

Court File No. 32-2274873  
Estate File No. 32-2274873

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(IN BANKRUPTCY AND INSOLVENCY)**



THE HONOURABLE )

FRIDAY, THE 4<sup>th</sup> DAY

)

JUSTICE *MESBUR* )

OF AUGUST, 2017

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A  
PROPOSAL OF HEAVEN FRESH CANADA INC.**

**ORDER**

**(Approval of DIP, SISP, Stay Extension  
returnable August 4, 2017)**

**THIS MOTION**, made by the Applicant, Heaven Fresh Canada Inc. ("**Heaven Fresh**"), pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") for approval of certain interim financing, a Sale and Investor Solicitation Process and for an extension of the automatic stay period in respect of the Notice of Intention to Make a Proposal herein, was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the Notion of Motion, the Affidavit of Imran Bashir, sworn July 27, 2017, and the exhibits attached hereto (the "**Bashir Affidavit**"), the First Report of MNP Ltd., in its capacity as proposal trustee (the "**Proposal Trustee**") of Heaven Fresh dated July 31, 2017 (the "**First Report**"), and on being advised that the secured creditors who are likely to be

affected by the charges created herein were provided notice of the within motion, and on hearing submissions of counsel for Heaven Fresh, and submissions of the Proposal Trustee, no one appearing for any other person on the Service List, although duly served as it appears from the Affidavit of Service of Elaine Persaud sworn July 31, 2017, filed,

## **SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and Motion Record in respect of this Motion is hereby abridged and service is validated such that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the “**Protocol**”) is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which appears on the Commercial List website at the following link: <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/>) shall be valid and effective service. This Order shall constitute an order for substituted service pursuant to Rule 16.04 of the *Rules of Civil Procedure* (the “**Rules**”). Subject to Rule 3.01(d) of the *Rules* and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission.

3. **THIS COURT ORDERS** that the E-Service List Keeper (as defined in the Protocol) for the purpose of this proceeding shall be the Proposal Trustee.

## **DIP FINANCING**

4. **THIS COURT ORDERS** that Heaven Fresh is hereby authorized and empowered to obtain and borrow under an interim financing facility (the “**DIP Facility**”) granted by Danby

Products Limited (in such capacity, the “**DIP Lender**”) to be used for the purposes described in the interim financing agreement attached as Exhibit “K” to the Bashir Affidavit (the “**DIP Agreement**”), provided that the total borrowings under the DIP Facility shall not exceed \$100,000.00 as specified in the DIP Agreement, unless permitted by further Order of this Court.

5. **THIS COURT ORDERS** that the DIP Facility shall be on the terms and subject to the conditions set forth in the DIP Agreement.

6. **THIS COURT ORDERS** that Heaven Fresh is authorized and empowered to execute and deliver such other documents as may be contemplated by the DIP Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and Heaven Fresh is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Agreement as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

7. **THIS COURT ORDERS** that the DIP Lender shall be entitled to the benefit of and is hereby granted a super-priority charge (the “**DIP Charge**”), as more particularly set out below, which shall not exceed an aggregate amount of \$100,000.00, on Heaven Fresh’s current and future properties, assets and undertakings of every nature and kind whatsoever and wherever situated, including all proceeds thereof (collectively, the “**Property**”). The DIP Charge shall not secure any obligation that exists before this Order is made.

8. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order or the *BIA*:

- (a) upon the occurrence of an event of default under the DIP Agreement, the DIP Lender, upon three (3) business days' notice to Heaven Fresh and to the Proposal Trustee, may exercise any and all of its rights and remedies against Heaven Fresh or the Property under or pursuant to the DIP Agreement, and the DIP Charge, including, without limitation, to cease making advances to Heaven Fresh, and exercise any and all of its rights and remedies against Heaven Fresh and the Property under or pursuant to the DIP Agreement and the DIP Charge, including without limitation, set off and / or consolidate any amounts owing by the DIP Lender to Heaven Fresh against the obligations of Heaven Fresh to the DIP Lender under the DIP Agreement, or the DIP Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against Heaven Fresh and for the appointment of a trustee in bankruptcy of Heaven Fresh; and,
- (b) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of Heaven Fresh or the Property.

9. **THIS COURT ORDERS AND DECLARES** that that the DIP Lender shall be treated as an unaffected creditor in any proposal filed by Heaven Fresh under the *BIA* with respect to any advances made pursuant to the DIP Agreement.

10. **THIS COURT ORDERS** that: (a) pending expiry of the time for filing a notice of appeal or application for leave to appeal in respect of this Order and the disposition of any

motions to review, rescind or vary this Order, applications for leave to appeal or appeals from this Order (collectively, “**Challenges**”), Heaven Fresh is authorized to borrow funds under the DIP Facility in accordance with the DIP Agreement; (b) irrespective of the disposition of any Challenges, the DIP Lender shall have the benefit of the DIP Charge and all other provisions of this Order in respect of all amounts so advanced; and (c) this Order is subject to provisional execution to the extent necessary to give effect to the foregoing.

### **SUPER-PRIORITY OF THE DIP CHARGE**

11. **THIS COURT ORDERS** that the filing, registration or perfection of the DIP Charge shall not be required, and that the DIP Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the DIP Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

12. **THIS COURT ORDERS** that the DIP Charge shall constitute a charge on the Property and the DIP Charge shall rank in priority to all other security interests, trusts, liens, charges and encumbrances and claims of secured creditors, statutory or otherwise (collectively, “**Encumbrances**”), in favour of any individual, firm, corporation, governmental body or agency (except statutory deemed trusts that, at law, rank in priority to all other charges), or any other entities (all of the foregoing, collectively being “**Persons**” and each being a “**Person**”).

13. **THIS COURT ORDERS** that, except as otherwise expressly provided for herein or as may be approved by this Court, Heaven Fresh shall not grant any Encumbrances over any Property that ranks in priority to, or *pari passu* with, the DIP Charge, unless Heaven Fresh also

obtains the prior written consent of the Proposal Trustee and the DIP Lender, or further Order of this Court.

14. **THIS COURT ORDERS** that the DIP Charge and the DIP Agreement shall not be rendered invalid or unenforceable, and the rights and remedies of the DIP Lender entitled to the benefit of the DIP Charge and/or the DIP Lender thereunder shall not otherwise be limited or impaired in any way by: (i) the pendency of these proceedings and the declaration of insolvency of Heaven Fresh; (ii) any application(s) for bankruptcy order(s) issued pursuant to the *BIA*, or any bankruptcy order made pursuant to such applications; (iii) the filing or deemed filing of any assignments for the general benefit of creditors made pursuant to the *BIA*; (iv) the provisions of any federal or provincial statutes; or (v) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an “**Agreement**”) which bind Heaven Fresh, and notwithstanding any provision to the contrary in any Agreement:

- (a) neither the creation of the DIP Charge, nor the execution, delivery, or performance of the DIP Agreement, shall create or be deemed to constitute a breach by Heaven Fresh of any Agreement to which it is a party;
- (b) the DIP Lender shall not have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from Heaven Fresh entering into the DIP Agreement, or the creation of the DIP Charge; and,
- (c) the payments made by Heaven Fresh pursuant to this Order, or the DIP Agreement, and the granting of the DIP Charge, do not and will not constitute

preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

### **SALE AND INVESTOR SOLICITATION PROCESS**

15. **THIS COURT ORDERS** that the Sale and Investor Solicitation Process (the “SISP”) as set out in Exhibit “L” to the Bashir Affidavit and attached as Schedule A hereto, be and hereby is approved.

16. **THIS COURT ORDERS** that Heaven Fresh and the Proposal Trustee be and are hereby authorized and empowered to take such steps as are necessary or desirable to carry out and perform their obligations under the SISP, provided that any definitive agreement to be executed by Heaven Fresh in respect of the sale of all or part of the Property shall require further approval of the Court.

### **EXTENSION OF PROPOSAL PERIOD**

17. **THIS COURT ORDERS** that, pursuant to subsection 50.4(9) of the *BIA*, the time for filing a proposal with the Official Receiver in the proceedings of Heaven Fresh, including the stay of proceedings, is hereby extended to and including October 4, 2017.

### **GENERAL**

18. **THIS COURT ORDERS** that both Heaven Fresh and the Proposal Trustee shall be at liberty, and are authorized and empowered, to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Proposal Trustee is authorized and empowered

to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in any jurisdiction outside Canada.





## SCHEDULE "A"

### SALE PROCESS

1. Commencement of Sale Process. Within five (5) Business days of an Order being issued by the Ontario Superior Court of Justice [Commercial List] (the "**Court**") (the "**Sales Process Order**") approving and authorizing, inter alia, the marketing and sale process for all or part of the business and assets (the "**Property**") of Heaven Fresh Canada Inc. (the "**Company**") (the "**Sale Process**"), the Company shall commence the Sale Process (the "**Commencement Date**")
2. Contacting Interest Parties. Commencing on the Commencement Date (a) the Proposal Trustee shall, on behalf of the Company, contact such initial parties previously identified by the Company as potential purchasers of the business and/or assets of the Company (or known to have expressed such an interest) and advise such parties of the opportunity to acquire the business and/or assets (the "**Opportunity**"); and, (b) distribute "teaser" documentation to other parties identified as potentially interested parties with respect to the Opportunity.
3. Advertisement. Within five (5) Business Days of the Commencement Date, the Proposal Trustee shall have an advertisement of the Opportunity published in The Globe and Mail (National Edition), and may, but not required, further advertise the Opportunity in such other industry and trade publications or media sources as determined appropriate by the Company, in consultation with the Proposal Trustee.
4. Due Diligence. Commencing on the Commencement Date, the Proposal Trustee shall make available to prospective purchasers (collectively, the "**Prospective Purchasers**"), upon receipt of an executed confidentiality agreement and non-disclosure agreement, in the prescribed form, from a Prospective Purchaser, (a) a confidential information memorandum, prepared by the Company with the assistance of the Proposal Trustee, describing the Property and Opportunity in sufficient detail as is reasonably required by Prospective Purchasers to consider submitting an offer for the Property and facilitate the conduct of due diligence by the Prospective Purchasers; and, if necessary, (b) access to an electronic data room, created and maintained by the Proposal Trustee on behalf the Company, containing documents and information pertaining to the Opportunity.
5. Offer Deadline. Any offers to purchase the Property must be submitted in writing to and received by the Company care of the Proposal Trustee at 111 Richmond Street West, Suite 300, Toronto, ON, M5H 2G4, attention: Sheldon Title, by no later than 5:00 pm (Toronto time) on thirtieth (30<sup>th</sup>) day following the Commencement Date (the "**Offer Deadline**"). Should the Offer Deadline not fall on a Business Day, it will be extended to the next Business Day.
6. Qualifying Offers. The Company, in consultation with the Proposal Trustee, shall determine whether any offers are "Qualifying Offers". Qualifying Offers must, among other things, meet the following minimum criteria:
  - (a) the offer must be for a purchase price that the Company, in consultation with the Proposal Trustee, would accept (subject to such further negotiation as may take place in accordance with this sales process);

## SCHEDULE "A"

- (b) the offer must be accompanied by a deposit in the form of certified cheque or bank draft payable to the Proposal Trustee in Trust which is equal to at least fifteen (15%) percent of the aggregate purchase price payable under the offer;
  - (c) the offer must be irrevocable and open for acceptance for fifteen (15) Business Days;
  - (d) the offer must not contain any contingency relating to due diligence or financing or any other material conditions precedent to the offeror's obligation to complete the transaction;
  - (e) the offer must contain written evidence satisfactory to the Company of the ability to consummate the transaction; and
  - (f) the offer must be on such terms and conditions as are typical in the context of sales in the context of restructuring and insolvency proceedings, which terms shall include without limitation: (i) the sale of the Property on an "as is, where is" basis, without any representations, warranties or conditions made or granted in connection therewith; (ii) that the completion of the transaction is conditional on the granting of an approval and vesting Order by the Court (the "**Approval and Vesting Order**"); and, (iii) a closing of the transaction to occur within three (3) Business Days of the Approval and Vesting Order being issued by the Court.
7. Negotiation of Qualifying Offers. The Proposal Trustee may, in consultation with the Company, enter into negotiations on the Company's behalf with the offerors in respect of one or more of the Qualifying Offers in an effort to ascertain the highest and best offer. Additionally, it is open to the Company, in consultation with the Proposal Trustee, to elect not to accept any of the Qualifying Offers, whether before or after negotiation of the same.
8. Winning Offer. Within five (5) Business Days of the Offer Deadline, the Company shall, in consultation with the Proposal Trustee, determine the highest and best offer with respect to the Property (the "**Winning Offer**"), at which point the Company shall proceed to enter into a definitive agreement of purchase and sale in connection therewith (the "**Sale Agreement**"), subject to Court approval.
9. Court Approval of the Winning Offer. Within three (3) Business Days following the fully execution of Sale Agreement, the Company or the Proposal Trustee will direct its counsel to set a Court date for a motion for the approval of the Winning Offer and the Sale Agreement, and an approval and vesting order in respect of the same.
10. Return of Deposits. All deposits received (except such deposit forming part of the Winning Offer) shall be held by the Proposal Trustee in Trust until the execution of the Sale Agreement and, thereafter, returned to the respective Prospective Purchasers thereafter. The deposit forming part of the Winning Offer shall be dealt with in accordance with the Sale Agreement.

Modifications. Subject to the Sales Process Order or other order of the Court, the Company, in consultation with the Proposal Trustee, shall have the right to adopt such other rules for the Sale Process, that, in its sole discretion, will better promote the goals of the Sale Process.

Court File No. 32-2274873  
Estate File No. 32-2274873

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(IN BANKRUPTCY AND INSOLVENCY)**

Proceeding Commenced at **Toronto**

**ORDER**

(Approval of DIP, SISP, Stay Extension returnable August 4, 2017)

**BLANEY McMURTRY LLP**  
Barristers and Solicitors  
2 Queen Street East, Suite 1500  
Toronto, Ontario M5C 3G5

**Mervyn D. Abramowitz (LSUC #28325R)**  
Tel: (416) 597-4887  
Fax: (416) 593-3396  
Email: [mabramowitz@blaney.com](mailto:mabramowitz@blaney.com)

Lawyers for Heaven Fresh Canada Inc.