the Monitor's Ninth Report.

In accordance with the terms of the Initial Order, and as directed by paragraph 7(b)(iii) of the Sale Approval and Vesting Order, the Monitor has set aside from the Proceeds a reserve in the amount of \$150,000 to satisfy any required Administration Charge-covered professional fees to be incurred, the extent of which shall be known in the fullness of time. To the extent such reserved funds are unused, they will form the subject of a future final distribution to the Designated Creditors, or such of them as are entitled to such residue.

As directed by paragraph 7(c) of the Sale Approval and Vesting Order, remaining Proceeds are currently held in the Monitor's trust account awaiting distribution to certain Designated Creditors, as defined in the Claims Procedure Order, according to their priority ranking against the Proceeds, which stand in lieu of the assets of the Applicants which have been sold.

The Affidavit of Mr. Lirette confirms the holders of security over the personal property of the

Applicants. As has been confirmed at earlier junctures of these proceedings, Workers Compensation Board of Nova Scotia is no longer owed money by the Applicants, and each of Farm Credit Canada and the Nova Scotia Farm Loan Board have been paid out pursuant to arrangements made with the purchaser of the Applicants' assets.

The Ninth Report of the Monitor will confirm that Bank of Nova Scotia (Atlantic CAU), the purchase money security interest holder over a Chevrolet Silverado, has recently repossessed that vehicle, which did not stand to yield any equity potentially availing creditors of the Applicants, net of the lien of Bank of Nova Scotia's lien.

Furthermore, CNH Industrial Capital Canada Ltd. ("CNH") has remained in close discussions with the Purchaser of the Applicants' assets and undertaking, and it is envisaged that the leases of two New Holland tractors will either be assumed by that Purchaser, or the units will be recovered by CNH, but in either case, there is negligible, if any resulting gain for creditors associated with those units given the magnitude of outstanding indebtedness on those units subject to the purchase money security interest of CNH.

The Affidavit of Maurice Chiasson dated September 15, 2016, filed at an earlier juncture of these proceedings appended to it an October 9, 2015 Subordination and Intercreditor Agreement among American Legend Cooperative ("ALC"), North American Fur Auctions ("NAFA"), Victory Farms Inc. and Jonathan Mullen. This Agreement confirms that NAFA obtained priority over ALC as regards live mink, their progeny and all mink sale proceeds, though ALC retained first priority over other personal property of the Applicants, including but not limited to equipment, and cash (other than mink proceeds).

ALC and NAFA are therefore the Designated Creditors which stand to recover distributions at this time.

As will be set forth in greater detail in the Ninth Report of the Monitor, in a matter identified to the Court on prior occasions (see Eighth Report dated May 26, 2017, at Section 7; and Supplement to the Seventh Report dated April 25, 2017, at Section 3), Victory Farms Inc. ("Victory") and RBC have reached agreement deemed satisfactory to the Monitor (subject to this Honourable Court's approval), as to the settlement of RBC's set-off claim. By the terms of this agreement, which was deemed a prudent means of avoiding costly and perhaps protracted litigation, RBC's claim in excess of \$19,000 would be deemed fully satisfied upon payment by Victory to RBC of the sum of \$8,000, which funds are drawn from Victory's cash on hand in its RBC account, and not from asset sale proceeds.

Section 21 of the CCAA preserves the right of set-off in these proceedings, and unlike the situation in a bankruptcy where the intervention of a Trustee has been held to defeat the requisite mutuality required to anchor a legal set-off claim, such is not the case under the CCAA (*Re Air Canada* 2003 CarswellOnt. 4016 (Ont. S.C.J.)).

RBC's set-off rights were stayed by the Initial Order, but they were not extinguished, and in addition to the post-filing claims addressed by the Applicants pertaining to active RBC Visa cards, this set-off issue remained outstanding as matters progressed.

ALC, as the creditor with an otherwise senior interest in the Applicants' cash on hand, has been given notice of the Applicants' proposed settlement of this claim with RBC, and may address it at the hearing of this matter.

From the Monitor's perspective, the settlement between RBC and Victory is in the best interests of the Designated Creditors to the extent it preserves residual funds available for distribution through the avoidance of costly litigation, which might otherwise erode this return.

It is envisaged that a final distribution will be made at a later time, once all realizations are concluded and the Administration Charges are finalized at the end of the Monitor's mandate. The Monitor will report further to all affected Designated Creditors and to the Court at that time.

With the assistance of counsel, the Monitor has created a recovery schedule outlining the distributions contemplated across the Designated Creditors, based upon the Monitor's conclusions with respect to the priority of various claims against the Proceeds remaining after the DIP Loan was retired, the Administration Charges are repaid, and the post-filing liabilities are discharged.

From the residual Proceeds, the Monitor has determined that the sum of \$1,148,755 remains divisible amongst the Designated Creditors at this time, in the respective amounts to be articulated in the Monitor's Ninth Report, and shown at Schedule "A" to the draft Distribution Order submitted herewith.

### **Issues**

We submit the issues before the Court can be described in the following terms:

- (a) Has service been effected in accordance with paragraph 32 of the Initial Order?;
- (b) Is the interim distribution to certain of the Designated Creditors in the manner proposed by the Monitor in the Ninth Report of the sum of \$1,148,755, being the amount of Proceeds remaining after the satisfaction of the liabilities referenced in paragraph 7(b) of the Sale Approval and Vesting Order, worthy of the approval of this Honourable Court?
- (c) Does the settlement which Victory has negotiated with RBC warrant the approval of this Honourable Court? and
- (d) Do the Monitor's activities and conduct, as outlined within the various Reports filed by the Monitor in these proceedings to date, including the forthcoming Ninth Report, warrant the approval of this Honourable Court?

### **Argument**

#### **(a) Service and Notice**

Service of affected secured creditors and stakeholders shall be effected through electronic means, in accordance with paragraph 32 of the Initial Order, which provides:

"32. The Applicants and the Monitor, and any party who has filed a demand of notice may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsel's e-mail addresses as recorded on the service list from time to time, and the Monitor may post a copy

of any or all such materials on its website at [www.insolvencies.Deloitte.ca](http://www.insolvencies.Deloitte.ca).”

Immediately after filing the within Motion materials, the Monitor will cause these materials to be sent electronically to the Service List maintained in these proceedings, and shall courier a copy of the Motion materials to the lone party on that list without an electric means of receiving service.

An Affidavit of Service will be filed in support of the Motion, and in advance of same being delivered it is respectfully submitted the giving of notice and the manner of service were adequate and proper in the circumstances.

**(b) Distribution of Net Proceeds**

Paragraph 7 of the Sale Approval and Vesting Order provides as follows:

“7. The Monitor, in addition to its prescribed rights and obligations under the CCAA and the express powers provided to it under Orders issued by this Honourable Court in this proceeding, is hereby directed and empowered:

a. to receive and hold for the purposes set out herein, in the trust account of Monitor’s counsel:

- (i) the net closing proceeds from the Transaction; and
- (ii) other funds of the Applicants on hand or in the Applicants’ bank account after the Closing

b. after Closing, to pay from those funds:

- i. any amounts outstanding on the DIP Facility (as defined in the orders of this Honourable Court dated September 27, 2016, and February 16, 2017), upon payment of which the DIP Facility shall cease to revolve, no more advances under the DIP Facility can be made, and the DIP Lender’s Charge shall be deemed to be released and discharged;
  - ii. debts incurred in the course of business after the Initial Order issued by this Honourable Court on August 31, 2016 (the “Initial Order”), including amounts set out in paragraph 7 of the Initial Order, as approved by the Monitor;
  - iii. to pay, in accordance with the terms of the Initial Order, amounts secured by the Administration Charge (as defined in the Initial Order);
- c. to hold the balance of the funds in trust pending further order(s) of this Court.

As will be outlined in the Ninth Report, the Monitor holds the remaining Proceeds in the amount of \$1,148,755, net of the reconciliation of post-filing accounts, the partial reimbursement of the DIP Facility, and the allocation of an Administration Charge reserve, and currently maintains these funds in its trust account.

Required at this juncture is an Order directing their distribution, in accordance with the creditor claims priorities identified in the Ninth Report and the supporting Affidavit which has been filed.

The Affidavit of Mr. Lirette filed in respect of this Motion addresses the security situation vis a vis those items of the Applicants' personal property which were included within the approved sale to the Purchaser of the Applicants' assets and undertaking.

We respectfully submit the distribution of residual Proceeds in the manner recommended by the Monitor is appropriate.

Save and except for certain assets excluded from the sale to the Purchaser, in respect of which arrangements have been made between the affected creditors and the Purchaser, the Monitor has overseen the realization of all available Proceeds from the sale of the Applicants' assets.

Should further realizations result (manifesting either in a receipt of distributable funds by the Applicants or an unspent remainder under the Administration Charge reserve), whatever funds come into the Monitor's possession, will become payable to Designated Creditors in accordance with their respective priority over such funds.

When that occasion arises, or should it prove the case that no further realizations are available, we shall return seeking an Order discharging the Monitor and providing any further directions as may be required.

**(c) Approval of the Settlement with RBC:**

As set out above (and as was described in the Supplement to the Seventh Report and the Eighth Report of the Monitor), Victory has been involved in a dispute with RBC concerning a \$19,000 purported set-off claim being made by the latter.

After RBC seized funds in Victory's account in contravention of the stay of proceedings, the Monitor intervened and facilitated a return of those funds. The restoration of the funds to Victory's use did not end the dispute however, and while RBC's set-off rights were stayed, they were not extinguished, and indeed persist under the CCAA pursuant to Section 21.

Victory has subsequently entered into negotiations with RBC, and in an effort to prevent what could be a costly and protracted contest before this Honourable Court, Victory and RBC have agreed to fully and finally settle the dispute by way of a payment to RBC of \$8,000 from funds currently on hand in Victory's RBC account (not proceeds from the sale of the Applicants' assets).

Affected creditors ALC and NAFA have been notified of this settlement, which is conditional on the approval of this Honourable Court, and on balance (given the erosive effects an extended dispute could have on overall creditor recovery net of Administration Charges), the Monitor concurs with the Applicants that the resolve is in the best interests of the Designated Creditors, and submits the same for approval.

**(d) Approval of the Reports, Activities and Conduct of the Monitor to Date**

As set forth in the Notice of Motion, the Monitor seeks this Honourable Court's approval of the contents of the Monitor's Ninth Report (to be filed imminently), together with this Honourable Court's endorsement and approval of the Monitor's conduct and activities to date, as described therein.

While such is customary at the conclusion of an administration, for instance at the time of the Monitor's discharge (which phase of this matter is not yet upon us), it has recently become customary for Monitors in CCAA proceedings, (along with BIA Receivers), to seek interim approval of their conduct as set forth in formal reporting (see *Re Cline Mining Corp.* 2015 ONSC 622 (Ont. S.C.J.), and *Re Target Canada Co.* 2015 ONSC 7574 (Ont. S.C.J.), where Morawetz J. made the following comments (at paras 1-2):

"Alvarez & Marshal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted."

We are not aware of any opposition to this aspect of the Motion, and respectfully submit the Monitor has conducted itself prudently and in a commercially reasonable manner since its appointment, and as evidenced by the various Reports issued in these proceedings, together with a pre-filing Report, has conducted itself in the skillful and diligent manner befitting an officer of this Honourable Court.

We respectfully submit the conduct of the Monitor as set forth in the various Reports issued to date speaks for itself, and is worthy of approval by this Honourable Court.

As such, we humbly request that such approval form part of the draft Order submitted herewith, which includes this Court's endorsement of the Monitor's various Reports, conduct and activities to date.

**(e) Further Extension of Stay Period**

As shall be set forth in the Monitor's Ninth Report and accompanying cash flow projection, it is also the Monitor's understanding that the Applicants are seeking a further extension of the stay period in this matter (to December 1, 2017), in order to accommodate a final distribution (itself dependent upon some final HST refunds being collected) and discharge hearing, with the two events likely combined into one hearing to save cost.

The Monitor is supportive of this latest, and most likely final, stay extension as the completion of the mandate and distributions to creditors under the protection of a stay of proceedings is critical to ensure the orderly wind-down of these proceedings.

The December 1, 2017 date is quite a distance from today's date, and it was selected by the Applicants conservatively so as to avoid the need to return in the interim. It is certainly the

Monitor's expectation that final steps in these proceedings will unfold well before this date, and we will encourage that outcome.

All of which is respectfully submitted this 11<sup>th</sup> day of August, 2017.



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Ben Durnford

Solicitor for the Monitor