

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**

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

July 12, 2022

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I. INTRODUCTION

1. This factum is filed by Conforti Holdings Limited (“**Conforti**” or the “**Company**”) in support of the motion by Crowe Soberman Inc. (“**Crowe**”), in its capacity as proposal trustee of Conforti (the “**Proposal Trustee**”) for approval of the proposal made by Conforti to its creditors.

2. Conforti has been a successful family owned and operated beauty salon business for more than 45 years. Its principals, Antonio and Sylvia Conforti (together, the “**Principals**”) founded the Company in 1977 after moving to Canada from Italy. The Company has made significant investments in Southern Ontario over the past 45 years, including, before it filed a notice of intention to make a proposal to creditors (“**NOI**”) in September 2020, employing approximately 1,000 employees and independent contractors at its various salons.

3. At the start of the COVID-19 pandemic Conforti was a thriving business and success story. Like so many other businesses, COVID’s impact was devastating for Conforti. Conforti could not pivot to take out service, patios or home deliveries. All of its salons were inside shopping malls and just like so many other personal services businesses, Conforti’s operations were completely shut down for extensive periods and then severely restricted during those months they could open. Not only did these restrictions precipitate the NOI filing, but they have significantly constrained the Company’s cash flow during these proposal proceedings.

4. Conforti’s NOI filing was not precipitated by risky investments, reckless behaviour, bad judgment or any other blameworthy conduct. It was simply the result of the COVID pandemic.

5. In spite of this challenging business environment, Conforti's creditors have worked with the Company to ensure that it could continue to operate and have the chance to emerge from the proposal proceedings as a viable business. Its landlords have worked with the Company to find ways to accommodate Conforti's cash flow needs while respecting its rental obligations. Its employees have continued to provide services to customers when the salons were open to ensure that the Company could continue to earn revenue. Conforti fought to retain as many of its salons as possible and to keep employees employed through the lockdowns.

6. These same creditors, in particular Conforti's landlords, have now agreed to compromise nearly \$10 million in claims admitted for voting purposes in connection with Conforti's proposal so that the Company may continue to operate.

7. Moroccanoil, Inc. ("**Moroccanoil**"), is the one and only "creditor" opposing the proposal. Moroccanoil is a contingent creditor that has not yet proven its claim against Conforti; Conforti in fact adamantly denies that Moroccanoil is a creditor. Moroccanoil looks to bankrupt the Company to avoid Conforti's pending \$6.53 million claim against it (the "**Counterclaim**"). Moroccanoil has been embroiled in highly contentious litigation with Conforti before courts in the United States for more than ten years. Opposing approval of Conforti's proposal is just another scorched earth litigation tactic by Moroccanoil to defeat the Counterclaim.

8. Conforti submits that despite Moroccanoil's self-interested protestations, the proposal should be approved. It is made in good faith, is reasonable, and is calculated for the general benefit of Conforti's creditors. The Company's creditors stand to benefit more from the proposal than a bankruptcy, not only from the distributions expected under the proposal, but also from Conforti's continuing operations.

II. FACTS

A. Background

9. Conforti has been a family owned and operated business for more than 45 years.

The Principals founded the business in 1977 after immigrating to Canada from Italy.¹

10. The Company is a successful family business. From 2017 to 2019, Conforti averaged approximately \$35 million a year in gross profit, and generated \$55.8 million in sales revenue in 2019.²

11. As at the time of its NOI filing in September 2020, Conforti operated 52 beauty salons under ten different trade names in Southern Ontario.³ The Company also had more than 600 employees and 400 independent contractors working at its head office and at salons as stylists, estheticians, and front desk personnel.⁴

12. As a result of the financial pressures from the COVID-19 pandemic, the Company has been forced to rationalize its operations over the past two years. Currently, Conforti operates 35 salons, with 540 employees and independent contractors.⁵

13. Until August 23, 2021, Conforti owned and operated its head office from a 11,000 square foot commercial property municipally known as 7755 Warden Avenue, Unit 2, Markham, Ontario (the “**Head Office**”). As further described below, the Head Office was sold pursuant to a sales process administered by the Proposal Trustee on August 23, 2021.⁶

¹ Affidavit of Antonio Conforti, sworn November 11, 2021 (“**Second Conforti Affidavit**”) at para 13.

² First Report of the Proposal Trustee, dated October 23, 2020 at para 10.

³ Affidavit of Antonio Conforti, sworn October 21, 2020 (“**First Conforti Affidavit**”) at para 4.

⁴ First Conforti Affidavit at para 8.

⁵ Report of Trustee on Proposal, dated June 22, 2022 (the “**Proposal Report**”) at para 24, Motion Record of the Proposal Trustee (the “**Proposal Trustee MR**”) at Tab 2, p 13.

⁶ Second Conforti Affidavit at para 10.

B. Expansion

14. In 2010, Conforti decided to expand its operations by opening additional salons beyond the 47 it operated at that time. From 2010 to 2017, Conforti added an additional 13 salons to its portfolio at a substantial investment (the “**Expansion**”).⁷

15. In order to fund this significant operational expansion and otherwise manage Conforti’s liquidity, the Principals decided that management fees for their oversight of the business would be charged by a related company, Beauty Experts Inc. (“**BEI**”), to Conforti but the fees would be deferred until after the Expansion was complete (the “**Management Fees**”).⁸

16. As a condition of BEI’s provision of management services to Conforti, BEI required Conforti to execute a general security agreement to secure the due payment and performance of Conforti’s obligations to BEI. Pursuant to the general security agreement, dated March 2, 2010, Conforti granted BEI a security interest over all of Conforti’s personal property.⁹

17. The Expansion was complete in 2018.¹⁰

C. Proposal Proceeding

18. Most of Conforti’s salons are located in shopping malls. In the years leading up to the NOI filing, traffic in many of the malls had declined, but the rent charged by shopping mall landlords had increased.

19. Traffic in malls came to a halt on March 24, 2020, when the Province of Ontario shut down all non-essential workplaces, including shopping malls, in order to limit the

⁷ Second Conforti Affidavit at paras 14-15.

⁸ Second Conforti Affidavit at para 17.

⁹ Second Conforti Affidavit at para 18.

¹⁰ Second Conforti Affidavit at para 22.

spread of COVID-19.¹¹ Shopping malls in the Greater Toronto Area were closed throughout most of the spring and summer of 2020 due to the COVID-19 pandemic.¹²

20. As a result of these financial pressures, and the demands from one of its landlords, on September 28, 2020, Conforti filed an NOI under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”), naming Crowe as Proposal Trustee.¹³

21. At the time the NOI was filed, the Proposal Trustee was not aware of any ongoing litigation between Moroccanoil and Conforti. Accordingly, Moroccanoil was inadvertently left off of the list of creditors set out in the NOI filing.¹⁴

22. Further, Conforti did not disclose the amounts owing to BEI on account of the Management Fees, or BEI’s related security interest, in its original statement of affairs, filed on September 28, 2020, or subsequent motions to the Court on October 26, 2020, December 14, 2020, and January 27, 2021, because Mr. Conforti did not believe he had to disclose the BEI debt or security because it was owed to a related third party.¹⁵

23. The Company ultimately disclosed the BEI debt and security in its March 12, 2021 statement of affairs filed in connection with a holding proposal and in advance of the first meeting of Conforti’s creditors.¹⁶

24. The stay of proceedings afforded by Conforti’s NOI filing was extended three times by orders of the Court.¹⁷

¹¹ First Conforti Affidavit at para 17.

¹² Second Conforti Affidavit at para 29.

¹³ Second Conforti Affidavit at para 30.

¹⁴ Second Conforti Affidavit at para 31.

¹⁵ Factum of the Proposal Trustee, dated July 9, 2022 (the “**Proposal Trustee Factum**”), at paras 15, 17.

¹⁶ Proposal Trustee Factum at para 14.

¹⁷ Second Conforti Affidavit at para 33.

25. Before the final extension of the stay of proceedings expired, Conforti filed a holding proposal to its creditors on March 12, 2021. Conforti filed a holding proposal at that time because its salons were closed as a result of the COVID-19 public health restrictions, and it was unclear when the salons would be permitted to reopen, let alone reopen at full capacity.¹⁸

26. The Proposal Trustee held the first meeting of Conforti's creditors on April 1, 2021. The creditors meeting was adjourned to October 29, 2021, and subsequently adjourned at that meeting to March 31, 2022 (the "**Creditors Meeting**").¹⁹

D. Sale of Head Office

27. The prolonged closure of Conforti's salons for most of the past two years as a result of the COVID-19 pandemic has caused Conforti to increasingly deplete the cash reserves it had on hand at the time it filed the NOI.²⁰

28. In order to conserve cash resources and reduce its overall debt load for the benefit of its creditors, Conforti, in consultation with the Proposal Trustee, decided to sell the Head Office.²¹

29. By motion returnable May 25, 2021, Conforti obtained an order (the "**Sale Process Order**") (i) authorizing and directing the Proposal Trustee to carry out a stalking horse sales process for the sale of the Head Office; and (ii) approving a stalking horse asset purchase agreement between Conforti and Cicaplus Ltd. (the "**Stalking**

¹⁸ Second Conforti Affidavit at para 36.

¹⁹ Second Conforti Affidavit at paras 38-39.

²⁰ Second Conforti Affidavit at para 40.

²¹ Second Conforti Affidavit at para 41.

Horse Purchaser") as a stalking horse bid (the "**Stalking Horse APA**"). The Stalking Horse Purchaser is related to Conforti.²²

30. The Proposal Trustee received seven Qualifying Bids (as that term is defined in the Sale Process Order) for the Head Office as a result of the sale process.²³

31. In accordance with the Sale Process Order, the Proposal Trustee held an auction among the Qualified Bidders (as defined in the Sale Process Order) on July 15, 2021. At the conclusion of the auction, the Stalking Horse Purchaser was the Successful Bidder (as defined in the Sale Process Order) having submitted the highest bid for the Head Office. The successful bid was for \$6,200,000, which was \$2,668,650 higher than the Stalking Horse APA. Of the \$6,200,000 purchase price, \$2,768,650 was to be paid in cash, and the balance was to be satisfied by the assumption of related-party debt, including \$1,500,000 owed by Conforti to BEI on account of the Management Fees (the "**BEI Debt**").²⁴

32. By motion returnable August 23, 2021 (the "**Sale Approval Motion**"), the Proposal Trustee sought approval of the sale of the Head Office to the Stalking Horse Purchaser pursuant to an augmented Stalking Horse APA (the "**Augmented APA**").²⁵

33. Although the Proposal Trustee had obtained an independent legal opinion confirming, subject to the usual assumptions and qualifications, the validity and enforceability of the third-party debt including the BEI Debt in support of its Sale Approval Motion, Moroccanoil challenged the validity of BEI Debt (the "**Moroccanoil Motion**").²⁶

²² Second Conforti Affidavit at para 42.

²³ Second Conforti Affidavit at para 45.

²⁴ Second Conforti Affidavit at para 46.

²⁵ Second Conforti Affidavit at para 47.

²⁶ Second Conforti Affidavit at paras 48-49.

34. Ultimately, Conforti, the Stalking Horse Purchaser, and Moroccanoil agreed that the sale could be approved and the vesting order granted subject to certain terms. Among other things, the Stalking Horse Purchaser was required to deposit \$1,500,000 in trust with counsel for the Proposal Trustee pending resolution of the Moroccanoil Motion.²⁷

35. The Augmented APA was approved and the Head Office was vested in the Stalking Horse Purchaser pursuant to an order of the Court dated August 23, 2021. The approval and vesting order was without prejudice to, among other things, the positions of the Stalking Horse Purchaser and Moroccanoil with respect to the BEI Debt.²⁸

36. The Moroccanoil Motion was heard on March 15, 2022, and the Court granted the motion on May 31, 2022, such that the BEI Debt was deemed unsecured.²⁹

E. Proposal

37. On March 28, 2022, Conforti filed an amended proposal to its creditors with the Office of the Superintendent of Bankruptcy (as further amended, the “**Proposal**”).³⁰

38. Details of the Proposal are contained in the Proposal Trustee’s Report on the Proposal, dated June 22, 2022. At a high level, the Proposal provides for a total Creditor Payment Fund (as defined in the Proposal) of \$2,430,000 for creditors upon court approval of the Proposal. This is 22.7% of all claims admitted for voting on the Proposal.³¹

²⁷ Second Conforti Affidavit at para 50.

²⁸ Second Conforti Affidavit at para 52.

²⁹ [Re Conforti Holdings Limited, 2022 ONSC 3263.](#)

³⁰ Proposal Report at para 16, Proposal Trustee MR at Tab 2, p 11.

³¹ Amended Proposal, Appendix “AC” to Proposal Report, Proposal Trustee MR at Tab 2AC, p 198.

39. In the event that Conforti is successful on its Counterclaim against Morccanoil, Conforti will contribute an additional 60% of the Paid Net Judgement and Bond Funds to the Creditor Payment Fund (all as defined in the Proposal).³²

40. As noted above, Conforti held the Creditors Meeting in order to vote on the Proposal on March 31, 2022. At the meeting, the Proposal was updated to conform with section 65.11 of the BIA.³³

41. The Proposal is more beneficial to Conforti's creditors than a bankruptcy. The Proposal Trustee estimates, based on claims filed and not including contingent claims, that Conforti's creditors will receive a 20% return under the Proposal as opposed to 13% in a bankruptcy scenario. If the contingent claims are considered, Conforti's creditors will receive 16% under the Proposal and 11% in a bankruptcy.³⁴

42. At the Creditors' Meeting, Conforti's creditors voted overwhelmingly to approve the Proposal: 96.3% of Conforti's creditors holding 100% of claims admitted for voting purposes voted in favour of the Proposal. The only creditor to vote against the Proposal was Moroccanoil.³⁵

F. Moroccanoil Litigation

43. Moroccanoil is a California corporation that carries on business as a distributor of hair care products in Canada (among other countries).³⁶

44. For the past decade, Moroccanoil has embroiled Conforti in litigation before the United States District Court for the District of New Jersey (the "**US Court**"). Throughout the proceedings Moroccanoil has engaged in "scorched earth" litigation tactics that have

³² Voting Summary, Appendix "AB" to Proposal Report, Proposal Trustee MR at Tab at Tab 2AB, p 195.

³³ Proposal Report at para 19, Proposal Trustee MR at Tab 2, p 12.

³⁴ Proposal Report at para 22, Proposal Trustee MR at Tab 2, p 13.

³⁵ Voting Summary, Appendix "AB" to the Proposal Report, Proposal Trustee MR at Tab 2AB, p 195.

not only prolonged the proceedings but also significantly increased the legal costs for all of the parties.³⁷

45. In 2011, Moroccanoil sued Conforti's predecessor, Salon Distribution, Inc. ("SDI") and Mr. Conforti in the US Court. The parties subsequently resolved that litigation by way of a settlement agreement, dated July 15, 2013 (the "**Settlement Agreement**").³⁸

46. Among other things, the Settlement Agreement required SDI to purchase, and Moroccanoil to supply, \$1,298,000 worth of Moroccanoil products over three years.³⁹

47. The Settlement Agreement also required SDI to obtain a bond in the amount of \$1,250,000 to secure the liability of SDI and Mr. Conforti for breach of the Settlement Agreement.⁴⁰

48. Pursuant to the terms of the Settlement Agreement, from July 15, 2013 to January 2015, Conforti purchased \$804,091.61 in Moroccanoil products.⁴¹

49. In January 2015, Moroccanoil alleged that Conforti had diverted Moroccanoil products to a store in Macau. Despite this allegation, at no time did Moroccanoil provide any evidence that Conforti had diverted products to Macau. Moroccanoil relied on this alleged diversion and stopped supplying its products to Conforti in breach of the Settlement Agreement in February 2015.⁴²

50. Despite the fact there was no evidence that Conforti had diverted Moroccanoil products, and that Moroccanoil itself had breached the Settlement Agreement by failing

³⁶ Second Conforti Affidavit at para 12.

³⁷ Second Conforti Affidavit at paras 5, 54.

³⁸ Second Conforti Affidavit at para 55.

³⁹ Second Conforti Affidavit at para 56.

⁴⁰ Second Conforti Affidavit at para 57.

⁴¹ Second Conforti Affidavit at para 64.

⁴² Second Conforti Affidavit at paras 65-66.

to sell Moroccanoil products to Conforti, Moroccanoil brought a motion to enforce the agreement in the US Court in April 2015.⁴³

51. In August 2015, Conforti opposed Moroccanoil's motion and filed an affirmative cross-motion to enforce the Settlement Agreement (with Moroccanoil's motion, together, the "**US Action**"), including a claim for \$4,430,000 and a further \$2,100,000 in legal fees (the Counterclaim).⁴⁴

52. On August 11, 2021, the US Court stayed the US Action pending determination of the NOI proceedings. Moroccanoil represented to the Court that the NOI proceedings and its claim would be completed before the end of 2021.⁴⁵

53. Moroccanoil filed a proof of claim with the Proposal Trustee on August 19, 2021. The Proposal Trustee has not yet made any determination on the substance of the proof of claim. For purposes of the Creditors' Meeting, the Proposal Trustee treated the proof of claim as contingent and valued it at \$1 for procedural purposes only.⁴⁶

54. By motion returnable March 15, 2022, the Proposal Trustee sought directions from the Court that would have permitted the US Action to return to the US Court for adjudication. The Court denied the Proposal Trustee's motion. The Court's decision is subject to motions for leave to appeal from both Conforti and the Proposal Trustee.

III. ISSUE PRESENTED

55. The issue presented on this motion is whether Conforti's proposal should be approved.

⁴³ Second Conforti Affidavit at para 68.

⁴⁴ Second Conforti Affidavit at paras 69-70.

⁴⁵ Second Conforti Affidavit at para 74.

⁴⁶ Second Conforti Affidavit at para 75.

IV. LAW AND ARGUMENT

A. Proposal Received Required Majority Support

56. A debtor's proposal to its creditors is deemed to be accepted by the creditors if all classes of creditors vote in favour of the proposal by a majority in number and two-thirds in value.⁴⁷

57. At the Creditors' Meeting the Proposal was approved by the requisite double majority of creditors: 96.3% of Conforti's creditors, holding 100% of claims admitted for voting purposes voted in favour of the Proposal. The only creditor to vote against the Proposal was Moroccanoil, a contingent creditor whose claim was valued at \$1 for voting purposes.⁴⁸

B. Proposal Should be Approved

58. Once a proposal is accepted by a debtor's creditors, the trustee is required to apply to court for approval of the proposal.⁴⁹ In order to approve a proposal, the court must be satisfied that the proposal:

- (i) is reasonable;
- (ii) is calculated to benefit the general body of creditors; and
- (iii) is made in good faith.⁵⁰

59. A proposal is reasonable if it has a reasonable possibility of being completed in accordance with its terms.⁵¹

60. The Court must also be satisfied that the proposal's payment and distribution terms are adequate to meet the requirements of commercial morality and maintaining

⁴⁷ s 54(2)(d), *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("BIA").

⁴⁸ Voting Summary, Appendix "AB" to the Proposal Report, Proposal Trustee MR at Tab 2AB, p 195.

⁴⁹ s 58, BIA.

⁵⁰ [*Kitchener Frame Ltd., Re, 2012 ONSC 234 at para 19*](#); s 59(2), BIA.

⁵¹ [*Abou-Rached, Re, 2002 BCSC 1022 at para 68*](#).

the integrity of the bankruptcy system.⁵² A proposal meets the requirements of commercial morality and maintains the integrity of the bankruptcy system if a debtor's creditors will receive a greater recovery under a proposal than under a bankruptcy.⁵³

61. Courts will also take into account the interests of the debtor, its creditors, and the public at large in the integrity of the bankruptcy system.⁵⁴ The public interest requires that efforts be made to promote the continuity of viable enterprises.⁵⁵

62. However, courts should give "substantial deference" to the majority vote of creditors at the creditors' meeting and the recommendation of the proposal trustee.⁵⁶ If a large majority of creditors have voted to accept a proposal, "it will take strong reasons for the court to substitute its judgment for that of the creditors."⁵⁷

63. Conforti submits that the Proposal should be approved because it is reasonable, is calculated to benefit the general body of the Company's creditors and is made in good faith.

64. Conforti has already deposited the necessary funds with the Proposal Trustee to fulfill the Company's obligations to fund the Proposal. The remaining funds are owed by Conforti if, and only if, it is successful on its Counterclaim. In the event of Conforti's success, the Company will make a further distribution to the Proposal Trustee of 60% of any judgment paid by Moroccanoil to Conforti, after all legal fees and costs have been satisfied. Accordingly, Conforti has already substantially completed its obligations under the Proposal, and there is every reason to believe that Conforti will make any

⁵² [Kitchener Frame, Re, 2012 ONSC 234 at para 22.](#)

⁵³ [Tridont Health Care Inc., Re, \[1991\] OJ No 130 at para 14 \(Ont Sup Ct J \[Commercial List\]\).](#)

⁵⁴ [Kitchener Frame Ltd., Re, 2012 ONSC 234 at para 20.](#)

⁵⁵ [Paradis et Stesi Société immobilière, 2019 QCCS 2016 at para 25 \(internal quotations omitted\).](#)

⁵⁶ [Kitchener Frame Ltd., Re, 2012 ONSC 234 at para 21.](#)

⁵⁷ [Abou-Rached, Re, 2002 BCSC 1022 at para 66.](#)

remaining payments to the Proposal Trustee in the event the Company is successful on its Counterclaim.

65. Further, the Proposal's payment and distribution terms comport with the requirements of commercial morality and maintenance of the integrity of the bankruptcy system because, as noted in the Proposal Trustee's Report, Conforti's creditors will receive more under the Proposal than in a liquidation scenario. In a bankruptcy, the Proposal Trustee estimates that creditors would receive a distribution of only 13%, versus the 20% minimum recovery they are expected to receive under the Proposal and the business's operational requirements.⁵⁸

66. Conforti burned through extensive cash reserves during the COVID lockdowns while trying to maintain as many of the Company's salons as possible and retain as many employees and independent contractors as it could. Conforti fought as hard as possible to continue as a going concern in one of the worst hit industries by the pandemic and related restrictions.

67. Conforti is ready to emerge from the proposal proceedings while continuing to provide work for 540 employees and independent contractors, and reward their landlords who stood by them by becoming fully performing tenants under the Company's various leases and extensions.

68. The Proposal is also made in good faith. Conforti monetized its only material asset, its Head Office, nearly a year ago for the benefit of its creditors. The sale of the Head Office not only reduced Conforti's ongoing overhead costs, but also generated significant sale proceeds which are being used to fund the Proposal.⁵⁹

⁵⁸ Proposal Report, para 22, Proposal Trustee MR at Tab 2, p 13.

⁵⁹ Second Conforti Affidavit at paras 41, 46.

69. Conforti's only other material asset is the Counterclaim, which both Conforti and Mr. Conforti continue to prosecute for the benefit of the Company's creditors.

70. As noted by the Proposal Trustee in its Report, Conforti does not have any other assets of significant value. Its only remaining assets, namely hair salon furniture and beauty supplies, are unlikely to generate more than \$230,000 for creditors.⁶⁰ If such assets were monetized, Conforti would be unable to run its business. Accordingly, Conforti has and is attempting to realize all of its material assets in order to maximize recoveries for creditors.

71. Moreover, deference should be given to the approval of the Proposal by Conforti's creditors: 96.3% of Conforti's creditors holding 100% of claims admitted for voting purposes voted in favour of the Proposal. The only creditor to vote against the Proposal was Moroccanoil a contingent creditor who, as further explained below, is uniquely motivated to bankrupt Conforti.

72. Conforti's landlords have agreed to compromise nearly \$10 million in claims that they may be owed in order to enable Conforti to survive as a business and continue as a performing tenant under the various leases with the Company. As opposed to Moroccanoil's contingent and unliquidated claim, these are actual amounts lost by the creditors and not a speculative damages amount based on questionable evidence that has yet to be adjudicated.

73. These landlords have stood by Conforti for the past 22 months and worked with the Company to enable it to not only remain in business during a tumultuous and uncertain time, but also provide Conforti with the opportunity to emerge from the Proposal proceedings as a going concern.

74. Similarly, Conforti's employees and independent contractors have also stood by the Company and continued to work with Conforti to ensure that when the salons were open during the pandemic and, if the proposal is approved, once the Company emerges from the proposal proceedings, Conforti could continue to provide services to customers all at great personal uncertainty.

75. The only creditor opposing approval of the Proposal is Moroccanoil, who is motivated to bankrupt Conforti in order to defeat the Counterclaim. In comparing the relative advantages to Conforti's creditors if the Proposal is approved, and to Moroccanoil if it fails, the contingent creditor's motivation is readily apparent.

76. Among other things, approval of the Proposal will:

- maximize recoveries for Conforti's creditors, including Moroccanoil in the event that it is successful on its claim;
- potentially increase creditor recoveries by permitting Conforti to continue to prosecute the Counterclaim for the benefit of all of the Company's creditors;
- preserve employment and contract work, respectively, for Conforti's 540 employees and independent contractors;
- ensure the Company's twelve landlords have a viable tenant at 35 leased premises representing millions in annual rental revenue;⁶¹ and
- maintain supplier relationships;

77. Conversely, if the Proposal is not approved and Conforti is deemed bankrupt, Moroccanoil—and only Moroccanoil—will benefit by:

- defeating the Counterclaim.

⁶⁰ Trustee's Report to Creditors on Proposal, dated March 23, 2022, Appendix "W" to Proposal Report, Proposal Trustee MR at Tab 2W, p 179.

- laying claim to a bond in the amount of approximately \$1 million used to secure the settlement which is the subject of the litigation in the US.

No creditors other than Moroccanoil stand to benefit if the Proposal is defeated because creditor recoveries are less in a bankruptcy scenario than under the Proposal. Further, Conforti's 540 employees and independent contractors will lose their jobs, and the Company's landlords will lose their tenant.

78. The good faith efforts of Conforti, its landlords, and its employees, as well as the millions of dollars in claims compromised by landlords, are all being jeopardized by Moroccanoil's unique motivation to bankrupt the Company in order to eliminate a viable Counterclaim against Moroccanoil take the bond for its sole benefit

79. This is not a case where the Court should refuse to approve a proposal because it serves the interests of persons other than Conforti's creditors, Conforti has not fully disclosed its assets and encumbrances, or where the proposal is bound to fail.⁶² Instead, the Proposal has been specifically designed by Conforti to maximize realizations for the Company's creditors.

80. Conforti has also made full disclosure of its assets and obligations to the Proposal Trustee and to its creditors in advance of the Creditors' Meeting. It has at all times worked with the Proposal Trustee to maintain its business operations in a challenging and unpredictable operating environment.

81. Accordingly, Conforti submits that the Proposal should be approved.

⁶¹ Cash Flow Projections (13 weeks) for the period March 14 to June 6, 2022, Appendix "X" to the Proposal Report, Proposal Trustee MR Tab 2X, p 184.

⁶² [Abou-Rached, Re, 2002 BCSC 1022 at para 78.](#)

C. Section 173 Facts Are Not Proven

82. Under section 59(3) of the BIA, if any facts mentioned in section 173 are proven against a debtor, the court shall refuse to approve a proposal unless the proposal provides reasonable security for the payment of not less than fifty cents on the dollar of all unsecured claims provable against the debtor's estate, or "such percentage thereof as the court may direct."⁶³

83. Where a debtor's assets are less than fifty cents of its unsecured liabilities, the debtor will not be liable for the shortfall if it arose as a result of an economic downturn.⁶⁴

84. Conforti submits that none of the facts in section 173 of the BIA have been proven against the Company.

85. First, while Conforti's assets may not equal fifty cents on the dollar of its unsecured liabilities, this is a direct result of the COVID-19 pandemic.

86. Not only was the COVID pandemic unpredictable, the financial consequences of the pandemic are also not circumstances for which Conforti can be held responsible or a result of deliberate misconduct or culpable neglect.

87. The Proposal Trustee has opined that Conforti's insolvency was caused entirely by the COVID-19 pandemic and not as a result of any blameworthy conduct on the part of Conforti.⁶⁵ Not a single creditor—including Moroccanoil—disagrees with this conclusion.

88. Other than Conforti's administrative failings to disclose the BEI Debt for six months and not initially serving Moroccanoil with the proposal materials, which

⁶³ s 59(3), BIA.

⁶⁴ [See Abou-Rached, Re, 2002 BCSC 1022 at paras 89, 92.](#)

⁶⁵ Proposal Trustee Factum, at para 30.

Moroccanoil relies upon to try and bankrupt Conforti, there is no other alleged improper conduct by any creditor, including Moroccanoil.

89. This is not a case, like in *Re Berthiaume*, where the debtor failed to disclose income, assets, the disposition of assets, and under reported income with the effect of depriving creditors of recoveries or surplus income payments.⁶⁶ Instead, and as the Proposal Trustee has opined, there is no prejudice to the Company, its creditors or the insolvency proceeding caused by these late disclosures.⁶⁷

90. Nor can Moroccanoil point to any purported prejudice. Moroccanoil was aware of the sale of the Head Office. It did not object to the process, the price, or the closing of the same. It simply challenged the validity of the BEI Debt.

91. In order to close the sale of the Head Office as quickly as possible so as to minimize ongoing overhead costs for Conforti's creditors, BEI posted the total amount of the BEI Debt, \$1.5 million, into court.

92. Moreover, Moroccanoil could have moved at any time after learning of the proposal proceedings to terminate the stay if it was actually prejudiced by the same. It did not.

93. Moroccanoil participated in both the October and March creditors' meetings. That the contingent creditor is bitter it could not control the vote at either meeting is not grounds to bankrupt the Company, or evidence of prejudice.

94. Moreover, and as opposed to *Re Berthiaume* and other similar cases where facts are established under section 173(o) of the BIA, it is entirely unclear what advantage Conforti possibly could have gained by not disclosing the BEI Debt at the time of the NOI filing or not initially serving Moroccanoil with the NOI filing materials.

⁶⁶ [2019 ONSC 2727](#).

95. However, even if a fact under section 173 of the BIA has been proven against Conforti, which the Company denies, Conforti submits that the Court should exercise its discretion to approve the Proposal with a lower amount of security.

96. In *Abou-Rached, Re*, the B.C. Supreme Court exercised its discretion to approve a proposal that provided 15% security for the payment of all unsecured claims, even though a fact pursuant to section 173 of the BIA had been established, where the proposal was viable and there was a “paucity of assets of the debtors otherwise available to the creditors”.⁶⁸

97. Similarly, in *Tridont Health Care Inc., Re*, the Court approved a proposal that provided for a 9% dividend to unsecured creditors even though a fact under section 173 of the BIA had been proven where the proposal was reasonable, advantageous to creditors, and there was a reasonable possibility that it would be implemented.⁶⁹

98. In *Paradis et Stesi Société immobilière*, in approving a proposal that provided for security for payment of approximately 1.6% of all unsecured claims, the Quebec Superior Court reasoned that a court is required to take into consideration the interests of all creditors, and the debtors’ creditors preferred to maintain their business relationship with the debtors rather than force a bankruptcy because they stood to gain from the debtors’ continued operations. Conversely, the business prospects of the creditors who opposed approval of the proposal were compromised as a result of ongoing litigation.⁷⁰

99. Conforti respectfully submits that the Court should exercise its discretion and approve the 22.7% security provided by the Proposal. The security provided by the

⁶⁷ Proposal Trustee Factum at paras 32b, 33c.

⁶⁸ [2002 BCSC 1022 at para 135](#).

⁶⁹ [\[1991\] OJ No 130 at para 15](#).

Proposal is a meaningful amount, and reflects a near complete monetization of Conforti's assets. As detailed above, Conforti does not have any other assets that can be realized for the benefit of its creditors, or additional cash flow to increase the payments under the Proposal.

100. While Conforti had intended to use \$500,000 that BEI had hoped to retain under its security, the Court's decision on BEI's security means that the full \$1.5 million will be paid to Conforti's creditors and the additional cash will not be available to fund Conforti's operations.

101. Accordingly, and as demonstrated by the Company's cash flows, if Conforti were required to provide increased security through the Proposal, the Company would not be able to meet its debts as they come due, including its \$520,000 monthly rental obligations for the salons.⁷¹ Conforti simply does not have any additional funds to contribute to the Proposal without jeopardizing its ability to fund operations.

102. All of Conforti's creditors, other than Moroccanoil, have approved the Proposal.

103. Although the security is less than 50%, it is still significantly more than the amounts approved by the courts in *Abou-Rached, Re, Paradis et Stesi Société immobilière* and *Tridont Health Care Inc., Re*.

104. Further, the vast majority of Conforti's creditors support the Proposal because, like the creditors who approved the proposal in *Paradis et Stesi Société immobilière*, they have more to gain if Conforti remains in business than if it is bankrupt. Conversely, Moroccanoil has nothing to lose by opposing the Proposal and everything to gain by bankrupting Conforti in order to defeat the Company's \$6,530,000 Counterclaim.

⁷⁰ [2019 QCCS 2016](#).

⁷¹ Cash Flow Projections (13 weeks) for the period March 14 to June 6, 2022, Appendix "X" to the Proposal Report, Proposal Trustee MR at Tab 2X, p 184.

105. In all of the above circumstances, Conforti submits that if a fact under section 173 of the BIA has been established, which the Company denies, the Court should exercise its discretion to approve the security provided by the Proposal.

V. RELIEF REQUESTED

106. In light of the foregoing, Conforti requests that the Proposal Trustee's motion be granted and the Proposal approved.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of July, 2022.



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SCHEDULE “A”
LIST OF AUTHORITIES

1. *Re Conforti Holdings Limited*, 2022 ONSC 3263
2. *Kitchener Frame Ltd., Re*, 2012 ONSC 234
3. *Abou-Rached, Re*, 2002 BCSC 1022
4. *Tridont Health Care Inc., Re*, [1991] OJ No 130 (Ont Sup Ct J [Commercial List])
5. *Paradis et Stesi Société immobilière*, 2019 QCCS 2016
6. *Re Berthiaume*, 2019 ONSC 2727

SCHEDULE “B”
RELEVANT STATUTES

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

Vote on proposal by Creditors

Voting system

(2) For the purpose of subsection (1),

...

(d) the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, a class of creditors having equity claims — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

Application for court approval

58 On acceptance of a proposal by the creditors, the trustee shall

(a) within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court’s approval of the proposal;

(b) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;

(c) forward a copy of the report referred to in paragraph (d) to the official receiver at least ten days before the date of the hearing; and

(d) at least two days before the date of the hearing, file with the court, in the prescribed form, a report on the proposal.

Court may refuse to approve the proposal

59(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

Reasonable security

59(3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

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

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

(a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;

(b) the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by the bankrupt and as sufficiently disclose the business transactions and financial position of the bankrupt within the period beginning on the day that is three years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;

(c) the bankrupt has continued to trade after becoming aware of being insolvent;

(d) the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;

(e) the bankrupt has brought on, or contributed to, the bankruptcy by rash and hazardous speculations, by unjustifiable extravagance in living, by gambling or by culpable neglect of the bankrupt's business affairs;

(f) the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt;

(g) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred unjustifiable expense by bringing a frivolous or vexatious action;

(h) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, when unable to pay debts as they became due, given an undue preference to any of the bankrupt's creditors;

(i) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both

dates included, incurred liabilities in order to make the bankrupt's assets equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities;

- (j)** the bankrupt has on any previous occasion been bankrupt or made a proposal to creditors;
- (k)** the bankrupt has been guilty of any fraud or fraudulent breach of trust;
- (l)** the bankrupt has committed any offence under this Act or any other statute in connection with the bankrupt's property, the bankruptcy or the proceedings thereunder;
- (m)** the bankrupt has failed to comply with a requirement to pay imposed under section 68;
- (n)** the bankrupt, if the bankrupt could have made a viable proposal, chose bankruptcy rather than a proposal to creditors as the means to resolve the indebtedness; and
- (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

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

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