

District: Ontario
Division No. 09-Toronto
Court No. 31-2675583
Estate No. 31-2675583

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
CONFORTI HOLDINGS LIMITED**

**FACTUM OF CONFORTI HOLDINGS LIMITED
(Motion Returnable October 26, 2020)**

October 23, 2020

MILLER THOMSON LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1101
Toronto, ON M5H 3S1

Bobby Sachdeva LSO #: 34454C
Tel: 905.532.6670
Fax: 905.660.0139
bsachdeva@millerthomson.com

Erin Craddock LSO #: 62828J
Tel: 416.595.8631
Fax: 416.595.8695
ecraddock@millerthomson.com

Lawyers for Conforti Holdings Limited

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I. INTRODUCTION

1. Conforti Holdings Limited (“**Conforti**”) filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”), on September 28, 2020. Crowe Soberman Inc. was appointed the proposal trustee of Conforti (the “**Proposal Trustee**”).¹

2. This factum is filed in support of Conforti’s motion for, among other relief, an order:

- a. approving a debtor-in-possession term sheet between Conforti and Antonio Conforti (in such capacity, the “**DIP Lender**”), dated October 20, 2020 (the “**DIP Term Sheet**”), a DIP loan (the “**DIP Loan**”) and the authority to borrow up to \$500,000;
- b. granting the following charges over Conforti’s property:
 - i. a charge in favour of the DIP Lender (the “**DIP Lender Charge**”);
 - ii. a charge in favour of the Proposal Trustee and its counsel, and counsel to Conforti to secure payment of their professional fees and disbursements (the “**Administration Charge**”); and
 - iii. a charge in favour of the directors and officers of Conforti (the “**Director’s Charge**”);
- c. approving the first report of the Proposal Trustee, to be filed (the “**First Report**”), and the conduct and activities of the Proposal Trustee as described therein; and
- d. extending the time to file a proposal from October 28, 2020 to December 14, 2020.

II. FACTS

A. Background

3. Conforti is an Ontario corporation that, as at the date of the NOI filing, operated 52 beauty salons under 10 different trade names in Southern Ontario. All but one of Conforti’s

salons are located inside shopping malls of varying sizes including ones such as the Eaton Centre in Toronto.²

4. Conforti currently has more than 600 employees and 400 independent contractors.³

5. The circumstances leading to the filing of the NOI are set out in the affidavit of Antonio Conforti, sworn October 21, 2020 (the “**Conforti Affidavit**”). As described in the Conforti Affidavit, Conforti initiated NOI proceedings on account of the financial pressure arising from the COVID-19 pandemic and demands from one of its landlords. The COVID-19 pandemic, including the closure of all shopping malls for approximately three months and the subsequent reduced foot traffic in the shopping malls, has negatively impacted Conforti’s liquidity and its ability to fund business operations.⁴

6. Moreover, the salons’ operating expenses have increased due to the costs of personal protective equipment for Conforti’s employees and independent contractors, single use salon supplies, and cleaning products.⁵

B. Activities Since the NOI was Filed

7. Since the NOI was filed on September 28, 2020, Conforti’s activities have included:⁶

- a. working with the Proposal Trustee and Conforti’s financial advisors to ensure that the company’s operations will continue uninterrupted during the proposal proceedings;
- b. sending 17 Notices to Lessor to Disclaim or Resiliate a Lease by Commercial Tenant to its landlords; and

¹ Affidavit of Antonio Conforti, sworn October 21, 2020 (“**Conforti Affidavit**”), at para 29.

² Conforti Affidavit at para 4.

³ Conforti Affidavit at para 8.

⁴ Conforti Affidavit at paras 17-21.

⁵ Conforti Affidavit at para 21.

⁶ Conforti Affidavit at paras 31-34.

c. engaging in discussions/negotiations with its landlords regarding lease payments for the next 6 months.

C. DIP Loan

8. As demonstrated by the cash flow forecast developed by Conforti with the Proposal Trustee (the “**Cash Flow Forecast**”), Conforti needs financing to fund operations and restructuring costs during the proposal proceedings.⁷

9. Conforti’s principal, Antonio Conforti, is prepared to provide up to \$500,000 in funding to assist Conforti with meeting its operational expenses, the proposal proceedings and its restructuring pursuant to the terms of the DIP Term Sheet.⁸

10. The proposed DIP Loan is conditional upon court approval of the DIP Term Sheet and the granting of the DIP Charge as a first-ranking charge on Conforti’s property.⁹

11. The Proposal Trustee has reviewed the DIP Term Sheet and approves of the same.¹⁰

D. Administration Charge

12. As part of these proceedings, the Proposal Trustee, counsel for the Proposal Trustee, and counsel for Conforti (collectively, the “**Professional Group**”), are seeking an administrative charge in the maximum aggregate amount of \$250,000 against all of Conforti’s assets (the “**Administration Charge**”).¹¹

13. The Professional Group is requesting that the Administration Charge rank below the DIP Loan Charge, but prior to the interests of all other secured and unsecured creditors of Conforti.¹²

⁷ Conforti Affidavit at para 37.

⁸ Conforti Affidavit at para 38.

⁹ Conforti Affidavit at para 39.

¹⁰ Conforti Affidavit at para 40.

¹¹ Conforti Affidavit at para 43.

¹² Conforti Affidavit at para 44.

E. Directors Charge

14. Conforti is also seeking approval to grant its directors and officers a charge on Conforti's property in priority to all other charges other than the DIP Lender Charge and the Administration Charge, up to a maximum amount of \$100,000.¹³

15. The Directors' Charge is intended to address potential claims that may be brought against Conforti's directors and officers for post-filing liabilities.¹⁴

16. Conforti's directors and officers do not have the benefit of directors' and officers' liability insurance coverage.¹⁵

17. The Directors' Charge is crucial to the continued involvement of the officers and directors during the Proposal Proceedings to provide them with certainty regarding their personal liability.¹⁶

18. The Proposal Trustee is supportive of the granting of the Directors' Charge.¹⁷

III. ISSUES PRESENTED

19. The issues presented on this motion are whether:

- a. the DIP Term Sheet and DIP Lender Charge should be granted;
- b. the Administration Charge and Directors' Charge should be granted; and
- c. the time to file a proposal should be extended to December 14, 2020.

¹³ Conforti Affidavit at para 48.

¹⁴ Conforti Affidavit at para 49.

¹⁵ Conforti Affidavit at para 50.

¹⁶ Conforti Affidavit at para 51.

¹⁷ Conforti Affidavit at para 54.

IV. LAW AND ARGUMENT

A. The DIP Term Sheet and DIP Lender Charge Should be Approved

20. Conforti respectfully submits that the DIP Term Sheet and related DIP Lender Charge should be approved. A court may grant a priority charge in favour of a DIP lender pursuant to section 50.6(1) of the BIA.¹⁸

21. In deciding whether to grant a DIP lender's charge a court must consider:¹⁹

- a. the duration of the proposal proceedings;
- b. how the debtor's business and affairs will be managed during the proposal;
- c. whether the debtor's management has the confidence of its major creditors;
- d. whether the loan would enhance the prospects of a viable proposal being made;
- e. the nature and value of the debtor's property;
- f. whether any creditor would be materially prejudiced by the charge; and
- g. the position of the proposal trustee.

22. In *Re Colossus Minerals Inc.*, this Court approved a DIP charge where, among other reasons, the debtor's cash flow demonstrated that the loan was necessary and sufficient to fund the debtor's cash flow during a requested extension of the stay of proceedings, the debtor's creditors supported the loan, the loan's terms were consistent with DIP financing terms in other similar proceedings, and the proposal trustee supported the loan and the related DIP charge.²⁰

23. Similarly, in *Re Mustang GP Ltd.*, this Court approved a DIP loan where it enhanced the potential for creditor recovery.²¹

24. Conforti submits that the DIP Term Sheet and DIP Lender Charge should be approved because it enhances Conforti's ability to make a viable proposal by funding Conforti's operations

¹⁸ s 50.6(1), *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA").

¹⁹ s 50.6(5), BIA.

²⁰ 2014 ONSC 514 at paras 3-10 <<http://canlii.ca/t/g30lx>>.

during the proposal proceeding. The DIP Loan is necessary to fund Conforti's operations during the proposal extension period, as demonstrated by the Cash Flow Forecast.

25. Conforti's only secured creditors are its principal who is providing the DIP Loan, The Toronto-Dominion Bank who has provided Conforti with a letter of credit, Royal Bank of Canada for certain obligations under an assignment agreement with Conforti and its principal, and vehicle financing creditors.²² Payments for those vehicles are made by the district managers who drive them.²³ These creditors will not be materially prejudiced by the DIP Loan Charge.

26. Finally, the Proposal Trustee is supportive of the DIP Term Sheet and the DIP Lender Charge.

B. The Administration Charge Should be Granted

27. Conforti also submits that the Administration Charge should be granted. A court may grant a charge over a debtor's property to secure the payment of the fees and expenses of the trustee, its counsel and any other legal experts engaged by the debtor pursuant to section 64.2 of the BIA.²⁴

28. The court may order that this charge rank in priority to any secured creditor's claims.²⁵

29. Administration charges are routinely granted in proposal proceedings where the professionals are essential to a successful restructuring proceeding.²⁶

²¹ 2015 ONSC 6562 at para 28 <<http://canlii.ca/t/glt34>>.

²² Conforti Affidavit at paras 10, 13-15.

²³ Conforti Affidavit at para 15.

²⁴ s 64.2(1), BIA

²⁵ s 64.2(2), BIA.

²⁶ See *Re Colossus Minerals Inc.*, 2014 ONSC 514 at paras 13-14 <<http://canlii.ca/t/q30lx>>; *Re Danier Leather Inc.*, 2016 ONSC 1044 at para 57 <<http://canlii.ca/t/gncpr>>.

30. Conforti submits that the Administration Charge is necessary for a successful restructuring. It is unlikely that the Professional Group will continue to be involved in the proposal proceedings in the absence of the charge.²⁷

31. The quantum of the charge is also reasonable given the nature and scope of the services to be provided by the Professional Group and the uncertainty of Conforti's ability to fund the professionals' fees from free cash flow.²⁸

32. Further, the Proposal Trustee is supportive of the charge.

C. The Directors' Charge Should be Granted

33. Conforti also seeks the approval of a Directors' Charge to indemnify its directors and officers against post-filing liabilities in their capacities as directors and officers.

34. A court may grant a priority charge for the benefit of a debtor's directors and officers to indemnify the directors and officers against obligations they may incur as directors and officers after the filing of the proposal pursuant to section 64.1 of the BIA.²⁹

35. This Court has approved director's charges where a debtor's officers and directors do not have sufficient insurance coverage, the directors and officers are critical to a successful proposal proceeding and the proposal trustee supported the charge.³⁰

36. Conforti submits that the Directors' Charge is appropriate because its directors and officers do not have the benefit of directors and officers insurance. Conforti requires the continued involvement of its directors and officers for a successful restructuring: the company's directors and officers have relationships with employees and landlords that cannot be replicated

²⁷ Conforti Affidavit at para 44.

²⁸ Conforti Affidavit at para 47.

²⁹ s 64.1, BIA.

³⁰ *Re Colossus Minerals Inc.*, 2014 ONSC 514 at paras 16-21, <<http://canlii.ca/t/g30lx>>; see also *Re Danier Leather Inc.*, 2016 ONSC 1044 at paras 59-71 <<http://canlii.ca/t/gncpr>>.

or replaced. As a result, Conforti requests the Directors' Charge to ensure their continued involvement in the restructuring proceedings.

37. The Proposal Trustee is supportive of the Directors' Charge.³¹

D. The Time to Make a Proposal Should be Extended

38. The initial stay expires on October 28, 2020. Conforti is requesting an extension of this period to December 14, 2020 (the 45 day period expires on a Saturday).

39. A court may grant an extension of the time to make a proposal pursuant to section 50.4(9) of the BIA. Section 50.4(9) of the BIA provides that the time for making a proposal may be extended if:³²

- a. the debtor has acted and is acting in good faith and with due diligence;
- b. the debtor would likely be able to make a viable proposal if the extension was granted; and
- c. no creditor would be materially prejudiced if the extension is granted.

40. Conforti submits that it has satisfied the requirements of section 50.4(9) of the BIA because it has acted and will continue to act in good faith and with due diligence and it is likely to make a viable proposal if the extension is granted. Since the NOI was filed, Conforti has worked with the Proposal Trustee and Conforti's financial advisors to ensure the continued operation of its business. It has also sent disclaimer notices for 17 leases, and engaged in discussions/negotiations with its landlords for lease payments over the next several months. These discussions are at varying stages and Conforti requires additional time to complete the negotiations.³³

³¹ Conforti Affidavit at para 54.

³² s 50.4(9), BIA; *Re Colossus Minerals Inc.*, 2014 ONSC 514 at paras 37-43 <<http://canlii.ca/t/g30lx>>; *Re Mustang GP Ltd.*, 2015 ONSC 6562 at para 41 <<http://canlii.ca/t/glt34>>.

³³ Conforti Affidavit at para 34.

41. Further, Conforti submits that no creditor will be materially prejudiced if the extension is granted.

V. RELIEF REQUESTED

42. In light of the foregoing, Conforti requests that the Court approve the relief sought in its notice of motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23nd day of October, 2020



Erin Craddock

MILLER THOMSON LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1101
Toronto, ON M5H 3S1

Bobby Sachdeva LSO #: 34454C
Tel: 905.532.6670
Fax: 905.660.0139
bsachdeva@millerthomson.com

Erin Craddock LSO #: 62828J
Tel: 416.595.8631
Fax: 416.595.8695
ecraddock@millerthomson.com

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Re Colossus Minerals Inc.*, 2014 ONSC 514
2. *Re Danier Leather Inc.*, 2016 ONSC 1044
3. *Re Mustang GP Ltd.*, 2015 ONSC 6562

**SCHEDULE “B”
RELEVANT STATUTES**

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

Notice of Intention

Extension of time for filing proposal

50.4(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- (a)** the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b)** the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c)** no creditor would be materially prejudiced if the extension being applied for were granted

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor’s property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor’s cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

...

Factors to be considered

(5) In deciding whether to make an order, the court is to consider, among other things,

- (a)** the period during which the debtor is expected to be subject to proceedings under this Act;
- (b)** how the debtor’s business and financial affairs are to be managed during the proceedings;
- (c)** whether the debtor’s management has the confidence of its major creditors;
- (d)** whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e)** the nature and value of the debtor’s property;

- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

- (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
- (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
CONFORTI HOLDINGS LIMITED

Court File Nos.: Division No. 09-Toronto
Court No. 31-2675583 and Estate No. 31-2675583

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

Proceeding commenced at Toronto

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(Motion Returnable October 26, 2020)**

MILLER THOMSON LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1101
Toronto, ON M5H 3S1

Bobby Sachdeva LSO #: 34454C
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