SUPERIOR COURT OF JUSTICE

# COUNSEL/ENDORSEMENT SLIP

**COURT FILE NO.: CV-23-00710259-00CL** **DATE: DECEMBER 13, 2023**

**NO. ON LIST: 3**

**TITLE OF PROCEEDING:** MASTERMIND GP INC (Re)

**BEFORE: JUSTICE STEELE**

## PARTICIPANT INFORMATION

**For Plaintiff, Applicant, Moving Party:**

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**ENDORSEMENT OF JUSTICE STEELE:**

[1] On November 23, 2023, the Mastermind Entities were granted protection from their creditors under the *Companies' Creditors Arrangement Act* under the Initial Order. The Court extended the Initial Order and granted further protections on November 30, 2023.

[2] Mastermind has since completed negotiations with Unity Acquisitions Inc. ("Unity" or the "Purchaser") and entered into an asset purchase agreement with Unity.

[3] The Mastermind Entities now seek an order (a) approving the asset purchase agreement dated as of December 1, 2023 between Mastermind LP and Unity, (b) vesting all of Mastermind LP's rights, title and interest in and to the purchased assets in Unity, and (c) granting a sealing order over certain sections in the APA related to the calculation of the purchase price and over confidential appendix B to the Monitor's Second Report.

[4] The Monitor supports the relief sought today by the Mastermind Entities.

[5] No party opposed the relief sought.

*Should the Court approve the APA and the Transaction contemplated in the APA and vest the purchased assets in the Purchaser?*

[6] Section 36(1) of the CCAA gives the Court power to authorize a debtor company to sell or dispose of assets outside the ordinary course of business. The authority of the Court to approve a sale of all or substantially all of the assets of a debtor company is well established: *Nortel Networks Corp. et al. (Re)*, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]), at paras. 35-40, 48, *Target Canada Co. (Re)*, 2015 ONSC 846 [Commercial List], at para. 3.

[7] The Court must first be satisfied that section 36(2) of the CCAA has been complied with. Section 36(2) requires that notice be provided to secured creditors who are likely to be affected by the proposed sale. CIBC, the only secured creditor of the Mastermind Entities, was consulted, and supports the transaction.

Further, the Birch Hill Lenders, a former secured creditor of the Mastermind Entities, also supports the transaction.

[8] Under section 36(3) of the CCAA, the Court is to consider the following factors in determining whether to grant the authorization to sell assets outside the ordinary course of business:

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.

[9] I consider the above factors in turn below.

[10] The Mastermind Entities undertook a robust process leading to the sale, which started long before these CCAA proceedings. In March 2023, the Mastermind Entities engaged Alvarez & Marsal Canada Securities Inc. ("A&M Corporate Finance") to advise them on various strategic alternatives given their ongoing liquidity issues. A&M Corporate Finance determined that a going concern sale would be the best course forward. A&M Corporate Finance and the Mastermind Entities developed a sale process that was conducted in two phases starting in April 2023. First, 95 potential bidders were identified. From those, four parties submitted non-binding letters of intent and discussions progressed with two of these parties. However, both these parties withdrew from the sale process. Subsequently, A&M Corporate Finance recanvassed the market to try to find a going concern purchaser for the Mastermind Entities. One party expressed interest and signed an agreement to acquire the Mastermind Entities. However, that transaction fell through as a result of difficulties satisfying certain requirements under the *Competition Act*. The Mastermind Entities then commenced CCAA proceedings while continuing efforts to secure a going concern purchaser. The Mastermind Entities reached out to approximately 15 potential buyers who had previously expressed an interest in the business, one of whom was Unity. There is no doubt that the Mastermind Entities engaged in a robust process leading up to the sale that was reasonable in the circumstances.

[11] The Monitor supports the proposed transaction. As noted at para. 8.1(2) of the Monitor's Second Report, the APA and the transaction "are the product of an extensive, fair and transparent" process. Moreover, the Monitor has filed a report with the Court stating that in their view the sale would be more beneficial to the creditors than a sale under a bankruptcy. Although the pure economic recovery may be the same or similar as in a bankruptcy liquidation, the other going concern benefits to stakeholders are preferable under the proposed sale. In particular, over 500 employees will have the opportunity to continue their

employment and landlords in respect of 48 stores will have the opportunity to continue to transact with the Purchaser.

[12] The Mastermind Entities kept their current and former secured creditors apprised of the sale process as the transaction progressed. CIBC and the Birch Hill lenders were involved with the negotiations with Unity.

[13] The proposed sale is the only option for the Mastermind Entities, other than a full liquidation. Unlike a liquidation, the transaction will benefit many stakeholders by continuing the operation of 48 purchased stores, providing jobs to at least 85% of the employees on substantially similar terms of employment, continuing business for various suppliers, and maintaining relationships with landlords and customers. As noted above, no stakeholder has objected to the proposed sale, and the Monitor supports the proposed sale.

[14] The Monitor and the Mastermind Entities are of the view that the consideration is fair and reasonable. The transaction, including the purchase price, is the result of comprehensive negotiations. The board of directors and management of the Mastermind Entities have exercised their business judgment to determine the most appropriate deal in the circumstances for the business. The Court must show deference to their business judgment, absent any indication that the Mastermind Entities have acted improvidently (of which there has been no suggestion): *Nordstrom Canada Retail, Inc. et al. (Re)*, 2023 ONSC 4199, at paras. 18-20, *Stelco Inc. (Re)*, [2005] O.J. No. 729, at paras. 65-68, *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247, at paras. 51-55.

[15] I am satisfied that the proposed transaction should be approved.

*Should the Court grant the requested Sealing Order?*

[16] The Mastermind Entities seek a sealing order over the unredacted version of the APA. The unredacted version of the APA contains the mechanism for the calculation of the purchase price. Further, the Mastermind Entities ask that confidential appendix B to the Monitor's Second Report with the comparison to the full liquidation scenario also be sealed because, among other things, it contains the mechanism for the calculation of the purchase price.

[17] Section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record.

[18] The Supreme Court of Canada, in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 38, articulated the test applicable when determining whether a sealing order ought to be granted:

> The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

i. Court openness poses a serious risk to an important public interest;

ii. The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

iii. As a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness – for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order – properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[19] Canadian courts have recognized the important public interests that CCAA proceedings serve and that the regime functions as a "supporting framework for the resolution of corporate insolvencies in the public interest:" *Re Nortel Networks*, [2009] O.J. No. 3169, at para. 29.

[20] The pricing mechanism used in the sale transaction is a result of extensive negotiations. Unity considers the pricing mechanism to be proprietary and commercially sensitive. The Mastermind Entities indicated that disclosing Unity's proprietary pricing mechanism could harm their competitive advantage.

[21] The appendix to the Monitor's report that illustrates the difference between the sale transaction and a full liquidation scenario includes the proprietary pricing mechanism. Further, in the unlikely event that the Mastermind Entities had to pivot to a full liquidation scenario, the disclosure of the pricing information could impact their recovery.

[22] The requested order sought is proportionate, as the information regarding the transaction that is pertinent to stakeholders is available. The information that is sealed is limited in scope to cover only sensitive confidential commercial information.

[23] I am satisfied that the mechanism for the calculation of the purchase price (which is included in the unredacted version of the APA) and confidential appendix B to the Monitor's Second Report contain confidential commercial information. I have considered the *Sierra Club* principles, as modified by *Sherman Estate*, and the submissions of the applicant, and am satisfied that it is appropriate to grant the requested sealing order.

[24] The applicant is directed to provide the sealed confidential exhibit to the Court clerk at the filing office in an envelope with a copy of this endorsement and the signed order (with the relevant provisions highlighted) so that the confidential exhibit can be physically sealed.

[25] Order attached.

[26] The Mastermind Entities are scheduled to return to Court on January 12, 2024 at 10 am (one hour).