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

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 MCEWAN ENTERPRISES INC.

NOTICE OF MOTION

(returnable on November 12, 2021)

First Capital Holdings (Ontario) Corporation ("**First Capital**") will make a motion to a Judge presiding over the Commercial List (the "**Court**") on Friday, November 12, 2021 at 9 a.m., or as soon after that time as the motion can be heard, by judicial videoconference due to the COVID-19 emergency via Zoom conference coordinates to be provided.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THIS MOTION IS FOR an Order, including, amongst other things:

(a) if necessary, abridging the time for service and filing of this notice of motion and the corresponding motion record or, in the alternative, dispensing with same;

(b) to the extent that the within proceedings under the CCAA (as defined herein) have not been terminated prior to the hearing of this motion, either:

(i) terminating the within CCAA proceedings, including, without limitation, the stay of proceedings ordered by paragraphs 15 to and including 19 of the Amended and Restated Initial Order of The Honourable Mr. Chief Justice Morawetz made on October 7, 2021 in Court File No. CV-21-00669445-00CL (the "**CCAA Stay**"); or

(ii) in the alternative, and without terminating the within CCAA proceedings, lifting the CCAA Stay for the purpose of allowing this motion to proceed and the relief being sought hereunder to be granted and implemented;

(c) to the extent that the Debtor has become or will become bankrupt prior to the hearing of this motion, lifting the stay of proceedings provided by section 69.3(1) of the *Bankruptcy and Insolvency Act* (Ontario) (the "**BIA**") for the purpose of allowing this motion to proceed and the relief being sought hereunder to be granted and implemented;

(d) requiring that any attempt to disclaim the lease in respect of Yonge & Bloor (as defined below) be made on full and proper notice to First Capital;

(e) appointing Alvarez & Marsal Canada Inc. ("**A&M**"), or an alternative licensed insolvency trustee acceptable to this Court, as receiver (in such capacity, the "**Receiver**") of all the assets, properties and undertakings of McEwan Enterprises Inc. (the "**Debtor**") (including, without limitation, the Debtor's shares in 2860117 Ontario Inc.) pursuant to section 101 of the *Courts of Justice Act* (Ontario) (the "**CJA**"), for the substantive purpose of designing and implementing a Court-approved marketing and sale process for the Debtor's assets and/or business (including, without limitation, obtaining and providing the necessary materials to bidders for due diligence purposes) and authorizing the Receiver to bring a motion to this Court to approve the transaction contemplated by the best bid received thereunder; and

(f) such further and other relief as counsel may request and this Court may deem just, including, without limitation, costs in respect of the Debtor's motion that was heard on October 15, 2021, and was dismissed on November 1, 2021.

THE GROUNDS FOR THE MOTION ARE:

(a) the Debtor's business consists of a portfolio of high-end restaurants, grocery stores, food halls and catering services, and the Debtor has experienced financial difficulties since 2017;

(b) one of the Debtor's grocery locations since 2019 is at the intersection of Yonge and Bloor Streets in Toronto, Ontario ("**Yonge & Bloor**"), the landlord of which is First Capital;

(c) after having requested and received significant accommodations from First Capital and other landlords throughout the Covid-19 pandemic, the Debtor commenced proceedings under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") on September 28, 2021 with the express, substantive purpose of selling the Debtor's business to the Debtor's current shareholders (the "**Related Party Transaction**"), without offering the purchase opportunity to any third-party;

(d) as set out in the Second Report of A&M in its capacity as the Monitor of the Debtor (in such capacity, the "**Monitor**") dated October 14, 2021 (collectively, the "**Monitor's Second Report**"), First Capital submitted the following materials to the Monitor and its counsel on October 11, 2021 in support of an alternative arm's length transaction by First Capital (the "**First Capital Transaction**"):

(i) a debtor-in-possession term sheet (the "**DIP Term Sheet**") pursuant to which First Capital would provide interim financing during a 14-day due diligence period (the "**Due Diligence Period**"), as well as further financing consistent with what was proposed in the Related Party Transaction if due diligence were satisfied or waived by First Capital; and

(ii) the Yonge & Bloor Landlord's Purchase Agreement (as defined in the Monitor's Second Report), which is described in the Monitor's Second Report as being "*in substantially the same form*" as the Related Party Transaction's purchase agreement, subject to the following three "*Key substantive differences*:"

(A) "*the addition of the Yonge & Bloor Lease as a go forward operating location would appear to make the Yonge & Bloor Landlord's Purchase Agreement, on its face, financially superior;*"

(B) "*the potential for employee severance and termination claims to arise as a result of Mr. McEwan and potentially other employees not accepting new employment offers from the Yonge & Bloor Landlord, which may be material*;" and

(C) "*the inclusion of the Due Diligence Period;*"

(e) the Debtor brought a motion, which was heard on October 15, 2021, to approve the Related Party Transaction, which motion was dismissed by The Honourable Mr. Chief Justice Morawetz on November 1, 2021;

(f) featuring prominently in His Honour's decision to dismiss the motion to approve the Related Party Transaction was the Debtor's non-compliance with section 36(4) of the CCAA, which prohibits the Court from granting such a motion in a related-party context unless "*good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company*" and "*the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition;*"

(g) during oral submissions made to the Court during the hearing on October 15, 2021, counsel for the Debtor advised that the Debtor, through a bankruptcy, would attempt to consummate the Related Party Transaction if the Debtor's CCAA approval motion were denied;

(h) First Capital believes that the concerns expressed by the Court would not be addressed if the Related Party Transaction is completed in a bankruptcy (or any other insolvency process) without testing the market's interest in acquiring the Debtor's business and assets (and, in any event, the decision to recommend a transaction for Court approval in a bankruptcy and/or receivership resides with the Court-officer and not the Debtor);

(i) the Monitor has already confirmed that the arm's-length First Capital Transaction is, "*on its face*," the financially superior option of the two transactions that have been submitted for consideration;

(j) at least one party other than First Capital and the Debtor has also expressed an interest in acquiring the Debtor's business;

(k) First Capital, like any other arm's-length bidder, reasonably requires a brief due diligence period, which cannot occur in any meaningful fashion unless the Debtor or a Court-officer acting on its behalf provides the necessary materials for due diligence purposes;

(l) given the Debtor's past advice that it intends on bankrupting itself, there cannot be any credible impairment of the Debtor's goodwill arising from the marketing of the Debtor's business and assets, nor should concern about potential employee claims preclude the running of a marketing and sale process (given that all employees are terminated anyways by operation of law in a bankruptcy);

(m) good faith, which is statutorily mandated under both the CCAA and the BIA, requires in the context of this case that the purchase opportunity be marketed beyond the Debtor's insiders and not be withheld from bidders with an interest in the opportunity, including, without limitation, the superior third-party interest that First Capital has already expressed;

(n) unless the Debtor is now prepared to run a third-party CCAA sale process under the supervision of the Monitor, or to submit a CCAA plan of arrangement, it is just and convenient that a receiver be appointed for the substantive purposes described above;

(o) sections 18.6 and 36(4) of the CCAA;

(p) sections 4.2 and 69.3 of the BIA;

(q) section 101 of the CJA;

(r) rules 1.04, 2.03, 3.02, 37 and 41 of the *Rules of Civil Procedure* (Ontario); and

(s) such further grounds as are required and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

(a) the affidavits of Mark McEwan sworn September 27, 2021 and October 1, 2021, and the transcripts of (and undertakings and refusals from) the resulting cross-examinations of Mr. McEwan on these affidavits;

(b) the Monitor's Second Report;

(c) the consent to act of the proposed Receiver; and

(d) such further materials and grounds as are required and this Court may permit, including, without limitation, an affidavit by a representative of First Capital, to be sworn.

November 2, 2021

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Proceedings commenced at Toronto

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