Court File No. CV-23-00709610-00CL

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 MAV BEAUTY BRANDS INC., MARC ANTHONY COSMETICS LTD., MARC ANTHONY US HOLDINGS, INC., MARC ANTHONY COSMETICS USA, INC., MAC PURE HOLDINGS, INC., MAV MIDCO HOLDINGS, LLC, RENPURE, LLC, ONESTA HAIR CARE, LLC, and THE MANE CHOICE HAIR SOLUTION LLC

Applicants

FACTUM OF THE APPLICANTS
(Re: Amended and Restated Initial Order, Approval, Vesting and Distribution Order and Assignment Order)

November 22, 2023

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TO: THE SERVICE LIST

PART I – OVERVIEW[1]

1. The Applicants are a group of hair care and personal care companies with a diversified portfolio of four brands.

2. As a result of financial difficulties, the Applicants made significant efforts to address their liquidity issues and, at the end of March 2023, commenced the Strategic Review Process. Execution of the Asset Purchase Agreement is the product of a thorough canvassing of the market and a competitive process conducted over a period of approximately seven months to identify potential purchasers of or investors in the Companies' business.

3. Following completion of the Strategic Review Process and after careful consideration of all alternatives available to the Companies, the Boards of Directors of the Companies determined that filing for protection pursuant to the CCAA to implement the Transaction contemplated by the Asset Purchase Agreement is in the best interests of the Companies and represents the best alternative available to the Applicants and its stakeholders generally. Accordingly, on November 14, 2023, the Applicants sought and obtained relief under the CCAA pursuant to the Initial Order.

4. Among other benefits, the Transaction provides for the continuation of the Companies' business as a going concern, preservation of employment for nearly all of the Companies' employees, and ongoing business with the Companies' customers and suppliers.

5. The Lenders will suffer a significant shortfall in recovery of their debt. However, all the letters of intent and expressions of interest submitted during the Strategic Review Process would have resulted in the Lenders suffering a significant shortfall. The Lenders (being the fulcrum secured creditor of the Applicants) and their advisors were consulted in connection with, and throughout, the Strategic Review Process.

6. This factum is filed in support of the Applicants' motion for approval of (a) the ARIO, among other things, (i) extending the Stay Period, (ii) increasing the amounts which may be borrowed by the Applicants under the DIP Agreement, and (iii) approving the Piper Engagement Letter and the Transaction Fee Charge; (b) the Transaction to be implemented pursuant to the

[1] Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the affidavits of Laurel MacKay-Lee sworn November 13, 2023 (the "**Initial Affidavit**") and November 17, 2023 (the "**MacKay-Lee Affidavit**"), and the affidavit of Mike Genereux sworn November 16, 2023 (the "**Genereux Affidavit**").

proposed Approval, Vesting and Distribution Order; and (c) an Assignment Order assigning the Sellers' contracts to the Purchaser or its designee in connection with the Transaction.

PART II – THE FACTS

7. The facts underlying this motion are more fully set out in the Initial Affidavit, the MacKay-Lee Affidavit, and the Genereux Affidavit.

A. Background

8. The Companies are a group of hair care and personal care companies with a diversified portfolio of four brands.[2]

9. The Companies have experienced continuing declines in operating performance as a result of, among other things, net product distribution losses with the Companies' retail customers and external pressures, including increased operating costs in light of rapidly accelerating interest rates, competition in the personal care industry generally, and disruption to retail sales as a result of store closures and shifts in end-consumer preferences toward e-commerce and online platforms during the COVID-19 pandemic.[3]

10. As a result of the Companies' financial difficulties, the Applicants sought and were granted protection under the CCAA pursuant to the Initial Order on November 14, 2023, which, among other things:

(a) appointed A&M as Monitor of the Applicants;
(b) granted the Stay of Proceedings in favour of the Applicants and their D&Os until and including November 24, 2023;
(c) approved the DIP Agreement between the Applicants, the Agent, and certain of the lenders party to the Credit Agreement, dated November 13, 2023, pursuant to which the Applicants were authorized to borrow up to $250,000 during the initial Stay Period and granted a corresponding DIP Lenders Charge; and
(d) granted the Administration Charge in the amount of $450,000 and the D&O charge in the amount of $600,000.[4]

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[2] Initial Affidavit, *supra* at para 19, Application Record dated November 13, 2023, Tab 2.
[3] *Ibid* at para 7, Application Record dated November 13, 2023, Tab 2.
[4] MacKay-Lee Affidavit, *supra* at para 6, Motion Record of the Applicants dated November 17, 2023 ("**MR**"), Tab 2.

11. Since the granting of the Initial Order, the Applicants, in close consultation with, and with the assistance of, the Monitor, have been working in good faith and with due diligence to stabilize their business and operations.[5] Among other things, the Applicants have continued to work with the Purchasers toward a successful closing of the Transaction and have sent notices to all identified contractual counterparties who may have their contract assigned to the Purchaser under the proposed Assignment Order.[6]

B. The Strategic Review Process

12. On March 31, 2023, the Companies, in consultation with the Lenders, publicly announced the Strategic Review Process. On April 10, 2023, the Company formed the Special Committee to oversee the Strategic Review Process.[7]

13. Piper Sandler, in consultation with the Companies and the Lenders, generated a list of Potential Bidders comprised of strategic buyers and private equity firms. Piper Sandler began contacting the Potential Bidders on April 10, 2023, and contacted a total of 97 Potential Bidders during the Strategic Review Process.[8] Of the 97 Potential Bidders, 25 executed and returned an NDA to Piper Sandler to receive access to the VDR containing due diligence information in respect of the Companies and their business to assist Potential Bidders in making an offer.[9]

14. In support of the initial marketing and solicitation process, the Companies offered in-depth management presentations regarding, among other things, their business, operations and assets, to Potential Bidders and the Companies conducted several follow-up diligence sessions to upload additional information to the VDR.[10]

15. Piper Sandler sent the Process Letter to each of the Potential Bidders who had executed an NDA and explicitly indicated interest in continuing in the Strategic Review Process, pursuant to which Potential Bidders were required to submit an LOI by the Bid Deadline.[11]

16. As a result of the efforts of the Applicants and Piper Sandler, five parties submitted non-binding letters of intent or expressions of interest during the Strategic Review Process. A period of extensive and intensive arm's length negotiations followed receipt of the non-binding offers,

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[5] *Ibid* at para. 7, MR Tab 2.
[6] *Ibid* at para 10, MR Tab 2.
[7] Genereux Affidavit, *supra* at paras. 9-10, MR Tab 3.
[8] *Ibid* at para 13-14, MR Tab 3.
[9] *Ibid* at para 15, MR Tab 3.
[10] *Ibid* at para 16, MR Tab 3.
[11] *Ibid* at paras 19-20, MR Tab 3.

each of which was carefully evaluated by the Special Committee and its advisors, Piper Sandler and A&M.[12] The Lenders (as the fulcrum creditors) and their advisors were consulted in connection with, and throughout, the Strategic Review Process.[13]

17. Following completion of the Strategic Review Process and after careful consideration of all alternatives available to the Companies and having given due consideration to the interests of all stakeholders, the Boards of Directors of the Companies, determined that filing for protection pursuant to the CCAA in order to implement the Transaction contemplated under the Asset Purchase Agreement was in the best interests of, and represented the best alternative available to, the Applicants and their stakeholders.[14]

C. The Transaction

(i) Asset Purchase Agreement and Transaction

18. The Sellers and the Purchaser executed the Asset Purchase Agreement on November 13, 2023.[15] The Transaction contemplates that the Purchaser will purchase the Purchased Assets and assume the Assumed Contracts and the Assumed Real Property Leases (each as defined in the Asset Purchase Agreement).[16] As consideration for the above, the Purchaser will pay the aggregate sum of the Purchase Price, less certain post-closing adjustments, and will assume the Assumed Liabilities.[17]

19. The Purchase Price is subject to adjustments for (a) any Working Capital Overage or Working Capital Underage; (b) the value of the Cure Costs; and (c) the Purchaser's economic contribution to the Accrued Vacation Payout.[18]

(ii) Assignment of Contracts

20. The Asset Purchase Agreement identifies the contracts and leases which the Purchaser will assume in connection with the Transaction, being the Assumed Contracts and Assumed Real Property Leases.[19]

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[12] MacKay-Lee Affidavit, *supra* at para 16, MR Tab 2.
[13] *Ibid* at para 17, MR Tab 2.
[14] *Ibid* at para 18, MR Tab 2.
[15] *Ibid* at para 21, MR Tab 2.
[16] *Ibid* at para. 4, MR Tab 2.
[17] *Ibid* at para 23, MR Tab 2.
[18] *Ibid* at para 23, MR Tab 2.
[19] *Ibid* at para 27, MR Tab 2.

21. Certain of the Assumed Contracts are "Material Contracts", as defined in the Asset Purchase Agreement. Assignment of the Material Contracts is a condition precedent to closing the Transaction. While not a condition to closing, the Asset Purchase Agreement also obliges the Applicants to seek an order assigning any Assumed Contracts for which a consent has not been obtained.[20]

22. There are approximately 35 Assigned Contracts which the Applicants are seeking to assign pursuant to the Assignment Order (made up of approximately 20 Material Contracts and approximately 15 other Assumed Contracts for which consent to assignment has not been obtained).[21]

23. On November 14, 2023, the Applicants sent a notice to each identified counterparty of an Assumed Contract informing it of the Transaction and the proposed assignment of their contract to the Purchasers. Where assignment of the Assumed Contract requires the consent of the counterparty, the notice sent by the Applicants to the counterparty sought such consent and informed the counterparty of this motion.[22]

24. The Applicants have used their best efforts to obtain the consent of all counterparties (where such consents are required) by following up with the applicable contractual counterparties with either (a) a second written notice sent on November 21, 2023, seeking the consent of the counterparty and informing the counterparty of this motion, or (b) direct communication from the Applicants by telephone or email.

25. In the event that consent to assignment of the Assigned Contracts remain outstanding as of the date of the Motion, the Applicants are seeking the Assignment Order to, among other things:

(a) assign such Assigned Contracts to the Purchasers;
(b) prevent any counterparty to any such Assigned Contracts from exercising any right or remedy under such Assigned Contract under various circumstances; and
(c) vest in the Purchaser or its designee all right, title and interest of the relevant Seller in such Assigned Contract.[23]

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[20] *Ibid* at paras 28 and 33, MR Tab 2.
[21] *Ibid* at para 28, MR Tab 2.
[22] *Ibid* at para 10, MR Tab 2.
[23] *Ibid* at para 34, MR Tab 2.

(iii) Distributions to the Lenders

26. The Asset Purchase Agreement provides for a cash payment to be paid to the Sellers on the closing of the Transaction.[24] The Applicants are seeking authorization for the Sellers to make certain distributions to the Lenders.[25]

D. Retention Bonus Plan

27. In connection with the Strategic Review Process that was publicly announced on March 31, 2023, the Companies worked with their advisors to develop the Retention Bonus Plan to incentivize certain Key Employees who perform critical roles for the Companies to remain with the Companies throughout the Strategic Review Process, and ultimately, a restructuring of the Companies.[26]

28. The Retention Bonus Plan was approved by the Special Committee on May 9, 2023. Pursuant to the terms of the Retention Bonus Plan, the Key Employees will receive a bonus payment in the amount of 75% of their gross annual base salary at the earlier of (a) April 30, 2024; or (b) closing of the Transaction. The aggregate amount payable under the Retention Bonus Plan is approximately $1.19 million.[27]

29. The bonus payments under the Retention Bonus Plan will be paid from the proceeds of sale from the Transaction. The Lenders support payment of the retention bonuses.[28]

PART III – ISSUES

30. The issues to be determined on this motion with respect to the ARIO are whether this Court should:

(a) extend the Stay Period until and including December 21, 2023;

(b) authorize the Applicants to borrow up to the full principal amount of $3.9 million pursuant to the DIP Agreement and grant a corresponding increase to the DIP Lenders Charge;

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[24] *Ibid* at para 38, MR Tab 2.
[25] *Ibid*, MR Tab 2.
[26] *Ibid* at para 48, MR Tab 2.
[27] *Ibid* at paras 49-50, MR Tab 2.
[28] *Ibid* at para. 54, MR Tab 2.

(c) increase the amounts of the Administration Charge and the D&O Charge; and

(d) approve the Piper Engagement Letter and grant the Transaction Fee Charge.

31. The issues to be determined on this motion with respect to the Approval, Vesting, and Distribution Order are whether this Court should:

(a) approve the Asset Purchase Agreement and the Transaction contemplated therein, and vest all of the Purchased Assets in the Purchasers;

(b) approve the distributions to the Lenders;

(c) seal Confidential Appendix "1" to the First Report of the Monitor dated November 20, 2023 (the "**First Report**"), which contains the unredacted Asset Purchase Agreement; and

(d) seal Confidential Appendix "2" to the First Report, which contains a summary of the terms of the letters of intent received in the Strategic Review Process and the Asset Purchase Agreement.

32. The issue to be determined on this motion with respect to the Assignment Order being sought is whether this Court should approve the assignment of the Assigned Contracts to the Purchaser or its designee in connection with completion of the Transaction.

PART IV – LAW AND ANALYSIS IN RESPECT OF THE ARIO

A. The Stay Extension Should be Granted

33. The Initial Order provided for a Stay Period up to and including November 24, 2023. The Applicants are seeking an extension of the Stay Period to and including December 21, 2023.

34. Section 11.02(2) of the CCAA gives this Court the authority to grant an extension of the Stay Period for any period "it considers necessary".[29] To do so, this Court must be satisfied that circumstances exist that make the order appropriate and that the Applicants have acted, and are acting, in good faith and with due diligence.[30]

[29] CCAA, s. 11.02(2).
[30] CCAA, s. 11.02(3).

35. Since the Initial Order, in addition to continuing to run their business, the Companies have, among other things: (a) held two town hall meetings for their employees to explain the impact of the CCAA Proceedings and the proposed Transaction; (b) communicated with various stakeholders, including suppliers and customers; (c) sent notices to contractual counterparties who may have their contracts assigned under the proposed Assignment Order; and (d) continued to work with the Purchaser to advance the proposed Transaction.[31]

36. The Companies require the extension to the Stay Period in order to continue operating and to close the Transaction contemplated by the Asset Purchase Agreement.

37. As demonstrated in the Cash Flow Forecast, with the benefit of the DIP Agreement, the Applicants are forecasted to have sufficient liquidity through to the end of the proposed extension to the Stay Period.[32]

38. The Monitor has opined that the Applicants are continuing to act in good faith and with due diligence and supports the proposed extension to the Stay Period.[33]

B. Availability Under the DIP Agreement Should be Increased

39. The Applicants are seeking to increase the maximum amount permitted to be drawn on the DIP Facility from $250,000 to $3.9 million.[34]

40. As set out in the Initial Affidavit, the Cash Flow Forecast indicates that the Applicants will need to draw up to $3.9 million under the DIP Facility in order to maintain operations and fund these CCAA Proceedings up to the closing of the Transaction.[35]

41. The Applicants previously addressed the factors under subsection 11.2(1) and (4) that the Court must consider in deciding whether to approve a charge in connection with interim financing in their factum (the "**Initial Order Factum**") filed in support of the Initial Order.

42. The Applicants submit that the requested increase to the maximum principal amount under the DIP Agreement is fair and reasonable and that the criteria under subsections 11.2(1) and 11.2(4) support approval of this relief, as:

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[31] First Report, *supra* at para 3.1.
[32] *Ibid* para 12.2.
[33] *Ibid*.
[34] *Ibid* at para 44, MR Tab 2.
[35] *Ibid* at para 45, MR Tab 2.

(a) notice of this Motion been given to all of the Applicants' secured creditors;

(b) given the Applicants' assets and circumstances, they cannot obtain alternative financing outside of these CCAA proceedings;

(c) the DIP Facility is necessary in order for the Applicants to pursue its restructuring efforts, which will preserve its business as a going-concern for the benefit of all its stakeholders;

(d) the DIP Facility is being advanced by the Applicants' secured lenders, namely the Lenders under the Credit Agreement, thereby demonstrating their confidence in management;

(e) the Lenders under the Credit Agreement are owed far in excess of the value of the Applicants assets; therefore no creditor is going to be prejudiced by the DIP Facility;

(f) the quantum of the DIP Facility is reasonable and appropriate having regard to the short period of the anticipated proceedings and the Cash Flow Forecast;

(g) the DIP Lenders Charge will not secure any obligations incurred prior to the commencement of these CCAA Proceedings; and

(h) the Monitor supports the requested increase to the maximum principal amount under the DIP Agreement.[36]

C. The Increased Administration Charge and D&O Charge Should be Granted

43. The Applicants are seeking to increase the amount of the Administration Charge and the D&O Charge at the Comeback Hearing.

44. The Applicants seek to increase the maximum amounts of the Administration Charge from $450,000 to $700,000, and the D&O Charge from $600,000 to $725,000. The increases being sought to the Administration Charge and the D&O Charge reflect the Companies' estimated increase to (a) the expected amount of professional fees which could be outstanding during the CCAA Proceedings, with respect to the Administration Charge; and (b) the maximum amount of liabilities that the Companies' directors and officers could become liable for during the CCAA Proceedings, with respect to the D&O Charge. The estimated increases were determined in consultation with the Monitor.[37]

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[36] First Report, *supra* at para 10.9.
[37] MacKay-Lee Affidavit, *supra* at para 47, MR Tab 2.

45. The initial amounts of the Administration Charge and the D&O Charge were limited to the amount of professional fees estimated that could be outstanding during the initial Stay Period and the amount of liabilities that the Companies' D&Os could become liable for during the initial Stay Period.

46. The Applicants previously addressed the factors under sections 11.51 and 11.52 that the Court must consider in deciding whether to approve the D&O Charge and Administration Charge, respectively, in their Initial Order Factum filed in support of the Initial Order.

47. The Applicants submit that the proposed increases to the Administration Charge and the D&O Charge are appropriate, which reasons include:

(a) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout these CCAA proceedings;
(b) there is no anticipated unwarranted duplication of roles;
(c) the Monitor believes that the proposed increase to the Administration Charge is reasonable[38];
(d) the Applicants will benefit from the active and committed involvement of their directors and officers, who have considerable institutional knowledge and valuable experience and whose continued participation will help facilitate the Transaction;
(e) the Applicants cannot be certain whether the existing insurance will be applicable or respond to any claims made, and do not have sufficient funds available to satisfy any given indemnity should its directors and officers need to call upon such indemnities;
(f) the D&O Charge does not secure obligations incurred by a director as a result of the directors' gross negligence or wilful misconduct;
(g) absent approval by this Court of the D&O Charge in the amounts set out above, some or all of the Companies' directors and officers will resign; and
(h) the Monitor is of the view that the increased amount to the D&O Charge is appropriate and reasonable in the circumstances. [39]

[38] First Report, *supra* at para 10.3
[39] First Report, *supra* at paras 10.3 and 10.7.

D. Piper Sandler's Engagement and the Transaction Fee Charge Should be Approved

48. The Applicants seek approval of the Piper Engagement Letter and the granting of the Transaction Fee Charge to secure the fees that may become payable pursuant to the Piper Engagement Letter.

49. Section 11 of the CCAA provides the Court with authority to allow debtor companies to enter into arrangements to facilitate a restructuring, which may include the retention of expert advisors where necessary to help with the debtor's restructuring efforts.[40]

50. Courts have approved the appointment of advisors in restructuring proceedings, and corresponding charges to secure such advisors' professional fees, where such advisors' knowledge and experience is critical to assisting the debtor with a successful restructuring or is necessary to assist the debtor with a liquidation sale.[41]

51. Piper Sandler played a crucial role in conducting the Strategic Review Process over a period of approximately seven months. During the process, Piper Sandler worked with A&M and the Applicants' legal counsel and reported to the Special Committee. Piper Sandler consulted with the Lenders' advisors throughout the process.[42]

52. Piper Sandler was paid a modest monthly fee during the process. The bulk of their compensation is payable in the form of a success fee upon closing of the Transaction. In the circumstances, approval of the Piper Engagement Letter and granting of the Transaction Fee Charge to secure payment of the Transaction Fees is appropriate. Piper Sandler has worked for nine months for the benefit of the Applicants and their stakeholders, and their efforts have culminated in a Transaction which provides for a going-concern sale of the Companies' business.

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[40] *Victorian Order of Nurses for Canada (Re)*, 2015 ONSC 7371 at para 27.
[41] *Payless ShoeSource Canada Inc and Payless ShoeSource Canada GP Inc (Re)*, 2019 ONSC 1215 at paras 30 - 32; see also *Target Canada Co (Re)*, 2015 ONSC 303 at para 72.
[42] First Report, *supra* at para 6.30(iii).

PART V – LAW AND ANALYSIS REGARDING THE PROPOSED APPROVAL, VESTING AND DISTRIBUTION ORDER

A. The Asset Purchase Agreement and the Transaction Should be Approved

(i) This Court has Jurisdiction to Approve the Transaction and Vest the Purchased Assets in the Purchaser

53. It is well-established that this Court has jurisdiction to approve a sale of all or substantially all the assets of a debtor company in a CCAA proceeding where such sale is in the best interests of stakeholders generally. The sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA.[43]

54. Section 36 of the CCAA provides that a debtor company may sell assets outside of the ordinary course of business if authorized to do so by the Court. Section 36(3) sets out the following factors for the Court to consider when determining whether to authorize a sale of assets by a debtor company in a CCAA proceeding. The criteria are non-exhaustive and the Court must look at the proposed transaction as a whole and decide whether it is appropriate, fair and reasonable:

(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.[44]

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[43] *Re Nortel Networks Corp.* (2009), 2009 CanLII 39492 (Ont. Sup. Ct. J.) at paras. 35-40 and 48 [*Nortel*]; *Re Brainhunter Inc.* [2009] O.J. No. 5207 (Ont. Sup. Ct. J.) at para. 12; *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 2870 at para. 13. [*Canwest*]

[44] CCAA, s. 36(3); *Re Nelson Education Limited*, 2015 ONSC 5557 at para. 38 [*Nelson*]; *Re Bloom Lake*, 2015 QCCS

55. In *Canwest*, Justice Pepall held that the criteria enumerated in section 36(3) of the CCAA largely overlapped with the traditional common law criteria established in *Royal Bank v Soundair Corp.* for approval of a sale of assets in an insolvency scenario and remain relevant when considering the statutory test:

(a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
(b) the interests of all parties;
(c) the efficacy and integrity of the process by which offers have been obtained; and
(d) whether there has been unfairness in the working out of the process.[45]

56. A court should also give effect to the business judgement rule, which affords deference to the exercise of the commercial and business judgement of the debtor company in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient.[46]

(ii) The Test to Approve a Transaction resulting from a Pre-Filing Sales Process is the same as the Test to Approve a Transaction resulting from a Post-Filing Sales Process

57. Courts have, on many occasions, approved sale transactions where the debtor company conducted a sales process before making an insolvency filing.[47] In approving transactions of this nature, courts have held that the same principles that apply to the approval of a sale transaction resulting from a post-filing sales process apply to the approval of a sale transaction resulting from a pre-filing sales process.[48]

58. Where a debtor seeks approval of a sale transaction developed prior to an insolvency filing, the court will still consider the *Soundair* principles but with specific consideration of the economic realities of the business and the proposed transaction. Sale approval is warranted where the sale represents the best available commercial alternative in the circumstances, particularly where an extension of the process could jeopardize the continued operation of the

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1920 at paras. 25-26. [*Bloom Lake*]
[45] CCAA, s. 36(3); *Canwest*, *supra* at para. 13; *Royal Bank v Soundair Corp.* (1991), 83 D.L.R. (4th) 76 (Ont. C.A.) at para. 16; *Nelson*, *supra* at paras. 37-38.
[46] *Bloom Lake*, *supra* at para. 28.
[47] *Nelson*, *supra*; *Bloom Lake*, *supra*; *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586; *Re PT Holdco, Inc. et al.*, Approval and Vesting Order granted February 25, 2016 (Court File No. CV-16-11257-00CL); *Re Golf Town Canada et al.*, Approval and Vesting Order granted September 30, 2016 Court File No. CV-16-11527-00CL); *Karrys Bros, Ltd. (Re)*, 2014 ONSC 7465 at paras. 15-16. [*Karrys*]. This decision is attached as Schedule "C".
[48] *Nelson*, *supra* at paras. 31-33 and 35-59; *Bloom Lake*, *supra* at paras. 25-27 and 29.

business.[49]

59. Furthermore, the Court should consider the impact on various parties and contemplate whether their position and proposed treatment would realistically be any different if an additional process was undertaken; this is unlikely to be the case where the process actually followed is consistent with what a court would have approved if the process was conducted post-filing.[50]

60. The Court in *Karrys* determined that a pre-filing marketing process undertaken by the debtors in advance of proposal proceedings under the *Bankruptcy and Insolvency Act* had met the principles in *Soundair* as:

(a) two financial advisors were engaged in a broad and comprehensive marketing process;
(b) the evidence was that the proposed sale was the best available option in the circumstances;
(c) further delay would likely have resulted in a greater erosion of value such that an immediate sale was the only way to maximize recovery; and
(d) the process actually followed by the debtors was indistinguishable from what the court might reasonably have approved had prior authorization been sought.[51]

61. For the reasons described below, the Applicants submit that the factors in *Karrys* also exist in the case at bar. These factors, together with the *Soundair* principles and the factors that this Court should consider in approving the Transaction, are discussed below.

(iii) The Asset Purchase Agreement and Transaction Satisfy the Requirements in Section 36(3) of the CCAA and the *Soundair* Criteria

62. The Strategic Review Process undertaken by the Companies and Piper Sandler to identify a refinancing, restructuring, sale and other transaction in respect of the Companies' business satisfies the requirements of section 36(3) of the CCAA and the *Soundair* principles. The Asset Purchase Agreement and the Transaction contemplated therein is the best available outcome for the Companies' business and their stakeholders in the circumstances. Each of the criteria enumerated in section 36(3) of the CCAA and the *Soundair* principles are reviewed in turn.

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[49] *Elleway Acquisitions Limited v 4358376 Canada Inc.*, 2013 ONSC 7009 at paras. 27 and 31-32; *Karrys Bros, Ltd. (Re)*, 2014 ONSC 7465 at paras. 15-16. [*Karrys*].
[50] *Re Tool-Plas Systems Inc.*, 2008 CanLII 54791 (Ont. Sup. Ct. J.) at paras. 15-19.
[51] *Karrys*, *supra* at paras. 12-16.

(A) ***The process leading to execution of the Purchase Agreement was reasonable in the circumstances and there is no concern as to its efficacy and integrity. The Companies undertook significant efforts to obtain the best price and have not acted improvidently***

63. The Asset Purchase Agreement is the result of an extensive exploration of strategic alternatives carried out by the Companies and Piper Sandler which formally commenced at the end of March 2023. The proposed Transaction is the product of a thorough and robust canvassing of the market and a competitive process over a lengthy period of approximately seven months to identify potential purchasers of or investors in the MAV Group's business.[52]

64. The Strategic Review Process was extensive, included the consideration of various potential options and alternatives that may be available to the Applicants, provided significant information and time for Potential Bidders to perform due diligence, and was structured in a manner consistent with how a Court-appointed monitor might conduct or oversee a sale process within a formal Court proceeding.[53]

65. The Strategic Review Process was undertaken in a thorough, transparent, and professional manner with the assistance of the Piper Sandler team with significant experience in advising on transactions in the beauty and personal care industry, as well as professionals who specialize in providing investment banking and financial restructuring services to develop and negotiate restructuring and sale transactions.[54] Further, the Lenders and their financial advisor, KPMG, were kept apprised throughout the Strategic Review Process.[55]

66. Through the Strategic Review Process, such efforts by the Applicants, Piper Sandler and/or A&M included, among other things:

(a) public announcement of the Strategic Review Process;
(b) consideration of a broad range of strategic alternatives, including the raising of additional debt or equity capital;
(c) conducting a broad canvass of the market and contacting a total of 97 Potential Bidders;
(d) participation in ongoing management presentations between the Applicants and six Potential Bidders;

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[52] First Report, *supra* at para 6.30(iii).
[53] *Ibid* at para 6.30(vi).
[54] Genereux Affidavit, *supra* at para. 4, MR Tab 3.
[55] *Ibid* at para 18, MR Tab 3.

(e) participation in numerous diligence sessions with the Applicants' management team and certain Potential Bidders; and

(f) carefully considered all offers received.[56]

(B) The Monitor has indicated its support of the Strategic Review Process.

67. In *Nelson*, the Court indicated that the monitor's "blessing" of a sale process undertaken prior to a CCAA filing is an important factor to consider.[57] The Monitor is of the view that the Strategic Review Process was fulsome and that the Purchase Price and other consideration set out in the Asset Purchase Agreement is the best indication of the market value of the Applicants' business and operations and is reflective of current market conditions.[58]

68. Further, as stated above, the Monitor believes that the Strategic Review Process was extensive and was structured in a manner consistent with how a Court-appointed monitor might conduct or oversee a sale process within a formal Court proceeding.[59]

(C) *The Monitor believes that the Transaction is more beneficial to creditors than a sale or disposition under bankruptcy*.

69. As stated in the First Report, the Monitor is of the view that the proposed Transaction, which provides for the continuation of the Applicants' business as a going concern, is better for stakeholders than any result that would be achieved in a liquidation proceeding under the *Bankruptcy and Insolvency Act* (Canada).[60]

(D) *Creditors were adequately consulted, the interests of all parties have been considered, and there has been no unfairness in the working out of the Strategic Review Process.*

70. Throughout the Strategic Review Process, Piper Sandler engaged with the Lenders and their financial advisor and kept them informed on the Strategic Review Process, through weekly and other periodic update calls with KPMG commencing May 4, 2023.[61]

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[56] *Ibid* at paras 9, 11, 14, 16, 17 and 46, MR Tab 3.
[57] *Nelson*, *supra* at para. 38.
[58] First Report, *supra* at para 6.30(iv).
[59] *Ibid* at para 6.30(vi).
[60] *Ibid* at para 6.30(xi).
[61] Genereux Affidavit, *supra* at para. 18, MR Tab 3.

71. The Companies carefully considered all alternatives available to the Companies and having given due consideration to the interests of all stakeholders, the Boards of Directors of the Companies determined that filing for protection pursuant to the CCAA in order to implement the Transaction contemplated under the Asset Purchase Agreement is in the best interests of the Companies and represents the best alternative available to the Applicants.[62]

(E) ***The Transaction is a positive development for the Companies' stakeholders.***

72. If implemented, the proposed Transaction will provide for the continuation of the Applicants' business as a going concern, preserve employment for nearly all employees, and allow for ongoing business with the Applicants' customers and suppliers. The likely alternative to the proposed Transaction is an orderly wind-down or liquidation of the Applicants' business.[63]

73. The Monitor is of the view that the Transaction is substantially better for all of the Companies' stakeholders than the likely alternative.[64]

(F) ***The consideration to be received under the Purchase Agreement and Transaction is fair and reasonable and the decision to proceed with the Transaction represents a proper exercise of business judgement.***

74. As stated above, the Boards of Directors of the Companies, with the benefit of advice from its professional advisors, carefully considered all alternatives available to the Companies and gave due consideration to the interests of all the Companies' stakeholders, in determining that the Transaction contemplated under the Asset Purchase Agreement is in the best interests of the Companies.[65]

75. The Monitor is of the view that the Purchase Price is reflective of an extensive marketing process and current market conditions and appears fair and reasonable under the circumstances.[66]

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[62] MacKay-Lee Affidavit, *supra* at para 18, MR Tab 2.
[63] First Report, *supra* at para 6.30(xi).
[64] *Ibid*.
[65] MacKay-Lee Affidavit, *supra* at para 18, MR Tab 2.
[66] First Report, *supra* at para 6.30(iv).

B. The Distributions Should be Granted

76. The Applicants are seeking authority for the Sellers under the Asset Purchase Agreement to distribute net proceeds available from the closing of the Transaction, after payment of the amounts owing under the Retention Bonus Plan and the reservation of an appropriate Wind-Down Reserve, to the Lenders.[67]

77. The Lenders' security has been reviewed by the Monitor, as noted in the First Report of the Monitor. The Monitor was provided with independent legal opinions from both Canadian and United States counsel, both of which have concluded that, subject to customary assumptions and qualifications, the Canadian and United States security documentation creates valid security interests in favour of RBC, in its capacity as the Agent under the Credit Agreement.[68]

78. Section 11 of the CCAA confers jurisdiction on this Court to make any order that it considers appropriate in the circumstances.[69] Accordingly, section 11 provides this Court with jurisdiction to authorize interim or final distributions to creditors absent a plan of compromise and arrangement.[70] The fact that a court-approved sale transaction does not result in recovery to creditors who do not have an economic interest in the assets is no reason to withhold approval of such distributions.[71]

79. This Court has granted similar relief in several other CCAA proceedings.[72]

C. Confidential Appendix "1" and Confidential Appendix "2" to the First Report Should be Sealed

80. The test to determine if a sealing order should be granted is set out in *Sierra Club* as recast in *Sherman Estate*: (a) court openness poses a serious risk to an important public interest; (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[73]

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[67] MacKay-Lee Affidavit, *supra* at para 38, MR Tab 2.
[68] First Report, *supra* at paras 5.2-5.3.
[69] CCAA, s. 11.
[70] *Nortel Networks Corp., Re*, 2014 ONSC 5274 at paras. 54-58; *AbitibiBowater Inc., Re*, 2009 QCCS 6461. [*Abitibi*]
[71] *Abitibi*, *supra* at para. 74.
[72] *FIGR Brands, Inc., Re*, Ancillary Order granted June 10, 2021 [Court File No. CV-00655373-00CL]; *Pharmhouse Inc., Re*, Ancillary Order granted March 11, 2021 [Court File No. CV-20-00647704-00CL]; *Harte Gold Corp., Re*, CCAA Distribution and Termination Order granted February 15, 2022 [Court File No. CV-21-00673304-00CL]
[73] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 53 [*Sierra Club*]; *Sherman Estate v.*

81. The Supreme Court in *Sierra Club* and *Sherman Estate* explicitly recognized that commercial interests such as preserving confidential information or avoiding a breach of a confidentiality agreement are an "important public interest" for purposes of this test. [74]

82. Courts have applied the Sierra Club and Sherman Estate tests in the insolvency context and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors.[75] In particular:

(a) Chief Justice Morawetz recently granted a sealing order in *Bridging Finance* in respect of bids and a receiver's summary of the economic terms of such bids, because they contained confidential information[76];

(b) Justice Penny very recently granted a sealing order in *Acerus* in respect of a confidential summary of bids received in a SISP[77], which is substantially the same in all material respects to the confidential summary of bids in the Confidential Appendix that the Applicants are seeking a sealing order in respect of;

(c) Justice Osborne very recently granted a sealing order in *Fire & Flower* in respect of a confidential summary of the economics of competing bids received in a SISP[78], which is substantially the same in all material respects to the confidential summary of bids in the Confidential Appendix that the Applicants are seeking a sealing order in respect of; and

(d) Justice Osborne very recently granted a sealing order in *Silicon Valley Bank* in respect of an unredacted purchase agreement and a confidential summary of bids[79], which is substantially the same in all material respects to the Confidential Appendices that the Applicants are seeking a sealing order in respect of.

83. The proposed sealing order is supported by considerations of: (a) public interest[80]; (b) serious risk that public disclosure of the unredacted Asset Purchase Agreement and confidential summary of offers could impair any efforts to remarket the Company if the Transaction does not

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Donovan, 2021 SCC 25 at paras. 38 and 43. [*Sherman Estate*]
[74] *Sierra Club*, *supra* at para. 55; *Sherman Estate*, *supra* at paras. 41-43.
[75] *Re Danier Leather Inc.*, 2016 ONSC 1044 at para. 82; *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347 at paras. 23-28.
[76] *Ontario Securities Commission v Bridging Finance Inc.*, 2022 ONSC 1857 at paras. 50-54. [*Bridging Finance*]
[77] *Acerus Pharmaceuticals Corporation (Re), 2023 ONSC 3314*, at para. 39.
[78] Plan of Arrangement of Fire & Flower Holdings Corp. et al., 2023 ONSC 4934 at paras. 35-36.
[79] *Attorney General of Canada v Silicon Valley Bank*, 2023 ONSC 4703. [*Silicon Valley Bank*]
[80] See for example, *Danier Leather Inc., Re*, 2016 ONSC 1044 at para. 84, *Springer Aerospace Holdings Ltd., Re*, 2022 ONSC 6581 at paras. 29-30; *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354, at para. 72.

close; (c) lack of a reasonable alternative to a sealing order to mitigate the aforementioned risks[81]; and (d) proportionality, where the proposed sealing order seeks to keep confidential only the redacted pricing and certain economic terms in the Asset Purchase Agreement and the deal structure information contained in the confidential summary of bids received.

84. The proposed sealing order provides for the Confidential Appendix "1" to be sealed only until either (a) closing of the Transaction contemplated under the Asset Purchase Agreement; or (b) by further Order of the Court, and Confidential Appendix "2" to be sealed until further Order of the Court.

85. The Monitor supports the Applicants' request to seal the confidential appendices.[82]

PART VI – LAW AND ANALYSIS IN RESPECT OF THE ASSIGNMENT ORDER

86. The Asset Purchase Agreement contemplates that, subject to its terms, the Purchaser is to assume the Assumed Contracts and the Assumed Real Property Leases. Notwithstanding the Applicant's efforts, certain consents required in connection with the assignment to certain of the Assumed Contracts remain outstanding at this time. The Applicant is seeking the Assignment Order solely with respect to those contracts identified on Schedule "A" to the proposed Assignment Order.[83] The specified contracts are contracts where: (a) consent to assignment is required under the terms of the contract; and (b) no consent has been returned at this time.

87. Section 11.3 of the CCAA provides that this Court may grant an order assigning the rights and obligations of the Applicant to "any person who is specified by the court and agrees to the assignment", with certain limited exceptions.[84] In deciding whether to exercise its discretion under s. 11.3, this Court must consider, among other things, three statutory factors:

(a) Whether the Monitor approved the proposed assignment. The Monitor supports the Applicants' request for the Assignment Order;[85]

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[81] *Original Traders Energy Ltd. (Re)*, (January 30, 2023), Court File No. CV-23-00693758-00CL (Endorsement of Justice Osborne) at para. 62.
[82] First Report, *supra* at paras 6.24 and 6.27.
[83] As additional consents are received, the Applicant will update the Schedule "A" to remove such contacts.
[84] CCAA, s. 11.3.
[85] First Report at para 6.38.

(b) Whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations. The Purchaser is indirectly owned by Nexus Capital Management LP ("**Nexus**"). Nexus is a private equity firm founded in 2013 which invests in a range of industries including internet & e-commerce, consumer and chemicals. As at December 31, 2022, Nexus managed in excess of US$2.44 billion of advisory assets of which all were on a discretionary basis.[86]

Nexus invests in businesses through funds, including Nexus Special Situations III, L.P. ("**Nexus Fund**"). The Nexus Fund has committed to provide the Purchaser with funding (up to a fixed amount) that is adequate to satisfy obligations under the Purchase Agreement and allow the Purchasers to be capitalized sufficiently to satisfy their ongoing working capital needs, including performing under the Assigned Contracts on a go-forward basis, after the closing of the Transaction.[87] Where the assignee is a sophisticated financial entity, courts have found comfort in the viability and likely success of the proposed assignment[88]; and

(c) Whether it would be appropriate to assign the rights and obligations to that person. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA, which are "avoiding the social and economic losses resulting from liquidation of an insolvent company".[89] Thus, where an assignment is necessary for the business to continue as a going-concern, Courts have found the assignment to be appropriate.[90] It is a condition to closing the Transaction that certain of the Assigned Contracts (being the Material Contracts) be assigned by consent or by Court order.[91] Despite the Applicants' best efforts, they were unable to obtain the required consents to assign the Material Contracts listed in the Assignment Order. The assignment of the Assigned Contracts are therefore necessary for the Transaction to close and for the continued operation of the Business by the

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[86] Affidavit of Kayla Dean Obia sworn November 16, 2023, at paras 3 and 7, MR Tab 4.
[87] *Ibid* at para 8, MR Tab 4.
[88] See, for example, *UrtheCast Corp., Re*, 2021 BCSC 1819 at para. 50.
[89] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70.
[90] *Veris Gold Corp. (Re)*, 2015 BCSC 1204 at paras. 49, 50. See also *TBS Acquireco Inc. (Re)*, 2013 ONSC 4663 at para. 25, in which this Court considered the assignment appropriate as a result of, among other things, the fact that it "would result in the continuation of business in the greatest number of stores and the continued employment of the greatest number of people".
[91] MacKay-Lee Affidavit, *supra* at para 33, MR Tab 2.

Purchaser, which will benefit the Applicants and their stakeholders by providing for the continuation of the Business as a going concern.

88. The Assumed Contracts can be divided into a number of general categories integral to the Business, including: (a) customer agreements and purchase orders; (b) supplier agreements and purchase orders; (c) broker agreements; (d) third-party logistics agreements; and (e) intellectual property agreements.[92]

89. The Applicants have sent notices to contractual counterparties who may have their contracts assigned to the Canadian Purchaser or the US Purchaser, as applicable, under the proposed Assignment Order.[93] The Applicants have also made best efforts to obtain consents to all Assumed Contracts (where such consents are required) by following up with the applicable contractual counterparties after delivery of the notices described above and prior to the hearing of the Motion.

90. This Court may not make an order under s. 11.3 of the CCAA unless it is satisfied that all monetary defaults in relation to the assigned contracts, with certain exceptions, will be remedied on or before the day fixed by this Court. The Asset Purchase Agreement contemplates the payment of cure costs in relation to the Assumed Contracts. It is a condition to Closing that the Purchaser delivers evidence satisfactory to the Sellers, of payment by the Purchaser to the Monitor of the cure costs, if any. The Companies do not believe there are any cure costs owing on any of the Assigned Contracts.[94]

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[92] *Ibid* at para 29, MR Tab 2.
[93] First Report, *supra* at para 3.1(iv).
[94] MacKay-Lee Affidavit, *supra* at para 35, MR Tab 2.

PART VII – ORDER SOUGHT

91. For the foregoing reasons, the Applicants respectfully submit that this Court grant the ARIO, the Approval, Vesting and Distribution Order, and the Assignment Order, in the forms requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of November, 2023.

Stikeman Elliott LLP

STIKEMAN ELLIOTT LLP
Counsel for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *AbitibiBowater Inc., Re*, 2009 QCCS 6461
2. *Acerus Pharmaceuticals Corporation (Re),* 2023 ONSC 3314
3. *Attorney General of Canada v Silicon Valley Bank*, 2023 ONSC 4703
4. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
5. *Elleway Acquisitions Limited v 4358376 Canada Inc.*, 2013 ONSC 7009
6. *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354
7. *Karrys Bros, Ltd. (Re)*, 2014 ONSC 7465
8. *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586
9. *Nortel Networks Corp., Re*, 2014 ONSC 5274
10. *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347
11. *Ontario Securities Commission v Bridging Finance Inc.*, 2022 ONSC 1857
12. *Payless ShoeSource Canada Inc and Payless ShoeSource Canada GP Inc (Re),* 2019 ONSC 1215
13. *Plan of Arrangement of Fire & Flower Holdings Corp. et al.*, 2023 ONSC 4934
14. *Re Bloom Lake*, 2015 QCCS 1920
15. *Re Brainhunter Inc.* [2009] O.J. No. 5207 (Ont. Sup. Ct. J.)
16. *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 2870
17. *Re Danier Leather Inc.*, 2016 ONSC 1044
18. *Re Nelson Education Limited*, 2015 ONSC 5557
19. *Re Nortel Networks Corp.* (2009), 2009 CanLII 39492 (Ont. Sup. Ct. J.)
20. *Re Tool-Plas Systems Inc.*, 2008 CanLII 54791 (Ont. Sup. Ct. J.)
21. *Royal Bank v Soundair Corp.* (1991), 83 D.L.R. (4th) 76 (Ont. C.A.)
22. *Sherman Estate v. Donovan,* 2021 SCC 25
23. *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41

24. *Springer Aerospace Holdings Ltd.*, *Re*, 2022 ONSC 6581

25. *Target Canada Co (Re)*, 2015 ONSC 303

26. *TBS Acquireco Inc. (Re)*, 2013 ONSC 4663

27. *UrtheCast Corp., Re*, 2021 BCSC 1819

28. *Veris Gold Corp. (Re)*, 2015 BCSC 1204

29. *Victorian Order of Nurses for Canada (Re)*, 2015 ONSC 7371

SCHEDULE "B"
TEXT OF STATUTES AND REGULATIONS

COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c C-36

General Powers of the 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.

Stays, etc. – other than initial application

11.02 (2) 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.

Burden of proof on application

(3) 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.

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 (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.

SCHEDULE "C"
***Karrys Bros Ltd. (Re)*, 2014 ONSC 7465**

CITATION: Karrys Bros. Ltd. (Re), 2014 ONSC7465
COURT FILE NO.: 32-1942339/1942340/1942341
DATE: 20141224

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF AN INTENTION TO MAKE A PROPOSAL OF KARRYS BROS., LIMITED, KARRYS SOFTWARE LIMITED AND KARBRO TRANSPORT INC.,

COUNSEL: *E. Pillon and K. Esaw* for the Applicants

L. Rogers for PWC

S. Graft for BMO

C. Armstrong for Core-Mark

HEARD: December 23, 2014

ENDORSEMENT

Overview

[1] On December 23, 2014 I granted orders approving a sale of substantially all of the applicants' assets together with various related administrative orders, with reasons to follow. These are those reasons.

[2] This motion seeks approval of a sale of the applicants' assets out of the ordinary course, authorization to distribute funds to the senior secured lender, a sealing order of certain confidential information and various administrative orders, including:

(i) extending the time for filing a proposal;

(ii) approving a key employee retention agreement;

(iii) approving an administrative charge;

(iv) approving the consolidation of the applicants' proposal proceedings; and

(v) approving the report of the proposal trustee.

Background

[3] Karrys is a wholesale distributor of tobacco, confectionery, snacks, beverages, automotive supplies and other products to retail, gas and convenience stores across Canada. As of November 1, 2014, Karrys' assets were exceeded by its liabilities by over $1 million. Karrys expericnced net losses of over $3 million in each of the last two years.

[4] As a result of its financial difficulties, Karrys committed defaults under its loan agreement with the Bank of Montréal in 2013. BMO is Karrys' senior secured lender. BMO agreed to a number of forbearance agreements to enable the sales process which is at the heart of this motion.

[5] Karrys commenced a sales process in December 2013. It retained a financial advisor, Capitalink. Karrys had initial, exclusive negotiations with Core-Mark, itself a wholesale distributor of similar goods, in May through July 2014. Those negotiations did not result in an agreement.

[6] Karrys retained Price Waterhouse Coopers to assist Karrys and Capitalink in undertaking a more expansive sale process. In the fall of 2014, Karrys developed a process in which Core-Mark agreed to make a stalking horse bid for substantially all of Karrys' assets.

[7] Over 53 potential strategic and financial buyers were also invited to bid on the assets. Thirteen of these potential buyers entered into confidentiality agreements and received a confidential information memorandum and access to Karrys' data room. PWC and Capitalink responded to all reasonable requests for information.

[8] By the bidding deadline of noon on December 10, 2014, however, no other bids were received. Core-Mark was, accordingly, declared the successful bidder.

[9] Karrys now asks for the court's approval of the asset purchase agreement with Core-Mark and for a vesting order, together with approval of distribution, from the proceeds, of the amount owed to BMO and other related relief.

The Sale and Vesting Order

[10] Jurisdiction to make orders approving the sale derives from s. 65.13 of the BIA. Factors for the court to consider when asked to approve a sale out of the ordinary course are also listed in s. 65.13.

[11] It is not necessary for the debtor to present its proposal under the BIA before an order approving a sale, *Re Komtech*, 2011 ONSC 3230.

[12] In this case, the sale was the result of a broad and comprehensive marketing process. Two financial advisors were engaged. When initial negotiations with Core-Mark did not produce an amount the applicants originally thought acceptable, another process was initiated with the assistance of PWC. Efforts to lever the Core-Mark offer were, however, although widely promoted, ultimately unsuccessful. The "market" has, in that sense, spoken.

[13] The proposal trustee, PWC, has reviewed the sale process and is supportive of the process and the result. The proposal trustee has, as well, conducted a detailed analysis of the Core-Mark bid measured against a "liquidation in bankruptcy" scenario. Even under a "best case" liquidation scenario, the unsecured creditors would be expected to recover significantly less than under the Core-Mark sale transaction. Under the proposed sale, there is the possibility of surplus for distribution to unsecured creditors. There would be no such possibility under a liquidation scenario. BMO, the senior secured lender, is also supportive of the process and the result.

[14] Because the purchase price represents, through an extensive sales process, the highest price realizable and an amount which is greater than what could be realized under a liquidation, the consideration to be received for the assets is reasonable and fair. Further, the sale will enable Karrys to make the payments contemplated under s. 65.13(8) of the BIA.

[15] The fact that the sales process was not pre-approved by the court is not a bar to the court's approval in this case. Is clear on the evidence that the Core-Mark transaction is the best available option in the circumstances. No one has come forward to argue otherwise. The test is the same whether approval is sought before or after the process – the principles in *Soundair* govern. The *Soundair* test has been met. A judgment call had to be made whether to further extend the process in hopes of perhaps finding a better bid. Further delay would just as likely have resulted in a greater erosion of value. An immediate sale was, on the evidence, the only way to maximize recovery.

[16] In addition, the process actually followed is indistinguishable from what the court might reasonably have approved had prior authorization been sought. There is no evidence, or likelihood, that Karrys or its creditors would be in a better position if some further, or other, sales process had been followed.

[17] The sale is approved and the vesting order shall issue.

The Key Supplier Issue

[18] On the very day Karrys filed its notice of intention to make a proposal, Karrys' principal tobacco supplier delivered a substantial quantity of tobacco. A dispute arose over payment. The supplier took the position it was under no legal obligation to continue to supply and that it would not supply unless payment was received. Karrys' supply agreement had expired and the parties were operating on the basis of an informal supply arrangement.

[19] Ensuring ongoing tobacco supply from this supplier was critical to Karrys in terms of the ongoing operations of the business pending the closing of the sale to Core-Mark, the satisfaction of conditions precedent to the closing with Core-Mark, including the loss of potential customers should their tobacco requirements not be satisfied, and the resulting risk that the Core-Mark transaction would be lost as a result.

[20] Karrys and its legal advisers considered there was significant litigation risk relating to the ability to enforce a stay of proceedings against the supplier in any event and, accordingly, entered into negotiations with the tobacco supplier.

[21] These negotiations resulted in a substantial payment to the supplier which, arguably, involved post-filing payment for a pre-filing obligation. Given the importance of this supplier to ongoing operations and to the success of the Core-Mark sale, however, Karrys, along with its advisors, had little option but to reach a settlement.

[22] Unlike the CCAA, the concept of "critical suppliers" is not found in the proposal provisions of the BIA. Nevertheless, in my view, similar considerations can and should be taken into account in appropriate circumstances. In this case, Karrys and its advisors reasonably believed that the ongoing viability of the business and the Core-Mark sale (which, as found

above, represents the highest realizable price for Karrys' assets available in the circumstances) required the ongoing availability of this critical source of supply. There is also a significant net benefit to Karrys arising from sales of the product supplied. The supply contract negotiated, in the context of both the importance of the supply and significant litigation risk, was, I find, reasonable in the circumstances.

BMO Distribution

[23] BMO delivered notices of intention to enforce its security. The unchallenged evidence before the court is that BMO holds a valid, perfected security interest over each of the applicants' assets. BMO is entitled to a distribution of proceeds from the sale in satisfaction of its claim.

Sealing Order

[24] I am satisfied that the confidential appendices should be sealed until the deal is closed. There is an important public interest in maximizing returns in proceedings of this kind. It is important, therefore, that until the deal is concluded, commercially sensitive information about the deal not be publicly disclosed. Failure to grant the order would impair the integrity of any subsequent process. In addition, in the context of the key employee retention agreement, there is sensitive personal information which ought not to be disclosed.

[25] The *Sierra Club* test has been met on the facts of this case, *Elleway Acquisitions Ltd.*, 2013 ONSC 7009. The salutary effects of granting the sealing order outweigh the limited deleterious effect of restricting access to these limited pieces of evidence.

Extension

[26] Section 50.4(9) of the BIA grants the jurisdiction to grant the extension. The initial proposal period expires on January 12, 2015. The Core-Mark transaction will not close until February 2015.

[27] The applicants are acting in good faith. There is some prospect of surplus funds for distribution to unsecured creditors, given time to close the Core-Mark sale and assess the remaining priorities and claims. The cash flow statements indicate that Karrys has sufficient cash to fund operations through to the end of February 2015. There is no evidence any creditor will be prejudiced by the extension.

[28] Accordingly, the time for filing a proposal is extended to February 23, 2015.

Key Employee

[29] It is often recognized in restructuring proceedings that retention of key employees is vital. Securing payment is, in turn, a vital incentive for the employee to remain.

[30] In this case, there is one employee whose assistance has been, and will remain, key to ongoing operations to the date of sale. The retention bonus in issue is relatively modest. It is supported by the proposal trustee and BMO. Without securing the retention payment, there is a

significant risk the employee would leave. In addition, given the abbreviated timeframe for closing the Core-Mark sale, it would be almost impossible to find a timely replacement.

[31] For these reasons, the retention agreement and charge, as requested, is approved.

Administrative Charge

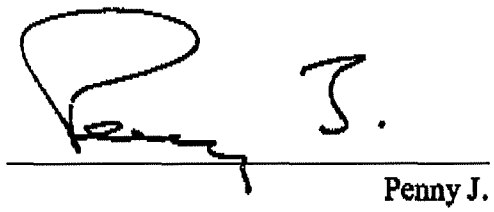
[32] Section 64.2 of the BIA provides for a super-priority to secure the fees for needed professional services during the restructuring. Secured creditors have received notice of this request. The proposal trustee supports the granting of the charge. The amount sought is, in my view, appropriate. The administrative charge requested is approved.

Consolidation

[33] It is clear that the operations of the three applicants are closely intertwined such that it would be difficult to disentangle their affairs. In order to secure the just, most expeditious and least expensive resolution, it is necessary to consolidate these closely related bankruptcy proceedings. This will avoid duplication and reduce cost. The requested order is therefore granted.

Proposal Trustee Report

[34] Given my approval of the elements above, it follows that the first report and activities of the proposal trustee should also be approved.



Penny J.

Date: December 24, 2014

Court File No. CV-23-00709610-00CL

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 MAV BEAUTY BRANDS INC., MARC ANTHONY COSMETICS LTD., MARC ANTHONY US HOLDINGS, INC., MARC ANTHONY COSMETICS USA, INC., MAC PURE HOLDINGS, INC., MAV MIDCO HOLDINGS, LLC, RENPURE, LLC, ONESTA HAIR CARE, LLC, and THE MANE CHOICE HAIR SOLUTION LLC

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

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