Court File No. CV-15-10832-00CL

**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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP. and TARGET CANADA PROPERTY LLC (the "Applicants")**

# FACTUM OF THE RESPONDING PARTY, CAPITAL BRANDS, LLC

November 25, 2016

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**TO: SERVICE LIST**

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# FACTUM OF THE RESPONDING PARTY, CAPITAL BRANDS, LLC

## I - NATURE OF THE MOTION

1. Capital Brands, LLC ("**Capital Brands**") is seeking to have Alvarez and Marsal Canada Inc., in its capacity as the court appointed Monitor (the "**Monitor**"), accept for filing and consider its late filed claim in these *CCAA* proceedings and allow Capital Brands to participate *nunc pro tunc* in the dividends paid to similar creditors in this proceeding.

2. Capital Brands' failure to file its claim on a timely basis was as a result of innocent inadvertence. If the Court makes that finding, there is no equitable reason for the Court to penalize Capital Brands.

3. A party with a late filed claim should participate retroactively in dividends that were missed prior to filing its claim in the *CCAA* proceeding, provided that in doing so the parties who have previously received dividends are not forced to disgorge the funds that they had previously

received. There is no dispute that the Monitor in this case has sufficient funds on hand to pay Capital Brands the retroactive dividends without causing any previous recipient to disgorge any funds.

4. Failing to allow Capital Brands to participate retroactively in the dividend would be an unfair penalty visited on an innocent party. It should be remembered that ultimately Capital Brands is the aggrieved party, having supplied hundreds of thousands of dollars of goods to Target Canada Co. ("**Target**") in good faith and having not received any payment in respect of same.

## II - FACTS

5. Capital Brands was a supplier of consumer products to Target. In the period between October 7, 2014 and January 15, 2015, when Target filed for *CCAA* protection, Capital Brands supplied merchandise to Target in respect of which no payment was made. The total amount Target owes Capital Brands is $414,431.46.

Affidavit of Jeff Klausner, sworn September 23, 2016 ("**Klausner Affidavit**") at para. 2.

6. On January 15, 2015, Target filed for *CCAA* protection. Capital Brands had no warning of this filing.

Klausner Affidavit at para 3.

7. Shortly after the initial filing, the Monitor published a list of known creditors of Target on its website. Capital Brands is listed as a creditor on that creditor listing in the amount of $422,437 USD.

Klausner Affidavit at paras 5 & 6.

8. On June 11, 2015, an order was granted in the *CCAA* proceedings of Target under which a claims procedure was set up for the filing of unsecured claims (the "**Claims Procedure Order**").

Klausner Affidavit at para 7.

9. The Claims Procedure Order identified the notification requirements with respect to the Claims Process. The Claims Procedure Order also set a Claims Bar Date for creditors asserting Pre-Filing Claims of August 31, 2015, and a Restructuring Period Bar Date of the later of (i) 45 days after the date on which the Monitor sent a Claims Package with respect to a Restructuring Period Claim, and (ii) August 31, 2015.

Notice of Motion (Advice and Directions), at para. 2(e), Monitor's Motion Record (Late Claims) (motion returnable November 29, 2016), at Tab 1, page 3.

10. The Monitor's website contains a notice which the Monitor advises was sent out to creditors around the time that the Claims Procedure Order was made. The Monitor has not provided evidence that the claims package was ever specifically sent to Capital Brands. Capital Brands has no knowledge of receiving such a package, if such a notice or the claims package was ever sent to Capital Brands, although it concedes it could have been.

Klausner Affidavit at para 8.

11. Capital Brands believed that it had filed a proof of claim by August 31, 2015. This belief was confirmed in the eyes of the relevant personnel at Capital Brands as they received dozens of communications from people seeking to buy the Capital Brands' claim, up to and including August 1, 2016. Capital Brands rejected these offers.

Klausner Affidavit at paras. 10-11 & 15.

12. Capital Brands' belief that it had a valid and filed claim was reinforced because Capital Brands confirmed that its claim was listed on the Monitor's list of claims. Capital Brands wrongly assumed that, just as in the case in a bankruptcy process in the US, when a claim is listed on the trustee's (or Monitor's) creditor list, the claim is deemed filed and accepted in that amount if not listed as disputed, contingent or unliquidated.

Klausner Affidavit at paras. 11-13.

13. On May 25, 2016, a creditors' meeting was held where affected creditors voted to approve the Applicants' Joint Amended and Restated Plan of Compromise and Arrangement dated April 13, 2016 (the "**Plan**"). The Plan became effective on June 28, 2016.

Notice of Motion (Advice and Directions), at paras. 2(h) & (k), Monitor's Motion Record (Late Claims) (motion returnable November 29, 2016), at Tab 1, pages 3-4.

14. In July of 2016, Capital Brands learned that a distribution was made to creditors of Target. Capital Brands learned this not from the Monitor or from any Target communication, but from a claims trader who contacted Capital Brands seeking to purchase the "second distribution" proposed to Target's creditors. However, no distribution was received by Capital Brands.

Klausner Affidavit at para 17.

15. On July 27, 2016, Capital Brands contacted the Monitor to inquire why its distribution had not been received.

Klausner Affidavit at para 18.

16. On July 28, 2016, the Monitor responded to Capital Brands. The Monitor advised that it had not received a proof of claim from Capital Brands. This came as a shock to Capital Brands, who was operating under the understanding that they had a proven claim in the proceedings.

Klausner Affidavit at para 19.

17. Upon further investigation, Capital Brands established that the claim may not have been filed a result of inadvertence on the part of Capital Brands. In particular, during the relevant time period when the claims package was sent out by the Monitor, the accounting personnel at Capital Brands went through a significant turn over. As such, the claim may have inadvertently not been filed notwithstanding the mistaken belief of the new accounting personnel that it had been filed by their predecessors.

Klausner Affidavit at paras. 20-25.

18. In August 2016, upon discovering the Monitor's position that no claim had been filed, Capital Brands promptly contacted its lawyers in Los Angeles, Margulies Faith LLP, to assert its claim. Margulies Faith LLP contacted the Monitor to ask it to allow Capital Brands to file a late claim; however, the Monitor would not allow Capital Brands to file a late claim.

Klausner Affidavit at para 27.

19. Capital Brands retained Blaney McMurtry LLP to assist in asserting its claim in the matter on September 14, 2016.

Klausner Affidavit at para 28.

20. On September 20, 2016, the Monitor filed a report with the Court that it is contemplating a further distribution of proceeds in the near future. Capital Brand's counsel contacted the Monitor on September 20, 2016 and wrote to the Monitor on September 22, 2016, identifying the late filing issue, the intent to file a late claim, and asked that they hold back sufficient funds to pay Capital Brands' claims in full.

Klausner Affidavit at paras. 29-30.

21. Capital Brands filed its claim on September 23, 2016 with the requisite supporting documentation. The Monitor has not provided any indication that it disputes the validity of the claim, other than with respect to its timeliness.

Klausner Affidavit at para. 33.

**III - ISSUES**

22. The issues to be determined on this motion are:

(a) Should Capital Brands be permitted to file a Proof of Claim in the Claims Process?

(i) Our Position: Capital Brands should be allowed to file its claim, which claim should be reviewed by the Monitor *nunc pro tunc* as if it had been filed on or before August 31, 2015.

(b) Assuming the Capital Brands claim, once filed with the Monitor is admitted, can Capital Brands participate in the first distribution which it missed, or only in the subsequent distributions?

(i) Our Position: Given that Capital Brands' failure to file a claim was inadvertent, and given that the Monitor has sufficient funds to pay the dividend in full without disturbing dividends previously paid, Capital Brands should be entitled to participate *nunc pro tunc* in full.

**IV - LAW**

**Issue 1: Admitting a Late Filed Claim**

23. The leading test to evaluate whether a court will accept creditor claims after the passing of the claim bar date is articulated in *Blue Range*:

(a) Was the delay caused by inadvertence and, if so, did the claimant act in good faith?

(b) What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

(c) If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

(d) If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

*Blue Range Resource Corp. Re*, 2000 ABCA 285 ("***Blue Range***"), para. 26, Book of Authorities of Capital Brands, LLC ("**Capital Brands BOA**"), Tab 1.

24. It is respectfully submitted the Court need only address the first two parts of this test in the context of the Capital Brands matter.

***Was the failure to file inadvertent and did the claimant act in good faith?***

25. Canadian courts require that there be inadvertence to justify the late filing of a claim. Inadvertence requires that the party acted in good faith and was not simply trying to delay or avoid participation in the *CCAA* proceedings. As long as there is good faith, inadvertence can include carelessness, negligence, and accidents.

*Blue Range*, paras. 14 & 27, Capital Brands BOA, Tab 1.

26. Capital Brands' failure to file a claim meets this test. It was caused by such inadvertence and compounded by the good faith belief of external information from various sources, which could easily mislead a reasonable person into believing a valid claim had been filed. There is no evidence that Capital Brands delayed the filing of its claim on purpose, or that it could possibly have received or hoped to receive any advantage from doing so.

***What is the effect of permitting the claim in terms of the existence and impact any relevant prejudice caused by the delay?***

27. In assessing prejudice, the court considers the interests of all affected parties to determine whether the late claim should be allowed. The primary question is whether the other creditors lost a realistic opportunity to do anything that they otherwise might have done.

> Vern DaRe, "The Treatment of Late Claims Under the CCAA" (2001), 26 CBR (4th) 142, pg. 6, Capital Brands BOA, Tab 2.
>
> *Blue Range*, para. 40, Capital Brands BOA, Tab 1.
>
> *Ontario v. Canadian Airlines Corp.*, 2000 CarswellAlta 1336, para. 20, Capital Brands BOA, Tab 3.

28. The jurisprudence emphasizes that the key element in determining whether prejudice exists is timing. Timing has two elements: (1) the stage in the proceeding that the claim is filed; and (2) the length of time the claimant took to bring the claim after realising its existence.

> *Blue Range*, para. 36, Capital Brands BOA, Tab 1.
>
> Stanley J. Kershman, "When Late is Better Than Never Missing The Claims Bar Date", *Kershman's Collection of Bankruptcy and Insolvency Articles*, KERN/RP-021 (March 31, 2005) [Posted on Quicklaw May 13, 2005] at para 18, Capital Brands BOA, Tab 4.

29. One factor the courts do not consider in determining prejudice is whether the other creditors will receive less money if the late claim is allowed. However, the materiality of the late claim is still relevant to prejudice. When the ratio of the claim to the total amount of claims is low, the cost of admitting the claim is not likely to be considered material.

> *Blue Range*, paras. 37 & 40, Capital Brands BOA, Tab 1.

30. The court also considers whether the claim was really a "surprise" claim. If other creditors or the debtor are aware of the claim, then that would decrease any prejudice.

> Vern DaRe, "The Treatment of Late Claims Under the CCAA" (2001), 26 CBR (4th) 142, pg. 6, Capital Brands BOA, Tab 2.

31. The Capital Brands claim again easily meets this test. The claim is insignificantly small as against the total proven claims in the Target proceeding. Other parties had notice of the claim, as it was posted on the Monitor's website.

Thirty-first Report of the Monitor, dated September 20, 2016, at para. 4.3.

Klausner Affidavit at para. 6.

32. Respectfully, it is a severe response that undermines the purpose of the *CCAA* process for the court to extinguish the right of a creditor that under normal limitation rules would survive for several more years. The Court is meant to act as a facilitator rather than as a means to extinguish valid claims misfiled due to logical explanations.

Stanley J. Kershman, "When Late is Better Than Never Missing The Claims Bar Date", *Kershman's Collection of Bankruptcy and Insolvency Articles*, KERN/RP-021 (March 31, 2005) [Posted on Quicklaw May 13, 2005], at para 8, Capital Brands BOA, Tab 4.

33. The Plan in these proceedings has already been approved and sanctioned by the Court. There is no suggestion that allowing this late filed claim would have any impact on that fact. The Monitor did allow $15.6 million worth of late filed claims immediately prior to the meeting of creditors even though such late filed claims could have impacted the vote on the Plan. Respectfully, it should be even easier to allow late filed claims after the vote on the Plan.

Thirty Second Report of the Monitor, dated October 31, 2016, at para. 4.12, Monitor's Motion Record (Late Claims) (motion returnable November 29, 2016), Tab 2.

Twenty-sixth Report of the Monitor, dated April 7, 2016, at para. 5.11.

34. Moreover, Capital Brands is not asserting a claim as against any of the releasees under the Plan, including Target Corporation, or otherwise seeking to circumvent the releases granted by the Plan. Capital Brands is seeking to be included in the distribution of proceeds, pursuant to the terms of the Plan, and to be treated as any other unsecured creditors under the Plan. To that

effect, Capital Brands is relying on the Plan, and not applying to amend the provisions of the Plan or the Sanction Order.

35. The only possible prejudice would be a reduction in the dividend to be received by other creditors, which the court is directed not to consider by the rule in *Blue Range*. Regardless, the Monitor has advised that there will be no financial prejudice to the dividend to be received in any event in this case.

> *Blue Range*, paras. 37 & 40, Capital Brands BOA, Tab 1.
>
> Thirty Second Report of the Monitor, dated October 31, 2016, at para. 6.4, Monitor's Motion Record (Late Claims) (motion returnable November 29, 2016), Tab 2.

36. It is submitted that the Court can analogize the situation where a party discovers that it has failed to file a claim in a claims bar process, to the consideration given by courts to the purpose behind limitation periods generally, as they are applied to litigants who discover their cause of action after such a period has expired.

37. The case law exemplifies that Courts do not use limitation periods to disenfranchise people from legitimate claims they did not know about. The objective of limitation periods is to force the timely litigation of disputes, not to extinguish rights.

> Graeme Mew, *The Law of Limitations*, 2nd Ed. (Markham, Ontario: Butterworth, 2004) at pg. 65, Capital Brands BOA, Tab 5.

38. The Supreme Court of Canada has said that the utility of a limitation period must be offset against the injustice of precluding a cause of action before the putative plaintiff could reasonably know of the facts essential to the advancement of the claim.

> *Peixeiro v Haberman*, [1997] 3 SCR 549, at paras 39 & 44, Capital Brands BOA, Tab 6.

39. In this matter, Capital Brands only became aware of its issue after the limitation period created by the Claims Procedure Order had expired. It promptly acted to seek relief, as soon as it became aware that such relief was necessary. To hold that Capital Brands is barred from filing a claim would essentially be imposing a strict interpretation of the limitation period doctrine without regard to the discoverability rule which is supposed to moderate it.

Klausner Affidavit at paras 19-33 & 33.

40. The standard for being excused for missing a claims bar should be less strict than the standard for being excused for missing a limitation period generally. A general limitation period arises from a statute, which carries with it a higher degree of deemed knowledge on the part of general population effected by it. By comparison, each claims bar procedure is different, unique to the proceeding to which it attaches, has unique dates and procedures, which derive from a specific court order and cannot therefore be deemed to be generally known.

41. It is respectfully submitted that Capital Brands' failure to file a claim in accordance with the Claims Procedure Order meets the test set out *in Blue Range* and should therefore be allowed to be filed.

**Issue 2: Which distributions is Capital Brands claimants entitled to participate in?**

42. The *CCAA* does not provide any statutory answer to the question of how to treat claims which are allowed after a dividend or dividends has been paid. As such, it is open to the Court to reach its own reasonable interpretation.

43. The Court has inherent jurisdiction to "gap-fill" to give effect to the scheme or purpose of the legislation where the legislation is silent, as is the case here.

*Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60, at para. 64, Capital Brands BOA, Tab 7.

44. The *Bankruptcy and Insolvency Act* ("*BIA*") does have a section that contemplates the procedure for treatment of late claimants:

> **150** A creditor who has not proved his claim before the declaration of any dividend ***is entitled on proof of his claim to be paid***, out of any money for the time being in the hands of the trustee, ***any dividend or dividends he may have failed to receive before*** that money is applied to the payment of any future dividend, but ***he is not entitled to disturb the distribution of any dividend declared*** before his claim was proved for the reason that he has not participated therein, except on such terms and conditions as may be ordered by the court. [emphasis added]
>
> *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3, s. 150.

45. Section 150 of the *BIA* should be interpreted to say that a person with a late filed claim can be paid for previous dividends missed, if there are funds on hand to pay them, but that they cannot reach into the pockets of those who have previously received funds in order to do that. This interpretation is supported both by the plain reading of section 150 and the case law interpreting section 150.

46. The case law interpreting section 150 of the *BIA* supports the proposition that a creditor who files a late claim is entitled to be paid the amount of the dividends that were already paid before further dividends are paid.

> L.W. Houlden and Geoffrey B. Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis*, G§184, Capital Brands BOA, Tab 8.
>
> *Re Malkin*,1922 CarswellOnt 45, 3 CBR 26 (SC (Bank)), at para. 7, Capital Brands BOA, Tab 9.
>
> *Re Pilot Butte Sanf & Gravel Co*, [1968] 11 CBR (NS) 254 (SKQB) at paras. 8 & 11, Capital Brands BOA, Tab 10.

47. The reason Courts have allowed a creditor to partake in previous distributions, even if they are a late claimant, is because the scheme of the *BIA* requires that all creditors be treated equally. There is no reason that creditors under the *CCAA* should not be afforded the same treatment of equality.

*Re HW Petrie Ltd*, 1938 CarswellOnt 66, [1938] 1 DLR 793 (Ont SC (Bank)) at para. 20, Capital Brands BOA, Tab 11.

48. Further, this is not a situation where there are no funds available to accommodate the creditor's late claim, as was the case in *Re Macdonald Homes Inc*. In this case, there are sufficient funds available to compensate the late claimants for the previous dividends and still provide another dividend to all eligible creditors. The Monitor has advised that admitting the Capital Brands claim in full will not diminish the recovery to the other creditors, which they expected to receive when they voted in favour of the Plan.

*Re Macdonald Homes Inc*., [2003] OJ No 5140 (Sup Ct J), Capital Brands BOA, Tab 13.

Thirty Second Report of the Monitor, dated October 31, 2016, at para. 6.4, Monitor's Motion Record (Late Claims) (motion returnable November 29, 2016), Tab 2.

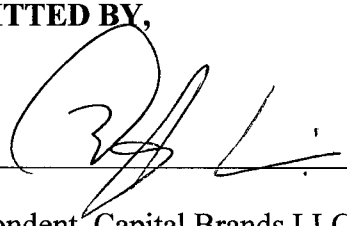
49. Therefore, the *BIA* allows a late claimant to participate in previous distributions if there are available funds and as long as the funds that have already been distributed are not disturbed. This flexible approach to late claims should also be applied to late claims under the CCAA.

50. This approach is supported by a purposive analysis of claims bar process under the CCAA. The purpose of a claims bar is not to disenfranchise legitimate claimants, but to provide information necessary to assist the debtor in organizing its restructuring and submitting a plan. That process is now complete. As a result, the bar serves no legitimate purpose to the company in restructuring which is greater than the harm which would be suffered by the creditor if the claim is not allowed.

*Re Timminco Ltd*, 2014 ONSC 3393, at para 38, Capital Brands BOA, Tab 13.

51. Based upon the foregoing, it is respectfully submitted that Capital Brands should be entitled to receive the dividend from the first distribution as well as from subsequent distributions to the extent of its proven claim.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED BY,**



David Ullmann
Lawyer for the Respondent, Capital Brands LLC

**SCHEDULE "A"**
LIST OF AUTHORITIES

1. *Blue Range Resource Corp. Re*, 2000 ABCA 285
2. Vern DaRe, "The Treatment of Late Claims Under the CCAA" (2001), 26 CBR (4th) 142
3. *Ontario v. Canadian Airlines Corp.*, 2000 CarswellAlta 1336
4. Stanley J. Kershman, "When Late is Better Than Never Missing The Claims Bar Date", *Kershman's Collection of Bankruptcy and Insolvency Articles*, KERN/RP-021 (March 31, 2005) [Posted on Quicklaw May 13, 2005]
5. Graeme Mew, *The Law of Limitations*, (Markham, Ontario: Butterworth, 1991)
6. *Peixeiro v Haberman*, [1997] 3 SCR 549
7. *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60
8. L.W. Houlden and Geoffrey B. Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis*, G§184
9. *Re Malkin*,1922 CarswellOnt 45, 3 CBR 26 (SC (Bank))
10. *Re Pilot Butte Sanf & Gravel Co*, [1968] 11 CBR (NS) 254 (SKQB)
11. *Re HW Petrie Ltd*, 1938 CarswellOnt 66, [1938] 1 DLR 793 (Ont SC (Bank))
12. *Re Macdonald Homes Inc*., [2003] OJ No 5140 (Sup Ct J)
13. *Re Timminco Ltd*, 2014 ONSC 3393

**SCHEDULE "B"**
STATUTES AND LEGISLATION

***BANKRUPTCY AND INSOLVENCY ACT*** **(R.S.C., 1985, c. B-3)**

S. 150 - **Right of creditor who has not proved claim before declaration of dividend -**

A creditor who has not proved his claim before the declaration of any dividend is entitled on proof of his claim to be paid, out of any money for the time being in the hands of the trustee, any dividend or dividends he may have failed to receive before that money is applied to the payment of any future dividend, but he is not entitled to disturb the distribution of any dividend declared before his claim was proved for the reason that he has not participated therein, except on such terms and conditions as may be ordered by the court.

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Proceeding commenced at Toronto

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