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Honourable Justice Glen G. McDougall  
Supreme Court of Nova Scotia (Halifax)  
The Law Courts  
1815 Upper Water Street  
Halifax, NS B3J 1S7

My Lord:

**Re: Motion of Victory Farms Inc. ("VFI") and Jonathan Mullen Mink Ranch Limited ("JMMR") for Stay Extension pursuant to section 11.02(2) of the Companies' Creditors Arrangement Act ("CCAA")**



A motion is to be heard by your Lordship on January 30, 2017, at 2 p.m. VFI and JMMR ("the Applicants") seek an order providing for a short extension of the Stay Order of August 31, 2016. Please accept this as the pre-hearing brief of the Applicants.

Filed on this motion are:

1. The Fifth Affidavit of Jonathan Mullen<sup>1</sup>
2. A Report of the Monitor<sup>2</sup>
3. A draft Order;
4. This brief.

An affidavit of service will be filed when the matter comes before the court.

### **The Facts**

Since the court granted the last extension motion on November 25, 2016, the Applicants have continued with the business of growing the mink herd, and are now in the final stages of harvesting the crop. As noted in the 5<sup>th</sup> affidavit of Jonathan Mullen:

(a) with the assistance of counsel and the monitor, the Applicants have prepared a draft Plan Outline which was provided to secured creditors for discussion purposes;

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<sup>1</sup> A sworn version will be filed prior to the hearing

<sup>2</sup> The monitor will file prior to the hearing

- (b) the Applicants have proceeded with the harvest of the 2016 crop of mink, which is ultimately expected to produce between 78,000 and 80,000 pelts.
- (c) the Applicants have retained 36,000 mink as breeders.
- (d) the Applicants continue with the process of fur grading selection, size selection and blood testing, which will result in approximately 9,000 more pelts being produced for sale.
- (e) the Applicants plan to harvest the male breeders after mating in March, which will likely leave 20,000 to 21,000 fertile females. That will conclude the annual pelting giving a total number of pelts harvested at between 78,000 and 80,000, which will go to auction in May and July, 2017.

Counsel has been engaged in discussions directly or through counsel with North American Fur Auctions Limited ("NAFA"), Nova Scotia Farm Loan Board ("NSFLB"), Farm Credit Canada ("FCC") and American Legend Cooperative ("ALC"), who are the senior secured creditors of the Applicants. There is a reasonable prospect of a Plan of Arrangement being developed which will satisfy the senior secured creditors.

The details of the secured creditors are set out in the Affidavit of Tim Hill, Q.C., filed on August 24, 2016. To summarize, the secured charges affecting the property of VFI and JMMR are as follows:

- (a) VFI owns one real property parcel which is mortgaged in favour of Nova Scotia Farm Loan Board ("NSFLB");
- (b) JMMR owns eight real property parcels, three of which are mortgaged in favour of Farm Credit Canada ("FCC");
- (c) VFI has registered against its personal property charges in favour of ALC, NSFLB, FCC, the Bank of Nova Scotia, CNH Industrial Capital Canada Ltd. and NAFA;
- (d) JMMR has registered against its personal property charges in favour of ALC, FCC, and NAFA; and
- (e) There is one judgment in favour of the Workers' Compensation Board registered against the personal property of VFI.

At this time NAFA, which is the DIP lender, has advanced the sum of \$1,500,000, as provided for in the Court's order of September 27, 2016.

## REQUIREMENTS OF THE CCAA

In our submissions of Septembers 21<sup>st</sup> and November 16<sup>th</sup> last we drew the attention of the court to the following points. We have not attached the cases cited again, as they remain in the court file.

Section 11.02(2) of the CCAA, reads:

### **11.02(2) Stays, etc. — other than initial application**

A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

The prerequisites for the making of such an order are set out in section 11.02(3):

### **11.02(3) Burden of proof on application**

The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

The Court's attention is respectfully drawn to the following extracts from *Re San Francisco Gifts Ltd.*<sup>3</sup>, which summarize the approach taken to the issues raised in section 11.02(3) (although it is noted that the sections are renumbered as a result of the 2009 amendments):

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<sup>3</sup> 2005 ABQB 91

### ***Fundamentals***

11 The well established remedial purpose of the CCAA is to facilitate the making of a compromise or arrangement by an insolvent company with its creditors to the end that the company is able to stay in business. The premise is that this will result in a benefit to the company, its creditors and employees. The Act is to be given a large and liberal interpretation.

12 The court's jurisdiction under s. 11(6) to extend a stay of proceedings (beyond the initial 30 days of a CCAA order) is preconditioned on the applicant satisfying it that:

(a) circumstances exist that make such an order appropriate; and

(b) the applicant has acted, and is acting, in good faith and with due diligence.

13 Whether it is "appropriate" to make the order is not dependant on finding "due diligence" and "good faith." Indeed, refusal on that basis can be the result of an independent or interconnected finding. Stays of proceedings have been refused where the company is hopelessly insolvent; has acted in bad faith; or where the plan of arrangement is unworkable, impractical or essentially doomed to failure.

### ***Meaning of "Good Faith"***

14 The term "good faith" is not defined in the CCAA and there is a paucity of judicial consideration about its meaning in the context of stay extension applications. The opposing landlords on this application rely on the following definition of "good faith" found in *Black's Law Dictionary* to support the proposition that good faith encompasses general commercial fairness and honesty:

A state of mind consisting of: (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealings in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage. [Emphasis added]

15 "Good faith" is defined as "honesty of intention" in the *Concise Oxford Dictionary*.

16 Regardless of which definition is used, honesty is at the core. ...

### ***Supervising Court's Role***

28 The court's role during the stay period has been described as a supervisory one, meant to: "...preserve the *status quo* and to move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure." That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling of creditors' meetings and the like. On the contrary, this role requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interests is maintained.

29 Although the supervising judge's main concern centres on actions affecting stakeholders in the proceeding, she is also responsible for protecting the institutional integrity of the CCAA courts, preserving their public esteem, and doing equity. She cannot turn a blind eye to corporate conduct that could affect the public's confidence in the CCAA process but must be alive to concerns of offensive business practices that are of such gravity that the interests of stakeholders in the proceeding must yield to those of the public at large.

To summarize, the Court is vested with a great deal of discretion on a motion such as this. Throughout its inquiry the Court will bear in mind the "well established remedial purpose of the CCAA", which is "to facilitate the making of a compromise or arrangement by an insolvent company with its creditors to the end that the company is able to stay in business".

In reaching a decision on the motion the Court is informed by its appreciation of the honesty of the intentions of the debtor, the effect of an extension on the stakeholders in the business (which may include equity owners, employees and creditors, amongst others), and the integrity of the CCAA process.

In the case at bar, there is no suggestion that the applicants lack integrity in their operations or approach to the CCAA process, or that the process is doomed to failure.

This is a patently honest attempt to save the business by ultimately reaching a realistic compromise with the creditors. The business is perhaps peculiar, in that in common with many “farming” operations, there is one sale of a crop each year. Thus, the outputs are spread over the year, with one input coming when the crop goes to market on an annual basis. However, the input time is fast approaching with the harvest nearly complete.

This short extension will allow a plan of arrangement to be discussed with the key creditors with a view to putting the compromise to the creditors at large.

In this regard, the Court’s attention is drawn to *Re Federal Gypsum Co.*<sup>4</sup>, and the comments of Justice MacAdam:

34 In view of the preliminary approval of the Plan and the calling of a meeting of creditors to consider and vote on the Plan, it necessarily follows that there should be an extension of the stay to enable the Company to present the Plan to the creditors, to conduct the claims process as previously ordered and to determine whether the creditors have voted in favour or against the Plan. In *Cansugar Inc., Re*, 2004 NBQB 7 (N.B. Q.B.), Justice Glennie, in referencing s.11(6) of the CCAA, noted:

In my opinion, the requirements of section 11(6) of the C.C.A.A. have been satisfied in this case. The continuation of the stay is supported by the overriding purpose of the C.C.A.A., which is to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the Court, and to prevent maneuvers for positioning among creditors in the interim. [emphasis added by counsel]

35 To similar effect, Topolniski J. in *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 (Alta. Q.B.), at para. 28 observed:

The court’s role during the stay period has been described as a supervisory one, meant to: ‘...preserve the status quo and to move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure.’ That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling of creditors’ meetings and the like. On the contrary, this role

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<sup>4</sup> 2007 NSSC 384



requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interests is maintained. [emphasis added by counsel]

36 Notwithstanding the objection by the Royal Bank, including the potential prejudice as outlined by counsel in the event there is a deterioration in the value of the assets securing its operating loan, continuation of the stay is to be supported in view of the overriding purpose of the CCAA "...to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the court...".

The previous extension has not given rise to deterioration in the value of the assets. Quite the opposite. There will be close to 80,000 pelts produced.

The short extension now sought will "preserve the status quo and move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure."

#### **SUMMARY**

It is respectfully submitted that this is an appropriate case in which the Court may exercise its discretion to grant an extension for the period sought. The Applicants have acted, and continue to act, in good faith and with due diligence in all the circumstances.

All of which is respectfully submitted.

**BOYNECLARKE LLP**

A large, stylized handwritten signature in black ink, appearing to be 'TH' with a large loop.

Tim Hill, Q.C.

TH/vbb

2016

Hfx. No. 454744

Supreme Court of Nova Scotia

Application by Victory Farms Incorporated and Jonathan Mullen Mink Ranch  
Limited for relief under the Companies' Creditors Arrangement Act

**Order Approving Extension of Stay**

Before the Honourable Justice Glen G. McDougall, in chambers

**Upon** Victory Farms Incorporated and Jonathan Mullen Mink Ranch Limited (the "Applicants"), having made motion for an Order to extend the stay of proceedings originally granted by order of this Court dated August 31, 2016;

**An Upon** reading the Report of Deloitte Restructuring Inc. (the "Monitor"), the Affidavit of Jonathan Mullen, and the other materials on file herein;

**And Upon** hearing from counsel for the Applicants, the Monitor, and such other counsel as appeared;

**Now on** motion of the Applicants the following is ordered and declared:

It is ordered that:

**EXTENSION OF STAY OF PROCEEDINGS**

1. The stay of proceedings is extended commencing from and including the 31<sup>st</sup> day of January, 2017, to and including February 17, 2017.

**EFFECTIVE TIME & DATE**

2. This Order and all of its provisions are effective as of 12:01 a.m. local time on the date of this Order.

Issued January 30, 2017

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Deputy Prothonotary