

**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
(Transaction Approval Motion)
(Returnable March 29, 2021)**

March 25, 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 CCAA proceedings (the “**CCAA Proceedings**”). The Initial Order was subsequently amended and restated on November 13, 2020 (the “**Amended and Restated Initial Order**”).
2. This factum is filed in connection with a motion by the KSF Group on March 29, 2021 for:

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

- (a) an Order substantially in the form of the draft order attached at tab 3 of the KSF Group's motion record (the "**Approval and Vesting Order**"), among other things:
- a. approving the 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), which are entities controlled directly or indirectly by Third Eye Capital Corporation ("**TECC**");
 - b. upon Closing, vesting in the Purchasers the Vendors' rights, titles and interests in and to the assets being purchased by the Purchasers pursuant to the Credit Bid APA (the "**Purchased Assets**") free and clear of all Claims (as defined in the Approval and Vesting Order);
 - c. authorizing and directing the Monitor to hold the Cash Priority Payables Amount (as defined in the Credit Bid APA), and to administer the payment of Cash Priority Payables (as defined in the Credit Bid APA);
 - d. terminating the DIP Lenders' Charge (as defined in the Amended and Restated Initial Order) upon closing of the Credit Bid APA, with the remainder of the financing for these CCAA Proceedings to be provided by payment of the Wind Down Amount (as defined in the Credit Bid APA);
 - e. sealing Confidential Appendix "1" to the Third Report (the "**Confidential Supplement**") of the Monitor to be filed (the "**Third Report**"); and
- (b) an Order substantially in the form of the draft order attached at tab 4 of the KSF Group's motion record (the "**Termination Order**"), among other things:
- a. extending the stay of proceedings (the "**Stay**") to May 31, 2021 (the "**Outside Date**");
 - b. authorizing and approving the KSF Group entering into and borrowing an additional \$775,000 (\$2,700,000 in the aggregate so far in these CCAA Proceedings) from the DIP Lenders (as defined below) under a third amendment to

the DIP Loan Agreement (as defined below), to be executed (the “**Third DIP Amendment**”).

- c. terminating these CCAA Proceedings upon the filing by the Monitor of a Monitor’s certificate (the “**Monitor’s Discharge Certificate**”);
- d. terminating the Directors’ Charge and the Administration Charge (each as defined in the Amended and Restated Initial Order) upon the filing of the Monitor’s Discharge Certificate and subject to confirmation that the obligations secured thereby have been satisfied;
- e. approving the fees and disbursements of the Monitor and its counsel;
- f. approving the second report of the Monitor dated February 9, 2021 (the “**Second Report**”), the Third Report and the actions, conduct and activities of the Monitor described therein;
- g. upon termination of these CCAA Proceedings, discharging the Monitor and releasing the Monitor from any potential claims against it;
- h. authorizing and directing the Monitor to hold the Wind Down Amount (as defined in the Credit Bid APA) in trust, and to administer payments to parties entitled to receive amounts pursuant to the Wind Down Budget (as defined in the Credit Bid APA), from time to time; and
- i. authorizing the KSF Group to commence bankruptcy proceedings following the completion of these CCAA Proceedings, and directing that the estates of the KSF Group be procedurally consolidated.

PART II – THE FACTS

1. The facts with respect to this motion are briefly recited herein and are more fully set out in the Affidavit of Peter Tsebelis sworn March 23, 2021 (the “**Tsebelis March 23 Affidavit**”).

2. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Tsebelis March 23 Affidavit.

The Sale Process

3. The Sale Process Approval Order authorized the KSF Group to implement the Sale Process soliciting offers for a sale, refinancing or other investment transactions in respect of all or part of the Property.²

4. The Sale Process provided that in the event that no Qualified LOIs (as defined in the Sale Process) were submitted by December 18, 2020, or if none of the Qualified LOIs received provided for consideration in an amount satisfactory to TECC (in its capacity as administrative agent for the senior secured pre-filing lenders (the “**Lenders**”) and the DIP lenders (the “**DIP Lenders**”)), the KSF Group would terminate the Sale Process and not move on to Phase 2.³

5. On or about December 22, 2020, following a review of the Qualified LOIs received as part of Phase 1 of the Sale Process, TECC advised that it would not consent to continuing the Sale Process as none of the offers resulted in consideration satisfactory to TECC.⁴

6. The KSF Group terminated the Sale Process on or about December 23, 2020.⁵

The Transaction

7. TECC, on behalf of the Purchasers, and the KSF Group subsequently negotiated the Credit Bid APA. Following the closing of the Transaction, the Purchasers intend to reopen many of the KSF Group's restaurants when government restrictions are lifted, or the COVID-19 Pandemic has subsided (the “**Acquired Restaurants**”).⁶

8. The material terms of the Transaction include:⁷

² Tsebelis March 23 Affidavit para 12

³ Tsebelis March 23 Affidavit para 14

⁴ Tsebelis March 23 Affidavit para 15-16

⁵ Tsebelis March 23 Affidavit para 16

⁶ Tsebelis March 23 Affidavit paras 17-18

⁷ Tsebelis March 23 Affidavit para 19

TERM	DESCRIPTION
The Vendors	The Vendors are comprised of all of the entities that make up the KSF Group other than The King Street Hospitality Group Inc. (“ KSHGI ”) and Bonta Trading Co. Inc. (“ Bonta ”).
The Purchasers	The Purchasers are a number of newly incorporated entities that are controlled either directly or indirectly by TECC.
Purchase Price	The consideration for the Purchased Assets is: (i) the full and final release of eighty-three percent (83%) of all amounts owing by the Applicants pursuant to the pre-filing senior secured credit facilities with TECC (collectively, the “ TECC Debt ”); (ii) cash equal to the outstanding balance owing under the DIP Loan Agreement (the “ TECC DIP Debt ”), which, subject to this Court’s Order, will be re-distributed to TECC on closing; (iii) cash sufficient to satisfy Cash Priority Payables; and (iv) cash equal to the estimated Wind Down Amount.
Cash Priority Payables	The Cash Priority Payables under the Credit Bid APA are: (i) all payables owing by any Vendor for services rendered, goods provided, or otherwise related to the period, on or after the Filing Date; (ii) any portion of the Approved Supplier Payment Amount ranking <i>pari passu</i> with or in priority to the TECC Debt or TECC DIP Debt; and (iii) any amount required to be paid pursuant to Section 36(7) of the CCAA.
Employment Matters	At least five (5) days before the Closing Date, the Purchasers may make an offer of employment to any employee who is then employed by a Vendor (each employee who accepts the offer, a “ Transferred Employee ”).
Assumed Obligations	<p>The Purchasers will assume limited obligations of the Vendors, including: (i) obligations under Purchased Contracts that are ultimately assigned to the Purchasers; (ii) certain obligations with respect to Transferred Employees; and (iii) Assumed Priority Payables.</p> <p>The Assumed Priority Payables under the Credit Bid APA are: (a) all amounts owing (including all amounts accrued but not yet payable) by any of the Vendors for any period up to and including the Closing Date which rank <i>pari passu</i> or in priority to any of the TECC Debt and that are not Cash Priority</p>

TERM	DESCRIPTION
	Payables; (b) any amounts secured by the Administration Charge; and (c) any amounts secured by the Directors' Charge.
“As Is, Where Is”	The Transaction is on an “as is, where is” basis with limited representations and warranties being provided by the Vendors.
Conditions Precedent	The proposed Transaction is not conditional on any material condition other than the Approval and Vesting Order, which shall not have been stayed, varied, or vacated.

Extension of the Stay

9. The KSF Group is seeking an extension of the Stay until the Outside Date.

10. Since the KSF Group last appeared before this Court, the KSF Group has acted in good faith and with due diligence.⁸ Notably, during this period, the KSF Group has:

- (a) continued to operate a limited takeout and delivery business;
- (b) administered applications for, and reporting under, applicable subsidy programs;
- (c) vacated the premises municipally known as 75 Portland, Toronto, Ontario;
- (d) negotiated the Credit Bid APA with the Purchasers; and
- (e) entered into discussions with various stakeholders regarding the Transaction.⁹

11. An extension of the Stay until the Outside Date will provide the KSF Group with the time necessary to close the Transaction and resolve the Remaining Matters (as defined below).¹⁰

The Third DIP Amendment

⁸ Tsebelis March 23 Affidavit para 24

⁹ Tsebelis March 23 Affidavit para 24

¹⁰ Tsebelis March 23 Affidavit para 23; Monitor’s Third Report para 72

12. The Court previously authorized and empowered the KSF Group to borrow the maximum amount of \$1,925,000 from the DIP Lenders pursuant to a commitment letter dated as of November 5, 2020 (as amended, the “**DIP Loan Agreement**”).¹¹

13. In order to fund the KSF Group’s operations until the closing of the Transaction, the KSF Group will need additional funding.¹² TECC has agreed to advance an additional \$775,000 pursuant to the Third DIP Amendment, increasing the maximum availability under the DIP Loan Agreement to \$2,700,000.¹³

14. The Third DIP Amendment does not alter the terms of the DIP facility previously approved by the Court other than by (i) providing for an increase in the principal amount; (ii) providing an extension of the maturity date contemplated thereunder; and (iii) increasing the amount of the “Closing Fee” payable to TECC.¹⁴

15. The Third DIP Amendment is in the best interests of the KSF’s stakeholders as it will provide the KSF Group with the funds necessary to close the Transaction.¹⁵

Termination of the CCAA Proceedings

16. Upon the closing of the Transaction, the Vendors will have sold all of their assets.¹⁶ KSHGI and Bonta, the only members of the KSFP Group that are not Vendors, do not currently have any assets.¹⁷

17. Following closing, there may be remaining administrative and transition issues to be resolved in the CCAA Proceedings (collectively, the “**Remaining Matters**”).¹⁸

18. The KSF Group is seeking an order terminating the CCAA Proceedings on completion of the Remaining Matters and authorizing MNP to act as trustee in bankruptcy for the KSF Group (in such capacity, the “**Trustee**”) upon the Vendors filing assignments in bankruptcy.¹⁹

¹¹ Tsebelis March 23 Affidavit para 26

¹² Tsebelis March 23 Affidavit para 27

¹³ Tsebelis March 23 Affidavit para 28

¹⁴ Tsebelis March 23 Affidavit para 29

¹⁵ Tsebelis March 23 Affidavit para 30

¹⁶ Tsebelis March 23 Affidavit para 31

¹⁷ Tsebelis March 23 Affidavit para 32

¹⁸ Tsebelis March 23 Affidavit para 34

¹⁹ Tsebelis March 23 Affidavit para 35

Procedural Consolidation of Bankruptcy Proceedings

19. The Applicants will have no assets once the bankruptcy proceedings commence. As such, the KSF Group, TECC and the Monitor are seeking to minimize the cost of administering the various bankrupt estates by procedurally consolidating the bankruptcy estates.²⁰

Approval of Activities and Fees and Disbursements of the Monitor

20. The Monitor and counsel have submitted affidavits for the approval of their fees and disbursements in these CCAA Proceedings as well as their fees and disbursements to assist in the completion of the administration of the CCAA Proceedings, to be paid in accordance with the revised cash flow forecast attached to the Third Report.²¹

21. The KSF Group is further seeking approval of the Second Report and the Third Report, and the activities of the Monitor described therein.²²

PART III– ISSUES

22. The issues to be determined by the Court with respect to this motion, are whether:

- (a) this Court should grant the Approval and Vesting Order;
- (b) this Court should seal Confidential Appendix “1” to the Third Report; and
- (c) this Court should grant the relief contemplated by the Termination Order.

PART IV – THE LAW

A. THE COURT SHOULD GRANT THE APPROVAL AND VESTING ORDER

23. Section 36 of the CCAA provides the statutory authority for court approval of the sale of a debtor company’s assets outside of the ordinary course of business.²³ Courts have established that

²⁰ Tsebelis March 23 Affidavit para 38

²¹ Tsebelis March 23 Affidavit para 40; Monitor’s Third Report para 79

²² Tsebelis March 23 Affidavit para 41

²³ CCAA, *supra* note 1, at s 36

Section 36 permits the sale of all or substantially all of a debtor company's assets, despite the absence of a plan of compromise or arrangement.²⁴

24. Sub-section 36(3) of the CCAA enumerates the factors to be considered by the Court when deciding whether to approve a sale:

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.²⁵

25. This Court has previously held that the factors noted above are not exhaustive and overlap to an extent with the factors²⁶ articulated in the Ontario Court of Appeal decision of *Royal Bank of Canada v Soundair Corp.*:²⁷

(a) whether sufficient effort has been made to get the best price and the vendor has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.²⁸

²⁴ *Brainhunter Inc. (Re)*, 2009 CanLII 67659 (ON SC [Comm List]), at paras 12-16

²⁵ CCAA, *supra* note 1, at s 36(1)

²⁶ *Target Canada Co. (Re)*, 2015 ONSC 7574, at para 17

²⁷ *Royal Bank of Canada v Soundair Corp.*, 1991 CarswellOnt 205, [1991] OJ No 1137 [*Soundair*]

²⁸ *Royal Bank of Canada v Soundair Corp.*, 1991 CarswellOnt 205, [1991] OJ No 1137, at para 16

26. Furthermore, Courts have held that, in CCAA proceedings, where there is no indication of improvident action on the part of the debtor companies, the informed business judgement of the debtors and the opinion of the Monitor are entitled to deference from the Court.²⁹

27. In the context of the factors set out above, the KSF Group submits that the Transaction contemplated by the Credit Bid APA is reasonable and appropriate in the circumstances and should be approved by this Court.

28. The Sale Process was recommended by the Monitor and approved by the Court as part of the Sale Process Approval Order.³⁰ The Applicants, with the assistance of the Monitor, implemented and terminated the Sale Process in accordance with its terms.³¹

29. The Credit Bid APA was developed in consultation with the Lenders and DIP Lenders, and the parties to the APA have been in discussion with several stakeholders of the Applicants with regards to the Transaction.³²

30. The Transaction contemplated by the Credit Bid APA is in compliance with sub-sections 36(6) and 36(7) of the CCAA.³³

31. The Transaction will preserve employment for the Transferred Employees,³⁴ result in the continued operation by the Purchasers of the Acquired Restaurants³⁵ and the preservation of the KSF Group's brands, to the benefit of many of the KSF Group's stakeholders.³⁶ In addition, when the Acquired Restaurants re-open, they will provide employment to hundreds of workers in the hospitality industry.³⁷

32. Consideration for the Transaction, which includes a credit bid of an amount equal eighty-three percent (83%) of the outstanding aggregate balance owing under the TECC Debt at the commencement of the Closing Date as well as cash sufficient to satisfy the TECC DIP Debt, the Cash Priority Payables and the Wind Down Amount, is well in excess of the consideration

²⁹ *Target Canada Co. (Re)*, 2015 ONSC 7574 [*Target Canada*], at para 18

³⁰ Tsebelis March 23 Affidavit para 12

³¹ Tsebelis March 23 Affidavit paras 13-16

³² Tsebelis March 23 Affidavit para 17; Monitor's Third Report para 34

³³ Tsebelis March 23 Affidavit paras 19-21; Monitor's Third Report para 37(c)

³⁴ Tsebelis March 23 Affidavit para 21

³⁵ Tsebelis March 23 Affidavit para 18

³⁶ Tsebelis March 23 Affidavit para 21

³⁷ Tsebelis March 23 Affidavit para 21

provided in the Qualified LOIs received during the Sale Process.³⁸ In addition, certain Assumed Priority Payables constitute Permitted Encumbrances assumed by the Purchasers, preserving the secured interests of the applicable creditors pending the final determination of the quantum of such claims.

33. The Monitor is of the view that the Transaction (i) will result in a better realization for the KSF Group's creditors as compared with a liquidation scenario;³⁹ and (ii) is in the best interests of the KSF Group's stakeholders.⁴⁰

B. THIS COURT SHOULD SEAL THE CONFIDENTIAL SUPPLEMENT

34. Pursuant to section 137(2) of the *Courts of Justice Act*, this Court has the statutory jurisdiction to order that any document filed with the Court be treated as confidential, sealed and form no part of the public record.⁴¹

35. Judges sitting on the Commercial List have recognized that seeking a sealing order in the context of a sale approval motion is customary.⁴²

36. In *Sierra Club of Canada v. Canada (Minister of Finance)*,⁴³ Supreme Court Justice Iacobucci adopted the following test to determine when a sealing order should be made:

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

³⁸ Monitor's Third Report, Confidential Appendix "1"

³⁹ Monitor's Third Report para 37(e)

⁴⁰ Monitor's Third Report para 37(d)

⁴¹ *Courts of Justice Act*, R.S.O. 1990, c. C.43, S. 137(2)

⁴² *Ron Handelman Investments Ltd v Mass Properties Inc.* (2009), 55 CBR (5th) 271 (Ont SCJ [Commercial List]) at para 26

⁴³ *Sierra Club v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42 (S.C.C.) at para 53

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which, in this context, includes the public interest in open and accessible court proceedings.

37. The Confidential Supplement to the Monitor's Third Report contains a summary of the Received Qualified LOIs received as part of the Sale Process and the Applicants are requesting that the Confidential Supplement be sealed.⁴⁴

38. The disclosure of this information would be harmful to the KSF Group's stakeholders if the Transaction contemplated by the Credit Bid APA does not close. The KSF Group submits that keeping this information confidential will not have any deleterious effects. In any case, the salutary effects of sealing this information outweigh any potential deleterious effects given that, in the ordinary course, the terms of similar transactions likely would be kept strictly confidential by the vendors.

C. THE COURT SHOULD GRANT THE TERMINATION ORDER

i. Extension of the Stay to the Outside Date

39. Under section 11.02 of the CCAA, the Court may grant an extension of the Stay if the Court is satisfied that, pursuant to sub-section 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.⁴⁵

40. The KSF Group has acted in good faith and with due diligence in these CCAA Proceedings.⁴⁶

⁴⁴ Tsebelis March 23 Affidavit para 15; Monitor's Third Report 30

⁴⁵ CCAA, *supra* note 1, s 11.02(2)

⁴⁶ Tsebelis March 23 Affidavit para 24

41. No stakeholders will experience prejudice if this relief, together with the approval of the Third Amendment, is granted as the Applicants will have the funds they require to meet their obligations until the Outside Date.⁴⁷

42. The Court has previously 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.⁴⁸ The Stay will provide the KSF Group with the time necessary to close the Transaction.⁴⁹

ii. Approval of the Third DIP Amendment and increase of the amount the KSF Group is authorized to borrow under the DIP Facility

43. The Court has previously authorized and empowered the KSF Group to borrow the maximum amount of \$1,925,000 from the DIP Lenders pursuant to the DIP Loan Agreement.⁵⁰

44. The KSF Group is seeking authorization under the Termination Order to enter into the Third DIP Amendment and increase the maximum borrowings available to the KSF Group under the DIP Loan Agreement by \$775,000 (\$2,700,000 in the aggregate).

45. An increase in the KSF Group's ability to borrow under the DIP Loan Agreement will provide the KSF Group with the liquidity it requires to maintain operations and close the Transaction.⁵¹

46. The revised cash flow forecast, which has been developed in conjunction with and approved by the DIP Lenders and the Monitor, reflects this additional cash requirement.⁵²

iii. Termination of the Proceedings

47. The KSF Group seeks an order permitting the Termination of these CCAA Proceedings upon the filing of the Monitor's Discharge Certificate.

⁴⁷ Tsebelis March 23 Affidavit para 23; Monitor's Third Report para 72

⁴⁸ *Ted Leroy Trucking [Century Services] Ltd., Re.*, 2010 SCC 60 [Century Services], at para 14

⁴⁹ Tsebelis March 23 Affidavit para 23

⁵⁰ Tsebelis March 23 Affidavit para 26

⁵¹ Tsebelis March 23 Affidavit paras 23, 27

⁵² Tsebelis March 23 Affidavit para 27; Monitor's Third Report para 25

48. Pursuant to section 11 of the CCAA,⁵³ the Court has the jurisdiction to terminate the KSF CCAA Proceedings. Section 11 provides that the Court "...may, subject to the restrictions set out in this Act... make any order that it considers appropriate in the circumstances."⁵⁴

49. It is appropriate for the Court to order that these Proceedings be terminated subject to completion of the Remaining Matters, as upon the closing of the Transaction, the KSF Group will have no remaining assets or business⁵⁵ and will have completed a going concern restructuring of the Acquired Restaurants in accordance with the purpose of the CCAA.

iv. Approval of the Monitor's Activities, Fees and Disbursements

50. The KSF Group is seeking the approval of the Monitor's activities as outlined in the Second Report and the Third Report.

51. This Court has previously held that "there are good policy and practical reasons for the court to approve of a Monitor's activities and provide protection for Monitors during the CCAA process."⁵⁶

52. This Court has held that requests for such relief is "not unusual", and "routinely granted".⁵⁷

53. The Monitor has been of assistance to the KSF Group during the CCAA Proceedings.⁵⁸ There is no evidence on the record that the Monitor's actions, conduct or activities were not in accordance with any Orders issued by the Court to date or the CCAA more generally.

54. The KSF Group also seeks the Court's approval of the fees and disbursements of the Monitor and its counsel. This Court has held that in approving such fees and disbursements, the Court must consider whether the fees in question were "fair and reasonable in all of the circumstances", and that "the concern is ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process."⁵⁹

⁵³ CCAA, *supra* note 1, at s 11

⁵⁴ CCAA, *supra* note 1, at s 11

⁵⁵ Tsebelis March 23 Affidavit para 31

⁵⁶ [Target Canada Co. \(Re\)](#), 2015 ONSC 7574, at para 24

⁵⁷ [Target Canada Co. \(Re\)](#), 2015 ONSC 7574, at para 2

⁵⁸ Monitor's Third Report para 17

⁵⁹ [Re Nortel Networks Corporation et al](#), 2017 ONSC 673 [*Nortel Networks*], at para 13 citing [Winalta Inc., Re](#), 2011 ABQB 399 [*Winalta*], at para 30

55. The onus is on the Monitor to show that the fees in question were fair and reasonable in the circumstances.⁶⁰ In considering whether a Monitor's fees are fair and reasonable in the circumstances, Courts have consistently relied on the following non-exhaustive factors, developed under the jurisprudence relating to the passing of a receiver's account:⁶¹

- (a) the nature, extent and value of the assets;
- (b) the complications and difficulties encountered;
- (c) the degree of assistance provided by the debtor;
- (d) the time spent;
- (e) the Monitor's knowledge, experience and skill;
- (f) the diligence and thoroughness displayed;
- (g) the responsibilities assumed;
- (h) the results of the Monitor's efforts; and
- (i) the cost of comparable services when performed in a prudent and economical manner.⁶²

56. As outlined in the Third Report, the fees and disbursements of the Monitor and its counsel are reasonable in the circumstances for the following reasons:

- (a) the number of stakeholders involved in these CCAA Proceedings necessitated the Monitor spending a significant amount of time administering these CCAA Proceedings including maintaining consistent communication with certain of the KSF Group's stakeholders, and facilitating the Sale Process;⁶³
- (b) the Monitor and its counsel have been thorough and diligent in the preparation of all Reports and materials filed in connection with these CCAA Proceedings; and

⁶⁰ *Re Nortel Networks Corporation et al.*, 2017 ONSC 673, at para 13 citing *Winalta Inc., Re*, 2011 ABQB 399, at para 32

⁶¹ *Re Nortel Networks Corporation et al.*, 2017 ONSC 673, at para 13-15

⁶² *Re Nortel Networks Corporation et al.*, 2017 ONSC 673, at para 13-15 citing *Belyea v Federal Business Development Bank*, 1983 CanLII 4086 (NB CA), at para 9

⁶³ Monitor's Third Report para 17

- (c) the Monitor's fees and disbursements and its counsel's fees and disbursements are comparable with market rates for the provision of similar services by other accounting and law firms in the jurisdictions in which the Monitor and its counsel operate.⁶⁴

v. Discharge of the Monitor and Release of the Monitor from Potential Claims

57. The proposed Termination Order provides for the discharge of the Monitor from its duties effective as of the date of the filing of the Monitor's Discharge Certificate.

58. The Court has jurisdiction to grant an order discharging the Monitor on terms similar to those proposed in the Termination Order pursuant to section 11 of the CCAA,⁶⁵ referred to above.

59. In the context of a CCAA termination order, this Court has regularly granted the discharge of a Monitor and released a Monitor and its counsel on terms similar to those sought in the proposed Termination Order.⁶⁶

60. The KSF Group submits that it is appropriate for this Court to order that the Monitor be discharged from its duties effective as of the date of filing of the Monitor's Discharge Certificate as:

- (a) subject to the completion of the Transaction and the administration of any remaining activities contemplated in the Wind Down Budget, the Monitor will have completed its duties and obligations as set out in the Amended and Restated Initial Order;⁶⁷

⁶⁴ Monitor's Third Report para 80

⁶⁵ *Re JTI-Macdonald Corp.*, 2010 ONSC 4212, at para 19

⁶⁶ *Re James E. Wagner Cultivation Corporation et al.*, Order granted July 30, 2020, Court File No. CV-20-006390000-00CL (Ont. Sup. Ct. J. [Commercial List]); *Orionis Corporation v Ontario Graphite, Ltd.*, Order granted April 29, 2020, Court File No. CV-20-00634195-00CL (Ont. Sup. Ct. J. [Commercial List]); *Re SFP Canada Ltd.*, Order granted June 30, 2020, Court File No. CV-20-634980-00CL (Ont. Sup. Ct. J. [Commercial List])

⁶⁷ Monitor's Third Report para 62

- (b) there will be no further purpose or benefit to these CCAA Proceedings following the Closing of the Transaction and the completion of the Remaining Matters; and
 - (c) the Monitor supports the issuance of the Termination Order at this time.⁶⁸
- vi. The court should authorize the KSF group to commence bankruptcy proceedings and any bankruptcy proceedings should be procedurally consolidated**

61. The KSF Group is seeking the Court's authorization to commence bankruptcy proceedings and the procedural consolidation of such bankruptcy proceedings, if authorized.

62. Although neither the *Bankruptcy and Insolvency Act*⁶⁹ nor the *Bankruptcy and Insolvency Act General Rules*⁷⁰ specifically provide for the procedural consolidation of bankruptcy estates, the inherent jurisdiction of the court can permit such an order to be made.⁷¹ This Court has previously granted the procedural consolidation of bankrupt entities on terms similar to those sought in the proposed Termination Order.⁷²

63. As noted by this Court in *Ornge Global GP Inc., Re*,⁷³ in circumstances where procedural consolidation will provide for greater administrative efficiency by avoiding unnecessary duplication in the administration of the bankrupt estates, the Court possesses the inherent jurisdiction to grant such an order.⁷⁴

64. Furthermore, in *Electro Sonic Inc., Re*,⁷⁵ Justice Brown (as he was then), writing for this Court, observed that bankruptcy proceedings "operate subject to the general principle that the litigation process should secure the just, most expeditious and least expensive determination of every proceedings on its merits"⁷⁶ and that a practical application of that general principle "occurs

⁶⁸ Monitor's Third Report para 62

⁶⁹ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3

⁷⁰ *Bankruptcy and Insolvency Act General Rules*, CRC, c 368

⁷¹ *Ornge Global GP Inc. (Re)*, 2013 ONSC 4518, at para 15

⁷² *Re Golf Town Canada Holdings Inc. et al.*, Order granted on June 12, 2018, Court File No. 31-2384013, Estate No. 31-2384013 (Ont. Sup. Ct. j. [Commercial List])

⁷³ *Ornge Global GP Inc. (Re)*, 2013 ONSC 4518, at para 15

⁷⁴ *Ornge Global GP Inc. (Re)*, 2013 ONSC 4518, at paras 14-15

⁷⁵ *Electro Sonic Inc., Re*, 2014 ONSC 942

⁷⁶ *Electro Sonic Inc., Re*, 2014 ONSC 942, at para 4

when courts join together...closely related bankruptcy proceedings so that they can proceed and be managed together.”⁷⁷

65. In this case, procedural consolidation, if granted, will enable the Trustee to administer the estates as one, issue a combined notice of the first meeting of creditors, enable the first meeting of creditors to be conducted on a joint basis, utilize a consolidated proof of claim, and maintain a single consolidated bank account.⁷⁸ These efficiencies will have the result of significantly reducing the costs of the administration.⁷⁹

66. Furthermore, a procedural consolidation of the bankrupt estates of the KSF Group will not result in any prejudice to the KSF Group’s creditors as there will be no assets in any of the bankrupt estates.⁸⁰

PART II- ORDER SOUGHT

67. For the foregoing reasons, the KSF Group respectfully requests that this Court grant Orders substantially in the form of the draft Approval and Vesting Order and Termination Order, attached at Tabs 3 and 4, respectively, to the KSF Group’s Motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25 day of March, 2021.



Virginie Gauthier / Thomas Gertner

⁷⁷ [Electro Sonic Inc., Re](#), 2014 ONSC 942, at para 4

⁷⁸ Tsebelis March 23 Affidavit para 38; Monitor’s Third Report para 67

⁷⁹ Monitor’s Third Report para 69

⁸⁰ Tsebelis March 23 Affidavit para 38; Monitor’s Third Report para 66

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [*Belyea v Federal Business Development Bank*](#), 1983 CanLII 4086 (NB CA)
2. [*Brainhunter Inc. \(Re\)*](#), 2009 CanLII 67659 (ON SC [Comm List])
3. [*Electro Sonic Inc., Re*](#), 2014 ONSC 942 (ON SC [Comm List])
4. [*Nortel Networks Corporation \(Re\)*](#), 2009 CanLII 39492 (ON SC [Comm List])
5. [*Ornge Global GP Inc. \(Re\)*](#), 2013 ONSC 4518 (ON SC)
6. [*Re JTI-Macdonald Corp.*](#), 2010 ONSC 4212 (ON SC)
7. [*Ron Handelman Investments Ltd v Mass Properties Inc.*](#) (2009), 55 CBR (5th) 271 (ON SC [Comm List])
8. [*Royal Bank of Canada v Soundair Corp.*](#), 1991CarswellOnt 205, [1991] OJ No 1137
9. [*Target Canada Co. \(Re\)*](#), 2015 ONSC 7574 (ON SC)
10. [*Ted Leroy Trucking \[Century Services\] Ltd., Re*](#), 2010 SCC 60
11. [*Sierra Club v. Canada \(Minister of Finance\)*](#), [2002] SCJ No. 42 (SCC)
12. [*Winalta Inc., Re*](#), 2011 ABQB 399
13. [*Re Golf Town Canada Holdings Inc. et al.*](#), Order granted on June 12, 2018, Court File No. 31-2384013, Estate No. 31-2384013 (Ont. Sup. Ct. j. [Commercial List])
14. [*Re James E. Wagner Cultivation Corporation et al.*](#), Order granted July 30, 2020, Court File No. CV-20-006390000-00CL (Ont. Sup. Ct. J. [Commercial List]);
15. [*Orionis Corporation v Ontario Graphite, Ltd.*](#), Order granted April 29, 2020, Court File No. CV-20-00634195-00CL (Ont. Sup. Ct. J. [Commercial List]);
16. [*Re SFP Canada Ltd.*](#), Order granted June 30, 2020, Court File No. CV-20-634980-00CL (Ont. Sup. Ct. J. [Commercial List])

**SCHEDULE “B”
RELEVANT STATUTES**

Bankruptcy and Insolvency Act, RSC 985, c B-3

Referred to generally.

Bankruptcy and Insolvency General Rules, CRC, c 368

Referred to generally.

Companies’ Creditors Arrangement Act, RSC 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.

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.

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(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Courts of Justice Act , RSO 1990, c C.43

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at: TORONTO

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(Transaction Approval Motion)**

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