

**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
KING STREET COMPANY INC., THE KING STREET HOSPITALITY GROUP INC., BONTA
TRADING CO. INC., 2268218 ONTARIO INC., 1733667 ONTARIO LIMITED, THE KING
STREET FOOD COMPANY INC., THE KING STREET RESTAURANT COMPANY INC.,
2112047 ONTARIO LTD., JI YORKDALE INC., JI SQUARE ONE INC., 1771669 ONTARIO INC.,
CXBO INC., 2608765 ONTARIO INC., 2272224 ONTARIO INC., 2327729 ONTARIO INC.,
2577053 ONTARIO INC., 2584858 ONTARIO INC., 2621298 ONTARIO INC., 2641784 ONTARIO
INC., and 26569669 ONTARIO INC.**

Applicants

**FACTUM OF THE APPLICANTS
(Comeback Hearing)
(Returnable November 13, 2020)**

November 12, 2020

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PART I – OVERVIEW

1. This factum is filed in connection with a motion by the Applicants (collectively, the “**KSF Group**”) on November 13, 2020 (the “**Comeback Hearing**”) in their proceedings under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”) for, among other things:

- (a) the granting of an amended and restated initial order (the “**Amended and Restated Initial Order**”), which amends and restates the initial order granted to the KSF Group on November 6, 2020 (the “**Initial Order**”) to provide certain additional relief, including:
 - a. extending the stay of proceedings (the “**Stay**”) to February 19, 2021 (the “**Extended Stay Period**”);
 - b. approving a first amendment dated as of November 12, 2020 to the DIP Term Sheet (the “**First Amendment**”) and increasing the maximum borrowings under the DIP Facility in accordance with the First Amendment to one million four hundred thousand dollars (\$1,400,000) (the “**Maximum DIP Amount**”);

- c. increasing the amount of the Directors' Charge to one hundred thousand dollars (\$100,000); and
- (b) the granting of an order (the "**Sale Process Approval Order**") approving a sales and investment solicitation process (the "**Sale Process**") in connection with the marketing and sale, refinancing or other investment in respect of all or part of the assets, property and undertakings (collectively, the "**Property**") of the KSF Group.

PART II – THE FACTS

1. The facts with respect to this motion are briefly recited herein and are more fully set out in the Affidavit of Peter Tsebelis sworn November 12, 2020 (the "**Tsebelis November 12 Affidavit**") and the First Report of the Monitor dated as of November 12, 2020 (the "**First Report of the Monitor**").
2. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Tsebelis November 12 Affidavit.

A. GRANTING OF INITIAL ORDER AND ACTIVITIES SINCE THE INITIAL ORDER WAS GRANTED

3. On November 6, 2020, the Court granted the Initial Order. Pursuant to the Initial Order, MNP Ltd. was appointed as CCAA Monitor (in such capacity, the "**Monitor**").¹
4. Since the Initial Order was issued, the KSF Group has acted in good faith and with due diligence. Among other things, it has communicated with stakeholders and continued its development of a strategy to expand the number of locations from which it currently offers takeout and delivery.²
5. Additionally, during this time period, the KSF Group with Third Eye Capital Corporation ("**TECC**") in its capacity as agent for the Lenders and DIP Lenders, and in consultation with the Monitor, have developed the Sale Process, in order to market and sell, refinance or recapitalize all or part of the Property, including the KSF Group's existing and planned restaurants.³

¹ Tsebelis November 12 Affidavit para 3

² Tsebelis November 12 Affidavit paras 5-6

³ Tsebelis November 12 Affidavit paras 5-23

B. THE SALE PROCESS AND THE EXTENSION OF THE STAY

6. The Sale Process contemplates the following timeline:⁴

Milestone	Deadline
Commencement Date	November 13, 2020
Publication of Notice and delivery of Teaser Letter and NDA	November 20, 2020
Phase 1 Bid Deadline	December 18, 2020
Phase 2 Bid Deadline	January 22, 2021
Selection of Successful Bid(s)	January 25, 2021
Court Approval of the Successful Bid(s)	By February 3, 2021
Closing of Successful Bid(s)	As soon as reasonably possible following court approval

7. The KSF Group is seeking an extension of the Stay until the end of the Extended Stay Period (being February 19, 2021).⁵

8. Under the Revised Cash Flow Forecast, the KSF Group is forecasted to have sufficient liquidity to fund its obligations and costs through to the end of the Extended Stay Period.⁶

PART III– ISSUES

9. The issues to be determined by the Court with respect to this motion, are whether:

- (a) this Court should extend the Stay until the end of the Extended Stay Period;
- (b) this Court should increase the maximum amount of borrowings under the DIP Facility;
- (c) this Court should increase the amount of the Directors’ Charge to one hundred thousand dollars (\$100,000); and
- (d) this Court should approve the Sale Process.

⁴ Sale Process para 6

⁵ Tsebelis November 12 Affidavit para 10

⁶ Tsebelis November 12 Affidavit para 9

PART IV – THE LAW

A. EXTENSION OF THE STAY

10. Under sub-section 11.02(1) of the CCAA, a Court may grant a Stay under the CCAA for a period not to exceed ten (10) days.⁷ On November 6, 2020, the Court granted an initial Stay to the KSF Group of ten (10) days which is set to expire on November 16, 2020. The KSF Group is now seeking a further extension of the Stay to the end of the Extended Stay Period (February 19, 2021).⁸

11. Pursuant to section 11.02(2) of the CCAA, the Court may grant an extension of the Stay if the Court is satisfied that (a) the KSF Group has acted, and is acting, in good faith and with due diligence; and (b) that circumstances exist that make the order appropriate.⁹

12. Extending the Stay in this case is reasonable and appropriate as the KSF Group has acted in good faith and with due diligence in the CCAA proceedings to date and no stakeholders will experience material prejudice if this relief is granted.¹⁰

13. An extension of the Stay will allow the KSF Group to undertake the following that will benefit the KSF Group's existing stakeholders: (i) continue, and perhaps expand, its existing takeout and delivery business; (ii) continue to explore and implement the Reopening and Expansion Plan; and (iii) implement the Sale Process in order to effect a restructuring of the KSF Group's business.¹¹

14. As noted above, the Revised Cash Flow Forecast indicates that, with the advances made available under the DIP Facility, the KSF Group will have sufficient liquidity to meet its obligations during the stay extension period being sought.¹²

15. For the reasons set out above, the KSF Group submits that the Stay should be extended until the end of the Extended Stay Period.

⁷ CCAA s. 11.02(1)

⁸ Tsebelis November 12 Affidavit para 10

⁹ CCAA, s 11.02(2)

¹⁰ Tsebelis November 12 Affidavit paras 5 and 13

¹¹ Tsebelis November 12 Affidavit para 14

¹² Tsebelis November 12 Affidavit para 12

B. INCREASE OF THE AMOUNT THE KSF GROUP IS AUTHORIZED TO BORROW UNDER THE DIP FACILITY

16. The KSF Group is seeking authorization under the Amended and Restated Initial Order to enter into the First Amendment and to borrow up to the Maximum DIP Amount.

17. In seeking this relief, the KSF Group adopts and relies on its prior submissions regarding the appropriateness of the DIP Facility as set out in the KSF Group's initial factum dated as of November 6, 2020 (the "**November 6 Factum**").¹³

18. The KSF Group's current operations (which are limited to its takeout and delivery business) do not generate sufficient funds to cover the KSF Group's day-to-day expenses including professional fees that are set to accrue during these CCAA proceedings, and therefore the DIP Facility is required to allow the KSF Group to service these costs.¹⁴

19. An increase in the KSF Group's ability to borrow until the DIP Facility will allow the KSF Group to, among other things, continue its restructuring efforts, including by way of the Sale Process, and in the interim maintain the value of its Property.¹⁵

20. The KSF Group's need to borrow up to the Maximum DIP Amount under the DIP Facility as part of the CCAA proceedings is consistent with and supported by the Revised Cash Flow.¹⁶

21. Accordingly, an increase in the authorized borrowings under the DIP Facility up to Maximum Amount is reasonable and appropriate in the circumstances.

C. INCREASE IN THE AMOUNT OF THE DIRECTORS' CHARGE

22. Pursuant to the Initial Order, this Court granted a Directors' Charge in the amount of seventy thousand dollars (\$70,000), to indemnify amounts the KSF Group's current and former directors and officers may incur during these proceedings, subject to certain limitations.

23. The KSF Group is seeking an Order increasing the amount of the Directors' Charge to one hundred thousand dollars (\$100,000).

¹³ November 6 Factum paras 70-76

¹⁴ Tsebelis November 6 Affidavit para 40

¹⁵ Tsebelis November 12 Affidavit para 16

¹⁶ Tsebelis November 12 Affidavit para 17

24. In seeking this relief, the KSF Group adopts and relies on its prior submissions regarding the appropriateness of the Directors' Charge as set out in the November 6 Factum.¹⁷

25. Additionally, at this time, the KSF Group submits that the increase being sought in the quantum of the Directors' Charge is appropriate and reasonable as it reflects the potential exposure of the KSF Group's directors and officers for a period of two (2) weeks whereas the previous amount of seventy thousand dollars (\$70,000) represented approximately ten (10) days of potential exposure.¹⁸

26. The Monitor and TECC are each supportive of the increase being sought to the Directors' Charge.¹⁹

D. APPROVAL OF THE SALE PROCESS

27. In determining whether it is appropriate to authorize a sales process of a debtor company's assets, this Court has previously found that the following factors may be considered:

- (a) Is a sale warranted at this time?
- (b) Will the sale be of benefit to the whole "economic community"?
- (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?²⁰

28. In examining whether a sales process is appropriate, this Court has also taken into account the factors set out in section 36(3) of the CCAA, which are normally considered when deciding whether to approve a sale transaction itself, including:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances; and
- (b) whether the monitor approved the process leading to the proposed sale or disposition.²¹

¹⁷ November 6 Factum, paras 81-84

¹⁸ Tsebelis November 12 Affidavit para 20

¹⁹ Tsebelis November 12 Affidavit para 21

²⁰ [Nortel Networks Corporation \(Re\)](#), 2009 CanLII 39492 (ON SC) at para. 49

²¹ [Brainhunter Inc. \(Re\)](#) 2009 CanLII 72333 (ON SC) at para 13-17, CCAA, S. 36(3)

29. In the context of the factors set out above, the KSF Group submits that the Sale Process is reasonable and appropriate in the circumstances and should be approved by this Court as:

- (a) the Sale Process will fairly canvass the market to identify potential purchasers of the KSF Group's Property;
- (b) the consent rights granted to TECC under the Sale Process are the result of negotiations amongst the KSF Group and TECC and the Monitor is of the view that the consent rights are appropriate given the amount owing to the Lenders / DIP Lenders;
- (c) the Sale Process is consistent with insolvency industry practices in such proceedings and in like circumstances, and, if successful, could result in greater recoveries than in a liquidation, and is to the benefit of all stakeholders, including secured and unsecured creditors;
- (d) a sale of the KSF Group's restaurants either together or separately will maximize value, and potentially allow all or certain of these restaurants to continue as a going concern; and
- (e) the Monitor and TECC are supportive of the Sale Process.²²

PART II- ORDER SOUGHT

30. For the foregoing reasons, the KSF Group respectfully requests that this Court grant Orders substantially in the form of the draft Amended and Restated Initial Order and Sale Process Approval Order, attached at Tabs 3 and 6, respectively, to the KSF Group's Motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of November, 2020.



Virginie Gauthier / Thomas Gertner

²² Tsebelis November 12 Affidavit paras 23-28; First Report of the Monitor para 35.

**SCHEDULE “A”
LIST OF AUTHORITIES**

2. [Nortel Networks Corporation \(Re\)](#), 2009 CanLII 39492 (ON SC [Comm List])
3. [Brainhunter Inc. \(Re\)](#), 2009 CanLII 72333 (ON SC [Comm List])

**SCHEDULE “B”
RELEVANT STATUTES**

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

Definitions

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.

Restriction on disposition of business assets

36 (1) 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.

Notice to creditors

(2) 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.

Factors to be considered

- (3) 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.

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INC., ET AL.

Court File No: CV-20-00650945-00CL

Applicants

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Proceeding commenced at: TORONTO

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