Court File No. CV-21-00669445-CL

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 MCEWAN ENTERPRISES INC.

Applicant

AFFIDAVIT OF ROBERT KOFMAN
(sworn October 11, 2021)

I, Robert Kofman, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY**:

1. I am the President of KSV Advisory Inc. ("**KSV**"), a financial advisory services firm providing corporate restructuring and valuation services. I swear this affidavit in support of the opposition by First Capital Holdings (Ontario) Corporation ("**First Capital**") to the motion returnable on October 15, 2021 by McEwan Enterprises Inc. ("**MEI**") for approval of a sale of substantially all of its business and assets to 2864785 Ontario Corp. (the "**Purchaser**").

2. I have personal knowledge of the matters to which I depose in this affidavit. Where I do not possess personal knowledge, I have stated the source of my information and, in all such cases, believe it to be true.

3. On October 5, 2021, KSV was retained by Aird & Berlis LLP ("**A&B**"), on behalf of First Capital, to provide financial advisory services to A&B and First Capital in the context of MEI's proceedings under the *Companies' Creditors Arrangement Act* (the "**CCAA**"). Despite swearing this affidavit, it is not our intention to be waiving solicitor client privilege generally and such privilege is intended to be maintained, other than as stated herein or arising from any answers to properly posed questions on an examination hereon.

I. MY QUALIFICATIONS

4. I have been practising in the area of restructuring and insolvency since May 1992. I hold an MBA and a BA from the University of Toronto. I am a Licensed Insolvency Trustee and a Chartered Insolvency and Restructuring Professional. I am also a member of the Insolvency Institute of Canada. Prior to my current position as President of KSV, I was the head of the Canadian restructuring practice of Duff & Phelps Canada Restructuring Inc. and prior to that, the Co-Managing Partner of RSM Richter LLP and the Co-President of its Canadian restructuring group, RSM Richter Inc. A copy of my CV is attached as Exhibit "A".

II. KSV

5. For over 50 years, KSV's practice (including its predecessor firms) has provided restructuring advisory services to private and public companies and their stakeholders. KSV also provides valuation, litigation support, transaction support and forensic services. KSV provides these services in essentially all industries. KSV's restructuring advisory services include assessing financial and operational performance, assessing the viability of underperforming businesses; developing restructuring plans; performing corporate finance

mandates; acting as interim management; and acting as financial advisor in the context of challenged businesses.

6. KSV is commonly appointed to act as monitor and information officer under the CCAA, as receiver, receiver and manager, licensed insolvency trustee and proposal trustee under the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**"), and as liquidator and other capacities under other legislation. KSV is a trustee within the meaning of subsection 2(1) of BIA.

7. KSV's professionals have significant experience providing restructuring services in the retail and restaurant industries. I have led and been involved in several mandates in these sectors. In acting in a court-appointed capacity, KSV has sold, under the jurisdiction of the court, dozens (if not hundreds) of distressed businesses, or parts thereof. KSV has also provided advisory services in numerous such transactions.

III. THE PROPOSED TRANSACTION

8. I have read the court materials filed in MEI's CCAA proceedings, including the affidavits of Mark McEwan, MEI's President and Secretary, sworn on September 27 and October 1, 2021 (jointly, the "**Affidavits**").

9. MEI is seeking approval of a sale of substantially all of its business and assets to the Purchaser pursuant to a purchase agreement dated September 27, 2021 between MEI and 2864785 Ontario Corp. (the "**Proposed Transaction**"). The Purchaser's ownership mirrors MEI's current ownership: McEwan Holdco Inc. ("**McEwan Holdco**") is to own

45% and Fairfax Financial Holdings Limited ("**Fairfax**"), through an affiliated entity, is to own the balance. Mr. McEwan is the sole shareholder of McEwan Holdco.

10. I understand that:

(a) the purchase price under the Proposed Transaction is to be satisfied through the cash payment of $520,000 plus an amount equal to the Cure Costs (as defined in the Purchase Agreement) and the assumption, on closing, of substantially all of MEI's liabilities, but for those obligations owing to: i) First Capital, in respect of a real property lease for a McEwen store located at Yonge and Bloor (the "**Yonge & Bloor Location**"); and ii) Cadillac Fairview in respect of a real property lease for the Fabrica Restaurant location at The Shops at Don Mills Plaza;

(b) Fairfax has agreed to provide up to $2.25 million to MEI to fund MEI's business during the CCAA proceedings, conditional on court approval of the Proposed Transaction;

(c) as discussed below, MEI has not conducted a strategic process to determine whether a transaction or transactions superior to the Proposed Transaction could be identified, MEI has not retained a financial advisor to consider or assess the reasonableness of the Proposed Transaction, and Alvarez & Marsal Canada Inc., the monitor appointed in MEI's CCAA proceedings (the "**Monitor**"), was not involved in the development of MEI's strategic process; and

(d) Mr. McEwan states in the Affidavits that no strategic process is contemplated in these proceedings because "*The Business, without the support of myself, the*

Company's management team and Fairfax, would not be the same business and the interests of, and recoveries to, stakeholders could be materially negatively affected".

11. In my opinion as a licensed insolvency trustee, there is nothing sufficiently unique about this situation that would justify or make appropriate a decision to sell without conducting a strategic process.

12. It is not unusual for high profile businesses with well known brands and/or executives to file for creditor protection or to commence insolvency proceedings. Recent experience illustrates this. Dozens of well-known retailers have filed for protection in Canada and elsewhere since the onset of the Covid-19 pandemic (the "**Pandemic**"). Many of these businesses have successfully emerged from their restructuring proceedings. The only evidence for not conducting a strategic process for MEI comes from Mr. McEwan; however, Mr. McEwan designed the process to sell the business to himself and to his partner, Fairfax. No independent justification for the decision to not conduct a strategic process is provided by the Monitor, or any other party, such as a reputable financial advisor, that confirms Mr. McEwan's view that "*The Business, without the support of myself, the Company's management team and Fairfax, would not be the same business and the interests of, and recoveries to, stakeholders* ***could*** *[emphasis added] be materially negatively affected*". Even Mr. McEwan's comment leaves open the possibility that stakeholders **could** have a better recovery through an alternative transaction.

13. Mr. McEwan does not address in his Affidavits the apparently special contribution that Fairfax brings to the operations of the business. Its contribution to the business appears to be as a provider of capital.

14. In my view, the value of the business, whether on an *en bloc* or piecemeal basis, and the relevance of Mr. McEwan and Fairfax to value preservation, would normally be determined through a court-supervised strategic process that canvasses financial and strategic purchasers, particularly in light of the fact that MEI's intellectual property, including the McEwan brand, appears to be an asset of MEI. In this regard, it is possible that any purchaser of the business may be able to acquire MEI's use of the McEwan brands notwithstanding that Mr. McEwan may have no ongoing relationship with the business. In my opinion, it is appropriate that the value of the IP should be determined by the market.

15. A proper canvassing of the market would also include the opportunity to bid on MEI's various operations on a piece meal basis, including its interest in One Restaurant at The Hazelton Hotel. Mr. McEwan states in paragraph 9 of his September 27, 2021 affidavit that "*many of the McEwan Locations have been historically successful and profitable; however, as discussed further below, certain locations have been underperforming for a number of years …*" A strategic process would determine whether a sale of some or all of the locations provides a recovery greater than the Proposed Transaction.

16. On October 7, 2021, Steven Graff of A&B sent an email to Sean Zweig of Bennett Jones LLP, the Monitor's legal counsel, asking various questions of the Monitor. Mr. Zweig responded on October 8, 2021 (the "**October 8th Email**"). A copy of this email chain is provided in Exhibit "B". In his response, Mr. Zweig advises that, "*The value of the*

Company's various locations/operations both on an individual and group basis is being considered within the Illustrative Liquidation and Valuation Range Analysis being prepared by the Monitor. The Monitor intends to comment on such values in its description of the analysis to be provided in the Second Report."

17. It is my view as a licensed insolvency trustee that a hypothetical valuation as referenced in paragraph 16 above (the "**Monitor's Analysis**") is not sufficient justification on its own for the Proposed Transaction, is not a substitute for a court-supervised strategic process and is not determinative of the value that may be realized in such a process.

18. The Monitor's Analysis is the type of support a court officer provides when recommending the court approve a transaction. Its purpose is to provide the court with all of the evidence it requires to approve a transaction, i.e., that the recommended transaction is both the best offer received after completing a properly conducted strategic process and that it also exceeds the liquidation value of the business and its assets. The Monitor's Analysis can only address the latter issue because no market canvassing of MEI has been performed. While there are limited circumstances where a sale process is not required in a restructuring proceeding involving a sale of substantially all of a debtor's assets, those facts, in my opinion, do not appear to be present in this case.

19. It is also my view as a licensed insolvency trustee that for a debtor to avail itself of the CCAA, it should be required to comply with its obligations under that statute. When advising a debtor company as to whether it is able to file for protection under the CCAA, its advisors consider the debtor's funding requirements, including the costs of conducting a strategic process. In my view, being short of liquidity is not, on its own, a rationale for

non-compliance with Section 36(4). Most insolvent businesses are liquidity strained. If a debtor company does not have sufficient liquidity, it tries to arrange a debtor-in-possession ("**DIP**") facility. If DIP funding is unavailable, filing for protection under the CCAA may not be an option. Fairfax has agreed to provide funding for MEI's business and operations conditional on court approval of the Proposed Transaction but has not provided funding for a strategic process. Fairfax is a well-known private equity firm and I believe it is able to fund the incremental costs of a strategic process.

20. In the October 8th Email, Mr. Zweig advises that, "*Since being engaged as of September 10, 2021 and beginning its mandate on September 14, 2021, A&M has been apprised of the Company's strategic process and has had numerous discussions regarding same. However, A&M was not involved in the development of the Company's strategic process*". In response to a question from Mr. Graff as to whether the Monitor has reached out to strategic parties to assess whether they would have an interest in a transaction, Mr. Zweig responded "*No, the Company is not supportive of the Monitor doing so."* In response to a further question concerning the Monitor's views of the transaction, Mr. Zweig states, "…. *the Monitor advised the Court, it has not yet completed its analysis as to whether the circumstances of this case and the proposed transaction satisfy the requirements enumerated in subsection 36(4) of the CCAA."*

21. In the nearly 30 years that I have been practising, I have not been involved with a situation where the CCAA applicant did not have the endorsement of the monitor (or proposed monitor) prior to the commencement of the strategic process. I am not aware of other circumstances where this has occurred.

22. I understand that the Monitor has not been provided with pro-forma financial projections for the business following these proceedings. In the October 8th Email, Mr. Zweig advises:

> 7. Has the Monitor reviewed the Company's post-filing financial projections?
>
> *The Monitor is not aware of the Company having any post-filing financial projections beyond its cash-flow projections.*
>
> 8. Has the Monitor normalized the Company's post-filing financial projections to assess whether the elimination of certain costs would significantly improve profitability? For example, is all executive compensation at market?
>
> *As noted immediately above, the Monitor is not aware of the Company having any post-filing projections beyond its cash-flow projections. The Monitor has been provided with the Company's payroll information, with the names of the Company's employees redacted. There is no compensation included within that strikes the Monitor as being in excess of market such that it would need to be removed, in whole or in part, to normalize post-filing projections should they be prepared. The Monitor has also asked the Company to provide it with compensation information for Mr. McEwan and his son.*

23. A pro-forma financial model reflecting MEI's restructured business would illustrate its anticipated future profitability and therefore its ability to make payments over time to its creditors. Without this information, First Capital is unable to consider whether the Proposed Transaction is in its best interest. A pro-forma financial projection is also commonly provided to prospective purchasers in a strategic process upon execution of a confidentiality agreement in the context of due diligence by these parties.

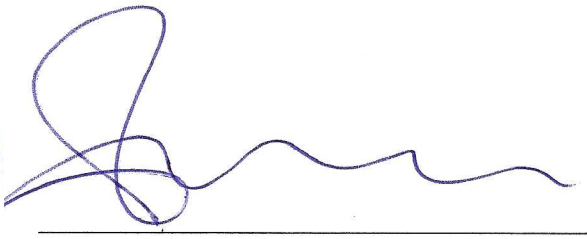
24. The only MEI financial information that I have reviewed is its historical financial statements included in its court materials filed in these proceedings. Those statements do not reflect a long history of deep financial losses and it appears self-evident that MEI's future performance is expected to improve after its business is restructured and the affects of the Pandemic subside, otherwise the Purchaser would not be prepared to complete the Proposed Transaction. In my opinion, the facts of this case do not justify allowing the

existing equityholders to enjoy the benefits of all of the upside resulting from the Proposed Transaction in the absence of a court-supervised strategic process.

IV. CONCLUSION

25. For the reasons described above, I do not think that the facts in this case make it sufficiently unique to justify that a strategic process not be conducted.

SWORN BEFORE ME over videoconference by Robert Kofman stated as being located in the City of Toronto in the Province of Ontario, before me at the City of Toronto in the Province of Ontario, on October 11, 2021, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely



A Commissioner for taking affidavits
Name: Jeremy Nemers

Robert Kofman

Attached is Exhibit “A”

Referred to in the

AFFIDAVIT OF ROBERT KOFMAN

Sworn before me

this 11th day of October, 2021

_____

Commissioner for taking Affidavits, etc

Bobby Kofman

President and Managing Director, KSV Advisory Inc.

+1 416 932 6228
bkofman@ksvadvisory.com

Bobby Kofman, MBA, CIRP is a Managing Director and the President of KSV Advisory Inc. Prior to KSV, Bobby was the Co-Managing Partner of RSM Richter LLP and the Leader of the Canadian Restructuring practice of Duff & Phelps, a global financial advisory services firm.

Bobby been practicing in the area of corporate turnarounds and restructuring since 1992. He is routinely engaged in Canada and the United States to represent debtors, secured creditors and other stakeholders. His experience working for various constituents allows him to understand the key issues relevant to each stakeholder group, enabling him to facilitate successful turnarounds, whether in the context of formal or informal restructuring proceedings. His ability to balance the interests of stakeholders has earned him a reputation for achieving exemplary results.

Bobby has extensive experience in virtually all industries. He has been involved with several of Canada's highest-profile restructurings, including Ardenton Capital Corporation; Sears Canada; the Canadian Tobacco Industry restructuring; Urbancorp; The Ravelston Corporation Limited, the parent company in the Hollinger Group; Lear Corporation; Pliant Corporation; Eddie Bauer Limited; Laura Secord, Jetsgo Corporation; Confederation Life Insurance Company; The T. Eaton Company Limited; Dylex Limited; The Canadian Red Cross Society and the Priszm Group of Companies. Additionally, he has been involved with numerous situations throughout the United States.

Bobby is a member of the Insolvency Institute of Canada. He is a Licensed Insolvency Trustee and a Chartered Insolvency and Restructuring Professional.

Bobby holds an M.B.A and a B.A. from the University of Toronto.

Attached is Exhibit “B”

Referred to in the

AFFIDAVIT OF ROBERT KOFMAN

Sworn before me

this 11th day of October, 2021

_____

Commissioner for taking Affidavits, etc

From: Sean Zweig <ZweigS@bennettjones.com>
Sent: October 8, 2021 12:09 PM
To: Steve Graff <sgraff@airdberlis.com>; Nevsky, Joshua <jnevsky@alvarezandmarsal.com>; Greg Karpel (gkarpel@alvarezandmarsal.com) <gkarpel@alvarezandmarsal.com>
Cc: Jeremy Nemers <jnemers@airdberlis.com>; Bobby Kofman <bkofman@ksvadvisory.com>; Joshua Foster <FosterJ@bennettjones.com>; David Sieradzki <dsieradzki@ksvadvisory.com>
Subject: RE: McEwan Enterprises

Steve,

Thank you for taking the time to discuss First Capital Holdings' questions and concerns with us yesterday. Further to our discussion, we've set out responses to your questions below, some of which may be better and more fulsomely discussed over another call or with the benefit of additional materials from the Company being provided upon finalizing a confidentiality arrangement.

1. To what extent was A&M involved in the development of the Company's strategic process?

   Since being engaged as of September 10, 2021 and beginning its mandate on September 14, 2021, A&M has been apprised of the Company's strategic process and has had numerous discussions regarding same. However, A&M was not involved in the development of the Company's strategic process.

2. What efforts have been taken by A&M to assess the reasonableness of the Company's proposed transaction?

   *As set out in the Monitor's First Report and communicated to the Court, the Monitor's assessment of the Company's proposed transaction is ongoing. The Monitor's ultimate conclusion as to the reasonableness of the proposed transaction will be set out within its Second Report to Court (the "**Second Report**"). To inform its conclusion, the Monitor is, among other things, preparing a hypothetical liquidation analysis (the "**Illustrative Liquidation and Valuation Range Analysis**") to model potential recoveries on a location by location basis as well as on a group basis utilizing a variety of assumptions. This analysis is ongoing and will be discussed within the Second Report.*

3. Has the Monitor reached out to any potential strategic parties to assess whether such parties may have an interest in a transaction?

   No, the Company is not supportive of the Monitor doing so.

4. What, in the Monitor's opinion, differentiates this case from others such that compliance with Section 36(4) is not required?

   As previously noted, the Monitor's assessment of the Company's proposed transaction is ongoing and no conclusion regarding same has been drawn at this time. The Monitor intends to set out its evaluation of and conclusion as to the proposed transaction within the Second Report in detail having regard to, among other things, the factors enumerated in subsection 36(4) of the CCAA. As the Monitor communicated to the Court, it is aware of cases in which a related-party sale transaction has been approved absent a sales process having been conducted. However, as the

Monitor advised the Court, it has not yet completed its analysis as to whether the circumstances of this case and the proposed transaction satisfy the requirements enumerated in subsection 36(4) of the CCAA.

5. What efforts have been made by the Monitor to review the operations of One Restaurant and its present financial position?

   The Monitor has received and reviewed the Company's financial information package which includes historical financial information in respect of One Restaurant. The Monitor has also received and reviewed the Hazelton Food Services Partnership's Partnership Agreement. One Restaurant's financial position will inform the Illustrative Liquidation and Valuation Range Analysis being prepared by the Monitor.

6. Is the Monitor comfortable with the financial disclosure concerning One Restaurant? Please provide us with a copy of the financial disclosure regarding One Restaurant.

   As discussed on our call, the Monitor thinks it would be helpful if you work with the Company's counsel on a confidentiality arrangement in respect of financial information pertaining to One Restaurant, along with other information requests. The Monitor does not believe that its involvement is required in the preparation of an appropriate non-disclosure agreement between the Company and First Capital Holdings; however, the Monitor is willing to be involved if helpful or needed.

7. Has the Monitor reviewed the Company's post-filing financial projections?

   The Monitor is not aware of the Company having any post-filing financial projections beyond its cash-flow projections.

8. Has the Monitor normalized the Company's post-filing financial projections to assess whether the elimination of certain costs would significantly improve profitability? For example, is all executive compensation at market?

   As noted immediately above, the Monitor is not aware of the Company having any post-filing projections beyond its cash-flow projections. The Monitor has been provided with the Company's payroll information, with the names of the Company's employees redacted. There is no compensation included within that strikes the Monitor as being in excess of market such that it would need to be removed, in whole or in part, to normalize post-filing projections should they be prepared. The Monitor has also asked the Company to provide it with compensation information for Mr. McEwan and his son.

9. Has the Monitor considered whether the break-up value of the Company (i.e. the sale of its various operations) may have greater value than the Company's proposed transaction?

   The value of the Company's various locations/operations both on an individual and group basis is being considered within the Illustrative Liquidation and Valuation Range Analysis being prepared by the Monitor. The Monitor intends to comment on such values in its description of the analysis to be provided in the Second Report.

Sean Zweig
***Partner*,* Bennett Jones LLP**
***Denotes Professional Corporation**
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From: Steve Graff <sgraff@airdberlis.com>
Sent: Thursday, October 7, 2021 11:28 AM
To: Sean Zweig <ZweigS@bennettjones.com>; Nevsky, Joshua <jnevsky@alvarezandmarsal.com>; Greg Karpel (gkarpel@alvarezandmarsal.com) <gkarpel@alvarezandmarsal.com>
Cc: Jeremy Nemers <jnemers@airdberlis.com>; Bobby Kofman (bkofman@ksvadvisory.com) <bkofman@ksvadvisory.com>
Subject: McEwan Enterprises

Good Morning Gentlemen. I look forward to speaking with you shortly. In the meantime, I wanted to convey our desire to work with you to achieve what I would consider to be a fair process associated with this CCAA proceeding. To that end, while we await the endorsement of Chief Justice Morawetz,, there will undoubtedly need to be a great deal of information that we (and likely you) will need in advance of next week's motion to determine whether the transaction is fair and reasonable, aside and apart from the our primary assertion that the transaction cannot even be considered in view of the CCAA and the manner in which this proposed related party sale transaction has unfolded. Much of the information that we seek constitutes responses to the questions raised of Mr. McEwan at his cross examination on Monday of this week. However, without limitation, could we raise the following informational requests with you (for all of our consideration).

1. To what extent was A&M involved in the development of the Company's strategic process?
2. What efforts have been taken by A&M to assess the reasonableness of the Company's proposed transaction?
3. Has the Monitor reached out to any potential strategic parties to assess whether such parties may have an interest in a transaction?
4. What, in the Monitor's opinion, differentiates this case from others such that compliance with Section 36(4) is not required?
5. What efforts have been made by the Monitor to review the operations of One Restaurant and its present financial position?
6. Is the Monitor comfortable with the financial disclosure concerning One Restaurant? Please provide us with a copy of the financial disclosure regarding One Restaurant.
7. Has the Monitor reviewed the Company's post-filing financial projections?
8. Has the Monitor normalized the Company's post-filing financial projections to assess whether the elimination of certain costs would significantly improve profitability? For example, is all executive compensation at market?
9. Has the Monitor considered whether the break-up value of the Company (i.e. the sale of its various operations) may have greater value than the Company's proposed transaction?

Thanks you for your prompt consideration of the above.

Steven L. Graff

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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 MCEWAN ENTERPRISES INC.

Court File No.: CV-21-00669445-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

AFFIDAVIT OF ROBERT KOFMAN
(sworn October 11, 2021)

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