

**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 February 12, 2021)**

February 10, 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**”).

2. The Initial Order was amended and restated on November 13, 2020 (the “**Amended and Restated Initial Order**”). On the same date, the KSF Group was granted an order (the “**Sale Process Approval Order**”), and together with the Amended and Restated Initial Order, the

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

“**November 13 Orders**”) approving a sales and investment solicitation process (the “**Sale Process**”) in connection with the marketing, and sale, refinancing or other investment in respect of all or part of the assets, property and undertakings of the KSF Group (collectively, the “**Property**”).

3. Pursuant to the Amended and Restated Initial Order, the stay of proceedings (the “**Stay**”) was extended to February 19, 2021.

4. This factum is filed in connection with a motion by the KSF Group on February 12, 2021 for, among other things the granting of an order (the “**Stay Extension and DIP Amendment Order**”) substantially in the form of the draft order attached at Tab 3 of the Applicants’ Motion Record, among other things:

(a) extending the Stay to and including April 2, 2021 (the “**Requested Stay Extension**”);

(b) (i) approving the second amendment to the DIP Term Sheet (as defined below) substantially in the form attached as Exhibit B to the Tsebelis February 5 Affidavit (as defined below) (the “**Second Amendment**”) in respect of a credit facility (the “**DIP Facility**”) from Third Eye Capital Corporation (“**TECC**”) and certain funds managed or advised by TECC or affiliated with TECC (collectively with TECC, the “**DIP Lenders**”), and (ii) authorizing an increase of \$525,000 in borrowings available to the KSF Group under the DIP Facility bringing the total amount available to \$1,925,000 (the “**Maximum DIP Amount**”); and

(c) approving the pre-filing report of the Monitor dated November 6, 2020 (the “**Pre-Filing Report of the Monitor**”) and the first report of the Monitor dated November 12, 2020 (the

“**First Report of the Monitor**”, and together with the Pre-Filing Report of the Monitor the “**Monitor’s Reports**”) and the actions, conduct and activities of the Monitor described therein.

PART II – THE FACTS

5. The facts with respect to this motion are briefly recited herein and are more fully set out in the Affidavit of Peter Tsebelis sworn February 5, 2021 (the “**Tsebelis February 5 Affidavit**”).

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

A. ACTIVITIES SINCE THE NOVEMBER 13 ORDERS WERE GRANTED

7. Since the November 13 Orders were issued by the Court, the KSF Group has acted in good faith and with due diligence.² During this period the KSF Group has, among other things:

(a) 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;

(b) with the assistance of the Monitor and the DIP Lenders, prepared weekly cash flow forecasts and reporting required by the DIP Lenders;

(c) responded to inquiries from various stakeholders, including the KSF Group’s employees and landlords, regarding the CCAA Proceedings and the Sale Process;

² Tsebelis February 5 Affidavit para 9

- (d) with the consent of the Monitor, issued disclaimer notices in respect of three (3) real property leases and one (1) equipment lease;
- (e) communicated and provided documents and other information to the Canada Revenue Agency in respect of its ongoing audits of the KSF Group's business;
- (f) worked with the Monitor and TECC in its capacity as administrative agent for and on behalf of the KSF Group's senior secured and DIP Lenders (collectively, the "**Lenders**"), as further described below, to implement the Sale Process, including responding to information and document enquiries from potential bidders;
- (g) with the Monitor and TECC, reviewed and considered all bids submitted by the Phase 1 Bid Deadline (as defined below) as part of the Sale Process;
- (h) continued to work on and refine a go-forward plan for the reopening of certain of the KSF Group's restaurants; and
- (i) assisted TECC in the development of a business plan relating to its credit bid purchase of the KSF Group's business, to be brought forward for approval at a later date, including crafting proposals to be presented to key go-forward stakeholders.³

B. IMPLEMENTATION AND TERMINATION OF THE SALE PROCESS

8. Under the Sale Process Approval Order, the KSF Group was authorized to implement the Sale Process.⁴ The Sale Process contemplated that the offer submission and evaluation stage of the Sale Process would be comprised of a maximum of two (2) phases. "**Phase 1**" being the

³ Tsebelis February 5 Affidavit para 9

⁴ Tsebelis February 5 Affidavit para 10

submission of letters of intent ("**LOIs**") from qualified bidders by no later than December 18, 2020 (the "**Phase 1 Bid Deadline**"), and "**Phase 2**" being the submission of formal binding offers from those parties that submitted LOIs and that have been invited by KSF Group, in consultation with the Monitor and TECC, to participate in Phase 2.⁵

9. The Sale Process provided that in the event that no Qualified LOIs (as defined in the Sale Process) were submitted by the Phase 1 Bid Deadline, or if none of the Qualified LOIs received provided for consideration in an amount satisfactory to TECC, the KSF Group was required to terminate the Sale Process.⁶

10. Following the Court's issuance of the Sale Process Approval Order, the KSF Group and the Monitor implemented Phase 1 of the Sale Process in accordance with the Sale Process Approval Order.⁷

11. On or before the Phase 1 Bid Deadline, six (6) parties submitted non-binding LOIs that constituted Qualified LOIs covering all aspects of the KSF Group's Property (the "**Received Qualified LOIs**").⁸ None of the Received Qualified LOIs provided for a purchase price sufficient to repay the Lenders in full and no offer, individually or collectively, provided for a purchase price satisfactory to the Lenders.⁹

12. On or about December 22, 2020, following a review of the Received Qualified LOIs with the Monitor and TECC, the KSF Group terminated the Sale Process.¹⁰

⁵ Tsebelis February 5 Affidavit para 11

⁶ Tsebelis February 5 Affidavit para 12

⁷ Tsebelis February 5 Affidavit para 13

⁸ Tsebelis February 5 Affidavit para 15

⁹ Tsebelis February 5 Affidavit para 16

¹⁰ Tsebelis February 5 Affidavit para 17

13. On the same date, TECC advised the KSF Group that it intended to submit a credit bid for a significant portion of the Property to be determined with the assistance of the KSF Group's management (the “**Credit Bid**”).¹¹

14. On December 23, 2020, counsel to the KSF Group informed the parties who submitted the Received Qualified LOIs that the KSF Group would not be proceeding with Phase 2 of the Sale Process.¹²

15. Following the termination of the Sale Process, the KSF Group immediately began working with TECC on the structure and terms of the Credit Bid sale transaction. The KSF Group continues to provide TECC with information TECC requires in order to finalize the documents required to evidence and implement the transaction, including an asset purchase agreement (the “**Credit Bid APA**”).¹³

16. Although not yet finalized, the transactions contemplated by the Credit Bid APA are intended to result in the continued operation of a significant portion of the KSF Group's restaurant portfolio (the “**Acquired Restaurants**”) and continued employment for certain of the KSF Group's employees, including certain employees employed at the Acquired Restaurants and in the KSF Group's back office.¹⁴

PART III– ISSUES

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

¹¹ Tsebelis February 5 Affidavit para 17

¹² Tsebelis February 5 Affidavit para 18

¹³ Tsebelis February 5 Affidavit para 19

¹⁴ Tsebelis February 5 Affidavit para 21

- (a) extending the Stay to the end of the Requested Stay Extension;
- (b) approving the Second Amendment and authorizing an increase of \$525,000 in borrowings available to the KSF Group under the DIP Facility to the Maximum DIP Amount; and
- (c) approving the Pre-filing Report of the Monitor and the First Report of the Monitor and the actions, conduct and activities of the Monitor described therein.

PART IV – THE LAW

A. THE COURT SHOULD GRANT THE STAY EXTENSION AND DIP AMENDMENT ORDER

i. EXTENSION OF THE STAY

18. On November 6, 2020, the Court granted an initial Stay to the KSF Group of ten (10) days, which expired on November 16, 2020. On November 13, 2020, the Court granted an extension of the Stay until February 19, 2021. The KSF Group is now seeking a further extension of the Stay to the end of the Requested Stay Extension.¹⁵

19. 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.¹⁶

¹⁵ Tsebelis February 5 Affidavit paras 6-8

¹⁶ CCAA, *supra* note 1, at s 11.02(2)

20. 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, including by implementing the Sale Process and working with TECC to negotiate the Credit Bid APA.¹⁷

21. 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.¹⁸

22. The Requested Stay Extension will provide the KSF Group with the breathing room necessary to allow the KSF Group to continue to negotiate and conclude the Credit Bid APA with TECC, which is intended to preserve the continued operations of the Acquired Restaurants and preserve employment for many of the KSF Group's employees.¹⁹

23. Should this Court approve the increase to the DIP Facility contemplated by the Second Amendment, the Applicants will have the funds available to meet their projected cash-flow requirements during the Requested Stay Extension.²⁰

24. As such, no creditor will be adversely impacted by the Requested Stay Extension.

25. For the reasons set out above, the KSF Group submits that the Stay should be extended until the date of the Requested Stay Extension.

¹⁷ Tsebelis February 5 Affidavit paras 13-21

¹⁸ *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 [Century Services], at para 14

¹⁹ Tsebelis February 5 Affidavit para 21

²⁰ Second Report of the Monitor MNP Ltd. dated February 9, 2021 [Monitor's Second Report], paras 28-31

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

26. Pursuant to the Amended and Restated Initial Order, the Court authorized and empowered the KSF Group to borrow the maximum amount of \$1,400,000 from the DIP Lenders pursuant to a commitment letter dated as of November 5, 2020 and accepted as of November 6, 2020 (the “**DIP Term Sheet**”) as amended by a first amendment dated as of November 12, 2020 (the “**First Amendment**”).

27. The KSF Group is seeking authorization under the Stay Extension and DIP Amendment Order to both enter into the Second Amendment and increase the borrowings available to the KSF Group under the DIP Facility by \$525,000.

28. The KSF Group’s current operations (limited to its takeout and delivery business) do not generate sufficient funds to cover the KSF Group’s day-to-day expenses including professional fees that are anticipated to accrue up until the end of the Requested Stay Extension in connection with these CCAA Proceedings, and therefore the DIP Facility is required to allow the KSF Group to service these costs.²¹

29. 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 TECC to finalize the terms of the Credit Bid APA, with the intention of returning prior to the expiry of the Requested Stay Extension period to seek approval thereof.²²

²¹ Monitor’s Second Report, paras 34-35; Tsebelis November 6 Affidavit para 40

²² Tsebelis February 5 Affidavit para 31

30. The KSF Group's need to borrow an additional \$525,000 under the DIP Facility as part of these CCAA Proceedings is consistent with and supported by the revised cash flow forecast, which has been developed in conjunction with and approved by the DIP Lenders and the Monitor.²³

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

iii. APPROVAL OF THE MONITOR'S REPORTS AND ACTIVITIES

32. The KSF Group is seeking the approval of the Pre-Filing Report of the Monitor and the First Report of the Monitor and the actions, conduct and activities of the Monitor as described therein.

33. Section 11 of the CCAA provides the Court with the authority to make any order it considers appropriate in the circumstances.²⁴ This Court has previously held that "there are good policy and practical reasons for the court to approve of Monitor's activities and provide protection for Monitors during the CCAA process."²⁵

34. The Monitor's activities, as described in the Pre-Filing Report of the Monitor and the First Report of the Monitor, should be approved. This Court has held that requests for such relief is "not unusual", and "routinely granted".²⁶

²³ Tsebelis February 5 Affidavit para 28

²⁴ CCAA, *supra* note 1, at s 11

²⁵ [Target Canada Co. \(Re\)](#), 2015 ONSC 7574 [*Target Canada*], at para 22

²⁶ [Target Canada](#), *supra* note 25, at para 2

PART II- ORDER SOUGHT

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of February, 2021.



Virginie Gauthier
Per: Katherine Yurkovich



Thomas Gertner

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [Target Canada Co. \(Re\)](#), 2015 ONSC 7574
2. [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.

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., ET AL.

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

Applicants

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Proceeding commenced at: TORONTO

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