



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-25-00734339-00CL DATE: March 21, 2025

NO. ON LIST: 3

TITLE OF PROCEEDING: **COMARK HOLDINGS INC. et al**

BEFORE JUSTICE: **CAVANAGH**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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For Defendant, Respondent, Responding Party, Defence:

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For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
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ENDORSEMENT:

[1] The background to this motion is set out in the Applicants' factum.

[2] Defined terms have the meanings assigned to them in the motion materials.

[3] In order to facilitate the completion of the sale of the Remaining Business, the Applicants seek on this motion an approval and reverse vesting order, among other things, approving the Purchase Agreement and the transactions contemplated therein (the "Transaction") pursuant to which the Purchaser will acquire substantially all of the Remaining Business by way of a reverse vesting structure, while certain property, agreements, and liabilities will be transferred to ResidualCo, and granting certain related relief in order to facilitate the Transaction.

[4] At the request of counsel for HMK, the portion of this motion addressing the request for a declaration under the *WEPPA* is adjourned so that counsel can seek and obtain instructions. A hearing date, if necessary, may be obtained through the Commercial List Office. If the motion is on consent or unopposed, counsel for the Monitor may provide the requested form of order to the CLO to be provided to me to be addressed without a further hearing.

[5] The relevant facts are set out in the supporting affidavit material and in the Monitor's Third Report.

[6] In deciding whether to approve a reverse vesting transaction, courts have considered the factors in section 36 of the *CCAA* which address court approval of an asset sale outside the ordinary course of business. These factors largely correspond to the *Soundair* criteria for approving an asset sale. Where approval of a reverse vesting order sought, the court has additional questions, including: (i) why the RVO is necessary; (ii) whether the RVO structure produces an economic result at least as favourable as any other viable alternative; (iii) whether any stakeholder is worse off under the RVO structure than they would have been under any other viable alternative; and (iv) whether the consideration reflects the importance and value of intangible assets being preserved under the RVO structure.

[7] I am satisfied that the s. 36(3) factors and the *Soundair* criteria are satisfied.

[8] The Sale Process was approved by this Court and was structured to provide a fair and reasonable process for canvassing the market or interest in the Remaining Business. The Sale Process was overseen by the Monitor, and was conducted in accordance with the terms of the Process Letter, with the Monitor soliciting 25 potentially interested parties (and engaging with additional interested parties), six of which ultimately executed a confidentiality agreement. All interested parties were treated fairly, and the virtual data room was made available to all parties that executed a confidentiality agreement.

[9] The Transaction will achieve repayment in full of the Outstanding Senior Secured Indebtedness which is owed by the Applicants to ParentCo as a result of the Debt Assignments. If the Transaction is not completed, the

result will be a liquidation. In its Third Report, the Monitor expresses its view that under a liquidation, the value of the Remaining Business will not exceed the obligations outstanding under the Outstanding Senior Secured Indebtedness (currently approximately \$3.6 million) and the ParentCo Loan Facility. There is no scenario which would result in any economic recovery for unsecured creditors.

[10] The proposed Transaction provides a number of benefits to the Applicants' creditors and other stakeholders, including: (i) approximately 45 leases will be retained by the Purchasers; (ii) a material portion of the Bootlegger business will continue to operate as a going concern; (iii) employment will be preserved for the Continuing Employees; (iv) various contracts will continue in the normal course, to the benefit of all parties; and (v) following closing, only limited matters will remain for the administration and wind-down of the CCAA Proceedings, which will be funded by way of a reserve to be held by the Monitor.

[11] The Monitor was involved in the development of the Sales Process, supported its approval, and played a significant role in soliciting offers during the Sales Process itself. The Monitor supports the proposed Transaction and the Applicants' request for the AVRO.

[12] I am satisfied that a reverse vesting structure is necessary and appropriate in this case to preserve the significant accrued tax attributes of the Comark Group for the go-forward business. As of February 24, 2024, the Applicants have approximately \$98.8 million of non-capital tax losses, the value of which cannot be realized by way of an asset sale. I accept that there is no viable alternative to the proposed RVO structure. The Transaction is the only going-concern solution to emerge following the canvassing of the market pursuant to the Court-approved Sales Process. The granting of the ARVO is a condition precedent to closing the Transaction and the Purchaser has indicated that it is not prepared to proceed with the Transaction as an asset sale because the structure would not enable it to acquire the tax attributes of the Comark Group that are fundamental to the overall Transaction.

[13] I am satisfied that the Transaction will generate the best economic result possible in the circumstances, as it will permit a material portion of the Bootlegger business to continue as a going concern while also realizing the value of the Applicants' tax losses, which would not have been possible in an asset sale. The RVO structure will produce an economic result more beneficial to the Applicants' stakeholders than what could be achieved by way of an asset sale (had one been available). No stakeholders will be worse off under the proposed RVO structure than they would be under any other viable alternative. There is no prospect of recovery for the Applicants' unsecured creditors under any alternative scenario or transaction structure.

[14] Subsection 36 (4) of the *CCAA* imposes additional criteria that apply where the proposed sale is to a person who is related to the debtor company. The court must be satisfied that: (i) who they had hers were made to sell the assets to persons who are not related to the company; and (ii) 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 bill. The court must be satisfied that, over on sufficient safeguards were opted to ensure that a related party transaction is in the best interests of the stakeholders of the Applicants, and that the risks to the estate associated with a related party transaction have been mitigated.

[15] I am satisfied that the proposed Transaction satisfies these criteria. The Monitor solicited parties, including unrelated parties, known to the Applicants and/or the Monitor as having interest, or potentially having interest, in the Remaining Business. Unrelated parties signed the standard form confidentiality agreement and received access to the data room to evaluate a potential acquisition of the Remaining Business. There were no other Qualified Bids, such that the Purchase Agreement represents the best and only transaction available in the circumstances. The Monitor, in the Third Report, has expressed his view that the factors that out in section 36 (4) of the *CCAA* are satisfied.

[16] I am satisfied that the proposed third-party releases are appropriate and properly limited and should be approved. The Releases apply in relation to claims against: (i) the current and former directors, officers, employees, consultants, legal counsel and advisors of the Applicants and ParentCo; (ii) the current and former

doctors, officers, employees, consultants, legal counsel and advisors to ResidualCo; (iii) the Purchaser and its legal counsel and their respective current directors, officers, partners, employees, consultants, advisors and assignees; and (iv) the Monitor and its legal counsel and their respective current directors, officers, partners, employees, consultants and advisors.

[17] I am satisfied that each of the Released Parties made significant and material contributions in connection with the *CCAA* proceedings, including with regard to the Sale, the Sales Process, and the Transaction. The proposed Releases are appropriately limited in scope. They apply only in respect of claims relating to the Transaction. They do not apply in respect of any claim or liability arising out of any actual fraud of the Released Parties. The proposed Releases do not apply in respect of any claim that is not permitted to be released pursuant to section 5.1 (2) of the *CCAA* or any claims in relation to the obligations of a Released Parties pursuant to the Purchase Agreement. The proposed Releases are supported by the Purchaser and the Monitor.

[18] Order to issue in form of Order signed by me today.

[19] The next hearing is scheduled for May 15, 2025 at 9:30 AM for 30 minutes.

Justice Cavanagh

Date: March 21, 2025