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**

APPLICANTS

FACTUM OF THE APPLICANTS

(Approval of Branded Goods Transaction Agreement)

PART I – NATURE OF THIS APPLICATION

1. Target Canada Co. ("**TCC**") and the other applicants listed above (the "**Applicants**") obtained relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") by an Initial Order dated January 15, 2015, as amended (the "**Initial Order**"). The relief requested by the Applicants was supported by the Affidavit of Mark J. Wong, sworn January 14, 2015 (the "**Initial Order Affidavit**"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor in this CCAA proceeding. On February 4, 2015, this Court approved an Agency Agreement and an Inventory Liquidation Process to be conducted by a contractual joint venture consisting of Merchant Retail Solutions ULC, Gordon

Brothers Canada ULC and GA Retail Canada, ULC (collectively, the "**Agent**") to sell substantially all of TCC's Merchandise and FF&E, subject to certain exceptions described further below.

2. This factum is filed in support of a motion to approve a transaction agreement (the "**Asset Purchase Agreement**") that has been negotiated with Target Corporation for the purchase of certain goods bearing the Target logos, trade-marks or other proprietary elements (the "**Purchased Assets**"). The Purchased Assets cannot be sold by the Agent in the Inventory Liquidation Process unless expressly designated by TCC due to the rights of Target Brands (a subsidiary of Target Corporation) to control the use of the intellectual property (the "**Target IP**").

3. The criteria for approval of the sale of the Purchased Assets to Target Corporation, a related party, that are set out in ss. 36(3) and (4) of the CCAA are clearly satisfied. The Target Canada Entities requested bids for Target-branded items from the liquidation firms participating in the auction to be selected as Agent, thereby seeking in good faith offers by which it could sell these assets to an unrelated third party. Only one bidder included some of these items in its bid. In the meantime, Target Corporation had submitted an offer to purchase a number of these assets.

4. Both the Target Canada Entities and the Monitor formed the view that if a third party purchaser for these items could be found at all, such purchaser would likely significantly discount its price to take into account the impact of the IP, including the costs to remove brand or other IP elements and/or the litigation risks associated with a potential challenge by Target Brands to any use of the IP. It would therefore not be beneficial to stakeholders as a whole to incur additional costs in further seeking to market these unique assets. Instead, the Target Canada Entities and the Monitor sought to ensure that objective benchmarks were established to satisfy the Court that the price offered by Target Corporation was reasonable and fair, and exceeded any

third party offer that might be made (assuming the assets are saleable to an unrelated third party at all, which is uncertain).

5. The price offered by Target Corporation, viewed in isolation, far exceeds all three of the independent valuations of the Purchased Assets obtained by the Target Canada Entities and the Monitor. In addition, in substance, the offer by Target Corporation must be viewed as having greater value to the Target Canada Entities than the purchase price paid under the Asset Purchase Agreement. Among other advantages, significant additional benefits will accrue to the estates of the Target Canada Entities by virtue of the assumption of Target Corporation of costs associated with disposing of certain of the Purchased Assets. In particular, Target Corporation will assume the substantial costs associated with removing the exterior signage on TCC stores. This signage has no independent liquidation value and represents a potential economic burden on TCC because of the obligations under its leases to remove it.

6. In summary, Target Corporation is effectively the only logical, and arguably the only possible, purchaser for the Purchased Assets due to their unique nature. Any potential detriment or risk that is theoretically associated with a related party transaction – and which section 36(4) of the CCAA is intended to prevent – has been satisfactorily addressed by the good faith efforts of the Target Canada Entities and the Monitor to evaluate the saleability of the Purchased Assets to an unrelated party, and by the three objective benchmarks obtained to ensure that the price paid by Target Corporation is superior to a potential third party offer (assuming such offer could be obtained and completed). The Asset Purchase Agreement clearly fulfills the objective of maximizing the value to the stakeholders of the Target Canada Entities, while ensuring that the orderly wind-down of the Canadian retail operations continues to occur in a cost-efficient and effective manner.

7. Based on the above, and on the submissions below, the Applicants therefore submit that the Asset Purchase Agreement should be approved and the Approval and Vesting Order should be granted.

PART II – FACTS

8. The facts with respect to this motion are more fully set out in the sixth Affidavit of Mark J. Wong.[1] Capitalized terms in this Factum not otherwise defined have the same meanings as in the Initial Order Affidavit and the Sixth Wong Affidavit.

Reasons for Accepting the Offer from Target Corporation

9. All intellectual property ("**IP**") relating to the Target brand is owned by Target Brands Inc. ("**Target Brands**"), which is a subsidiary of Target Corporation. As described in the Initial Order Affidavit, TCC was licensed prior to the CCAA filing to use the IP in carrying out its Canadian retail operations under a Master Agreement between Target Brands and TCC.[2]

10. Pursuant to the terms of the Master Agreement, Target Brands gave three months' notice on January 14, 2015 that it was terminating the agreement, including the IP licence,[3] effective as of April 14, 2015. Upon termination, it will be replaced by a short-term Intellectual Property License Agreement that gives TCC a limited, revocable, exclusive and non-sublicensable right to use the IP only in connection with the wind-down of TCC's Canadian retail operations. The Intellectual Property License Agreement will terminate on the earlier of the completion of the

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[1] Affidavit of Mark J. Wong, sworn March 23, 2015 [Sixth Wong Affidavit].

[2] Sixth Wong Affidavit, para. 4. See also Exhibit F to the Initial Order Affidavit.

[3] See Exhibit G to the Initial Order Affidavit.

wind-down or June 30, 2015, unless extended by TCC and Target Brands, in consultation with the Monitor. After termination, TCC will have no further right to use the IP in any manner.[4]

11. All of the Purchased Assets under the Asset Purchase Agreement represent various categories of Target-branded items, such as shopping carts, shopping baskets and the exterior signage on TCC stores. The Purchased Assets are unique in that they incorporate logos, trade-marks or other indicia of TCC or its affiliates.[5] By far the largest quantity of such items are the shopping carts, of which there are approximately 28,000, and merchandise bags, of which there are approximately 912,000.[6]

12. Nearly all of the Purchased Assets constitute “Excluded FF&E”, as defined under the Agency Agreement. Excluded FF&E include, among other things, all furnishings, removable trade fixtures and equipment which incorporate any branding, logos, trade-marks or other Target IP. These items cannot be sold by the Agent unless TCC exercises its option to designate them as “Designated Company Consignment Goods” under section 4.4 of the Agency Agreement.[7]

13. TCC has exercised its option, with Target Brands’ consent, to designate certain Target-branded items, such as electric scooters and shopping cart corrals, for sale by the Agent in the Inventory Liquidation Process. These items were designated on the basis that the Target branding could easily be removed from these items. The Purchased Assets that are the subject of the Asset Purchase Agreement, by contrast, cannot easily be divested of IP elements without

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4 Sixth Wong Affidavit, para. 6. See also Exhibit I to the Initial Order Affidavit.

5 Sixth Wong Affidavit, para. 7.

6 Seventh Report of the Monitor, dated March 24, 2015 [Monitor’s Seventh Report], para. 3.2.

7 Sixth Wong Affidavit, para. 8.

destroying or substantially decreasing their value. Certain items – such as shopping carts – were also needed for shoppers' use during the Inventory Liquidation Process.[8]

14. Target Brands views the Purchased Assets as using or displaying IP that is proprietary to Target Brands. Target Brands has therefore not agreed to allow the Purchased Assets to be sold by the Agent. Target Brands would also likely contest any sale of these Purchased Goods to a third party purchaser.[9] Nonetheless, TCC is required under its leases to ensure that all FF&E is removed from the TCC stores. The Purchased Assets must therefore be sold or otherwise disposed of as part of the orderly wind-down of the Target Canada Entities' business.[10]

15. Target Corporation submitted an offer in late January 2015 to purchase the Purchased Assets (the "**Initial Offer**").[11] Those Target-branded items that were covered by the Initial Offer are set out in detail in the Sixth Wong Affidavit.[12]

Terms of the Asset Purchase Agreement

16. TCC, Target Brands and Target Corporation entered into the Asset Purchase Agreement as of March 23, 2015. Under the agreement, Target Corporation has agreed to purchase the Purchased Assets for a purchase price of USD $2,215,020.[13] The Purchased Assets reflect amendments to the Initial Offer (the "**Revised Offer**") to delete certain assets (primarily, the video game shelves) and permit the Agent to sell them in the Inventory Liquidation Process, to refine

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8 Sixth Wong Affidavit, para. 9.

9 Sixth Wong Affidavit, para. 10.

10 Sixth Wong Affidavit, para. 13.

11 Sixth Wong Affidavit, para. 14.

12 Sixth Wong Affidavit, para. 12.

13 Sixth Wong Affidavit, para. 30. Converted into Canadian dollars, this purchase price amounts to approximately CDN $2.7 million.

the quantities of certain categories of Purchased Assets and to add "Bullseye Boutique" items that had not originally been included in the Initial Offer.[14]

17. Key terms of the Asset Purchase Agreement include:

(a) Consent by Target Brands for those Purchased Assets containing or incorporating IP owned by Target Brands to be transferred by TCC to Target Corporation;

(b) Sale of the Purchased Assets to Target Corporation on an "as is, where is" basis;

(c) Provision for the parties to agree, in consultation with the Monitor, regarding the timing for the transfer or destruction of the Purchased Assets after the Closing Date and consent by Target Corporation to bear the costs of such transfer or destruction; and

(d) Agreement by Target Corporation to bear the costs of all applicable sales and transfer taxes, registration charges and transfer fees.[15]

18. Closing of the Asset Purchase Agreement, if approved, is scheduled for March 31, 2015 or such later date as agreed by the parties.[16]

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[14] Sixth Wong Affidavit, para. 22. The list of items included in the Revised Offer is set out at para. 26 of the Sixth Wong Affidavit.

[15] Sixth Wong Affidavit, para. 31.

[16] Sixth Wong Affidavit, para. 31(e).

PART III – ISSUES AND THE LAW

19. The issues on this motion are as follows:

(a) should this Honourable Court approve the Asset Purchase Agreement and grant the proposed Approval and Vesting Order?

Test Under the CCAA is Met

20. Section 36 of the CCAA sets out the legal test for obtaining court approval that applies where a debtor company seeks to sell assets outside the ordinary course of business during a CCAA proceeding. Section 36 provides:

> **36(1) Restriction on disposition of business assets** – A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
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> **36(2) Notice to creditor**s – A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
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> **36(3) Factors to be considered** – In deciding whether to grant the authorization, the court is to consider, among other things,
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> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
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> (b) whether the monitor approved the process leading to the proposed sale or disposition;
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> (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;
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> (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.
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> **36(4) Additional factors — related persons** -- If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the

> factors referred to in subsection (3), grant the authorization only if it is satisfied that
>
> (*a*) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
>
> (*b*) 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.
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> **36(5) Related persons** -- For the purpose of subsection (4), a person who is related to the company includes
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> (*a*) a director or officer of the company;
>
> (*b*) a person who has or has had, directly or indirectly, control in fact of the company; and
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> (*c*) a person who is related to a person described in paragraph (a) or (b).
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> **36(6) Assets may be disposed of free and clear –** The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.
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> **36(7) Restriction – employers** – The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

21. In discussing section 36 of the CCAA, this Honourable Court has stated:[17]

> The CCAA is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book on the amendments states that "The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse."

22. Moreover, this Honourable Court has expressly noted that section 36(4) of the CCAA – which imposes two additional requirements in the context of a transaction for the sale of a debtor's assets to a related party – has the objective of preventing certain specific dangers that are associated with related party transactions in an insolvency context. The section is intended to:

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[17] *Re Canwest Global Communications*, 2009 CarswellOnt 7169 (S.C.J.) [*Canwest*] at para. 32.

> ...prevent the possible abuse by "phoenix corporations". Prevalent in small business, particularly in the restaurant industry, phoenix corporations are the result of owners who engage in serial bankruptcies. A person incorporates a business and proceeds to cause it to become bankrupt. The person then purchases the assets of the business at a discount out of the estate and incorporates a "new" business using the assets of the previous business. The owner continues their original business basically unaffected while creditors are left unpaid.[18]

23. Both subsections 36(3) and (4) must therefore be interpreted in light of the avowed intention of the legislator not to detract from the flexibility of the CCAA. The factors listed in section 36(3) are, on their face, not intended to be exhaustive. Nor are they intended to be a formulaic checklist that must be followed in every sale transaction under the CCAA.[19] These factors overlap, to a certain degree, with the *Soundair* factors that were applied in approving sale transactions under pre-amendment CCAA case law.[20] Under section 36(4) of the CCAA, this Court must be satisfied, overall, that sufficient safeguards were adopted to ensure that a related party transaction is in the best interests of the stakeholders of the Target Canada Entities and that the risks to the estate associated with a related party transaction have been mitigated.

24. The Applicants submit that, taking into account the factors listed in section 36(3) of the CCAA, the test set out in s. 36(4) of the CCAA, and the general interpretative principles underlying the CCAA, this Honourable Court should grant the Approval and Vesting Order. In the absence of any indication that the Target Canada Entities have acted improvidently, the informed business judgment of the Target Canada Entities – which is supported by the advice and the consent

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[18] See *Canwest*, supra note 17 at para. 34, citing Industry Canada "Bill C-55: Clause by Clause Analysis — Bill Clause No. 131 — CCAA Section 36".

[19] See for example, *Re White Birch Paper Holding Co.*, 2010 QCCS 4915 [*White Birch*] at para. 48; leave to appeal refused 2010 CarswellQue 11534, 2010 QCCA 1950 (Que. C.A.).

[20] *Re Canwest Publishing Inc./Publications Canwest Inc.,* 2010 ONSC 2870 at para. 13, citing *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (C.A.) [*Soundair*] at para. 16. Under the *Soundair* test, it was necessary to consider (1) whether sufficient efforts had been made to obtain the best price and that the debtor had not acted improvidently; (2) whether the interests of all parties had been considered; (3) the integrity and efficacy of the process for obtaining offers; and (4) whether there was any unfairness in working out the process.

of the Monitor – that the Asset Purchase Agreement is in the best interests of the Target Canada Entities and their stakeholders is entitled to deference by this Court.

a) Process Was Reasonable

25. Whether the process for achieving a sale transaction under the CCAA is fair and reasonable must be examined contextually, in light of the particular circumstances existing at the time.[21] Although it is common to sell assets under the CCAA by means of a process involving a broad canvass of the market, perhaps followed by a competitive bidding process among interested bidders, nothing in section 36 of the CCAA mandates that such a process be conducted in every case for every asset sold by a debtor company.[22]

26. Even under section 36(4), which requires the debtor to demonstrate that good faith efforts were made to sell or dispose of the assets to an unrelated party, there is no requirement that the assets must form part of a formal, competitive bidding process. Such a rigid rule would not only be antithetical to the inherent flexibility of the CCAA, but would preclude debtor companies from selling unique assets in the manner best suited to the disposition of those assets, including by means of a related party transaction that offers significant objectively measureable benefits to the debtor company's estate that could not be obtained upon a sale to an unrelated third party.

27. In order to grant approval under section 36 of the CCAA, the Court must be satisfied overall that the debtor has not acted improvidently. As the Courts have held, by reference

[21] See *White Birch*, above note 19 at para. 49: "The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA."

[22] The *Soundair* case itself acknowledges that an auction is not necessary or advisable in every case: see *Soundair*, above note 20 at para. 44, citing *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242 (Alta C.A.).

to the principles in *Soundair*, the decision to accept a particular offer is a matter of business judgment on the part of the debtor that should not lightly be interfered with in the absence of evidence of imprudence or unfairness.[23]

28. Moreover, the process adopted and the determination of fairness is dictated in large measure by the nature of the assets being sold, with particular deference being applied where the assets are unusual or unique. The *Soundair* case itself involved the sale of an unusual or unique asset in which the field of buyers was extremely limited, with only one or two purchasers being logical acquirors of the asset. The receiver's conduct in dealing with buyers and the receiver's process for entering into the transaction were evaluated in the context of the fact that the asset in question was unique and by its nature, not amenable to a broad competitive marketing process.[24]

29. The Applicants submit that the process for entering into the Asset Purchase Agreement was both fair and reasonable in the circumstances and the most appropriate manner in which to deal with the unique assets to which it applies. The Purchased Assets are, as a factual matter, unusual or unique because of the IP issues associated with the ability to sell these assets to a purchaser and the ability of the purchaser to use such assets once they have been acquired. Given their nature and quantity (e.g. the shopping carts), their value is likely maximized by a sale in bulk to a commercial party. However, Target Brands is likely to contest the ability of any likely commercial buyer to use items displaying the Target IP.[25]

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[23] *Re Terrace Bay Pulp Inc.*, 2012 ONSC 4247 at paras. 45 and 51-52, citing *Soundair*, above note 20 at paras. 21, 30-31.

[24] *Soundair*, above note 20 at para. 46.

[25] Sixth Wong Affidavit, para. 10.

30. Whether or not a legal challenge by Target Brands would ultimately be successful, the litigations risks are reasonably expected to materially affect the value of the Purchased Assets to an unrelated third party. This "cloud" on the title to the Purchased Assets would likely result in an unrelated third party purchaser – if such a purchaser would agree to acquire the assets at all – applying a discount to the purchase price to account for the need to remove the Target IP elements and/or to deal with the litigation risks.[26] As the Monitor has noted in its Seventh Report, Target Brands' IP rights "impose a significant limitation on the realizable value of the Purchased Assets."[27]

31. The uniqueness of the Purchased Assets makes Target Corporation the only realistic purchaser. However, despite the likely impediment to the sale of the Purchased Assets to unrelated third parties resulting from the IP issues, as part of the process leading to the selection of the Agent, the Target Canada Entities and the Monitor sought bids for certain of the Purchased Assets from each of the five liquidation firms participating in the auction. Only Hilco Global ("**Hilco**") submitted a bid with respect to some, but not all, of the assets included in the Initial Offer. None of the remaining bidders elected to submit an offer.[28] This inclusion of the Purchased Assets as part of the bid process for the Inventory Liquidation Process clearly satisfies the requirement under section 36(4) of the CCAA, read purposively, to demonstrate good faith efforts to sell or dispose of the Purchased Assets to an unrelated party.

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26 Sixth Wong Affidavit, para. 11.

27 Monitor's Seventh Report, para. 3.4.

28 Sixth Wong Affidavit, para. 16. Note that Hilco's bid did not include everything that had been included in the Initial Offer. It included certain other items (cart pushers, checkout counters and service desks) which had not been part of the Initial Offer.

32. Given that only one of the liquidation firms submitted a bid, and only for certain of the assets, the Target Canada Entities and the Monitor considered whether the proposed sale to Target Corporation was fair and reasonable, particularly in light of the IP issues associated with these assets and the fact that Target Brands had not consented to their inclusion in the Inventory Liquidation Process. Given the need for a purchaser to remove the Target IP elements and the potential litigation risks, the Target Canada Entities did not consider it to be beneficial to their stakeholders to incur the costs of conducting a further formal process to market these goods. Nonetheless, one additional liquidation firm (Great American, described below) was requested to submit a bid for the Purchased Assets and declined, although both Great American and Hilco provided assistance to the Target Canada Entities in valuing the Purchased Assets. Based on these valuations, as submitted further below, the likely price to be obtained from an unrelated third party did not support the sale of the Purchased Assets to an unrelated third party at all.[29]

33. The Applicants therefore submit that they have followed an entirely reasonable process, analyzed contextually in light of the unique assets in question and their limited or non-existent marketability to unrelated parties. They have fully considered the benefits and the risks of pursuing the Asset Purchase Agreement and the need to be scrupulous to address the particular dangers that are potentially associated with a related party transaction. They have consulted extensively with the Monitor. As submitted further below, they have evaluated the consideration offered by Target Corporation against three separate objective benchmarks. There is no hint of any abuse that section 36(4) is directed at preventing – namely, a debtor company seeking to move assets to related parties at a discount in order to shelter them from creditors.

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[29] Sixth Wong Affidavit, paras. 17, 24 and 27. See also Monitor's Seventh Report, paras. 3.7 and 3.8.

b) Monitor Concurs

34. As required by section 36 of the CCAA, the Monitor has been involved at every stage related to the proposed transaction.

35. The Monitor's Seventh Report indicates that the Monitor participated in the evaluation of whether it would be fair and reasonable to accept the Revised Offer from Target Corporation, as well as in the assessment of the values that could potentially be obtained if attempts were made to sell the Purchased Assets to an unrelated third party. In addition, the Monitor, in consultation with its counsel, evaluated the risks to the saleability of the Purchased Assets arising from the IP issues.[30] The Monitor supports the conclusion that the purchase price offered by Target Corporation far exceeds the estimated liquidation valuations obtained.[31]

36. The Monitor expressed the view that the process leading up to the Asset Purchase Agreement is fair and reasonable. Moreover, the Monitor participated in the negotiation of the Asset Purchase Agreement and is of the view that "a sale to Target Corporation [is] the most practical means of realizing value on the Purchased Assets."[32] Overall, it is the Monitor's opinion that the Asset Purchase Agreement benefits the creditors of the Target Canada Entities.[33]

37. It is the Monitor's opinion that the Asset Purchase Agreement would be more beneficial to the Applicants' creditors than a sale or other transaction in a bankruptcy.[34] Based on all of the above factors, the Monitor supports this Court's approval of the Asset Purchase

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[30] Monitor's Seventh Report, paras. 3.7 to 3.9; 3.11 to 3.17.

[31] Monitor's Seventh Report, paras. 3.18 to 3.22.

[32] Monitor's Seventh Report, paras. 3.24 and 3.26.

[33] Monitor's Seventh Report, para. 3.28.

[34] CCAA, s. 36(3(c); Monitor's Seventh Report, para. 3.28.

Agreement and the granting of the proposed Approval and Vesting Order. The Monitor's views are entitled to considerable deference from this Court.[35]

c) The Purchase Price is Fair and Reasonable

38. The Target Canada Entities and the Monitor are of the view that the consideration to be received by TCC is reasonable, taking into account the value of the Purchased Assets.

39. CCAA case law both prior to and subsequent to the enactment of section 36 has applied the test from *Soundair* in evaluating this criterion.[36] The debtor must demonstrate that sufficient effort has been made to obtain the best price and that it has not acted improvidently. This requirement is evaluated based on the information available at the time the offer is accepted. It requires deference to the debtor's business judgment in order to avoid turning the process into an auction conducted by the Court.[37] Added to these criteria in the case of a sale to a related party is the requirement under section 36(4) to demonstrate that the price is superior to any offer that could have been obtained from an unrelated third party.

40. Case law interpreting section 36 of the CCAA does not mandate that the purchase price of a debtor company's assets must be established following an "auction-like" process before the Court can determine that the consideration offered is fair and reasonable.[38] An auction or similar competitive bid process is simply one mechanism for providing a market-based evaluation of the consideration for a debtor company's assets. Objective, independent valuations are another.

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[35] J. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd Ed. (Toronto: Carswell, 2013) at p. 573.

[36] See for example *Terrace Bay,* above, note 23 at paras. 50-55.

[37] *Terrace Bay,* above note 23 at para. 51, citing *Soundair*.

[38] As noted above, *Soundair* itself was a case in which the Court held that a reasonable process did not necessarily require an auction.

41. As noted above, the Purchased Assets were included in the bid process for selection of the Agent, but insufficient bids were obtained through this process to provide a meaningful benchmark for comparison. The Target Canada Entities and the Monitor therefore made good faith efforts to ensure that sufficient valuation information was provided in order to compare the price offered by Target Corporation to the price (if any) that could be obtained from an unrelated third party. Three separate independent assessments of the liquidation values of the Purchased Assets provide an objective benchmark, leading to the conclusion that the purchase price offered by Target Corporation is far superior to any offer that might be forthcoming from a third party purchaser, if such purchaser could be found. These three valuations include:

(a) The Hilco bid submitted in the context of selecting the Agent included some, but not all, of the Purchased Assets.[39] Hilco was subsequently asked by the Monitor to provide an estimate (which was not a bid) for the other Purchased Assets that had been part of Target Corporation's Initial Offer in order to assist the Monitor and the Target Canada Entities in assessing the potential liquidation value of these items.[40] The combined amount of the Hilco bid and estimate for the Purchased Assets is approximately CDN $727,000.[41]

(b) The Target Canada Entities and the Monitor, out of prudence, obtained a further estimate in February 2015 from Maynards Appraisals Ltd. (the "**Maynards Appraisal**"), a leading auctioneer and appraisal firm. The initial appraisal conducted by Maynards was updated and revised as facts were ascertained and the

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[39] Sixth Wong Affidavit, para. 16.

[40] Sixth Wong Affidavit, para. 17.

[41] Sixth Wong Affidavit, para. 25.

scope of Target Corporation's Revised Offer was settled.[42] Apart from a discount to reflect the view that the value of the shopping carts will be detrimentally affected by approximately 25% to reflect the need for either the seller or a purchaser to remove Target IP, the Maynards Appraisal does not account for the impact of the potential issues regarding the IP or certain other costs.[43] The estimate provided by Maynards is approximately CDN $1.8 million.[44]

(c) Finally, as an additional data point for estimating the liquidation value for the Purchased Assets, the Monitor sought an offer for the Target-branded items included in Target Corporation's Revised Offer from GA Global Partners ("**Great American**"). Although Great American did not agree to submit a bid for the Purchased Assets, Great American provided an estimate of their value at approximately CDN $1.3 million. This estimated value is subject to a 20 percent commission under the terms of the Agency Agreement.[45]

42. Comparing the three valuations, it is readily apparent that the purchase price for the Purchased Assets offered by Target Corporation – which is equivalent to approximately CDN $2.7 million – is far superior to the values estimated by Hilco, Maynards and Great American.[46] Moreover, the only item for which the allocated value reflected in Target Corporation's *en bloc* bid was lower than the Hilco or Maynards values (the video game browser shelves) has been

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[42] Sixth Wong Affidavit, para. 18.

[43] Sixth Wong Affidavit, para. 19.

[44] Sixth Wong Affidavit, para. 25. This estimate does not include an estimate of the value of the Bullseye Boutique inventory.

[45] Sixth Wong Affidavit, para. 24. This estimate does not include an estimate of the value of the Bullseye Boutique inventory.

[46] See Sixth Wong Affidavit, paras. 25 to 29 and Exhibits A, B, and C.

excluded from the Asset Purchase Agreement and will be sold by the Agent.[47] The Applicants submit that the use of these valuation benchmarks represents a reasonable alternative to subjecting the Purchased Assets to a broader, competitive bidding process. This process also clearly satisfies the requirement under section 36(4) of the CCAA to demonstrate that the offer from Target Corporation, as a related party, is superior to any offer that could be obtained from an unrelated party.

d. Transaction is in Best Interests of Stakeholders

43. In addition to the significant benefits represented by the purchase price under the Asset Purchase Agreement, there are a number of other material advantages to the Asset Purchase Agreement that support the reasonable, informed business judgment of the Target Canada Entities in determining that the Asset Purchase Agreement is in the best interests of the Target Canada Entities and their stakeholders. These include:

(a) *Enhanced economic value* – The value to the Target Canada Entities of the Asset Purchase Agreement is further enhanced by the out-of-pocket expenses to be assumed by Target Corporation, estimated in the amount of approximately CDN $1.9 million.[48] Principal among these are expenses estimated at approximately CDN $1.7 million to remove exterior signage from TCC stores, an asset which has no liquidation value. In the absence of the assumption of these costs by Target Corporation under the Asset Purchase Agreement, these costs would be borne by the estate of the Target Canada Entities pursuant to the terms of the TCC leases and

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[47] Sixth Wong Affidavit, para. 21. Note that these items were initially included in the Purchased Assets because their design is proprietary. The Agent will sell these items subject to the condition that the proprietary design cannot be reproduced by the purchaser.

[48] Sixth Wong Affidavit, para. 33(b).

would represent an economic burden for the stakeholders of the Target Canada Entities. The assumption of these and other related costs is therefore a significant net benefit to the stakeholders of the Target Canada Entities.[49]

(b) *Flexibility* – The Asset Purchase Agreement allows the Monitor, TCC and Target Corporation to agree upon the timetable for delivery or destruction of the Purchased Assets. This flexibility allows items such as shopping carts to be retained by TCC until they are no longer needed as part of the Inventory Liquidation Process.[50]

(c) *No fees or commission* – The purchase price under the Asset Purchase Agreement is not subject to the brokerage fees, commissions or other disposal costs that TCC would incur if a firm such as Maynards, Great American or Hilco were engaged to sell the items to a third party.[51]

(d) *Guaranteed value* – The marketability of the Purchased Assets to an unrelated third party is questionable, as demonstrated by the fact that only one of the liquidation firms (Hilco) agreed to bid on some of these assets and Great American declined.[52] If TCC had rejected the Revised Offer from Target Corporation and it were later determined that the IP issues rendered the Purchased Assets completely unsaleable (which is a significant risk), TCC would be required to incur the substantial costs associated with their disposal.[53]In addition, because it is expected that there is

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[49] Sixth Wong Affidavit, para. 33(b). See also Monitor's Seventh Report, para. 3.23.

[50] Sixth Wong Affidavit, para. 33(c).

[51] Sixth Wong Affidavit, para. 33(a).

[52] As the Monitor notes in its Seventh Report, the Asset Purchase Agreement allows the Target Canada Entities to realize value on a group of assets which, for the vast majority, are arguably otherwise unsaleable: para. 3.21.

[53] Sixth Wong Affidavit, para. 33(d).

potential litigation risk associated with selling the Purchased Assets to a third party, this transaction avoids the potential additional costs and distraction that would be associated with such potential litigation and allows TCC and its advisors to focus on the orderly wind down.

44. The Applicants therefore submit that the Asset Purchase Agreement is beneficial overall to the creditors and other stakeholders of the Target Canada Entities.

e) Compliance with Additional Requirements Under Section 36

45. The Applicants submit that all of the other statutory requirements for obtaining relief under section 36 of the CCAA have been satisfied:

(a) No parties have registered security interests against the Purchased Assets.

(b) In any event, section 36(6) of the CCAA permits this court to authorize a sale or disposition free and clear of any security, charge or other restriction. As such, the proposed Approval and Vesting Order provides that the Purchased Assets will be vested free and clear of all security interests.[54] As required by section 36(6), the proposed Approval and Vesting Order further provides that the proceeds of the sale or disposition stand in place of the surrendered assets and that all Claims and Encumbrances (as defined in the proposed Approval and Vesting Order) will attach to the proceeds with the same priority as previously existed against the surrendered assets.[55]

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[54] Approval and Vesting Order, para. 4, Motion Record of the Applicants, Tab 3.

[55] Approval and Vesting Order, para. 5, Motion Record of the Applicants, Tab 3.

(c) Section 36(7) of the CCAA provides that relief under section 36 cannot be granted unless the Court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.[56] The amounts referred to under these subsections are amounts owing by a debtor company to its employees and former employees for unpaid wages that these employees would have been entitled to receive under the *Bankruptcy and Insolvency Act,* in addition to amounts that are owing for post-filing services to the debtor company. Given that the Applicants have been paying employees for all post-filing services and that the Employee Trust will satisfy claims arising from any early termination of eligible employees prior to the expiry of their statutory or contractual notice entitlement, the requirements of section 36(7) of the CCAA are satisfied in this motion.

46. For all of the reasons submitted above, the Applicants submit that the criteria for the approval of the Asset Purchase Agreement have been satisfied and that the Approval and Vesting Order should be granted.

PART IV – NATURE OF THE ORDER SOUGHT

47. For all of the reasons above, the Applicants submit that this Honourable Court should grant the relief substantially in the form of the draft Order attached as Tab 3 of the Motion Record.

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[56] Section 36(7) appears to contain a drafting error, as it references amounts that would be required to be paid under section 6(4)(a) of the CCAA. Section 6(4) of the CCAA does not have any subparagraphs. It may be inferred that the intention was to require payments under section 6(5)(a) and 6(6)(a).

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

“TRACY SANDLER”

Tracy Sandler

“JEREMY DACKS”

Jeremy Dacks

“SHAWN IRVING”

Shawn Irving

Schedule "A"

LIST OF AUTHORITIES

Case Law

1. *Canwest Global Communications (Re)*, 2009 CarswellOnt 7169 (S.C.J.)

2. *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, 2010 ONSC 2870

3. *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (C.A.)

4. *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247

5. *White Birch Paper Holding Co. (Re)*, 2010 QCCS 4915; leave to appeal refused 2010 CarswellQue 11534, 2010 QCCA 1950 (Que. C.A.)

Secondary Sources

6. J. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd Ed. (Toronto: Carswell, 2013)

Schedule "B"

COMPANIES' CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36, as amended

Compromises to be sanctioned by court

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

[…]

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(*a*) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(*b*) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(*a*) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(*b*) the court is satisfied that the company can and will make the payments as required under paragraph (a).

[…]

R.S., 1985, c. C-36, s. 6; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 123; 2004, c. 25, s. 194; 2005, c. 47, s. 126, 2007, c. 36, s. 106; 2009, c. 33, s. 27; 2012, c. 16, s. 82.

Restriction on disposition of business assets

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(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.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(*a*) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(*b*) 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.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(*a*) a director or officer of the company;

(*b*) a person who has or has had, directly or indirectly, control in fact of the company; and

(*c*) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

2005, c. 47, s. 131; 2007, c. 36, s. 78.