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File: 11440-1073174

August 20, 2018

VIA COURIER

The Honourable Justice Presiding in Chambers
Supreme Court of Nova Scotia
The Law Courts
1815 Upper Water Street
Halifax NS B3J 1S7

My Lord/My Lady:

Re: Wicker Emporium Limited (the "Applicant"), Hfx No. 475298
Motion for Approval of Sale of Assets – September 5, 2018, at 2 p.m.

We are counsel to the Applicant, which brings a motion for Court approval of the sale of assets outside the ordinary course of business, in accordance with s. 36 of the *Companies' Creditors Arrangement Act* ("*CCAA*"). The motion is scheduled to be heard before you at 2 p.m. on September 5, 2018.

Please accept the following as the submissions of the Applicant ahead of the hearing.

I. FACTS

The facts relevant to the present motion are set out in the Affidavit of Madan Mohan Kapahi sworn August 20, 2018, and filed herewith.

Briefly, the Applicant began as a small business at a single Halifax location in 1972. Over the next four decades, its founder, Madan Kapahi ("Mr. Kapahi"), grew Wicker Emporium into a highly successful, family-run furniture retailer selling to a loyal niche market. At its peak, the Applicant operated 23 stores in five provinces, in addition a Halifax warehouse, and an online store. Until earlier this year, the company employed approximately 150 people.

Due to a combination of sluggish sales of products at rural stores, a change in the retail furniture market toward more online shopping, and competition from larger box-type stores the company has not been profitable in recent years. By April of 2018, the Applicant had

more than $5 million in debt and was insolvent. It sought and was granted an Initial Order under the *CCAA* on April 18, 2018, and worked diligently in the following months to restructure, reduce overhead, increase revenue, and turn itself around.

Unfortunately, the Applicant's efforts to restructure have not been successful to date. Throughout the spring, the company was involved in a protracted dispute with one of its major shipping and logistics companies, Schenker of Canada Limited ("Schenker"), over the release of a number of shipping containers full of merchandise being held by Schenker at the Port of Halifax. This prevented special orders from reaching customers and inventory from reaching stores well into the summer. Sales have lagged behind initial forecasts.

Although it has disclaimed leases at and closed more than two-thirds of the stores it operated at the beginning of this proceeding, and liquidated the stock at those stores, the Applicant has been unable to meet cash flow projections since this proceeding was commenced. The company is fast running out of working capital and it is not in a position to obtain further cash injections. Mr. Kapahi has been sued by Schenker for $1 million on personal guarantees he granted in December 2017 and February 2018 in an effort to secure further services by that company and the release of containers it was holding at the Port of Halifax.

In accordance with the terms of the Order of Justice M. Heather Robinson dated June 14, 2018, MNP Ltd., the court-appointed Monitor, undertook a marketing process of the assets of the Applicant. By August 10, 2018 (the date by which offers were to be submitted), MNP had received just one offer to purchase the assets, from Artisan Direct Inc. ("ADI"). ADI's president is Raj Kapahi, the son of Mr. Kapahi, and a Director of the Applicant.

ADI's offer (the "APA") is for all the assets of the Applicant, including all inventory, equipment, good will, and intellectual property. In exchange, ADI has offered to:

1. Pay 50% of the landed cost value of inventory, except stale inventory, paid firstly by the assumption or pay out the Accord financing, with any balance due thereafter payable in cash on closing;

2. Assume all employee contracts for the Applicant's 30 – 35 remaining employees;

3. Pay employee wages accrued in the most recent pay period prior to the asset purchase;

4. Assume all remaining store leases;

5. Prepare and file with Canada Revenue Agency any outstanding payroll remittance forms, and pay to Canada Revenue Agency the amounts due for employee withholdings for the most recent pay period prior to the asset purchase closing date;

6. Prepare and file with Canada Revenue Agency any outstanding HST reports, and pay to Canada Revenue Agency amounts due for HST for the most recent remittance period prior to the asset purchase;

7. Pay to MNP 25 percent of amounts due in relation to this proceeding, and a promissory note to them for the balance of their fees and those of their counsel;

8. Issue a promissory note to the Applicant's legal counsel in relation to this proceeding; and

9. Assume two vehicle leases for which the Applicant is liable.

The total monetary value of this offer is estimated at $577,357.00. That value does not include the value to stakeholders in the retention of the remaining stores and employees.

We anticipate that the Monitor will be filing a report ahead of the September 5, 2018 hearing.

II. LAW & ARGUMENT

Pursuant to s. 36 of the *CCAA* **[TAB 1]**, a company that has received protection under that *Act* is prohibited from selling assets outside the ordinary course of business without prior approval of the Court. A Court considering a motion to approve such a sale (which motion must be brought on notice to creditors likely to be affected by the sale) is governed by *CCAA* s. 36(3), which states:

> 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;
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> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
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> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additionally, where a proposed sale of assets is to occur to a related person, a Court is further governed by *CCAA* s. 36(4):

> If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that
>
> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

"Related person" is defined at s. 36(5) to include an officer or director of a company or a person who is related to a director or officer of the company. ADI would be a "related person" to Wicker.

In *Re Target Canada Co.*, 2015 ONSC 2066 [**TAB 2**], Justice Morawetz granted a motion by the Applicant for approval of a sale of goods bearing Target logos, trademarks, and other proprietary elements to Target Corporation, a related company. In considering the requirements of s. 36, Justice Morawetz wrote (at para. 15):

> 15 I note that the factors listed in section 36(3) are not intended to be exhaustive, nor are they intended to be a formulaic check-list that must be followed in every sale transaction under the CCAA. Further, I also note that the factors overlap, to a certain degree, with the factors set out in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) ("*Soundair*"). The *Soundair* factors were applied in approving sale transactions under pre-amendment CCAA case law. Under section 36(4) of the CCAA, the Court must be satisfied, overall, that sufficient safeguards were adopted to ensure that a related party transaction is in the best interests of the stakeholders of the Applicants and that the risk to the estate associated with a related party transaction have been mitigated. [emphasis added]

In finding the proposed sale to the related party was in the best interest of the stakeholders of the Applicant, Justice Morawetz observed that the assets involved were of a unique nature that were unlikely to be of interest to other purchasers, that the Monitor had been involved throughout the transaction, and that only one other bid had been received for—some but not all of—the assets. Justice Morawetz also emphasized (at para. 21) that the obligations of the Applicant in relation to unpaid wages under *CCAA* s. 36(7) had been satisfied.

In the present case, the Applicant submits the offer from ADI meets the factors outlined in *CCAA* ss. 36(3). The Monitor approved the process leading to the proposed sale and its marketing process was reasonable in the circumstances, given the challenging financial situation of the Applicant and the need to solicit solid offers in a relatively short period. We

expect the Monitor will file a report stating its opinion that the sale would be more beneficial to creditors than any sale or disposition under bankruptcy or receivership.

In the Applicant's submission, the consideration for the assets is fair and reasonable, given the market value of the assets—particularly the Applicant's inventory and intellectual property—would be quite low in a bankruptcy. By discharging the Accord and CRA debts of the Applicant, the ADI offer will far exceed the return on those assets in a liquidation sale under a bankruptcy. In this regard, the sale will be more beneficial to the Applicant's creditors and other stakeholders.

For similar reasons, the Applicant says the factors under s. 36(4) are met under the ADI sale. Although the assets of the Applicant were marketed by the Monitor in good faith on the open market, no offers were received, other than that from the related ADI. As in the *Target* matter, the assets in this case are sufficiently unusual to be of little interest to other potential purchasers. The "Wicker Emporium" name and goodwill, together with its specialized inventory, are realistically only of value to someone interested in carrying on the business Mr. Kapahi founded more than 45 years ago. It is apparent only ADI is interested in doing so.

III. ORDER & RELIEF

For the foregoing reasons, the Applicant says this is an appropriate case for this Honourable Court to approve the sale of the assets of the Applicant to ADI in accordance with the terms of the offer as outlined in the APA.

All of which is respectfully submitted.

Yours respectfully,

BURCHELLS LLP

for D. Bruce Clarke, Q.C.

DBC/lst

TAB 1

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part III — General (ss. 19-43) [Heading added 2005, c. 47, s. 131.]
Obligations and Prohibitions [Heading added 2005, c. 47, s. 131.]

Most Recently Cited in: Industrial Properties Regina Limited v. Copper Sands Land Corp., 2018 SKCA 36, 2018 CarswellSask 252 | (Sask. C.A., May 23, 2018)

R.S.C. 1985, c. C-36, s. 36

s 36.

Currency

36.

36(1)Restriction on disposition of business assets

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

36(2)Notice to creditors

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.

36(3)Factors to be considered

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.

36(4)Additional factors — related persons

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

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

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

36(5)Related persons
For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

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

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

36(6)Assets may be disposed of free and clear
The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

36(7)Restriction — employers
The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Amendment History
2005, c. 47, s. 131; 2007, c. 36, s. 78; 2017, c. 26, s. 14

Currency
Federal English Statutes reflect amendments current to July 25, 2018
Federal English Regulations are current to Gazette Vol. 152:15 (July 25, 2018)

TAB 2

2015 ONSC 2066, 2015 CarswellOnt 5211, 251 A.C.W.S. (3d) 377, 30 C.B.R. (6th) 335

2015 ONSC 2066
Ontario Superior Court of Justice [Commercial List]

Target Canada Co., Re

2015 CarswellOnt 5211, 2015 ONSC 2066, 251 A.C.W.S. (3d) 377, 30 C.B.R. (6th) 335

In the Matter of the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, as Amended

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.

Morawetz R.S.J.

Heard: March 30, 2015
Judgment: April 2, 2015
Docket: CV-15-10832-00CL

Proceedings: full reasons to *Target Canada Co., Re* (2015), 2015 CarswellOnt 4745, Morawetz R.S.J. (Ont. S.C.J. [Commercial List])

Counsel: Shawn Irving, Robert Carson, for Applicants, 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
Jay Swartz, for Target Corporation
Harvey Chaiton, for Directors and Officers
Alan Mark, Melaney Wagner, for Monitor, Alvarez & Marsal Inc.
Lad Kucis (Agent), for Pharmacy Franchisee Associaton Canada

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Assets in issue consisted of certain goods bearing logos, trademarks and other proprietary elements — Applicants brought motion for approval of asset purchase agreement — Motion granted — Asset purchase agreement was approved and approval and vesting order was granted — Criteria for approval of purchased assets to related party was set out in ss. 36(3) and (4) of Companies' Creditors Arrangement Act — Applicants had established that price offered by related party, viewed in isolation, exceeded all three independent valuations of purchased assets obtained by applicants and monitor — In addition, related party would assume substantial costs associated with removing exterior signage on stores — Risk theoretically associated with related party transaction had been satisfactorily addressed through efforts of applicants and monitor to evaluate salability of purchased assets to unrelated party — Process was reasonable in light of unique assets involved — Monitor supported motion for approval of asset purchase agreement — Transaction was in best interests of stakeholders — Requirements of s. 36(7) of Act had been satisfied.

Table of Authorities

Cases considered by *Morawetz R.S.J.*:

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 36 — considered

s. 36(3) — considered

s. 36(4) — considered

s. 36(7) — considered

FULL REASONS to judgment reported at *Target Canada Co., Re* (2015), 2015 CarswellOnt 4745 (Ont. S.C.J. [Commercial List]), concerning motion for approval of asset purchase agreement.

***Morawetz R.S.J.*:**

1 The Applicants bring this motion for approval of the Asset Purchase Agreement (the "APA") among Target Canada Co. ("TCC"), Target Brands, Inc. ("Target Brands") and Target Corporation, and vesting TCC's right, title and interest in and to the Purchased Assets (as defined in the APA) in Target Corporation.

2 The requested relief was not opposed.

3 The Purchased Assets consist of certain goods bearing the Target logos, trademarks and other proprietary elements. The Applicants take the position that the Purchased Assets cannot be sold by the Agent in the Inventory Liquidation Process unless expressly designated by TCC, because of the rights of Target Brands (a subsidiary of Target Corporation) to control the use of the intellectual property (the "Target IP").

4 The criteria for approval of the Purchased Assets to Target Corporation, a related party, is set out in sections 36(3) and (4) of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (CCAA).

> **36(3) Factors to be considered** — In deciding whether to grant authorization, the court is to consider, among other things,
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> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
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> (b) whether the monitor approved the process leading to the proposed sale or disposition;
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> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
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> (d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

36(4) Additional Factors — related persons — If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

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

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

5 All of the Purchased Assets represent various categories of Target Branded items, such as shopping carts, shopping baskets and the exterior signage on TCC stores. The Purchased Assets are unique in that they incorporate logos, trademarks or other indicia of TCC or its affiliates.

6 Target Brands views the Purchased Assets as using or displaying IP that is proprietary to Target Brands. Target Brands has not agreed to allow the Purchased Assets to be sold by the Agent. The Applicants are of the view that Target Brands would also likely contest any sale of the Purchased Assets to a third party purchaser.

7 The record establishes that the Applicants requested bids for the Purchased Assets from the liquidation firms which applied to be selected as agent. By following this process, the Applicants submit they sought good faith offers by which TCC could sell the assets to an unrelated third party. Only one bidder included some of the items in its bid.

8 Separately from the auction process, Target Corporation submitted an offer to purchase a number of the assets.

9 The Applicants and the Monitor formed the view that if a third party purchaser for the items could be found, such purchaser would likely discount its price to take into account the impact of the IP. That impact included the cost to remove brand or other IP elements and/or the litigation risks associated with a potential challenge by Target Brands to any unauthorized use of its IP.

10 The Applicants and the Monitor submit that it would not be beneficial to stakeholders as a whole to incur additional costs in seeking to market these unique assets. Instead, the Applicants and the Monitor sought to establish objective benchmarks to ensure that the price offered by Target Corporation was reasonable and fair, and exceeded any third party offer that might be made.

11 The Applicants have established that the price offered by Target Corporation, viewed in isolation, exceeds all three independent valuations of the Purchased Assets obtained by the Applicants and the Monitor. In addition, Target Corporation will assume the substantial costs associated with removing the exterior signage on TCC stores.

12 TCC, Target Brands and Target Corporation entered into the APA as of March 23, 2015. Under the Agreement, Target Corporation has agreed to purchase the Purchased Assets for U.S. $2,215,020.

13 The Applicants are of the view that Target Corporation is effectively the only logical purchaser for the Purchased Assets due to their unique nature.

14 The Applicants submit that, taking into account the factors listed in section 36(3) of the CCAA, the test set out in section 36(4) of the CCAA, and the general interpretative principles underlying the CCAA, the Court should grant the approval and vesting order. Further, the Applicants submit that in the absence of any indication that the Applicants have

acted improvidently, the informed business judgment of the Applicants — which is supported by the advice and the consent of the Monitor, that the APA is in the best interests of the Applicants and their stakeholders and is entitled to deference by the Court.

15 I note that the factors listed in section 36(3) are not intended to be exhaustive, nor are they intended to be a formulaic check-list that must be followed in every sale transaction under the CCAA. Further, I also note that the factors overlap, to a certain degree, with the factors set out in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) ("*Soundair*"). The *Soundair* factors were applied in approving sale transactions under pre-amendment CCAA case law. Under section 36(4) of the CCAA, the Court must be satisfied, overall, that sufficient safeguards were adopted to ensure that a related party transaction is in the best interests of the stakeholders of the Applicants and that the risk to the estate associated with a related party transaction have been mitigated.

16 I am satisfied that the risk theoretically associated with a related party transaction has been satisfactorily addressed through the efforts of the Applicants and the Monitor to evaluate the salability of the Purchased Assets to an unrelated party.

17 I am also satisfied that the process was reasonable in light of the unique assets involved. Whether or not a legal challenge by Target Brands would ultimately be successful, the litigation risks would, in my view, be expected to materially affect the value of the Purchased Assets to an unrelated third party. Further, the uniqueness of the Purchased Assets makes Target Corporation the only realistic purchaser. Only Hilco Global ("Hilco") submitted a bid with respect to some, but not all, of the assets included in the Initial Offer. None of the remaining bidders elected to submit an offer. Given that only one of the liquidation firms submitted a bid, the Applicants and the Monitor considered whether the proposed sale to Target Corporation was fair and reasonable. They came to the conclusion that the likely price to be obtained by an unrelated third party did not support the sale of the Purchased Assets to an unrelated third party.

18 As required by section 36 of the CCAA, the Monitor has been involved throughout the proposed transaction. The Monitor's Seventh Report comments at length on the transaction, and specifically whether it would be fair and reasonable to accept the offer from Target Corporation. The Monitor supports the conclusion that the purchase price offered by Target Corporation far exceeds the estimated liquidation values obtained. The Monitor is of the opinion that the APA benefits the creditors of the Applicants. The Monitor supports the motion for approval of the APA.

19 I am satisfied that the transaction is in the best interests of stakeholders. The transaction does provide some enhanced economic value to the estate. Further, the APA Agreement allows the Monitor, TCC and Target Corporation to agree upon the timetable for delivery of the Purchased Assets. This flexibility is of assistance to TCC and its Inventory Liquidation Process. In addition, there are no fees or commission payable on the transaction and the Agreement does provide certain guaranteed value to TCC.

20 The Applicants submit that all of the other statutory requirements for obtaining relief under section 36 have been satisfied. In particular, no parties have registered security interests against the Purchased Assets.

21 I am also satisfied that the requirements of section 36(7) have been satisfied. This section provides a degree of protection to employees and former employees for unpaid wages the employees would have been entitled to receive under the *Bankruptcy and Insolvency Act*, in addition to amounts that are owing for post-filing services to a debtor company. I also accept the Applicants' submissions that because they have been paying employees for all post-filing services and the Employee Trust will satisfy claims arising from any early termination of eligible employees, the requirements of section 36(7) have been satisfied.

22 For the foregoing reasons, the Asset Purchase Agreement is approved and the Approval and Vesting Order is granted.

Order accordingly.