Court/Estate File No. 31-2675583

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE PROPOSAL TO CREDITORS OF CONFORTI HOLDINGS LIMITED, A CORPORATION INCORPORATED UNDER THE ONTARIO *BUSINESS CORPORATIONS ACT*, R.S.O. 1990, C. B.16

REPLY FACTUM OF THE PROPOSAL TRUSTEE

(motion for court approval of proposal)
(returnable July 19, 2022)

July 17, 2022

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I. INTRODUCTION

1. This factum is delivered by the Proposal Trustee in reply to the factum of Moroccanoil served on July 14, 2022.

2. The capitalized terms used in this factum have the meaning given in the main factum of the Proposal Trustee unless otherwise indicated.

II. REPLY SUBMISSIONS

A. Projected creditor recovery under the Proposal

3. Moroccanoil asserts in its factum that the Proposal will yield a recovery of 16% on the claims of creditors.[1]

4. This is only a portion of the Proposal Trustee's analysis on the issue. The Proposal Trustee notes that recovery would be 16% only if all the contingent claims, being $2,807,478.12 for Moroccanoil and $377,830.12 for an unrelated creditor, Green Lighting Energy, were allowed in full. The Proposal Trustee also notes that if those contingent claims were not allowed at all, the recovery would be approximately 20%.[2]

5. In connection with the claim by Moroccanoil, the Proposal Trustee is also aware that security in the form of a bond of more than USD $700,000 in favour of Moroccanoil is also available. The Proposal Trustee understands that access to that bond by Moroccanoil is not available until a final determination of its claims against the Company.[3] Upon such final determination, any recovery under that bond will reduce Moroccanoil's claim on a

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[1] Moroccanoil factum, para. 36.
[2] Proposal Report para. 22; Motion Record, Tab 2, page 13. Claims Register, Appendix AF to the Proposal Report; Motion Record, Tab 2(AF), page 224.
[3] Affidavit of Mark Riedel sworn November 25, 2021, para. 9; Compendium of Moroccanoil, tab 12, page 113.

dollar for dollar basis before it would be entitled to share in any dividends under either the Proposal or a bankruptcy of the Company.

B. Good Faith

6. Moroccanoil's factum argues for relief based on the application of the new statutory duty of good faith that has been codified in s. 4.2(1) of the BIA.[4]

7. The Proposal Trustee's understanding of the law applicable to proposals under the BIA is that good faith on the part of the debtor was already an explicit consideration under the case law.[5]

8. A case cited by Moroccanoil in its factum is an example of the application of this consideration to a proposal before s. 4.2(1) was added to the BIA. In that case, the Court noted that (i) approval by the creditors was at least in part by the involvement of an individual who acquired over $15 million in claims against the debtor for $375,000, which were 80% of the 90% of creditors who had voted to approve, (ii) the debtor had listed assets worth over $67 million and a net worth of over $55 million in 2008, but at the time of his BIA filing in 2012 listed net assets of $50,000, debts of over $21 million, and gave a value of $1 to "various private companies", (iii) the proposal trustee had compiled a list of 48 companies but had not been provided with any records of those companies nor with any records of the affairs of the debtor, including bank statements, and (iv) the proposal contemplated ousting the application of the "look back" provisions in ss. 95 to 101 of the BIA, but the proposal trustee had been unable to assess whether that was reasonable. There the Court refused to approve the proposal on the basis of that lack of good faith (and in

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[4] Moroccanoil's factum, paras. 31-35.
[5] See for example *Kitchener Frame Limited (Re)*, 2012 ONSC 234 at para. 19.

addition to the fact that insufficient security had been granted for the payments promised in the proposal within the meaning of s. 59(3) of the BIA).[6]

9. Similar levels of misconduct by debtors were noted in the *Assaly* and *Berthiaume* cases cited by Moroccanoil about circumstances in which the breach of disclosure obligations regarding assets led to sanction by the Court. *Assaly* involved a failure by the debtor to disclose a number of assets, including valuable furniture with cumulative value of USD $30,000, failure to disclose the disposition of $450,000 effectively to the debtor's children, and lack of any disclosure of businesses that the debtor previously operated in the U.S.[7] *Berthiaume* involved what the Court found to be efforts to hide income in the company of the wife of the debtor, dishonesty about the disposition of real property, a motorcycle, and a cigarette boat prior to the bankruptcy, non-disclosure about how a $10,000 engagement ring and a $25,000 wedding were paid for, and twelve international vacations.[8]

10. While the *Assaly* and *Berthiaume* cases involved discharges from bankruptcy and conditions that were imposed, they are illustrative of the sort of conduct by a debtor that will lead to sanction by the Court. Similar conduct by a debtor in a proposal proceeding would be expected to lead to sanction as well, either through the refusal to approve a proposal under s. 59(2) of the BIA or the imposition of terms under s. 59(3).

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[6] *Milan, in bankruptcy*, 2012 ONSC 2899 at paras. 10, 20, 21, 22 and 41-43.
[7] *Re Assaly*, 2021 ONSC 3155 at para. 8.
[8] *Re Berthiaume*, 2019 ONSC 2727 at paras. 19-28, 55-56, 6-61, 70-71, 78, 79-81, and 82-88.

C. BIA s. 59(3)

11. Moroccanoil's factum argues that the 50 cent "threshold" in s. 59(3) of the BIA should not be overridden by a proposal that is better than a bankruptcy liquidation and is approved by the creditors.[9]

12. The Proposal Trustee's understanding of the basis for the 50 cent number in s. 59(3) of the BIA is that it is linked to s. 173(a) of the BIA, which provides that not having enough assets to pay 50 cents on the dollar of creditor claims is considered the debtor's "fault", unless there are circumstances "for which the debtor cannot justly be held responsible."

13. The *Wandler* case cited by both the Proposal Trustee in its main factum and by Moroccanoil in its factum supports this connection. It notes that when bankruptcy legislation was first introduced in the United Kingdom and in Canada, the respective parliaments wanted to balance as between "the honest and the dishonest debtor". The fifty cent amount was what Parliament set as the presumptive level below which the debtor would no longer be considered to be honest and misfortunate, but for which a satisfactory explanation would be required in order to avail the debtor of the rehabilitative aspects of the bankruptcy legislation.[10]

14. Moroccanoil's factum also asserts that "[a]though a Court has the discretion under Subsection 59(3) to lower this threshold, the power to do so should be used sparingly and with great care and caution."[11]Moroccanoil offers no authority for that proposition and the

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[9] Moroccanoil's factum, para. 43.
[10] *Re Wandler (Proposal)*, 2007 ABQB 153, paras. 29-32.
[11] Moroccanoil's factum, para. 38.

Proposal Trustee is unaware of any such authority. The authority before the Court is again the *Wandler* decision, which commented that when s. 59(3) is engaged:

> I prefer the view taken in Houlden and Morawetz that if no performance security is offered under a proposal, the court cannot approve it since s. 59(3) requires that there be a percentage of fifty cents on the dollar and zero is not a percentage of fifty cents. In any event, there must be some evidence presented to justify the court exercising its discretion to lower the percentage of performance security, and here there was none other than the creditors' approval of the Proposal, which alone is insufficient.

15. In *Wandler*, the Court was concerned about prospective payments in a proposal where there was no reasonable security for their payment beyond an initial payment that would only be worth 0.27% of the total amounts promised. BIA s. 59(3) was engaged because the debtor's assets were less than 50 cents on the dollar of the amounts owing and no circumstances had been shown as to why the debtor should not be held responsible for that. In fact the debtor had not even attended the hearing. The Court accordingly declined to approve the proposal.[12]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of July, 2022.

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[12] *Re Wandler (Proposal)*, 2007 ABQB 153, paras. 34, 35 and 38.

SCHEDULE A – LIST OF AUTHORITIES

1. *Re Assaly*, 2021 ONSC 3155
2. *Re Berthiaume*, 2019 ONSC 2727
3. *Kitchener Frame Limited (Re)*, 2012 ONSC 234
4. *Milan, in bankruptcy*, 2012 ONSC 2899
5. *Re Wandler (Proposal)*, 2007 ABQB 153

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