

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 NORTH AMERICAN FUR PRODUCERS INC., NAFA PROPERTIES INC.,
3306319 NOVA SCOTIA LIMITED, NORTH AMERICAN FUR AUCTIONS
INC., NAFA PROPERTIES (US) INC., NAFA PROPERTIES STOUGHTON
LLC, NORTH AMERICAN FUR AUCTIONS (US) INC., NAFPRO LLC
(WISCONSIN LLC), NAFA EUROPE CO-OPERATIEF UA, NAFA EUROPE
B.V., DAIKOKU SP.Z OO and NAFA POLSKA SP. Z OO

(the "Applicants")

FACTUM OF THE APPLICANTS
(Returnable November 5, 2020)

November 3, 2020

BLANEY McMURTRY LLP
Barristers and Solicitors
1500 - 2 Queen Street East
Toronto, ON M5C 3G5

David Ullmann (LSO #423571)
Tel: (416) 596-4289
Fax: (416) 594-2437
DUllmann@blaney.com

Stephen Gaudreau (LSO #65895M)
Tel: (416) 596-4285
Fax: (416) 594-3594
SGaudreau@blaney.com

Natasha Rambaran (LSO #80200N)
Tel: (416) 593-3924
Fax: (416) 593-7725
NRambaran@blaney.com

TO: **SERVICE LIST**

PART I – OVERVIEW

1. On October 31, 2019, this Court granted an Initial Order (as amended and restated, the “**Initial Order**”) to the Applicants pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”).
2. On October 7, 2020, NAFA Properties Inc. (“**NAFA Properties**” or the “**Vendor**”) and Niche Bakers Properties Inc. (the “**Purchaser**”) entered into an agreement of purchase and sale dated October 1, 2020, to, among other things, purchase the Vendor’s right, title, and interest in two long-term ground leases (collectively the “**Ground Leases**” and singularly the “**Ground Lease**”) in a property municipally known as 65 Skyway Avenue, Etobicoke, Ontario (the “**Skyway Property**”) (the “**Transaction**”). Each of the two Ground Leases have different landlords: one being the City of Toronto (the “**City Landlord**”) and the other being a group of private landlords known as the Black family (the “**Private Landlord**”).
3. The Applicants’ motion returnable November 5, 2020 seeks, among other things, an approval and vesting order for the Transaction (the “**Approval and Vesting Order**”) and an order seeking assignment of the City Landlord’s Ground Lease to the Purchaser (the “**Assignment Order**”). The Applicants are currently working with the Private Landlord to obtain an assignment on consent, failing which, it may return to Court to seek an assignment order with respect to the Private Landlord.
4. This Factum is filed in support of the proposed Assignment Order and seeks to advise the Court on the law related to this issue.

5. The Applicants submit that the Ground Lease of the City Landlord should be assigned by this Court and the Assignment Order granted for the following reasons, among others:

- (a) the statutory test for this Court to order the assignment of the Ground Lease is met;
- (b) the Monitor approves the proposed assignment;
- (c) the Purchaser has demonstrated that it has the financial wherewithal and intention to meet its obligations under the Ground Lease;
- (d) the proposed assignment of the Ground Lease is important to the Applicants' restructuring process;
- (e) the proposed assignment of the Ground Lease is consistent with the purposes of the CCAA;
- (f) the proposed assignment of the Ground Lease is essential in order to ensure that the Transaction closes, thereby realizing on the significant benefit of the Transaction for the Applicants and its stakeholders; and,
- (g) the Applicants will be in good standing under the Ground Lease at the time the Transaction closes.

6. Furthermore, although it is not a requirement of the statutory test to assign the Ground Lease, there is no countervailing prejudice to the City Landlord, who has not provided its consent to the proposed assignment. Following the assignment, the Purchaser's operating company—which has demonstrated its ability to fulfill the requisite lease covenants—will sublease the Ground Lease from the Purchaser under ostensibly identical lease terms.

7. Based on these considerations, and the submissions below, the Applicants submit that an assignment of the City Landlord's Ground Lease is reasonable and appropriate in the circumstances, and the proposed Assignment Order should be granted.

PART II – FACTS

8. The facts with respect to these proceedings and this motion are set out in the Affidavit of Douglas Lawson affirmed October 30, 2020 and the Fifth Report of the Monitor in this matter.

Affidavit of Douglas Lawson affirmed October 30, 2020 (“**Lawson Affidavit**”).

Fifth Report of the Monitor dated November 3, 2020 (“**Fifth Report of the Monitor**”).

9. Capitalized terms in this Factum not otherwise defined have the same meaning as those set out in the Affidavit of Douglas Lawson affirmed October 30, 2020 (the salient paragraphs being 63 to 107).

PART III – ISSUES

10. This Factum addresses the following issue:

(a) Can this Court order the assignment of the Ground Lease?

Answer: Yes.

PART IV – LAW & ARGUMENT

11. The proposed Assignment Order is reasonable and appropriate in the circumstances and should be granted because it meets the statutory test in the CCAA under section 11.3 for the following reasons, among others:

- (a) the Monitor supports the assignment of the Ground Lease;
- (b) the Purchaser has demonstrated that it possesses the financial wherewithal and the intention to perform all obligations under the Ground Lease; and
- (c) the assignment of the Ground Lease is important to the restructuring process, consistent with the purposes and spirit of the CCAA, and therefore, “appropriate” under section 11.3(3)(c) of the CCAA.

A. The Criteria for Assignment under the CCAA

12. Section 11.3 of the CCAA gives this Court statutory jurisdiction and discretion to make an order assigning a debtor company’s rights and obligations under an agreement, on notice to every party to the agreement and the monitor.

CCAA, s. 11.3, Schedule “B”.

13. The court has broad discretion to exercise this authority notwithstanding a restriction or prohibition on assignment in the relevant contracts.

Re TBS Acquireco Inc., 2013 ONSC 4663 at para. 25 ([CanLII](#)).

14. Section 11.3 sets out the following criteria for a court to consider in determining whether to make such an assignment:

- (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, s. 11.3(3), Schedule “B”.

15. The court must be 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 the CCAA or the company’s failure to perform a non-monetary obligation—will be remedied on or before a day fixed by the court.

CCAA, s. 11.3(4), Schedule “B”.

16. Section 11.3 of the CCAA does not require an applicant to seek consent to assignment prior to bringing an assignment motion, nor to accept whatever consent is proposed by a counterparty.

CCAA, s. 11.3(3), Schedule “B”.

17. Even prior to the 2009 CCAA amendments and the corresponding enactment of section 11.3, a court could exercise its inherent discretion under section 11 to authorize the assignment of a contract, including where the contract contained an anti-assignment clause and where consent of the counterparty to the contract was required but not obtained.

Re Playdium Entertainment Corp., 2001 CarswellOnt 4109 at paras. 32, 42 ([CanLII](#)).

Re Hayes Forest Service Ltd., 2009 BCSC 1169 at para. 31 ([CanLII](#)).

Re Nexient Learning Inc., 2009 CanLII 72037 ([CanLII](#)).

18. As such, section 11.3 of the CCAA does not require a debtor company to seek a contractual counterparty’s consent. It applies despite the terms of any contract and regardless of whether the counterparty’s consent has been sought, or whether the counterparty’s failure to consent is reasonable or unreasonable.

B. Section 11.3 Factors for Assignment have been Satisfied

19. In anticipation of a potential resolution, the Applicants are not seeking to force assignment of the Ground Lease with respect to the Private Landlord at this time. However, the Applicants are prepared to return to court to address this issue if the need arises.

20. The Applicants are, however, seeking assignment of the Ground Lease with respect to the City Landlord. Regarding the City Landlord, the Applicants submit that the section 11.3 factors have been satisfied, as set out below.

Subsection 11.3(1): Notice Has Been Given

21. Although not required to do so, NAFA Properties has made commercially reasonable efforts to obtain consent of the City Landlord to assign its Ground Lease to the Purchaser.

22. The City Landlord has been served with the relevant motion materials and were given prior written and verbal notice of NAFA Properties' intentions to seek assignment.

23. The Applicants first contacted the City Landlord on October 8, 2020 to advise of the Transaction, to request its consent, and to impress upon the City Landlord that the Transaction was time sensitive.

Lawson Affidavit at para. 95.

24. On October 22, 2020, the Applicants' counsel wrote to the City Landlord to advise, among other things, that in the event that NAFA Properties did not receive the consent for the Transaction by the motion returnable November 5, 2020, it would seek a forced consent pursuant to the provisions of the CCAA.

Lawson Affidavit at para. 95.

25. The Applicants' counsel served the City Landlord by email with the relevant motion materials on October 30, 2020 and this Factum on November 3, 2020. The City Landlord's representative, whom both Niche and the Applicants' counsel have been in contact with to discuss the Transaction, was also served with the above materials on the same dates. There has been no response to the motion.

Affidavit of Service of Ariyana Botejue sworn November 3, 2020.

Subsection 11.3(2) No Exception Applies

26. The Ground Leases do not fall within any exception set out in section 11.3(2) of the CCAA. In particular, they are not contracts that are not assignable by their nature, nor are they eligible financial contracts, contracts entered into post-filing or collective agreements.

Subsection 11.3(3) Criteria Are Satisfied

27. The criteria set out under subsection 11.3(3) have been satisfied.

(a) 11.3(3)(a): The Monitor approves the proposed assignments

28. The Monitor approves the proposed assignment of the Ground Lease and believes the Purchaser has demonstrated its ability to perform the obligations under the Ground Lease. The Monitor views the terms offered by the Purchaser for the assignment as fair, reasonable and appropriate in the circumstances.

Fifth Report of the Monitor at para. 32.

(b) 11.3(3)(b): The Purchaser's Ability to Perform the Obligations

29. While the Purchaser itself is a newly formed corporation, it will sub-lease the Skyway Property to its operating corporation, Niche Bakers Corp. The Purchaser's operating corporations, Niche Bakers Corp. and Niche Bakers (U.S.A.) Corp. are established businesses with strong revenue, financial performance, and growth prospects.

Affidavit of Jeffrey Wood, sworn October 28, 2020 at paras. 5-6.

30. The Purchaser and its operating companies plan to substantially invest into the Skyway Property in order to construct its commercial bakery. Its initial capital expenditures at the Skyway Property are expected to be between \$4-5 million prior to opening. The Purchaser and its operating companies also plan to hire an additional 75-100 new employees.

Affidavit of Jeffrey Wood, sworn October 28, 2020 at paras. 12, 16.

31. This anticipated investment into the Skyway Property is indicative of the Purchaser's (and its operating companies') strong balance sheet, cash flow, and growth potential. This also demonstrates the Purchaser's plans to make a long-term investment into the Skyway Property.

32. The Applicants and the Monitor are of the view that the Purchaser is not a credit risk to the City Landlord. This is supported by the Purchaser's (and its operating companies') overall financial wherewithal.

33. Based on the above, the Applicants submit that the Purchaser is capable and willing to perform the obligations under the Ground Lease.

(c) 11.3(3)(c): It is appropriate to assign the rights and obligations to the Purchaser

34. It is “appropriate” to assign the rights and obligations to the Purchaser in the circumstances. Assignment of the Ground Leases is important to the restructuring process and consistent with the purposes and spirit of the CCAA for the following reasons, among others:

- (i) the assignment will facilitate the Transaction’s closing;
- (ii) the Transaction represents the best available alternative in the circumstances to the Applicants and their stakeholders as a whole;
- (iii) the City Landlord has not objected to the assignment of the Ground Lease whether by consent or pursuant to section 11.3 of the CCAA;
- (iv) BDC, the Monitor and NAFA all support the assignment of the Ground Lease; and
- (v) if the Transaction does not proceed, the Applicants’ business could be jeopardized and this could result in a significant erosion of value and the non-performance or termination of the Ground Lease.

35. As mentioned, the Transaction is consistent with the objectives of the CCAA. In *Re Dundee Oil and Gas Limited*, Justice Dunphy acknowledged the court’s extraordinary power under section 11.3 to require counterparties to accept future performance from somebody they never agreed to deal with. However, Justice Dunphy noted the need to balance competing interests, and stated that the CCAA regime is more concerned about minimizing damage that arises from an insolvency than advancing the interests of one stakeholder over another.

36. In this case, the Applicants' secured creditors will be relying on the Transaction to close. There will be a substantial sum paid to its secured creditors on closing, including the elimination of over \$6.5 million in BDC secured debt. This will significantly assist the Applicants' ability to continue its restructuring efforts. Moreover, it is very unlikely that BDC will allow the Ground Leases to be disclaimed and returned to the Landlords given the size of the asset. Put differently, these Ground Leases will be assigned to a purchaser, whether it is this one or another down the line.

37. Furthermore, the proposed assignment meets the "twin goals" of assisting the reorganization process while treating the counterparty fairly and equitably.

Re Veris Gold Corp., 2015 BCSC 1204 at para. 58 ([CanLII](#)).

38. NAFA Properties has impressed upon the City Landlord that time is of the essence to obtain its consent. NAFA Properties have also provided the corporate and financial information with respect to the Purchaser (and its operating companies) to the Landlords.

Lawson Affidavit at paras. 88-89, 92-93.

39. The City Landlord advised that it could take between 6-8 weeks to obtain their consent.

Lawson Affidavit at paras. 90.

40. Despite its commercially reasonable efforts, NAFA Properties has been unable to obtain satisfactory consent from the City Landlord with respect to its Ground Lease. The Transaction needs to close in short order, as significant money is being expended each month that passes, to the detriment of the Applicants and their stakeholders.

41. The assignment of the City Landlord's Ground Lease is therefore appropriate, as it is vital to the closing of the Transaction and the Applicants' restructuring process, is consistent with the purposes of the CCAA, and is in the best interest of the Applicants' stakeholders.

(d) **Subsection 11.3(4): Monetary Defaults Will Be Satisfied within 15 Days of Closing**

42. Pursuant to the proposed Assignment Order, Cure Costs, if any, in respect of the Ground Leases are to be paid no later than twenty (20) days following closing or such later dates as may be agreed to with the counterparty to such assignment.

Assignment Order.

Lawson Affidavit at para. 105.

C. Transferring Leases under section 36 of the CCAA

43. Section 11.3 of the CCAA must be applied to assign a lease where the consent of the counterparty cannot be obtained. However, where consent to an assignment is obtained, the court can make an order to transfer a lease under section 36 of the CCAA.

CCAA, s. 36, Schedule "B".

44. As such, no assignment order under section 11.3 of the CCAA is being sought with respect to the Private Landlord on November 5, 2020 as their consent is anticipated (although it has not been given as yet and all rights are reserved), and notwithstanding the Respondents' Motion Record served and filed by the Private Landlord on November 3, 2020 (the "**Private Landlord's Motion Record**"). The Applicants had already advised the Private Landlord that they did not intend to contest this issue with the Private Landlord at the motion returnable November 5, 2020. The Applicants further advised that a separate hearing would be scheduled to determine this issue

on another date if negotiations faltered. Suffice to say, the Applicants disagree with the positions taken in the Private Landlord's Motion Record and will respond to those arguments in full in a supplemental factum if required to do so.

45. In the event that the Private Landlord consents to the assignment of its Ground Lease, the Approval and Vesting Order, which transfers and assigns all assets subject to the Transaction defined therein under section 36, will effect the transfer and no order under section 11.3 will be required.

PART V – ORDER REQUESTED

46. For the reasons described in detail herein, the Applicants believe that the granting of the proposed Assignment Order is in the best interest of the Applicants and its stakeholders. The Applicants therefore request an Order substantially in the form of the draft Assignment Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 3, 2020



David Ullmann
Stephen Gaudreau
Natasha Rambaran

Lawyers for the Applicants

SCHEDULE “A”— LIST OF AUTHORITIES

- | No. | Case |
|------------|--|
| 1. | <i>Re Dundee Oil and Gas Limited</i> , 2018 ONSC 3678 (CanLII). |
| 2. | <i>Re Hayes Forest Service Ltd.</i> , 2009 BCSC 1169 (CanLII). |
| 3. | <i>Re Nexient Learning Inc.</i> , 2009 CanLII 72037 (CanLII). |
| 4. | <i>Re Playdium Entertainment Corp.</i> , 2001 CarswellOnt 4109 (CanLII). |
| 5. | <i>Re TBS Acquireco Inc.</i> , 2013 ONSC 4663 (CanLII). |
| 6. | <i>Re Veris Gold Corp.</i> , 2015 BCSC 1204 (CanLII). |

SCHEDULE “B”—STATUTORY PROVISIONS

Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-3

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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.

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

Assets may be disposed free and clear

36(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.