

Court File No. CV-23-00700581-00CL

**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
15315441 CANADA INC.**

Applicant

**FACTUM OF THE APPLICANT
(Re: Stay Extension and Fees Approval)**

January 25, 2024

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TO: THE SERVICE LIST

PART I - OVERVIEW¹

1. The F&F Entities obtained relief under the CCAA by an Initial Order dated June 5, 2023, which was amended and restated on June 15, 2023. On June 19, 2023, this Court granted the SISP Order which among other things, approved the SISP and authorized the F&F Entities and the Monitor to immediately commence the SISP.
2. Following completion of the SISP, on August 29, 2023, the F&F Entities sought and obtained the Approval and Reverse Vesting Order which, among other things, approved the Subscription Agreement and the Transactions contemplated therein and approved the Claims Process, as the Transactions generated approximately \$13 million in excess of the secured debt of the F&F Entities.
3. The Transactions closed on September 15, 2023. Among other things, all Excluded Assets, Excluded Contracts, Excluded Leases, and Excluded Liabilities vested absolutely and exclusively in Residual Co., and the F&F Entities were deemed to cease being applicants in these CCAA Proceedings, with Residual Co. becoming an applicant in these CCAA Proceedings.
4. On October 13, 2023, Residual Co. sought and obtained the Stay Extension, Distribution, and Fees Approval Order, which, among other things: (a) approved the Monitor's activities and the fees of the Monitor and its counsel; (b) authorized the Monitor to make distributions from the Cash Consideration received and held by the Monitor in connection with the Transactions; and (c) extended the Stay Period until and including January 30, 2024.
5. This factum is filed in support of Residual Co.'s motion for, among other things: (a) approval of the Fifth Report of the Monitor and the activities of the Monitor referred to therein; (b) approval of the fees of the Monitor and its counsel, TGF; (c) authorizing the Monitor to accept the Late Claims received after the Claims Bar Date; and (d) extending the Stay Period until and including April 15, 2024.

¹ All capitalized terms used in this factum and not otherwise defined have the meanings given to them in the affidavit of Avininder Grewal sworn on January 23, 2024 (the "**Grewal Affidavit**") and the Fifth Report of the Monitor dated January 23, 2024 (the "**Fifth Report**").

PART II - FACTS

6. The facts with respect to this motion are more fully set out in the Grewal Affidavit and the Fifth Report. Dollar amounts referred to herein are in Canadian dollars unless otherwise stated.

A. Background

7. FFHC, through its wholly-owned subsidiaries, is an independent cannabis retail chain. At the time that the CCAA Proceedings were commenced, FFHC operated 91 retail cannabis stores across Canada and two (2) licensed wholesale distribution facilities. Certain subsidiaries of FFHC also carry on business as a wholesale cannabis distributor and operate digital platforms which provide various services and software products relating to cannabis products.²

8. Facing a severe liquidity crisis, the F&F Entities sought and were granted protection under the CCAA pursuant to the Initial Order granted on June 5, 2023 (which was amended and restated by the ARIO). The Initial Order and ARIO, among other things:

- a. appointed FTI as Monitor;
- b. granted a stay of proceedings in favour of the F&F Entities until and including September 1, 2023;
- c. approved the execution by the F&F Entities of the DIP Facility Agreement, pursuant to which the F&F Entities were authorized to borrow up to a total amount of \$9.8 million;
- d. approved the KERP and granted a corresponding KERP Charge in the amount of \$1.16 million; and
- e. granted the Administration Charge in the amount of \$600,000, the DIP Lender's Charge in the amount of \$9.8 million, and the D&O Charge in the amount of \$2.8 million.³

² Grewal Affidavit, *supra* at para. 4.

³ *Ibid* at paras. 5-7.

9. On June 19, 2023, the F&F Entities sought and obtained the SISP Order, which, among other things: (a) approved the SISP and authorized the F&F Entities and the Monitor to immediately commence the SISP; and (b) approved the Stalking Horse Agreement between FFHC and ACT, solely for the purpose of constituting the Stalking Horse Bid under the SISP.⁴

10. Following the completion of the SISP, the F&F Entities with the assistance of the Monitor identified the successful bid and transaction. On August 29, 2023, the F&F Entities sought and obtained from the Court:

- a. An Approval and Reverse Vesting Order which, among other things, approved the Subscription Agreement and the Transactions contemplated therein, and extended the Stay Period until and including October 15, 2023; and
- b. A Claims Process Order which approved the proposed claims process pursuant to which claimants may file claims against Residual Co.⁵

11. The Transactions closed on September 15, 2023. Among other things, the following occurred upon closing of the Transactions:

- a. all of FFHC's right, title and interest in and to the Excluded Assets vested absolutely and exclusively in Residual Co. All applicable Claims and Encumbrances continued to attach to the Excluded Assets and to the Purchase Price;
- b. all Excluded Contracts, Excluded Leases and Excluded Liabilities were channeled to, assumed by and vested absolutely and exclusively in Residual Co.; and
- c. the F&F Entities were deemed to cease being applicants in these CCAA Proceedings, with Residual Co. becoming an applicant in these CCAA Proceedings, and the F&F Entities were deemed to be released from the purview of the ARIO and all other Orders of this Court granted in respect of these CCAA Proceedings, save and except for the Approval and Reverse Vesting Order.⁶

⁴ *Ibid* at para. 8.

⁵ *Ibid* at para. 9.

⁶ *Ibid* at para. 10.

12. As a result of the Transactions, the F&F Entities are continuing to operate, with the majority of employees retaining their employment, majority of their landlords retaining a paying tenant and a majority of their suppliers retaining a paying counterparty. In addition, the Transactions generated approximately \$13 million in proceeds in excess of the secured debt of the F&F Entities.⁷

13. On October 13, 2023, the Applicant sought and obtained the Stay Extension, Distribution, and Fees Approval Order, which:

- a. approved the Fourth Report of the Monitor and the activities of the Monitor referred to therein;
- b. approved the fees of the Monitor and its counsel;
- c. authorized the Monitor to make certain distributions from the Cash Consideration received and held by the Monitor in connection with the Transactions; and
- d. extended the Stay Period until and including January 30, 2024.⁸

14. Since the granting of the Stay Extension, Distribution, and Fees Approval Order, the Applicant has, among other things:

- a. entered into discussions with counsel for the plaintiffs in the Pineapple Express Litigation with respect to whether the plaintiffs could continue their proceedings against Pineapple Express after the Transactions closed;
- b. engaged with the Monitor regarding matters relating to the Claims Process; and
- c. responded to creditor and stakeholder enquiries regarding these CCAA Proceedings.⁹

⁷ *Ibid* at para. 11.

⁸ *Ibid* at para. 12.

⁹ *Ibid* at paras. 15-22.

B. Overview of the Monitor's and TGF's Fees and Disbursements

15. The Monitor and TGF have been paid their fees and disbursements at their standard rates and charges by the Applicant, as applicable, from time to time, in accordance with paragraph 34 of the ARIO, as part of the costs of the CCAA Proceedings.¹⁰

16. The Monitor and TGF have maintained records of their professional time and costs. The Monitor now requests approval of its fees and disbursements for the period of October 1, 2023, to January 7, 2024, and the fees and disbursements of TGF for the period of October 1, 2023, to December 31, 2023 (both periods are collectively referred to as the "**Period**").¹¹

17. The total fees and disbursements of the Monitor for the period of October 1, 2023, to January 7, 2024, are \$394,168.21, with fees in the amount of \$344,972, disbursements in the amount of \$3,849.42, and HST in the amount of \$45,346.79, as are more particularly described in the Affidavit of Jeffrey Rosenberg sworn January 23, 2024 (the "**Rosenberg Affidavit**"), a copy of which is attached to the Fifth Report as Appendix "B".¹²

18. The total fees and disbursements of TGF from October 1, 2023, to December 31, 2023, are \$134,311.16, with fees in the amount of \$115,397.50, disbursements in the amount of \$3,461.93, and HST in the amount of \$15,451.73, as more particularly described in the Affidavit of Leanne Williams, sworn January 23, 2024 (the "**Williams Affidavit**", together with the Rosenberg Affidavit, the "**Fee Affidavits**"), a copy of which is attached to the Fifth Report as Appendix "C".¹³

19. The Monitor and TGF billed amounts at each firm's standard/regular hourly rates, which are consistent with the hourly rates charged by other firms of comparable size and expertise for the provision of similar services regarding significant and complex commercial restructuring and accounting matters.¹⁴

¹⁰ Fifth Report, *supra* at para. 31.

¹¹ *Ibid* at para. 32.

¹² *Ibid* at para. 33.

¹³ *Ibid* at para. 34.

¹⁴ Rosenberg Affidavit at paras. 4-5; Williams Affidavit at paras. 6-7.

20. In the Monitor's professional judgement, the accounts requested to be approved on this motion, as set out in the Fee Affidavits, are reasonable in the circumstances and have been validly incurred in accordance with the provisions of the Orders issued in the CCAA Proceedings.¹⁵

C. Activities of the Monitor and TGF

21. During the Period, the Monitor fulfilled the role of the Monitor as such role is described in the ARIO and prescribed by the CCAA.

22. During the Period, the Monitor has undertaken the following activities, among others:

- a. engaged with TGF regarding matters related to the CCAA Proceedings and the Claims Procedure;
- b. engaged with counsel for the Applicant regarding matters related to the Claims Procedure;
- c. continued to operate and monitor its telephone hotlines and email account for stakeholder inquiries;
- d. repaid the amount owing to ACT in accordance with the Stay Extension, Distribution, and Fees Approval Order;
- e. participated in certain post-closing matters together with Residual Co. and FIKA, which included:
 - i. commencement of the reimbursement of an insurance premium payment relating to the pre-closing period;
 - ii. the remittance of payments pertaining to the run-off of the directors' D&O insurance policy; and
 - iii. engaging in discussions with counsel to FIKA relating to the payment of post-filing amounts that were not paid by the F&F Entities prior to the

¹⁵ Fifth Report, *supra* at para. 35.

closing of the Transactions and continue to remain unpaid; and

- f. supervised and assisted with activities relating to the Claims Process, which included:
 - i. receiving and reviewing Proofs of Claims;
 - ii. engaging in discussions with Claimants;
 - iii. providing copies of the Claims Package to any person upon becoming aware of any circumstance giving rise to a Restructuring Claim;
 - iv. reconciling Claims together with FFHC and TGF; and
 - v. sending Notices of Revision or Disallowance to Claimants where a Claim was revised or disallowed.¹⁶

D. Claims Process

23. The Claims Bar Date for all Proofs of Claim for Pre-Filing Claims and Restructuring Claims was October 12, 2023. The Monitor received a total of 199 Proofs of Claim in the approximate aggregate amount of \$295,262,000 by the Claims Bar Date and an additional 12 Late Claims after the Claims Bar Date in the approximate aggregate amount of \$1,148,000.¹⁷

24. To date, the Monitor has issued 57 Notices of Revision or Disallowance and received 4 Notices of Dispute. The Monitor is in the process of reviewing and responding to these Notices of Dispute.¹⁸

25. Each of the 12 Late Claims were filed on or before November 15, 2023, which included the two largest claims totaling \$1,085,000 which were filed within a week of the Claims Bar Date, all of which appear to have been filed late inadvertently.¹⁹ The Applicant is seeking this Court's authorization to accept these Late Claims.

¹⁶ *Ibid* at para. 15.

¹⁷ Grewal Affidavit, *supra* at paras. 17-18.

¹⁸ *Ibid* at para. 19; Fifth Report, *supra* at paras. 18-19.

¹⁹ Fifth Report, *supra* at para. 24.

26. The Monitor is continuing to assess remaining Claims as quickly as possible and anticipates that this phase of the Claims Process will be completed shortly.²⁰

PART III – ISSUES

27. This issues to be considered on this motion are whether this Court should:

- a. approve the Fifth Report and the conduct and activities of the Monitor referred to therein;
- b. approve the fees and disbursements of the Monitor and TGF;
- c. authorize the Monitor to accept the Late Claims; and
- d. extend the Stay Period until and including April 15, 2024.

PART IV – LAW AND ARGUMENT

A. The Monitor’s Activities in the Fifth Report Should be Approved

28. A request to approve a monitor’s report “is not unusual”.²¹ There are policy and practical reasons for the Court to approve the Monitor’s activities and provide a level of protection for the Monitor during the CCAA Proceedings. Specifically, Court approval:

- a. allows the Monitor to move forward with next steps in the CCAA Proceedings;
- b. brings the Monitor’s activities before the Court;
- c. allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified;

²⁰ *Ibid* at para. 18.

²¹ *Re Target Canada Co*, [2015 ONSC 7574](#) at para 2 [*Target*].

- d. enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;
- e. provides protection for the Monitor not otherwise provided by the CCAA; and
- f. protects the creditors from the delay and distribution that would be caused by:
 - i. re-litigation of steps taken to date, and
 - ii. potential indemnity claims by the Monitor.²²

29. The form of the proposed order, with respect to approval of the Fifth Report and the Monitor's activities described therein, is consistent with the language used in *Target*²³ and subsequent proceedings.²⁴

30. In the present case, the Fifth Report and the conduct and activities of the Monitor referred to therein should be approved.

31. The Monitor has acted responsibly and carried out its activities in a manner consistent with the provisions of the CCAA and in compliance with the ARIO. No party has put forward evidence to the contrary. It is respectfully submitted that in the circumstances, the Court should respect the good faith decisions of the Monitor and its legal counsel related to the CCAA Proceeding.

B. The Monitor's and TGF's Fees Should be Approved

(i) Jurisdiction of this Court to Pass the Accounts

32. The jurisdiction of this Court to pass the accounts is confirmed at paragraph 34 of the ARIO, which provides that "The Monitor and its legal counsel shall pass their accounts from time to time before a judge of this court or a referee appointed by a judge."²⁵

²² *Target*, *ibid* at [para 22](#).

²³ *Target*, *ibid* at [paras 7 and 26](#).

²⁴ See, for example: [Re Clover Leaf Foods](#) (29 September 2020), Toronto CV-20-00641220-00CL (Ont Sup Ct [Commercial List]) Order (Re Approval of Monitor's Activities and Fees and for Stay Extension) at para 3.

²⁵ [Amended and Restated Initial Order](#) issued by Osborne J. on June 15, 2023, at para 34.

(ii) The Fair and Reasonable Test for Approval of Accounts

33. The test on a motion to pass accounts is to consider the “overriding principle of reasonableness”.²⁶ The overall value contributed by the Monitor and its counsel is the predominate consideration in assessing the reasonableness of the accounts.²⁷

34. There has been adequate disclosure of the activities of the Monitor and TGF in the Fifth Report and throughout the CCAA Proceedings. Based on the record filed in support of the motion and the degree of Court oversight and involvement throughout the CCAA Proceedings, it is respectfully submitted that the Court can and should determine that the Monitor’s and TGF’s accounts are fair and reasonable.

(iii) Factors to Be Considered

35. The test to be applied in determining whether to approve the Monitor’s and TGF’s fees is whether they are fair and reasonable. To aid in the determination of whether a court-appointed officer’s fees are fair and reasonable, the Ontario Court of Appeal has recognized the following list of non-exhaustive factors:²⁸

- a. the nature, extent and value of the assets being handled;
- b. the complications and difficulties encountered;
- c. the degree of assistance provided by the company, its officers or its employees;
- d. the time spent;
- e. the Monitor’s knowledge, experience and skill;
- f. the diligence and thoroughness displayed;
- g. the responsibilities assumed;

²⁶ *Nortel Networks Inc*, [2022 ONSC 6680](#) [*Nortel Inc*] at [para 10](#).

²⁷ *Re Nortel Networks Corporation et al*, [2017 ONSC 673](#) [*Nortel Corp*] at [paras 15, 21](#).

²⁸ *Diemer*, *supra* note 14 at [para 33](#); see also *Triple-I Capital Partners Limited v 12411300 Canada Inc*, [2023 ONSC 3400](#) at [para 23](#).

- h. the results achieved; and
- i. the cost of comparable services when performed in a prudent and economical manner.

36. These factors are not intended to be an exhaustive list and other factors may be material in any particular case.²⁹ Certain of the relevant factors are addressed immediately below.

37. The Monitor, with the assistance of TGF, carried out extensive activities during the Period, as detailed in the Fifth Report. The more significant responsibilities that the Monitor has assumed include: (a) repaying the secured debt of the Applicant by making a distribution to ACT; (b) participating in post-closing matters with Residual Co. and FIKA (as set out above); and (c) supervised and assisted with activities relating to the Claims Process, which included: (i) receiving and reviewing Proofs of Claims; (ii) engaging in discussions with Claimants; (iii) providing copies of the Claims Package to any person upon becoming aware of any circumstance giving rise to a Restructuring Claim; (iv) reconciling Claims together with F&F, TGF and Stikeman; (v) sending Notices of Revision or Disallowance to Claimants where a Claim was revised or disallowed; and (vi) considering and addressing complex issues relating to the Pineapple Express Litigation.³⁰

38. The breadth of matters detailed in the Fifth Report demonstrate the diligence and thoroughness displayed by the Monitor and TGF.

39. The time spent, and thus the fees and disbursements of the Monitor and TGF resulting from their activities, are commensurate with the significant role and responsibilities and activities undertaken. The work has been undertaken with a view to advancing the interests of the Applicant and its stakeholders by conducting the Claims Process in accordance with the Claims Process Order, with the goal of making a distribution to the Applicant's creditors as quickly as possible.³¹

40. The Monitor's and TGF's professional fees and disbursements are comparable to the rates charged by other professional firms of comparable size and expertise for the provision of similar services regarding significant and complex commercial restructuring matters.

²⁹ *Nortel Corp*, *supra* note 13 at [para 14](#).

³⁰ *Ibid* at para. 15.

³¹ Fifth Report, *supra* at paras. 18 and 30.

41. Accordingly, it is respectfully submitted that a consideration of the factors articulated by the courts supports the conclusion that the remuneration of the Monitor and TGF is fair and reasonable and their fees and disbursements for the Period should be approved.

C. The Late Claims Should be Accepted

42. The questions to consider with respect to whether a court should accept creditor claims after the passing of a claims bar date is articulated in *Blue Range*, which is:

- a. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
- b. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
- c. If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?
- d. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?³²

43. On the subject of prejudice, the fact that creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to the above-mentioned criterion. Allowing all legitimate creditors to share in the available process is an integral part of the process. A reduction in that share cannot be characterized as prejudice.³³

44. All of the Late Claims appear to have been filed late inadvertently and such Late Claims were filed prior to any distributions having occurred. Accordingly, there is no relevant prejudice in permitting the Late Claims to be accepted and the Monitor supports the relief sought to accept the Late Claims as properly filed.³⁴

³² [Blue Range Resources Corp. \(Re\)](#), 2000 ABCA 285 at [para. 26](#), leave to appeal to SCC refused, [2000] SCCA No. 648. [*Blue Range*]; Cited with approval by Regional Senior Justice Morawetz (as he then was) in [Target Canada Co. \(Re\)](#), 2017 ONSC 327 at [para. 25](#).

³³ *Ibid.*

³⁴ Fifth Report, *supra* at para. 24.

D. The Stay Extension Should be Granted

45. The current Stay Period expires on January 30, 2024. Pursuant to s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.³⁵

46. The Applicant is seeking to extend the Stay Period from January 30, 2024, to and including April 15, 2024. The extension of the Stay Period is necessary and appropriate in the circumstances to allow the Applicant and the Monitor to complete the Claims Process and make a distribution to the Applicant's creditors.³⁶

47. The Applicant has acted in good faith and with due diligence since the granting of the Stay Extension, Distribution, and Fees Approval Order. As stated above, the Applicant has, among other things:

- a. entered into discussions with counsel for the plaintiffs in the Pineapple Express Litigation with respect to whether the plaintiffs could continue their proceedings against Pineapple Express after the Transactions closed;
- b. engaged with the Monitor regarding matters relating to the Claims Process; and
- c. responded to creditor and stakeholder enquiries regarding these CCAA Proceedings.³⁷

48. No creditors are expected to suffer material prejudice as a result of the extension of the Stay Period to April 15, 2024. The Applicant is not carrying on active operations and is expected to maintain liquidity through the proposed extension of the Stay Period.³⁸

49. The Monitor supports the proposed extension of the Stay Period to and including January April 15, 2024.³⁹

³⁵ CCAA, *supra* s. 11.02(2) and (3).

³⁶ Grewal Affidavit, *supra* at para. 23.

³⁷ *Ibid* at paras. 15-22.

³⁸ *Ibid* at para. 24.

³⁹ Fifth Report, *supra* at para. 30.

PART V – ORDER SOUGHT

50. For the reasons set out above, the Applicant respectfully submits that the Court should grant the proposed Order in the form attached to the Applicant's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of January, 2024.

Stikeman Elliott LLP
/s _____

STIKEMAN ELLIOTT LLP

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Re Target Canada Co*, [2015 ONSC 7574](#).
2. *Nortel Networks Inc*, [2022 ONSC 6680](#).
3. *Nortel Networks Corp (Re)*, [2017 ONSC 673](#).
4. *Bank of Nova Scotia v Diemer*, [2014 ONCA 851](#).
5. *Triple-I Capital Partners Limited v 12411300 Canada Inc*, [2023 ONSC 3400](#).
6. *Nortel Networks Corp, Re*, [2014 ONSC 4777](#).
7. *Blue Range Resources Corp. (Re)*, [2000 ABCA 285](#)
8. *Target Canada Co. (Re)*, [2017 ONSC 327](#)

**SCHEDULE “B”
TEXT OF STATUTES AND REGULATIONS**

Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the [Bankruptcy and Insolvency Act](#) or the [Winding-up and Restructuring Act](#);
- (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.

Stays, etc. — other than initial application

(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.

Burden of proof on application

(3) The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

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 15315441 CANADA INC.

Applicant

Court File No. CV-23-00700581-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE APPLICANT
(RE: STAY EXTENSION AND FEES APPROVAL ORDER)**

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