

**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

**RESPONDING FACTUM OF
TARGET CORPORATION**

(Re: Motion of the Monitor returnable November 29, 2016)

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RESPONDING FACTUM OF TARGET CORPORATION

PART I ~ OVERVIEW

1. This motion concerns the appropriateness of permitting certain late claims to be filed in the *Companies' Creditors Arrangement Act*¹ ("**CCAA**") proceedings of Target Canada Co. ("**Target Canada**") and certain affiliated corporations and partnerships (collectively, the "**Applicants**").

2. The CCAA proceedings of the Applicants and the claims process were highly publicized. The late claims subject to this motion do not involve claimants who were completely unaware of the CCAA proceedings and the claims process or failed to file their claims as a result of honest inadvertence. Rather, such claimants either intentionally decided not to file claims in the claims process or failed to do so as a result of their cavalier disregard of it.

¹ R.S.C. 1985, c. C-36.

3. In addition, the motion is brought at a time when the claims bar date has long since passed, the Applicants' Amended and Restated Joint Plan of Compromise and Arrangement (the "**Plan**") has long since been approved, and the majority of the distributions pursuant to the Plan have already been made.

4. Significantly, the late claims that are the subject of this motion were released as against several parties pursuant to the Plan and the order approving that Plan. Target Corporation, the ultimate parent company of Target Canada and the sponsor of the Plan, is one of these released parties. Target Corporation relied on obtaining the releases provided for in the Plan and its anticipated recovery based on the Monitor's illustrative recoveries (which did not include the late claims) in making its significant contributions to the Plan far in excess of \$3.1 billion for the benefit of the Applicants' creditors.

5. In the circumstances, it is simply not just and equitable at this late stage to permit the late claims to be filed. Should this Court nevertheless permit the late claims to be filed, at the very least, they must remain subject to the releases contained in the Plan as approved by the order sanctioning the Plan.

PART II ~ FACTS

A) Background

6. On January 15, 2015, the Applicants were granted protection pursuant to an initial order (as amended and restated as of February 11, 2015, the "**Initial Order**") under the CCAA. Alvarez & Marsal Canada Inc. was appointed as the monitor of the Applicants

(the "**Monitor**").² Target Corporation, the responding party and Target Canada's ultimate parent company, was not an applicant in the CCAA proceedings.

B) The Claims Procedure Order

7. On June 11, 2015, the Ontario Superior Court of Justice (Commercial List) (the "**Court**") issued an order (as amended, the "**Claims Procedure Order**") approving the process for the filing and determination of claims against the Applicants and their former directors and officers (the "**Claims Process**"). Pursuant to the Claims Procedure Order, claimants with pre-filing claims were required to file a proof of claim with the Monitor on or before 5:00 p.m. on August 31, 2015 and claimants with restructuring period claims were required to file a proof of claim with the Monitor on or before the later of (i) 45 days after the date on which the Monitor sent a claims package with respect to a given restructuring period claim, and (ii) August 31, 2015.³

8. The Monitor took several steps to ensure that all potential claimants were made aware of the Claims Process and their need to file a claim before the claims bar date. Among other things, the Monitor:

- (a) posted the claims package to its website on June 12, 2015;

² Thirty-Second Report of the Monitor dated October 31, 2016 ("**Monitor's Thirty-Second Report**") at paras. 1.1-1.2; Motion Record of the Monitor dated October 31, 2016 ("**Monitor's Motion Record**"), Tab 2.

³ Thirty-Second Report at paras. 4.3-4.6; Monitor's Motion Record, Tab 2; Claims Procedure Order dated June 11, 2015 ("**Claims Procedure Order**"); Brief of Authorities of Target Corporation ("**Target Corporation's BOA**"), Tab 1.

- (b) arranged for the notice to claimants to be published in the Wall Street Journal (National Edition) and La Presse newspaper on June 16, 2015 and June 23, 2015;
- (c) arranged for the notice to claimants to be published in The Globe and Mail (National Edition) newspaper on June 17, 2015 and June 23, 2015;
- (d) caused a copy of the claims package to be mailed or e-mailed to approximately 3,700 known claimants on June 16, 2015;
- (e) caused a copy of the claims package to be emailed to the service list in the CCAA proceedings; and
- (f) provided the claims package to any party that requested it.⁴

9. More than 1,700 proofs of claim were filed with the Monitor prior to the claims bar date in accordance with the Claims Procedure Order. The Monitor also continued to accept proofs of claim filed after the claims bar date up until the date of the creditors' meeting to vote on the Plan.⁵

10. The Monitor has refused to accept late claims since the date of the creditors' meeting. In so doing, the Monitor has considered, among other things, the fairness to creditors who filed timely claims in accordance with the Claims Procedure Order and who voted on the Plan based in part on the illustrative recoveries analysis prepared by the Monitor and provided to such creditors.⁶

⁴ Thirty-Second Report at para. 4.5; Monitor's Motion Record, Tab 2; Eighteenth Report of the Monitor dated July 15, 2015 at paras. 6.2-6.3.

⁵ Thirty-Second Report at paras. 4.6-4.9; Monitor's Motion Record, Tab 2.

⁶ Thirty-Second Report at paras. 3.4-3.7; Monitor's Motion Record, Tab 2.

C) The Plan and the Releases

11. The Plan was the result of extensive negotiations between, among others, the Applicants, Target Corporation, landlords, trade creditors and a variety of other unsecured creditors and stakeholders. These negotiations culminated in a consensual global resolution of the CCAA proceedings in the form of the Plan.

12. Target Corporation, as Plan Sponsor (as defined in the Plan), made significant economic contributions to the CCAA proceedings and the Plan. These contributions included:

- (a) funding a trust established for the benefit of employees of Target Canada in the amount of \$95 million;
- (b) making available debtor-in-possession financing to Target Canada to allow Target Canada to meet payroll and other obligations;
- (c) providing ongoing shared services to facilitate the orderly wind down of the Applicants' operations; and
- (d) subordinating well in excess of \$3.1 billion in intercompany against Target Canada.⁷

13. Target Corporation made these contributions to the Plan in reliance upon obtaining the releases provided for in the Plan. Specifically, pursuant to the Plan, Target Corporation and its subsidiaries (including Target Brands Inc. ("**Target Brands**")) were released from all claims (subject to certain exceptions which are not relevant for the

⁷ Affidavit of Corey Haaland ("**Haaland Affidavit**") sworn November 22, 2016 at para. 5; Motion Record of the Target Corporation returnable November 29, 2016 ("**Target Corporation's Motion Record**"), Tab 1.

purposes of this motion) existing or taking place on or prior to the later of the Plan Implementation Date (June 28, 2016) and the date on which actions were taken to implement the Plan, that were in any way relating to, arising out of or in connection with the Claims, the Business whenever or however conducted, the Plan, the CCAA Proceedings (each as defined in the Plan), or any Claim that was barred or extinguished by the Claims Procedure Order.⁸

14. In addition, Target Corporation relied upon the anticipated recovery on its remaining claims which it did not subordinate based on the Monitor's illustrative recoveries.⁹

15. On May 25, 2016, at the creditors' meeting to vote on the Plan, affected creditors unanimously voted to approve the Plan.¹⁰

16. On June 2, 2016, the Court issued an order (the "**Sanction Order**"), among other things:

- (a) approving the Plan and the releases contained in the Plan;
- (b) fully and finally compromising and discharging all affected claims against the released parties (including Target Corporation and Target Brands);
- (c) forever discharging and extinguishing the ability of any person to proceed against the released parties in respect of the affected claims; and

⁸ Haaland Affidavit at para. 6; Target Corporation's Motion Record, Tab 1; Amended and Restated Joint Plan of Compromise and Arrangement dated April 6, 2016 ("**Plan**"), s. 7.1(c); Target Corporation's Motion Record, Tab 1B.

⁹ Haaland Affidavit at para. 6; Target Corporation's Motion Record, Tab 1.

¹⁰ Thirty-Second Report at para. 4.10; Monitor's Motion Record, Tab 2.

(d) permanently staying all proceedings in respect of the affected claims, subject only to the right of affected creditors to receive distributions under the Plan.¹¹

17. Target Corporation would not have sponsored the Plan on the terms to which it agreed without being able to rely on the finality and enforceability of the release and discharge of claims provided for in the Sanction Order.¹²

D) The Late Claims

18. Since the date of the creditors' meeting, the Monitor or its legal counsel have responded to inquiries from 12 putative claimants seeking to assert late-filed claims in the aggregate amount of at least \$8.4 million against the Target Canada Entities (the "**Late Claims**").

19. Target Corporation has been named as a defendant in three of the Late Claims and Target Brands has been named as a defendant in one of the Late Claims. Each of these Late Claims was initiated after the Sanction Order was granted (June 2, 2016) and the Plan implementation date occurred (June 28, 2016).¹³ Accordingly, each Late Claim against Target Corporation or Target Brands had already been released pursuant to the terms of the Plan as approved by the Sanction Order.

¹¹ Sanction and Vesting Order dated June 2, 2016 ("**Sanction Order**") at paras. 7 and 9; Target Corporation's Motion Record, Tab 1A.

¹² Haaland Affidavit at para. 10; Target Corporation's Motion Record, Tab 1.

¹³ Haaland Affidavit at para. 7; Target Corporation's Motion Record, Tab 1; Kulwinder Rai Claim, Erin Wolf-Bloom Claim, Shahida Abid Sindu Claim, 151516 Canada Inc. Cross-Claim; Target Corporation's Motion Record, Tabs 1D-1G.

20. To address these Late Claims and any as-yet unknown late claims that may be asserted in the future, the Monitor brought this motion seeking advice and directions from the Court.

21. Certain of the claimants have filed responding materials in connection with the motion. Their reasons for not having filed timely claims are set out in their responding motion materials and are summarized below:

- (a) Fruits and Passion Boutiques Inc. ("**Fruits and Passion**"): Fruits and Passion claims that it did not file a timely claim because it did not receive the claims package that was mailed to it in late June 2015, perhaps because Fruits and Passion moved its head office in summer 2015.¹⁴
- (b) Lou Pharma Corp. ("**Lou Pharma**"): Lou Pharma claims that it did not file a timely claim because Mr. Ghasemlou (Lou Pharma's sole shareholder, officer and director) was in Iran for all of June and July 2015 and most of August 2015, was not aware of the Claims Procedure Order or claims bar date, did not receive the claims package, was not familiar with legal process in Canada generally and had not previously had exposure to a claims process in any insolvency or restructuring proceeding.¹⁵
- (c) Kulwinder Kaur Rai: A paralegal at the law firm representing Ms. Rai claims that a timely claim was not filed because of Ms. Rai's counsel's view that the

¹⁴ Affidavit of Phil Choi sworn November 15, 2016; Responding Motion Record of Fruits & Passion Boutiques Inc. dated November 16, 2016; Tab 1.

¹⁵ Affidavit of Naser Ghasemlou sworn November 14, 2016; Responding Motion Record of Lou Pharma Corp. dated November 16, 2016; Tab 1.

CCAA proceedings did not apply to Ms. Rai's claim "because an insurer had already responded to the claim in British Columbia".¹⁶

- (d) Capital Brands, LLC ("**Capital Brands**"): Capital Brands claims that it assumed it had filed a timely claim because:
- (i) it received regular offers from claims traders to purchase Capital Brands' claim against Target Canada;
 - (ii) it was listed on the list of creditors posted on the Monitor's website and it assumed, based on its understanding of U.S. bankruptcy procedure, that being listed on the list of creditors meant that its claim was deemed to be filed; and
 - (iii) it was not aware of the disclaimer on the Monitor's website about the nature of the list of creditors.

Notwithstanding that the Monitor did not receive a proof of claim from Capital Brands, Capital Brands also states that it is "still unsure" that the proof of claim was not filed and relies on the turnover in its accounting department to justify its ignorance with respect to the status of the proof of claim.¹⁷

22. As at the date of this motion, two distributions to creditors with proven claims have been made, providing a recovery of approximately 68% of the total value of proven claims.¹⁸

¹⁶ Affidavit of Beverly Sagert sworn November 17, 2016; Responding Motion Record of Kulwinder Kaur Rai dated November 23, 2016; Tab 1.

¹⁷ Affidavit of Jeff Klausner sworn November 23, 2016 ("**Klausner Affidavit**").

¹⁸ Thirty-Second Report at para. 4.16; Monitor's Motion Record, Tab 2.

PART III ~ ISSUES

23. This motion raises two issues:
- (a) should the Late Claims be admitted; and
 - (b) if so, under what terms should the Late Claims be admitted?

PART IV ~ LAW AND ARGUMENT

24. Target Corporation submits that the Late Claims should not be admitted. In the alternative, if this Court rules that the Late Claims should be admitted, they should only be admitted *nunc pro tunc* such that they are bound by the releases contained in the Plan as approved by the Sanction Order.

A) The Late Claims Should Not be Admitted

25. The Late Claims should not be admitted because the claimants have not met the applicable test for the admission of late claims in a CCAA claims process.

26. As outlined at paragraphs 5.5-5.6 of the Thirty-Second Report of the Monitor dated October 31, 2016 filed in connection with this motion, the leading authority on the admission of late claims in CCAA proceedings is the Alberta Court of Appeal's decision in *Re Blue Range Resource Corp.*¹⁹. In *Blue Range*, the Alberta Court of Appeal cited four factors to be considered in determining whether a late claim should be admitted:

¹⁹ 2000 ABCA 285; Monitor's Brief of Authorities ("**Monitor's BOA**"), Tab 1.

- (a) Was the delay caused by inadvertence and if so, did the claimant act in good faith? The court also specified that inadvertence includes carelessness, negligence, accident, and is unintentional.
- (b) What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay? The timing of a late claim in a given proceeding is a key element in determining whether any prejudice will be suffered by either the debtor corporation or other creditors if the late claim is admitted.
- (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?²⁰

27. Given the element of good faith inadvertence which is unintentional, the initial test in *Blue Range* can be appropriately characterized as one of “honest inadvertence”, as contrasted with the U.S. test of “excusable delay” also considered and dealt with in *Blue Range*. Properly construed, *Blue Range* also requires that honest inadvertence be proven first before the consequent prejudice of admitting the late claim should be considered.

28. In addition, and as noted at paragraph 5.8 of the Monitor's Thirty Second Report, subsequent to *Blue Range*, Canadian courts have provided guidance on the relevance of the timing of a late claim. Specifically, courts have held that, while late claims

²⁰ *Ibid.* at paras. 26-27; Monitor's BOA, Tab 1.

may be admitted to the claims process subsequent to plan implementation, doing so is "tantamount to amending or modifying the plan", and the court's discretion to do so should be "exercised sparingly and in exceptional circumstances only."²¹ In other words, the test of honest inadvertence becomes significantly stricter the later in the proceedings one seeks to admit a late claim.

The Delay was not Caused by Honest Inadvertence

29. As described above, Target Canada's CCAA proceedings and the Claims Procedure were highly publicized. The Monitor fully complied with all of its obligations under the Claims Procedure Order and took several steps to ensure that all potential claimants were made aware of the Claims Process and their need to file a claim before the claims bar date. As a result of the Monitor's efforts, over 1,700 claimants filed timely claims pursuant to the provisions of the Claims Procedure Order, which was properly served and available to all interested parties on the Monitor's website.²² In the circumstances, it cannot be reasonably contended that claimants were not aware of the Claims Process or that the failure to file the Late Claims was honestly inadvertent. Rather, any failure to file a timely claim was either entirely intentional or caused by a cavalier disregard for the process altogether.

30. Fruits and Passion and Lou Pharma both claim that they did not receive the claims package. Fruits and Passion suggests this may have happened because it moved

²¹ *Re SemCanada Crude Co.*, 2012 ABQB 489 at para. 71, citing *Algoma Steel Corp. v Royal Bank*, [1992] O.J. No. 889 at para. 8 (C.A.); Monitor's BOA, Tab 4.

²² Claims Procedure Order at para. 1; Target Corporation's BOA, Tab 1. See also Sanction Order at paras. 2-3, Monitor's Motion Record, Tab 1A.

its head office in summer 2015, while Lou Pharma relies on the fact that its sole shareholder, officer and director was overseas for all of June and July 2015 and most of August 2015. Failure to receive a claims package is not the test. Neither of these claimants denies that it had knowledge of the CCAA proceedings. Knowing that it had a claim against Target Canada, each should have taken the reasonably necessary steps to protect its interests. They appear to have simply chosen not to worry about it. Ignoring the proceeding unless specifically contacted and urged to do something is not honest inadvertence.

31. In the case of Ms. Rai, a paralegal at the law firm representing Ms. Rai has sworn that Ms. Rai's counsel intentionally did not file a claim in the CCAA proceedings on Ms. Rai's behalf because he took the view that he did not need to do so based on the insured claim provisions of the Claims Procedure Order and the fact that an insurer had already responded to Ms. Rai's claim in British Columbia. As such, he willingly disregarded the Claims Process altogether without bothering to even at least contact the Monitor to confirm his understanding. He simply wrongly concluded that he did not have to file a claim. He did not inadvertently forget to file a claim.

32. Capital Brands believed that its claim had in fact been filed because, among other things, Capital Brands was listed on the list of creditors and Mr. Klausner (the Chief Accounting Officer of Capital Brands) assumed, without retaining or even speaking to Canadian counsel, that this had the same implications under Canadian law as it does under U.S. law. Even worse, Mr. Klausner states that he "was not aware of the disclaimer on the Monitor's website about the nature of the list of creditors". The "disclaimer" to which Mr. Klausner refers is actually the first page of the list of creditors, and it specifically states that

"[i]f and when a claims procedure is approved by the Court, further details and claims forms will be posted to the Monitor's website. It is through such a claims procedure that creditor claims will be reviewed and determined."²³ If Mr. Klausner had reviewed the list of creditors as he swears he did, he would have known that the only way for Capital Brands to prove its claim would be through a claims process in the CCAA proceedings.

33. In addition, Mr. Klausner repeatedly refers to the offers Capital Brands received from claims traders to purchase Capital Brands' claim to justify his belief that the Capital Brands claim had been filed. This is a remarkable position given that many of these offers require the party selling the claim to represent that it has filed a proof of claim in the CCAA proceedings.²⁴ Such cavalier disregard on the part of Mr. Klausner or Capital Brands goes far beyond honest inadvertence. And, again, wrongly concluding that one does not have to file a claim has a requisite element of intention to it and is not the same thing as inadvertently forgetting to file a claim.

Prejudice

34. The second, third and fourth factors of the *Blue Range* test deal with any prejudice to other creditors if the late claims are admitted. In this case, admitting the Late Claims would prejudice claimants that filed timely claims pursuant to the terms of the Claims Procedure Order, particularly given the timing of the Late Claims in relation to the status of the Applicants' CCAA proceedings. This is not a situation where the claims bar date has recently passed and no distributions have been made to creditors. As described above, the

²³ Klausner Affidavit, Exhibit B.

²⁴ Klausner Affidavit, Exhibit C.

claims bar date for pre-filing claims was August 31, 2015, over one year ago. The Plan was sanctioned on June 2, 2016 and implemented on June 28, 2016, approximately five months ago. Since that time, two distributions have been made to creditors with proven claims, totaling a recovery of approximately 68% of the total amount of proven claims and being substantially all of the funds currently available for distribution to creditors.

35. At this late stage of the CCAA proceedings, the Court should only exercise its discretion to admit late claims sparingly and in exceptional circumstances. There is nothing exceptional about the Late Claims. To the contrary, they involve claimants who employed a cavalier and disinterested approach to the nominal steps they needed to take to prove their claims. Accordingly, there is nothing to justify the extreme remedy of admitting the Late Claims in the circumstances.

B) If the Late Claims are Admitted, the Late Claims should be Admitted *Nunc Pro Tunc* such that they are Subject to the Releases in the Plan and the Sanction Order

36. In the alternative, if this Court nevertheless finds that the Late Claims should be admitted, the Late Claims should only be admitted *nunc pro tunc* such that they are subject to the same terms and conditions as claims that were filed on a timely basis pursuant to the Claims Procedure Order.

37. As outlined above, Target Corporation made significant economic contributions to the CCAA proceedings and the Plan in reliance upon obtaining the releases provided for in the Plan. Target Corporation would not have sponsored the Plan on the terms to which it agreed without being able to rely on the finality and enforceability of the release and discharge of claims provided for in the Plan as approved by the Sanction Order.

38. If the Court permits the Late Claims to be filed, the Court must confirm that the Late Claims are subject to the releases contained in the Plan as approved by the Sanction Order. Doing otherwise would be tantamount to amending or modifying the Plan and varying the Sanction Order, an order which was not appealed and which can only be set aside or varied in very limited and stringent circumstances, such as where there was fraud in obtaining the order or a fundamental change in circumstances since the granting of the order.²⁵ None of these circumstances apply in this case.

PART VI ~ ORDER REQUESTED

39. For the foregoing reasons, Target Corporation respectfully submits that the Late Claims should not be admitted and that if this Court does admit them, they must be admitted *nunc pro tunc* such that they clearly and explicitly are bound by the releases contained in the Plan as approved by the Sanction Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of November, 2016.



Davies Ward Phillips & Vineberg LLP
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²⁵ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 59.06(2); *Re Muscletech Research & Development Inc.*, 2006 CarswellOnt 6230 at para.10 (S.C.J.); Target Corporation's BOA, Tab 2; *Verge Insurance Brokers Ltd. v. Sherk*, 2015 ONSC 4044 at paras. 53-57 and 72, citing *Monarch Construction Ltd. v. Buildevco Ltd.* (1998), 26 CPC (2d) 164 (Ont. C.A.) and *McCowan v. McCowan* (1995), 24 O.R. (3d) 707 (C.A.); Target Corporation's BOA, Tab 3.

SCHEDULE "A"

LIST OF AUTHORITIES

1. Claims Procedure Order dated June 11, 2015
2. *Re Blue Range Resource Corp.*, 2000 ABCA 285
3. *Re SemCanada Crude Co.*, 2012 ABQB 489
4. *Re Muscletech Research & Development Inc.*, 2006 CarswellOnt 6230 (S.C.J.)
5. *Verge Insurance Brokers Ltd. v. Sherk*, 2015 ONSC 4044

SCHEDULE "B"
STATUTORY PROVISIONS

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Setting Aside or Varying

59.06(2) A party who seeks to,

(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

(b) suspend the operation of an order;

(c) carry an order into operation; or

(d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed.

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Proceeding commenced at Toronto

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