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

REPLY FACTUM OF CONFORTI HOLDINGS LIMITED
(Motion Returnable July 19, 2022)

July 15, 2022

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
bsachdeva@millerthomson.com

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

Lawyers for Conforti Holdings Limited

TABLE OF CONTENTS

I. INTRODUCTION

1. This factum is filed by Conforti Holdings Limited ("**Conforti**" or the "**Company**") in reply to the factum filed by Moroccanoil, Inc. ("**Moroccanoil**"), dated July 14, 2022.

2. Capitalized terms not defined herein shall have the meaning given to them in Conforti's factum, dated July 12, 2022.

II. CONFORTI DID NOT ACT IN BAD FAITH

3. Section 4.2 of the BIA provides that "[a]ny interested person in any proceedings under this Act shall act in good faith with respect to those proceedings."[1]

4. If a court is satisfied that an interested person "fails to act in good faith, on application by an interested person, the court may make any order it considers appropriate in the circumstances."[2]

5. While "interested person" is not defined in the BIA, it includes secured creditors and debtors.[3]

6. Under section 4.2 of the BIA, the good faith requirement requires "that an interested party not bring or conduct proceedings for an oblique motive or improper purpose.[4]

7. The content of the duty itself is fact-specific and requires parties not to lie or mislead the other. It does not require a duty of loyalty or disclosure, "or the subordination of one's own interest to the other".[5]

8. In determining whether a party has breached the good faith requirement, a court should consider the intent and policy objectives of the BIA.[6]

---

[1] s 4.2(1), BIA.
[2] s 4.2(2), BIA.
[3] *CWB Maxium Financial Inc. v. 2026998 Alberta Ltd.*, 2021 ABQB 137 at para 40.
[4] *CWB Maxium Financial Inc. v. 2026998 Alberta Ltd.*, 2021 ABQB 137 at para 59.

9. In *Kitchener Frame Ltd., Re*, Justice Morawetz (as he then was) reasoned that the proposal provisions of the BIA are intended to provide debtors with the opportunity to carry out a going concern or value maximizing restructuring to avoid bankruptcy and liquidation.[7]

10. In *CWB Maxium Financial Inc. v. 2026998 Alberta Ltd.*, the Alberta Court of Queen's Bench found that a secured creditor did not act in bad faith in bringing a receivership application where the application was not brought for an "oblique or improper purpose but rather to subject the assets of an insolvent debtor to an orderly, Court-supervised process for the benefit of interested parties."[8]

11. Conforti submits that it has at all times acted in good faith in these proposal proceedings. Contrary to Moroccanoil's protestations, the fact that this Court held that the BEI Debt was not secured does not constitute bad faith. First and foremost, BEI's actions and intentions in asserting the validity of the Management Fees and the BEI Debt are wholly irrelevant to whether Conforti, a separate corporate entity, acted in bad faith in these proposal proceedings.

12. Second, even if BEI's intentions could be imputed to Conforti, the documentation of the Management Fees and the BEI Debt by BEI is similarly wholly unrelated to these proposal proceedings, regardless of what Moroccanoil would like to infer. Neither the Management Fees nor the BEI Debt had any bearing on the impact of the COVID-19 pandemic on Conforti and the Company's decision to file the NOI.

13. However, assuming without conceding that BEI's failure to adequately document the BEI Debt and the Management Fees are somehow relevant to the proposal

---

[5] *CWB Maxium Financial Inc. v. 2026998 Alberta Ltd.*, 2021 ABQB 137 at para 59.
[6] *CWB Maxium Financial Inc. v. 2026998 Alberta Ltd.*, 2021 ABQB 137 at para 59.
[7] 2012 ONSC 234 at para 53.

proceedings and Conforti's intentions, such a failure does not constitute bad faith. Instead, it is a reflection of Mr. Conforti's view that the Management Fees owed were related company funds and he did not need to take steps to ensure that the accrued fees were adequately secured.

14. Further, the amounts claimed for Management Fees were based on the incomes the Principals earned in the years before the Expansion.[9] The amount of the Management Fees was not arbitrary.

15. Notably, in discussing Mr. Conforti's evidence regarding the Management Fees and the security for the same on the Moroccanoil Motion, this Court reasoned that it was "unable to find that Mr. Conforti's evidence is inherently implausible and should be disbelieved…. I am unable to find that, in respect of these factual matters, his answers were untruthful. Indeed, Moroccanoil relies on his evidence with respect to the dinner table agreement to support its submissions with respect to past consideration."[10]

16. In fact, at no point has this Court ruled that Conforti, BEI, or the Principals acted in bad faith. That legally this Court found that consideration was lacking for the BEI Debt, does not somehow mean that BEI's position on the Moroccanoil Motion was taken in bad faith.

17. Conforti also submits that there was no bad faith in disclosing the GSA and Management Fees in March 2021. In September 2020, the Company found itself struggling to survive and satisfy the amounts owing to creditors. It was an oversight that the BEI Debt was not disclosed in Conforti's initial filings in these proceedings. Given

---

[8] *CWB Maxium Financial Inc. v. 2026998 Alberta Ltd.*, 2021 ABQB 137 at para 208.

[9] Second Conforti Affidavit at para 20.

[10] *Conforti Holdings Limited, Re*, 2022 ONSC 3263 at para 51.

that Conforti's secured creditors are all related parties, it is unclear what ulterior motive Conforti could have had in disclosing one debt to a related party and not the other.

18. Moroccanoil's spurious allegations about alleged prejudice to Conforti's other creditors from the failure to disclose the BEI Debt and the GSA for the first six months of the proposal proceedings are without any factual basis. Conforti's creditors have voted three times in favour of proposals put forward by Conforti, including twice after the Stalking Horse Purchaser attempted to credit bid the BEI Debt. These creditors are sophisticated parties who are represented by legal counsel in these proceedings. At no point has any creditor but Moroccanoil alleged that they were prejudiced by the failure to disclose the BEI Debt or attempted to terminated the stay.

19. Instead, Conforti's other creditors have agreed to compromise nearly $10 million in claims to assist Conforti in continuing as a going concern.

20. Moreover, the mere fact that BEI was unsuccessful on the Moroccanoil Motion does not mean it was bad faith for BEI to claim that the BEI Debt was secured. It is a dangerous precedent if any time a creditor claims that a debt owed to it by a debtor is secured, and a court subsequently finds a legal basis lacking for the same, the creditor is acting in bad faith. This is not the conduct that section 4.2 of the BIA is designed to prohibit.

21. In respect of Moroccanoil's allegations about the SDI amalgamation that occurred eight years before this proposal proceeding was commenced, it is unclear how many times Moroccanoil wants to flog a dead horse. Not only are these allegations wholly irrelevant to this motion because they in no way relate to the proposal proceedings, the US Court has already ruled that it could "identify no litigation

advantage that [Conforti] gained from the belated disclosure, nor any prejudice that [Moroccanoil] has suffered."[11]

22. Similarly, there is no evidence that Moroccanoil was somehow prejudiced by not receiving the initial proposal proceeding materials. Moroccanoil has had ample opportunity to move to terminate the stay, or otherwise take steps to try to rectify the purported prejudice it has suffered. It has never done so.

23. Instead, Moroccanoil's motivations have been apparent throughout this proposal proceeding. Moroccanoil is nothing more than a contingent creditor with an unliquidated claim, whose objective is the demise of Conforti and the elimination of the threat the Company poses. These motivations are wholly relevant in considering its position on the within motion.[12]

24. In all of the above circumstances, Conforti submits that it has at all times acted in good faith in these proceedings and that no facts under section 173(1)(o) of the BIA have been proven.

[11] Second Conforti Affidavit at para 62.

[12] *Paradis et Stesi Société immobilière*, 2019 QCCS 2016.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of July, 2022.

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
bsachdeva@millerthomson.com

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

Lawyers for Conforti Holdings Limited

SCHEDULE "A"
LIST OF AUTHORITIES

1. *CWB Maxium Financial Inc. v. 2026998 Alberta Ltd.*, 2021 ABQB 137

2. *Kitchener Frame Ltd., Re*, 2012 ONSC 234

3. *Conforti Holdings Limited, Re*, 2022 ONSC 3263

4. *Paradis et Stesi Société immobilière*, 2019 QCCS 2016

SCHEDULE "B"
RELEVANT STATUTES

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

Duty of Good Faith
Good faith

4.2 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstance

Facts for which discharge may be refused, suspended or granted conditionally

173 (1) The facts referred to in section 172 are:

…

(o) the bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court.

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

Division No. 09-Toronto
Court No. 31-2675583
Estate No. 31-2675583

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

REPLY FACTUM OF CONFORTI HOLDINGS LIMITED
(Motion Returnable July 19, 2022)

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
bsachdeva@millerthomson.com

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

Lawyers for Conforti Holdings Limited