

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

8527504 CANADA INC.

Applicant

and

SUN PAC FOODS LIMITED

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 c. C. 43, AS AMENDED

NOTICE OF MOTION

Liquibrands Inc. (“**Liquibrands**”), in its capacity as creditor of Sun Pac Foods Limited (“**Sun Pac**”), will make a Motion before a Judge to be heard on a date and time to be fixed by the Commercial List at the Court House, 330 University Avenue, Toronto, Ontario, M5G 1E6.

PROPOSED METHOD FOR HEARING: The Motion is to be heard orally.

THE MOTION IS FOR:

1. An Order, if necessary, validating service of this Notice of Motion and Motion Record in the manner effected, abridging the time for service thereof and dispensing with service thereof on any party other than the parties served;

2. An Order directing the trial of an issue for a declaration that 8527504 Canada Inc. (“**852**”) and Bridging Capital Inc. (“**BCI**”) breached the terms of a “Forbearance Agreement” among those parties, Sun Pac and Liquibrands as herein described; and, if the declaration be given, an Order:

- (a) lifting the stay of proceedings in Court File CV-13-00492612-0000 (“**Action**”) and for leave for Sun Pac and Liquibrands to continue the Action against 852 and Bridging;
- (b) declaring Liquibrands entitled to claim under its general security agreement in priority to claims by 852 and BCI;
- (c) appointing msi Spergel Inc. (“**Spergel**”) as receiver of the remaining assets of Sun Pac for the purposes of advancing the litigation and disposing of the proceeds of realization and litigation;
- (d) requiring Sun Pac’s current receiver, BDO Canada Limited (“**BDO**”), to pay the proceeds of realization of the assets of Sun Pac into Court pending a final decision of the Court on the declaration and the action thereafter, if any, or pending further Court order; and
- (e) declaring that Liquibrands’ guarantee of Sun Pac debt is unenforceable; and

3. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

Background

4. Liquibrands is a privately held Canadian company.
5. Liquibrands acquired the shares of Sun Pac in November 2011 and is the sole shareholder of Sun Pac.
6. Sun Pac is a privately-owned, Canadian manufacturer of private label and branded beverage products, including juices, natural teas, sports drinks, juice concentrates, frozen juices and other beverage products. The company also manufactured croutons and bread crumbs under the 'McDowell Ovens' banner and private label brands owned by various large Canadian retailers (“**Breadcrumbs Division**”). Sun Pac products were distributed throughout North America.
7. Liquibrands is wholly owned by Csaba Reider.
8. Mr. Reider was an officer and director of Sun Pac and is the sole officer and director of Liquibrands.
9. Sun Pac operated at 10 Sun Pac Boulevard, Brampton, Ontario housing production as well as refrigerated, frozen and dry warehousing. This property was leased from Menkes GTA Holdings Inc.
10. BCI is a privately held Canadian company that provides financing to Canadian companies.
11. 852 is a company related to BCI.

12. 852 put Sun Pac into receivership.

13. Until November 2013, Sun Pac had approximately 52 employees. Before the imminent receivership it was forced to lay off its employees. The employees were later terminated by BDO.

14. 852 and BCI asked BDO to become the receiver over Sun Pac's assets and was appointed Receiver by court order in November 2013.

15. BDO also prepared a due diligence report for Sun Pac dated September 5, 2013 regarding the sale of the Breadcrumbs Division.

The Liquibrands Loan to Sun Pac

16. Pursuant to a Promissory Note between Liquibrands and Sun Pac dated May 1, 2012, Liquibrands loaned Sun Pac the amount of \$2,540,000.00, secured by a General Security Agreement dated May 1, 2012.

Loblaws Negotiations and the Lending Agreements with BCI and 852

17. Sun Pac had entered into negotiations with Loblaws Inc. ("**Loblaws**"), Canada's largest food retailer, in March, 2012, to manufacture for Loblaws carbonated juice, sports drinks and soft drinks. Negotiations continued during the winter and into the spring of 2013.

18. Sun Pac sought interim financing pending completion of the negotiations and approached BCI.

19. On January 18, 2013, BCI provided amended credit facilities to Sun Pac.

20. Liquibrands guaranteed \$1,000,000.00 of the Sun Pac loans.
21. The loans were assigned by BCI to 852 in May 2013.
22. On August 13, 2013, Reider advised 852 and BCI that he had reached agreement in principle with Loblaws.
23. On September 4, 2013, Sun Pac owed the defendants \$3,950,039.57. Sun Pac had a \$2,540,000.00 shareholders loan to Liquibrands, Apart from these debts, Sun Pac had no other debt other than ordinary course trade supplier invoices.
24. 852 notified Sun Pac that it was in default under its loans.
25. Sun Pac, Liquibrands, BCI and 852 entered into a Forbearance Agreement dated September 11, 2013.
26. The lenders agreed to finance Sun Pac and not to enforce their security subject to the terms of the Forbearance Agreement.
27. The credit facilities in the Forbearance Agreement included:
 - (a) Facility A: an operating credit line;
 - (b) Facility B: a demand, non-revolving loan in the amount of up to the lesser of (i) \$2,250,000.00 and (ii) 90% of the Equipment Appraisal;
 - (c) Facility C: a demand non-revolving loan of \$500,000.00; and
 - (d) Facility D: a loan in the amount of up to 2 times earnings before interest, taxes, depreciation and amortization (“**EBITDA**”) of the Breadcrumbs Division as

determined by BDO, less the amount advanced to Sun Pac under the Facility C Loan.

28. The lenders advanced the Facility C loan and continued to advance the Facility A loan up to the receivership of Sun Pac.

29. Sun Pac provided the lenders with full access to the plant, financial records, inventory and management and allowed them to exercise *de facto* control of Sun Pac to protect their security.

30. The Agreement anticipated execution of the Loblaws' contract, the sale of the Breadcrumbs Division and new financing to pay out the lenders by December 6, 2013.

31. Sun Pac signed an agreement with Loblaws dated September 24, 2013.

32. The contract with Loblaws creates potential gross revenue for Sun Pac in the amount of \$250,000,000.00 and a five year exit value of Liquibrands shares of approximately \$70,000,000.00.

33. Sun Pac entered into a letter of intent dated September 6, 2013 to sell the Breadcrumbs Division for \$3,000,000.00.

34. BDO prepared a report on the Breadcrumbs Division to satisfy the conditions for the advance of the Facility D loan.

35. Sun Pac met the conditions for an advance of \$1.1 million on the Facility D loan on October 1, 2013.

36. BDO prepared the report that quantified the amount due on the Facility D loan.

37. On October 4, 2013, the lenders refused to advance the Facility D Loan. They continued funding the Facility A operating line of credit.

38. Failure to fund the Facility D loan eliminated Sun Pac's working capital and caused Sun Pac to fail.

39. Sun Pac sought replacement and take out financing on short notice.

40. Sun Pac's management was restrained from entering agreements outside of the ordinary course of business, except with the prior written consent of the lenders. It could not market and sell the Breadcrumbs Division or accept any offer to purchase the Breadcrumbs Division; make any capital expenditures; encumber, sell, transfer, convey, lease or otherwise dispose of any assets out of the ordinary course of business; or modify any material contract without consent.

41. The lenders refused to amend the Forbearance Agreement or any of the lending agreements to allow Sun Pac to accept interim financing to repay the lenders.

42. Sun Pac was placed in receivership. The Loblaws contract is terminated by its terms; the employees' jobs were terminated once Sun Pac was placed into receivership; and the entire Sun Pac operation was liquidated.

The Action in Court File No. CV-13-00492612-0000

43. The plaintiffs assert:

- (a) The defendant lenders (BCI and 852) breached the Forbearance Agreement by failing to fund the Facility D loan.

- (b) The defendants refused to facilitate the replacement of Sun Pac's financing notwithstanding breach of their obligation to fund the Facility D loan.
- (c) The lenders security agreements and refusal to fund the Facility D loan eliminated Sun Pac's ability to find alternative financing, close the sale of the Breadcrumbs Division to repay its debt and continue operations in the ordinary course.
- (d) The lenders' management became *de facto* directors of Sun Pac and directed Sun Pac's operations solely in the defendants' interests, in bad faith, contrary to the defendants' contractual obligations, the reasonable expectations of the parties and commercially reasonable conduct.
- (e) The defendants' breach of their obligations to fund the Facility D loan caused Sun Pac to default on the lender's Facility A and C loan and eliminated working capital.
- (f) The lenders knew Sun Pac would be unable to continue as a going concern.
- (g) The lenders knew that their financing was intended to bridge the Loblaws contract negotiations and operations to fulfill the contract;
- (h) The lenders knew the financing provided working capital for Sun Pac pending permanent financing for the execution of Loblaws' contract;
- (i) Based on the defendants' access to Sun Pac's financial information they knew that failure to fund the Facility D loan would cause Sun Pac to cease operations.

- (j) The defendants owed the plaintiffs a duty of honesty and good faith in the performance of the Forbearance Agreement, in funding the Facility D loan and facilitating the financing necessary to repay the defendants and perform the retail food contract.
- (k) The lenders had an implied obligation to perform the lending agreements and Forbearance Agreement reasonably, honestly and in good faith; to not perform their obligations in a fashion that eviscerated the very purpose of the lending agreements and to use confidential business, operations and financial information for the purpose for which it was provided; in particular to monitor the execution of the Loblaws contract, the sale of the Breadcrumbs Division, and the refinancing of Sun Pac with long-term financing.
- (l) The defendants breached their duty of fair dealing and good faith in the performance of the contract.
- (m) As a result of the defendants' breach, the plaintiffs were unable to sell the Breadcrumbs Division, or start and complete the Loblaws' contract, and have and will suffer damages as herein claimed in loss of revenue to Sun Pac and loss of profits and dividends to Liquibrands.

The Receivership of Sun Pac

44. The Action was issued just prior to Sun Pac being placed into receivership by court order on November 12, 2013.

45. In the receivership order, Justice Mesbur ordered that:

3. *THIS COURT ORDERS that.... The Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:*

(j) to initiate, prosecute and continue the prosecution of any and all proceedings... now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

8. *THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.*

12. *THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post*

Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

Appointment of Receiver over Liquibrands

46. On January 16, 2014, 852 purported to appoint BDO as Receiver of Liquibrands.

Grounds for the Declaratory Relief Sought in the Trial of an Issue

47. BCI and 852 elected to affirm the Forbearance Agreement and were not entitled to terminate the loan agreement as they continued to take interest and financing charges on the Facility A loan while failing to honour their commitment to make payment of their obligation under the Facility D loan and breached their good faith obligations

48. Pursuant to the principles set out in paragraphs 70-73 of *Barclays Bank PLC v. Devonshire Trust*, 2013 ONCA 494 (CanLII):

- (a) failure of the defendants to make the liquidity payments under Facility D was the cause of Sun Pac's insolvency and, therefore, the defendants should be prevented by their own wrongdoing from relying on Sun Pac's insolvency as an event of default and a ground for termination;
- (b) in continuing to take interest and financing charges from Sun Pac under Facility A, during the period when it alleged Sun Pac was insolvent, the defendants had

elected to affirm the contract and lost the right to rely on Sun Pac's insolvency as a ground of default; and

- (c) the defendants are not entitled to rely on their termination of the lending agreements since: (i) they had elected not to rely on Sun Pac's insolvency; (ii) they failed to make a timely payment of their liquidity obligation under Facility D before terminating the lending agreements; and (iii) they breached their good faith obligations.

It will be Just and Convenient to Appoint a New Receiver if Liquibrands Obtains a Declaration

49. Sun Pac is in default of its obligations to Liquibrands.
50. BDO provided the report on Sun Pac's Breadcrumbs Division in a written agreement with Sun Pac which was used to claim the Facility D loan.
51. BDO is a creditor of Sun Pac.
52. Reider and Liquibrands asked BDO as receiver whether it would continue the Action.
53. BDO has neglected or refused to proceed with the Action though it would benefit all creditors and BDO has advised Reider it is disposing of business records.
54. Liquibrands believes that, if it obtains a declaration in the trial of an issue, it is in the best interests Sun Pac's stakeholders that a new receiver be appointed in order to, among other things, maximize value for Sun Pac's stakeholders.

55. Liquibrands proposes that Spergel be appointed as receiver. Spergel has agreed to accept the appointment on terms.
56. Section 101 of the *Courts of Justice Act*, R.S.O., c. C.43, as amended.
57. Section 248(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended.
58. Rule 45.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194.
59. Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) Affidavit of Csaba Reider sworn April 3, 2014 and exhibits attached thereto; and
- (b) such further and other evidence as the lawyers may advise and this Honourable Court may permit.

April 4, 2014

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Court File No. CV-13-10331-00CL

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PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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