



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

ENDORSEMENT

COURT FILE NO.: CV-23-00711935-00CL DATE: January 29, 2024

NO. ON LIST: 7

TITLE OF PROCEEDING: **TREES CORPORATION et al v. THE ATTORNEY GENERAL OF CANADA**

BEFORE: **JUSTICE OSBORNE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
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For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info

For Other:

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Dylan Chochla	Counsel for One Plant (Retail) Corp., the proposed DIP Lender	dchochla@fasken.com
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ENDORSEMENT OF JUSTICE OSBORNE:

[1] The Applicants seek various relief today including:

- a. an order amending and restating the Amended and Restated Initial Order dated January 2, 2024, to
 - i. amend the DIP Lender's name from One Plant Retail Corp. to One Plant (Retail) Corp.;
 - ii. authorizing approving the Amended and Restated DIP Term Sheet increasing the principal amount available to \$1,560,000;
 - iii. increasing the DIP Lender's Charge to the maximum amount of \$1,850,000;
 - iv. extending the stay of proceedings from February 29 to and including April 12, 2024;
 - v. authorizing payment by the Applicants of the professional fees and disbursements of the previous Monitor, EY, and its counsel, Torys; and
 - vi. authorizing the Applicants to take no further steps in relation to the Securities Filings and postponing the requirement for any future AGM during the CCAA Proceedings and extending the time to call and hold such AGM until after the conclusion of the CCAA Proceedings; and
- b. an order approving the proposed SISP and related relief, including authority for the Applicants and the Monitor to immediately begin the process, and including approval of a proposed Stalking Horse Agreement between the Applicants and the DIP Lender, solely for the purpose of constituting the Stalking Horse Bid.

[2] Defined terms in this Endorsement have the meaning given to them in the motion materials and/or the First Report of FTI in its capacity as Monitor dated January 24, 2024, unless otherwise stated.

[3] The Applicants rely on the affidavit of Jeffrey Holmgren sworn January 23, 2024 together with exhibits thereto, along with the First Report of the Monitor.

[4] The Affidavit of Service filed reflects that the motion materials were served on the Service List on January 23, 2024.

[5] Save as noted below, none of the relief sought today by the Applicants is opposed, and all of the relief is strongly recommended by the Monitor and is supported by the DIP Lender and proposed Stalking Horse Bidder.

[6] The Respondents CJ Marketing Ltd. & Arthur Minh Tri Nguyen-Cao appeared today through counsel to oppose the one term of the proposed DIP Term Sheet being the commitment fee of \$40,000, and the one term of the proposed SISP and Stalking Horse Bid Agreement that provides for a break fee of \$60,000. Other than those two terms, these parties do not oppose any of the relief sought. These parties did not file any responding materials but made submissions today through their counsel. Indeed, the fact that they were opposing even these two terms of the relief being sought was confirmed to the Applicants and the Monitor only earlier this morning.

- [7] I have not set out in this Endorsement the full factual background for, and context of, the motion before me today. That is fully set out in the motion materials and summarized in the First Report of the Monitor. I have reviewed all of those materials.
- [8] First, the proposed amendment to the First ARIO to correct the name of the DIP Lender is unopposed and is clerical in nature. No party suggests that there is any substantive substitution of the counterparty or that the name change/correction has any effect on this proceeding or steps within it. Rather, it simply corrects the typographical error in accordance with the Amending and Rectification Agreement entered into by the parties. That amendment is approved.
- [9] Second, I am satisfied that the DIP Term Sheet should be amended to increase the maximum principal amount available under the DIP Facility to \$1,560,000 and that the DIP Lender's Charge should be correspondingly increased to \$1,850,000 in respect of all outstanding principal amounts, plus interest, fees and costs.
- [10] The Revised Cash Flow Forecast is clear that the Applicants will lack sufficient liquidity to continue to fund operations through the requested stay extension period absent the Amended DIP Facility.
- [11] I observe that the original terms of the DIP Term Sheet provided for up to \$800,000 of funding. Those original terms will remain the same with respect to that initial \$800,000. I further observe that this initial \$800,000 was provided without interest and without any commitment fee.
- [12] The Amended and Restated DIP Term Sheet provides for subsequent advances beyond the initial \$800,000 to be provided in maximum tranches of \$200,000, it bears interest at 15% per annum, and it is subject to a commitment fee of \$45,000. The final \$350,000 would be available to the Applicants only if Phase 2 of the proposed SISP is required. The maturity date of the Amended DIP Facility is to be extended to April 12, 2024.
- [13] As noted, the Monitor fully supports the relief sought and worked with the Applicants in determining the quantum of the Amended DIP Facility and the corresponding DIP Lender's Charge.
- [14] In my view, the relief sought in this regard should be, and is, approved. I do not think it unreasonable for the DIP Lender to seek, admittedly in its own self-interest, interest as well as a commitment fee, now that the original DIP Facility of \$800,000 is clearly (and agreed by all) to be insufficient and a total amount of almost double that original Facility is now required.
- [15] As is clear from the First Report of the Monitor, the Monitor is satisfied that the interest rate represents a market rate given the circumstances of this case and the fact that the cannabis sector generally is extremely challenging at present. It is also clear from the First Report that the Monitor is of the view that the commitment fee is also appropriate, and is within the range of fees approved by this Court in other matters, albeit at the high end of that range particularly if one considers the fact that there is the very real possibility that the SISP will not proceed to Phase 2, with the result that the final \$350,000 will not be made available to the Applicants (thereby increasing the commitment fee as a percentage of the DIP available).
- [16] I am satisfied that the Amended and Restated DIP Term Sheet should be approved according to its terms as proposed. It is the only facility available to the Applicants today. I acknowledge that the creditors opposing the commitment fee indicated that if they had more time, they may be in a position to offer an alternative DIP facility that was as favourable as, or more favourable than, the proposed Amended and Restated DIP Facility in respect of which approval is sought today.
- [17] I also appreciate that timelines are relatively short, although this motion was served in accordance with the timelines provided in the Rules. The objective fact is that there is no alternative proposed DIP facility before me today. Moreover, the DIP Lender is not prepared to extend or increase the existing DIP

Facility except on the terms proposed today. The DIP Lender is the only party who has injected any funds into the business of the Applicants to provide the requisite stability to date to preserve value for stakeholders and continuing through the proposed stay extension period, in order that a SISP can be conducted.

[18] I further observe that the Applicants will be out of cash, according to the cash flow projections, on February 2. The practical reality is that there is no alternative proposed DIP facility before me today, and the time is now. The luxury of waiting longer is not available if asset value is to be preserved.

[19] Finally, those creditors opposing the commitment fee entered into a Subordination Agreement made as of May 15, 2020 between Tweed Franchise Inc. as senior lender (now the DIP Lender as successor to Tweed) and CJ Marketing as Subordinated Lender. Pursuant to article 2.01(g) of that Subordination Agreement, “the Subordinated Lender consents to any debtor-in-possession financing provided or approved by the Senior Lender in the event of any bankruptcy or insolvency proceeding of the Obligor.”

[20] The opposing creditors (i.e., CJ Marketing) acknowledge the contractual commitment, but argue today that notwithstanding their agreement, any DIP financing terms must be fair and reasonable.

[21] I am satisfied that those creditors clearly, and with advice, consented to *any* debtor-in-possession financing provided or approved by the Senior Lender [emphasis added]. In any event, I am satisfied that the proposed Amended and Restated DIP Facility is fair and reasonable in the circumstances. It is approved.

[22] Third, I am also satisfied that the stay extension should be continued through to and including April 12, 2024. That is clearly necessary to maintain stability and allow time to run the proposed SISP. It is approved.

[23] Fourth, I am satisfied that the activities and fees of the prior Monitor, EY and its counsel, Torys, are reasonable and should be approved. The work done was clearly necessary, appropriate and consistent with the respective mandates authorized. The accounts, and the fees they represent, are reasonable and appropriate. I observe that they also reflect discounts offered by both EY as the previous Monitor and by Torys as its counsel, and further that it is clear that there have been no transition fees charged or incurred, and no duplication of work has occurred, in the transition to the current Monitor, FTI. The accounts are approved.

[24] Fifth, I am satisfied that no further costs should be incurred in connection with securities filings and that the time limit within which the Applicants are required to hold an AGM should be extended as sought.

[25] While not determinative, I draw significant comfort from the fact that the relevant regulator, the Alberta Securities Commission, was specifically provided notice of the motion for this relief, and engaged through counsel in a dialogue with the Applicants, and does not oppose the relief sought.

[26] In any event, I am satisfied that the relief is appropriate here, and is approved.

[27] Sixth, I am satisfied that the proposed SISP, including the proposed Stalking Horse Agreement, is appropriate and should be approved. It has been developed by the Applicants, in conjunction with the Monitor, as a means to the seek to maximize the value of the business assets of the Applicants.

[28] With respect to the process itself, it is designed to be broad, flexible and solicit interest in, and opportunities for, a sale of all or substantially all of the Property or Business of the Applicants, or an investment therein.

- [29] The SISP contemplates a two-stage process pursuant to which Phase 1 would include non-binding LOIs which would be reviewed by the Applicants and the Monitor to determine whether there were any Qualified Phase 1 Bidders. If so, the process would proceed to Phase 2.
- [30] The process in general is appropriate and is approved.
- [31] With respect to the proposed Stalking Horse Agreement in particular, the Applicants are clear that approval is being sought only for the purposes of approval as a stalking horse bid. The objecting creditors have been equally clear that they reserve their rights to argue that the Stalking Horse Bid ought not to be ultimately approved as a purchase agreement, and that this issue will be addressed another day.
- [32] The proposed Stalking Horse Bid is essentially a credit bid. The proposed Purchase Price is, I acknowledge, augmented by the commitment to pay pre-filing GST/HST Obligations and Cash Consideration, all of which is estimated to be approximately \$3.6 million. Post-filing Claims liability is assumed, as are Intercompany Claims and specific Assumed Liabilities set out in the proposed agreement.
- [33] Importantly, the Purchaser intends to assume all store level employees of the Applicants and offer letters of employment to no fewer than 95% of such store level employees.
- [34] The issue, as noted above, is the break fee of \$60,000. All parties, including in particular the Applicants, the DIP Lender and proposed Stalking Horse Bidder, and the Monitor agree with the concern I expressed during the hearing of this motion that the circumstances in which a break fee reflective of additional risk would be appropriate in the context of a credit bid, would be extremely rare. My point is that the consideration being proposed in support of the Stalking Horse Bid is, in the main, not new capital exposed to this situation afresh, but rather is credit, such that the proposed Stalking Horse Bidder is already exposed for that amount and therefore ought not to be rewarded or compensated by what is, in effect, nothing new.
- [35] In the particular circumstances of this case, however, I accept the position urged upon me by the Applicants, the DIP Lender and the Monitor to the effect that the fee represents a reasonable reimbursement of the fees and costs incurred in negotiating and preparing the stalking horse bid and is not reflective of an element of risk for new capital. Given the quantum of the fee, in my view this is reasonable.
- [36] In addition, they submit and I accept that separate and apart from a consideration of the fee as a percentage of the purchase price, the fee as an absolute dollar amount is relevant. If the absolute dollar fee were, for example, \$1 million, the analysis may be very different even if it were within the percentage range of previously approved break fees. Here, however, the absolute dollar amount is relatively modest (\$60,000) and is also reasonable as against the alternative, which if the proposed SISP were not approved today, would almost inevitably involve the incurring of additional professional fees and costs in at least that amount, with the corresponding result that none of the stakeholders is better off in any event.
- [37] I appreciate that one effect of this break fee is that the cost of any alternative bid (and the opposing creditors indicate today that they anticipate submitting such a bid) necessarily increases. However, and in the particular circumstances of this case, in my view both the fact of the fee itself and the quantum of the fee are reasonable to ensure the continued stability and maximization of outcomes for all stakeholders. I also accept the submission that there is no evidence before me today of a chilling effect on the process, which is in many cases a risk militating against approval of such a break fee. Here, those creditors opposing the fee have confirmed that they, nonetheless, intend to participate in the process and submit a bid. They, at least, have not been dissuaded or “chilled” sufficiently so as to decline to participate in the process.
- [38] Having considered all of the issues, and in the absence of any evidence filed by the objecting parties, in my view the proposed SISP including the proposed Stalking Horse Bid, is reasonable and appropriate in the circumstances. It is approved. Again, to be very clear, whether the Stalking Horse Bid

should ultimately be approved as a sale agreement (as opposed to being approved as a stalking horse within the context of the SISP), is for another day.

[39] SISP Approval Order and Second Amended and Restated Initial Order to go in the form approved by me today. Both orders are effective immediately and without the necessity of issuing and entering.

A handwritten signature in black ink that reads "Osborne, J.". The signature is written in a cursive style with a large, looped initial "O".

Justice Osborne