

**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
KING STREET COMPANY INC., THE KING STREET HOSPITALITY GROUP INC.,
BONTA TRADING CO. INC., 2268218 ONTARIO INC., 1733667 ONTARIO LIMITED,
THE KING STREET FOOD COMPANY INC., THE KING STREET RESTAURANT
COMPANY INC., 2112047 ONTARIO LTD., JI YORKDALE INC., JI SQUARE ONE
INC., 1771669 ONTARIO INC., CXBO INC., 2608765 ONTARIO INC., 2272224 ONTARIO
INC., 2327729 ONTARIO INC., 2577053 ONTARIO INC., 2584858 ONTARIO INC.,
2621298 ONTARIO INC., 2641784 ONTARIO INC., and 26569669 ONTARIO INC.**

Applicants

**FACTUM OF THE APPLICANTS
(Returnable May 31, 2021)**

May 28, 2021

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PART I – OVERVIEW

1. The Applicants (collectively, the “**KSF Group**”) were granted protection under the *Companies' Creditors Arrangement Act*¹ (the “**CCAA**”) pursuant to an initial order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated November 6, 2020 (the “**Initial Order**”). Pursuant to the Initial Order, MNP Ltd. was appointed to act as Monitor of the KSF Group (the “**Monitor**”) in these proceedings (the “**CCAA Proceedings**”). The Initial Order was subsequently amended and restated on November 13, 2020.

2. On March 29, 2021, being the most recent appearance of the KSF Group before the Court in the CCAA Proceedings, the Court issued:²

¹ *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36 [CCAA]

² Tsebelis March 26 Affidavit para 6

(a) an Order (the “**Approval and Vesting Order**”), among other things:

(i) Approving a transaction (the “**Transaction**”) contemplated by an asset purchase agreement dated as of March 23, 2021 (the “**Credit Bid APA**”), between certain of the Applicants (the “**Vendors**”) and the Purchasers (as defined therein), being entities controlled by the agent of the KSF Group’s pre-filing senior secured and debtor-in-possession lenders (the “**DIP Lenders**”), Third Eye Capital Corporation (“**TECC**”); and

(ii) Upon closing of the Transaction, vesting in the Purchasers the Vendors’ rights, title and interests in and to the assets being purchased by the Purchasers pursuant to the Credit Bid APA free and clear of all Claims except for Permitted Encumbrances (as such terms are defined in the Approval and Vesting Order); and

(b) an Order (the “**CCAA Termination Order**”), among other things:

(i) Extending the stay of proceedings (the “**Stay**”) to no later than May 31, 2021 (the “**Current Stay Expiration Date**”);

(ii) Authorizing and approving the KSF Group entering into and borrowing an additional \$775,000 from the DIP Lenders under a third amendment to the commitment letter dated as of November 5, 2020, as amended by a first amendment dated November 12, 2020 and a second amendment dated as of February 12, 2021 (collectively, the “**DIP Loan Agreement**”); and

(iii) Terminating the CCAA Proceedings upon the filing by the Monitor of a Monitor’s certificate certifying that it has been advised in writing by the KSF Group that all

matters to be attended in the CCAA Proceedings have been completed (the “**Monitor’s Termination Certificate**”).

3. This factum is filed in connection with a motion by the KSF Group on May 31, 2021 for, among other things, the granting of an order (the “**Stay Extension Order**”) substantially in the form of the draft order attached at Tab 3 of the KSF Group’s Motion Record, among other things:

(a) extending the Stay to and including July 15, 2021 (the “**Proposed Stay Expiration Date**”);
and

(b) (i) approving the fourth amendment to the DIP Loan Agreement substantially in the form attached as Exhibit E to the Tsebelis May 26 Affidavit (as defined below) (the “**Fourth DIP Amendment**”), and (ii) authorizing an increase of \$500,000 in borrowings available to the KSF Group under the DIP Loan Agreement (the “**DIP Facility**”) bringing the total amount available to \$3,200,000 (the “**Maximum DIP Amount**”).

PART II – THE FACTS

4. The facts with respect to this motion are briefly recited herein and are more fully set out in the Affidavit of Peter Tsebelis sworn May 26, 2021 (the “**Tsebelis May 26 Affidavit**”).

5. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Tsebelis May 26 Affidavit.

A. ACTIVITIES SINCE THE APPROVAL AND VESTING ORDER AND CCAA TERMINATION ORDER WERE GRANTED

6. As noted above, the Approval and Vesting Order authorized the Vendors to enter into the Credit Bid APA with the Purchasers.³

7. Since the Approval and Vesting Order was issued, the Vendors have undertaken a number of activities in an effort to close the Transaction (collectively, the “**Transaction Matters**”) including assisting with discussions between the Purchasers and the KSF Group’s landlords in an attempt to obtain consensual assignments, amendments or new agreements with respect to the KSF Group’s existing leases (the “**Landlord Negotiations**”).⁴

8. At the time the Approval and Vesting Order was granted, it was the intention of the Vendors and the Purchasers that the Transaction would close⁵ and that the KSF Group would complete the administration of any post-closing transition items in accordance with the terms of the Credit Bid APA (collectively, the “**Remaining Matters**”) prior to the Current Stay Expiration Date.

9. Despite efforts to close the Transaction by the Current Stay Expiration Date, certain of the Landlord Negotiations remain ongoing at this point in time.⁶

10. The KSF Group anticipates that, in respect of those leases where Landlord Negotiations have not been concluded in the near term, the KSF Group will, in consultation with the Purchasers,

³ Tsebelis May 26 Affidavit para 8

⁴ Tsebelis May 26 Affidavit para 11

⁵ Tsebelis May 26 Affidavit para 10

⁶ Tsebelis May 26 Affidavit para 12

make a determination whether to disclaim or seek assignment orders in respect of such leases pursuant to section 11.3 of the CCAA⁷ prior to the Proposed Stay Expiration Date.⁸

11. The Vendors and the Purchasers remain committed to closing the Transaction, and have agreed to amend the Credit Bid APA in order to facilitate the extended outside date for closing.⁹

12. As evidence of the parties' commitment to complete the Transaction, and to coincide with the extension of the Stay being sought, the KSF Group has requested and TECC has agreed to increase the borrowings available to the KSF Group under the DIP Facility by \$500,000 in accordance with the terms of the Fourth DIP Amendment.¹⁰

PART III– ISSUES

13. The issues to be determined by the Court with respect to this motion, are whether this Court should grant the Stay Extension Order, *inter alia*;

(a) extending the Stay to the end of the Proposed Stay Expiration Date; and

(b) approving the Fourth DIP Amendment and authorizing an increase of \$500,000 in borrowings available to the KSF Group under the DIP Facility.

⁷ CCAA, *supra* note 1, at s 11.3

⁸ Tsebelis May 26 Affidavit para 15

⁹ Tsebelis May 26 Affidavit para 12

¹⁰ Tsebelis May 26 Affidavit para 7

PART IV – THE LAW

A. THE COURT SHOULD GRANT THE STAY EXTENSION ORDER

i. EXTENSION OF THE STAY

14. The CCAA Termination Order extended the Stay until May 31, 2021.¹¹ The KSF Group is now seeking a further extension of the Stay to the end of the Proposed Stay Expiration Date (being July 15, 2021).¹²

15. Under section 11.02 of the CCAA, the Court may grant an extension of the Stay if the Court is satisfied that, pursuant to subsection 11.02(3), (a) the KSF Group has acted, and is acting, in good faith and with due diligence; and (b) that circumstances exist that make the order appropriate.¹³

16. Extending the Stay in this case is reasonable and appropriate as the KSF Group has acted in good faith and with due diligence in the CCAA Proceedings to date. Since last appearing before this Court the KSF Group has, among other things:

(a) diligently worked on the Transaction Matters with the Purchasers and the Monitor;

(b) continued to operate a limited takeout and delivery business, in accordance with the provincial and municipal COVID-19 restrictions applicable in the Greater Toronto Area from time to time;

¹¹ Tsebelis May 26 Affidavit para 6

¹² Tsebelis May 26 Affidavit para 7

¹³ CCAA, *supra* note 1, at s 11.02

- (c) with the assistance of the Monitor and the DIP Lenders, prepared weekly cash flow forecasts and reporting required by the DIP Lenders;
- (d) administered payment to landlords and other suppliers for goods and services supplied during the post-filing period;
- (e) administered applications for, and reporting under, applicable subsidy programs provided by the federal government in response to the COVID-19 Pandemic, including the Canada Emergency Wage Subsidy (CEWS) and the Canada Emergency Rent Subsidy (CERS); and
- (f) continued to work on and refine a go-forward plan to be implemented by the Purchasers for the reopening of certain of the KSF Group's restaurants for indoor and outdoor dining by the Purchasers post closing of the Transaction, or earlier if public health laws permit.¹⁴

17. This Court has held that a Stay is appropriate where such an order would provide the debtor with breathing room while it continues to work towards a solution that would result in the business continuing as a going concern.¹⁵

18. An extension of the Stay to the Proposed Stay Extension Date will provide the KSF Group with the breathing room necessary to allow the KSF Group to close the Transaction and resolve the Remaining Matters.¹⁶ It is anticipated that the Transaction will result in the Purchasers continuing to operate all or part of the KSF Group's existing business as a going concern.¹⁷

¹⁴ Tsebelis May 26 Affidavit para 17

¹⁵ [Ted Leroy Trucking \[Century Services\] Ltd., Re.](#), 2010 SCC 60 [Century Services], at para 14

¹⁶ Tsebelis May 26 Affidavit para 13

¹⁷ Tsebelis May 26 Affidavit para 17(i)

19. It is the KSF Group's view that completing the Transaction is in the best interests of the KSF Group's stakeholders.¹⁸

20. Should this Court approve the increase to the DIP Facility contemplated by the Fourth DIP Amendment, the KSF Group will have the funds it requires to complete the Transaction and operate until the end of the Proposed Stay Extension Date.¹⁹

21. As such, no creditor will be materially prejudiced by extending the Stay until the Proposed Stay Extension Date.²⁰

22. For the reasons set out above, the KSF Group submits that the Stay should be extended until Proposed Stay Extension Date.

ii. INCREASE OF THE AMOUNT THE KSF GROUP IS AUTHORIZED TO BORROW UNDER THE DIP FACILITY

23. This Court has previously authorized and empowered the KSF Group to borrow the maximum amount of \$2,700,000 from the DIP Lenders pursuant to the DIP Loan Agreement.²¹

24. The KSF Group is seeking authorization under the Stay Extension Order to both enter into the Fourth DIP Amendment and increase the borrowings available to the KSF Group under the DIP Facility by \$500,000.²²

25. An increase in the KSF Group's ability to borrow under the DIP Facility will allow the KSF Group to, among other things, continue its operations while working in cooperation with the

¹⁸ Tsebelis May 26 Affidavit paras 16, 23

¹⁹ Fourth Report of the Monitor, MNP Ltd. dated May 27, 2021 [Monitor's Fourth Report], paras 26, 30

²⁰ Monitor's Fourth Report, para 30

²¹ Tsebelis May 26 Affidavit para 18

²² Tsebelis May 26 Affidavit para 7

Purchasers and Monitor towards the closing of the Transaction.²³ As noted above, it is the KSF Group's view that closing the Transaction is in the best interest of its stakeholders.²⁴

26. The KSF Group's need to borrow an additional \$500,000 under the DIP Facility as part of these CCAA Proceedings is consistent with and supported by the revised cash flow forecast, attached to the most recent report of the Monitor.²⁵

27. Accordingly, an increase in the authorized borrowings under the DIP Facility up to the Maximum DIP Amount is reasonable and appropriate in the circumstances.

PART II- ORDER SOUGHT

28. For the foregoing reasons, the KSF Group respectfully requests that this Court grant Orders substantially in the form of the draft Stay Extension Order, attached as Tab 3 to the KSF Group's Motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of May, 2021.



Thomas Gertner

²³ Tsebelis May 26 Affidavit paras 19, 23

²⁴ Tsebelis May 26 Affidavit paras 16, 23

²⁵ Tsebelis May 26 Affidavit para 21

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [*Ted Leroy Trucking \[Century Services\] Ltd., Re*](#), 2010 SCC 60

**SCHEDULE “B”
RELEVANT STATUTES**

Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36

General power of court

11 Despite anything in the [Bankruptcy and Insolvency Act](#) or the [Winding-up and Restructuring Act](#), if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances

Stays, etc. — other than initial application

11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

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Court File No: CV-20-00650945-00CL

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