



SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: CV-23-00700581-00CL DATE: 25 June 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: **Fire & Flower Holdings Corp., et al.**

BEFORE: JUSTICE OSBORNE

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE OSBORNE:

1. On June 21, 2023, I granted an order approving the SISP proposed by the Applicants and dismissing the cross-motion of Green Acre and I released a short Endorsement that stated reasons would follow. These are those reasons.
2. The background and context for this matter is set out in the endorsement of Steele, J. made when the Initial Order was granted, and in my Endorsements of June 15 and June 21. Defined terms in this Endorsement have the meaning given to them in the motion materials or my earlier Endorsements unless otherwise stated.
3. As I previously noted, I had adjourned the Applicants' motion on its original return date of June 15 until the hearing of this motion at the request of Green Acre. As further described below, I granted other relief on June 15 which was not opposed by any stakeholder. That included approval of a DIP Facility provided to the Applicants by ACT.
4. The adjournment of the SISP approval motion last week was granted at the request of Green Acre in part on the basis that it wished to cross-examine on the Trudel Affidavit relied upon by the Applicants. Green Acre subsequently advised that it did not intend to do so, and instead, as noted above, served its cross-motion materials.
5. The proposed SISP was developed by the Applicants, with the assistance and oversight of the Court-appointed Monitor with a view to maximizing the value of the business assets of the Applicants. As is clear from the motion materials, the SISP was designed to be flexible and broad, intended to solicit interest in, and opportunities for: a) one or more sales or partial sales of all, substantially all, or certain portions of the Property or the Business; and/or b) an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Applicants or their Business.
6. The SISP includes a Stalking Horse Agreement between the Applicants and ACT. ACT is a significant shareholder of the Applicants, holding approximately 35.7% of the issued and outstanding common shares, in addition to warrants. It is also the senior secured creditor, and an unsecured creditor, and the DIP Lender.
7. The terms of the proposed SISP and the timeline for key milestones are set out in the Affidavit of Stephane Trudel sworn June 14, 2023 together with exhibits thereto, and the First Report of the Monitor and the Supplement to the First Report, all of which is relied upon by the Applicants.
8. Green Acre is a minority shareholder with approximately 5% of the equity. Counsel advised the Court at the hearing of this motion that over the course of last weekend, it also purchased certain debt of the Applicants (there is no evidence before me as to the quantum or size) with the result that it is now also a creditor.
9. All parties are in agreement about the dire circumstances in which the Applicants find themselves, and about the necessity for fundamental change. Very material operating losses have been incurred and continue. Similar challenges to those facing the Applicants are facing other operators in the retail cannabis sector as well.

10. At its core, the position of Green Acre is that the business of the Applicants is viable and needs to be recapitalized and restructured, but not sold. It submits that ACT, as senior secured creditor and also proposed stalking horse bidder, will obtain an unfair advantage if the relief sought is approved, and all potentially available options will not be available for consideration.
11. Accordingly, Green Acre opposes the motion of the Applicants for approval of the SISP, and submits that approval of a SISP should be adjourned *sine die*. It also now brings a cross-motion for approval of a new DIP facility to be approved to replace the DIP Facility approved last week in this proceeding, which would be paid out and cancelled. It relies on the Affidavit of Shawn Dym sworn June 19, 2023 together with exhibits thereto.
12. Green Acre submits in its cross-motion that ACT is “improperly using its influence over the Applicants to force the Applicants into a premature SISP” (Notice of Motion, para. 8). Green Acre submits that since ACT has advised that it will not advance further funds under the DIP until a SISP is commenced, and since a SISP is not in the best interest of the Applicants since it will not maximize stakeholder value, the DIP facility approved last week will not maximize stakeholder value and should be replaced.
13. Green Acre, recognizing the problem created if, as it requests, the proposed SISP is not approved, in that the DIP Facility already approved will not, according to its terms, provide the liquidity and funding required by the Applicants to carry on operations and fun restructuring costs, therefore proposes a replacement DIP facility.
14. Green Acre submits that the DIP Facility should be replaced with the alternative DIP facility now proposed by Green Acre on behalf of a newly formed syndicate of lenders which, it submits, “has no interest in the immediate sale of the Applicants”. Instead, the syndicate “supports a restructuring of the business of the Applicants with a view to continuing operations as a going concern, or, if necessary, allowing the business of the Applicants to be marketed at a later date as an EBITDA-generating asset.”
15. Green Acres submits that its alternative proposed DIP facility contains a more favourable interest rate (10% as opposed to 12%) and a lower exit fee (\$300,000 as opposed to \$400,000) and provides for funding of up to \$9.8 million.
16. Fundamentally, I am not persuaded that the potential strategic options and alternatives that Green Acre submits that it wishes to pursue are precluded or foreclosed by the relief being sought by the Applicants.
17. On the contrary, I am satisfied that the SISP is appropriate here, and in my view will maximize the value of the business and assets of the Applicants for the benefit of all stakeholders. It is not as restrictive as is submitted by Green Acre and is specifically intended to solicit interest in, and opportunities for, the Applicants through a variety of different avenues or transaction structures. I do not accept the submission of Green Acre that the result will inevitably be a sale of the assets of the Applicants to the exclusion of all other alternatives. That may well be the result, but the SISP will canvass the market for all possible transactions and/or recapitalization alternatives.
18. The evidence in the Record supports this conclusion. These alternative structures may include a sale, or successive sales of the Property and/or the Business of the Applicants, in whole, or alternatively, in part. The alternative structures may also include an investment in, restructuring, recapitalization, and/or refinancing or other form of reorganization of the Applicants or their Business (Trudel Affidavit, para. 23).
19. The Court-appointed Monitor, in recommending approval of the SISP, confirmed in its First Report that all of these possible alternatives were available and would be available as part of the SISP, if approved (paragraph 22). The Monitor confirms that potential bidders may include local and international strategic and financial parties (paragraph 23).

20. There is no prohibition on any stakeholder, specifically including Green Acre, from participating in the process and submitting such proposal or proposals as it may see fit. As further described below, however, there is downside protection for the most economically affected stakeholders, in the form of the proposed stalking horse bid.
21. It is principally as a result of my conclusion that the proposed SISP does not prohibit or foreclose the exploration and development of alternative transactions, including but not limited to recapitalization transactions, that I also conclude that the concerns expressed by the Court in the principal authority relied upon by Green Acre, *Quest University Canada (Re)*, 2020 BCSC 318, do not assist Green Acre here.
22. In that case, the Court was rightly concerned in the circumstances that the proposed SISP would likely foreclose other possible solutions that would better serve stakeholders, and that the imposition of an SISP at that time would be antithetical to the purposes and objectives of the CCAA, which is intended to afford financially troubled companies with the breathing room to address, within appropriate constraints, its financial difficulties (paras. 104 -109).
23. It is important to remember that no approval of a stalking horse transaction is being sought or granted on this motion. That may be for another day, depending upon the manner in which circumstances unfold. In particular, and at the risk of stating the obvious, the appropriateness, or lack thereof, of approval of the stalking horse transaction will depend on what other proposals are received as part of that SISP. If there is a superior bid, it may very well be that application of the *Soundair* Principles would militate in favour of approval of an alternative transaction.
24. The mechanics of the proposed SISP are fully set out in the motion materials and the First Report of the Monitor. The timelines and key dates are relatively concise, with Phase 1 Bid Deadline of July 13 and the possibility of a Phase 2, if other qualified Bids are received, to take place through August, 2023 with the proposed outside date for closing of September 15. The relatively tight timeline is necessitated by the dire financial circumstances facing the Applicants, and the availability of DIP funding to sustain operations and restructuring costs.
25. I am satisfied that the factors identified by the Court to be considered in a determination of whether to approve a sales process as contemplated by ss. 11 and 36 of the CCAA are met here: *Nortel Networks Corporation (Re)*, 2009 CanLII at paras. 47 – 48.
26. I am further satisfied as to the fairness, transparency and integrity of the proposed process; the commercial efficacy of the proposed process in light of the specific circumstances of this case; and whether the sales process will optimize the chances, in these particular circumstances, of securing the best possible price for the assets: *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 (“*CCM*”) at paras. 6-14.
27. These factors are to be considered in light of the well-known *Soundair* Principles, which, while applicable to the test for approving a transaction following a sales process, not surprisingly track the same principles applicable to that process itself. (See *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):
 - a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
 - b. the interests of all parties;
 - c. the efficacy and integrity of the process by which the party obtained offers; and
 - d. whether the working out of the process was unfair.
28. The use of stalking horse bids to set a baseline for a sales process can be a reasonable and useful approach. As observed by Penny, J. of this Court, such an agreement can maximize value of a business for the benefit of stakeholders and enhance the fairness of the sales process as it establishes a baseline price and transactional structure for any superior bids. (See *Danier Leather Inc., Re*, 2016 ONSC 1044 at para. 20).

29. I observe again that the transaction contemplated by the Stalking Horse Agreement is not being approved today. I am satisfied that the inclusion of this as part of the SISP will facilitate the exploration of potential transactions but also provide a floor or a minimum by establishing a baseline price and deal structure. It provides for the preservation and continuity of the core business of the Applicants as a going concern, including but not limited to the continued employment of many employees as well as supplier and customer relationships.
30. I recognize that the Stalking Horse Agreement includes a break fee. This is one of the terms to which Green Acre points in support of its argument that the relief sought by the Applicants is not in the best interest of stakeholders.
31. That break fee has been reduced from that originally proposed, as noted above and confirmed by the Affidavit of Philip Yang sworn June 18, 2023. At the original return of the motion, I had expressed some concern with respect to the appropriateness of the quantum of the break fee, particularly in circumstances here where the transaction being proposed was a credit bid, meaning that there was no new capital at risk. While I recognize that whether a proposed transaction is a credit bid is only one of several factors to be taken into account, it certainly is a factor to be considered.
32. I am satisfied that the quantum of the break fee, as revised, is both within a reasonable range as has been accepted previously by this Court (see, for example, *CCM* at paras. 12 -14), and is appropriate in the particular circumstances of this case.
33. The First Report of the Monitor is also of assistance with respect to the break fee. At paragraph 44, the Monitor confirms that it, together with its counsel, have reviewed all stalking horse processes valued at over \$5 million and approved in CCAA and BIA proceedings between January, 2019 and April 2023 in order to assess the reasonableness of break fees approved by the Court.
34. The Monitor conducted the same analysis for all credit bids approved by the Courts and the First Report attaches as Appendix "B" a chart of observed fees which range from 0.9% to 3.4% and break fees ranging from 2.8% to 3.4%. The Monitor specifically supports the proposed break fee and opined that it is reasonable in the circumstances.
35. The SISP, including the Stalking Horse Agreement, is appropriate and is approved.
36. It follows that I am not persuaded that the replacement DIP facility proposed by Green Acre should be approved. It was proposed by Green Acre to fill the funding vacuum that would be created if, as that party requested, the SISP was not approved. That is, now, not the situation.
37. Moreover, the ACT DIP Facility already in place was approved less than one week ago, and that approval was not opposed by Green Acre. There may well be circumstances in which an existing DIP facility should be replaced, even so soon after it was approved, but in my view Courts should consider carefully when and in what circumstances that should occur. There is inevitable disruption and therefore increased uncertainty and instability created by substituting one DIP lender for another. While, as noted, there may very well be circumstances in which this disruption is warranted, instability and uncertainty are to be minimized to the greatest extent possible during a restructuring period.
38. Green Acre relies on caselaw setting out the factors to be considered in approval of a DIP facility, and submits that those factors are equally applicable in deciding who (i.e., which proposed DIP lender, if there is more than one) ought to be the approved DIP lender, and on what terms the DIP financing ought to be provided (see, for example, *Great Basin Gold Ltd. Re*, 2012 BCSC 1459).
39. That those factors are generally applicable is not at the core of the dispute here. However, in my view, they do not militate, in the particular circumstances of this matter, in favour of replacing a DIP facility

approved (without opposition from anyone, including but not limited to the party now proposing the alternative DIP) less than one week ago.

40. I am also cognizant of the cautionary note in *Great Basin* to the effect that courts must scrutinize interim financing proposals to ensure that they are reasonable and appropriate in the circumstances and that they do not inappropriately advantage one party over another to the detriment of that party and the stakeholders generally.
41. The slightly more favourable interest rate in the proposed alternative DIP does not, in my view justify the introduction of additional instability and uncertainty at this stage, less than a week after the DIP Facility was approved without opposition. I accept the submission of counsel for the Applicants that the dollar value of the interest savings to be realized by the alternative DIP is relatively minor - in the order of approximately \$50,000.
42. The uncertainty and instability that would be increased by replacing the DIP lender is compounded by the fact that the proposed alternative DIP would extend the maturity date to December 15 although the cash flow forecasts in the record show that the Applicants would be out of funds to continue to be able to operate by October. Counsel for Green Acre submits that it is likely that the syndicate on whose behalf Green Acre advances its cross-motion would likely be prepared to invest additional funds. However, I must base my decision on the committed terms as reflected in the record before me.
43. Both DIP facilities contemplate funding in the amount of up to \$9,800,000. However, as noted, the cash flow forecasts reflect that these funds would be sufficient for the applicants the Applicants through the restructuring period only until October.
44. In addition, I recognize that the approved DIP Facility contemplates an exit fee to which Green Acre takes objection today. I also recognize, however, that that term was in the materials served more than two weeks ago and was fully disclosed to all parties when the DIP Facility was approved last week.
45. Moreover, the alternative DIP Facility includes a covenant compelling the Applicants to engage in good faith discussions with Green Acre and then if, and only if, those discussions do not bear fruit, (in the words of Mr. Dym, the affiant for Green Acre), the “parties will pivot to a SISP strategy by July 15, 2023 and market themselves from a position of financial stability” (Dym Affidavit, para. 52).
46. I am concerned that this effectively gives Green Acre a period of exclusivity for negotiations with the Applicants to the exclusion of other parties, but which has the result of shortening by the same period of time (approximately one month) the period of time within which alternative transactions or structures (with an unlimited and unrestricted number of potential strategic partners or investors), might be explored.
47. One of the factors persuading me that the SISP should be approved today is the desire to maximize the period within which options and alternatives can be explored. As stated above, there is no reason why Green Acre cannot participate fully in that SISP process, and propose, if it (or the syndicate of arm’s length lenders with which it is working and who, it is said, oppose a sale at this time) wishes, a recapitalization of the business of the Applicants rather than a sale.
48. For all of these reasons, I granted the order approving the SISP (with the Stocking Horse Bid Agreement), declined to adjourn the SISP approval *sine die*, and dismissed the cross-motion of Green Acre for approval of the alternative DIP facility.

Oleary, J.