

**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

AFFIDAVIT OF CSABA REIDER

I, Csaba Reider, of the Town of Richmond Hill, Region of York, DO MAKE OATH AND SAY:

1. I am the sole officer, director and shareholder of Liquibrands Inc. (“Liquibrands”).
2. In November 2011, I directed Liquibrands in the acquisition of Sun Pac Foods Limited (“Sun Pac”).
3. Sun Pac was a 100 year old 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. Sun Pac also manufactured croutons and bread crumbs under

the 'McDowell Ovens' banner and private label brands owned by various large Canadian retailers (the "Breadcrumbs Division").

4. Liquibrands is the sole shareholder of Sun Pac.

5. I was the sole director and officer of Sun Pac. For further information with respect to my background, I attach hereto as **Exhibit A** a copy of my resume.

6. Bridging Capital Inc. ("Bridging") and 8527504 Canada Inc. ("852") were lenders to Sun Pac (collectively the "Lenders").

7. Liquibrands guaranteed \$1,000,000.00 of Sun Pac's debt.

8. Liquibrands financed Sun Pac.

9. Sun Pac owes \$2,540,000.00 to Liquibrands as a secured creditor. Attached hereto as **Exhibit B** is a copy of the Promissory Note from Sun Pac to Liquibrands dated May 1, 2012. Attached hereto as **Exhibit C** is a copy of the General Security Agreement from Sun Pac to Liquibrands dated May 1, 2012.

10. Sun Pac products were distributed throughout North America and the Caribbean from a 355,000 square foot facility at 10 Sun Pac Boulevard, Brampton, Ontario.

11. Sun Pac had approximately 52 employees.

12. In March, 2012, I started negotiations with Loblaws Inc. ("Loblaws") to provide beverage manufacturing services. Loblaws is the largest retail grocer in Canada. Indeed it is bigger than all other grocers combined.

13. To finance Sun Pac pending the completion of negotiations with Loblaws and to continue ongoing operations, Bridging provided credit facilities to Sun Pac secured by a general security agreement.

14. Specifically, on October 1, 2012, Bridging advanced a revolving loan of up to \$5,000,000.00 based on a lending formula under Facility A, \$500,000.00 (before facility fees) on January 18, 2013 under the Facility B term loan on the equipment, and the balance of the Facility B loan, \$1,182,524.00 (before facility fees), was advanced on January 31, 2013. Attached hereto as **Exhibit D** is a copy of the Letter Agreement between Sun Pac and Bridging dated October 1, 2012. Attached hereto as **Exhibit E** is a copy of the Amended and Restated Letter Agreement between Sun Pac and Bridging, dated January 17, 2013. Attached hereto as **Exhibit F** is a copy of the General Security Agreement between Sun Pac and Bridging dated October 1, 2012.

15. By August 13, 2013, Sun Pac had reached an agreement in principle with Loblaws.

16. The Loblaws negotiations continued to September 18, 2013, when a written contract was executed. Attached hereto as **Exhibit G** is a copy of the agreement between Sun Pac and Loblaws dated September 18, 2013.

17. The Loblaws contract provided:

- (a) six years of guaranteed sales comprising \$60,000,000.00 per year in sales with a 12 per cent gross margin;
- (b) guaranteed volumes or price adjustments to compensate for volume short falls and price increases for raw material price increases passed through to Loblaws;

- (c) Loblaws paid for the transportation of the goods from Sun Pac facilities;
- (d) Sun Pac's unit fixed cost increases arising from decreased volumes could be passed through to Loblaws;
- (e) Sun Pac had the exclusive right to produce designated "President's Choice" products including 72 products and flavours; and
- (f) Sun Pac had exclusivity in Ontario to produce "President's Choice" carbonated soft drinks and exclusivity in Canada to produce "President's Choice" carbonated juices and sports drinks.

18. Volumes were expected to increase with the sale of President's Choice products in Shoppers Drug Mart stores acquired by Loblaws.

19. The parties anticipated contract renewals beyond the initial term and I anticipated incremental sales to other retailers to follow.

20. In the first quarter of 2012, I retained Jim Shone ("Shone") at Firepower Capital Corporation ("Firepower") to find and structure third-party equipment financing, from lenders such as Element Finance or GE Capital, together with working capital financing and private equity of \$10,000,000.00.

21. Firepower forecast that, by 2015, assuming a steady annual net income of \$6,000,000.00 to \$10,000,000.00 per year and earnings before interest, taxes, depreciation and amortization ("EBITDA") of \$10,000,000.00 per year, the value of Sun Pac at the end of six years would be a multiple ranging from 6 to 7 times EBITDA; or \$60,000,000.00 to \$70,000,000.00. The value of

the Loblaws contract is set out in a financing presentation, attached hereto as **Exhibit H**, as prepared by Shone and my staff in or about September 2013.

22. On September 5, 2013, 13 days before the Loblaws contract was executed, 852's lawyers delivered a "default notification" to Sun Pac by fax. Although Sun Pac was not in default at that time, the president of Bridging, Natasha Sharpe ("Sharpe"), explained to me that this was required for the structuring of the Forbearance Agreement for facilities C and D. Bridging was the architect of the new agreement to advance further working capital, Sun Pac was not in default and Bridging was not calling our loan. At that time, Sun Pac owed the Lenders \$3,950,039.57. Attached hereto as **Exhibit I** is a copy of a letter dated September 5, 2013, from Philip Taylor ("Taylor") of Chaitons LLP Bridgings' solicitor to Csaba Reider.

23. The parties understood that Sun Pac was on the verge of executing the Loblaws contract.

24. A week before the Loblaws contract was executed, Sun Pac, Liquibrands and 852 entered into the Forbearance and Amending Agreement dated September 11, 2013 (the "Forbearance Agreement"), attached hereto as **Exhibit J**

25. Pursuant to the Forbearance Agreement, the Lenders agreed to provide Sun Pac with additional financing and to forbear from enforcing any security prior to the earlier of December 6, 2013, or default.

26. 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 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 EBITDA of the Breadcrumbs Division as determined by BDO Canada (“BDO”), less the amount advanced to Sun Pac under the Facility C Loan.

27. Credit facilities were to be repaid on the earlier of the termination or the sale of Sun Pac’s Breadcrumbs Division or lawful demand being made by 852.

28. The Lenders advanced the Facility C loan and left the Facility A, Facility B and Facility C loans intact up to the date of the receivership of Sun Pac.

29. Sun Pac provided the Lenders and its appointed collateral examination firm, GDR Advisory Group Inc. (“GDR”), with full access every 2 weeks to the plant, financial records, inventory and management and allowed them to exercise *de facto* control of Sun Pac to protect their security.

30. Sun Pac and Liquibrands agreed to market the sale of the Breadcrumbs Division.

31. The parties defined as a milestone that Sun Pac enter an agreement of purchase and sale of the Breadcrumbs Division by November 6, 2013 with a closing of the sale and repayment of debt by December 6, 2013.

32. Sun Pac entered into negotiations to sell the Breadcrumbs Division and on September 6, 2013, Sun Pac received a signed Letter of Intent from a purchaser at a sale price of \$3,000,000.00, attached hereto as **Exhibit K**.

33. Sun Pac retained BDO to prepare a Quality of Earnings Report for the Breadcrumbs Division. Attached hereto as **Exhibit L** is a copy of the Financial Due Diligence Engagement Letter dated September 5, 2013. Based on the report, the Lenders had an obligation pursuant to the Forbearance Agreement to advance the Facility D loan of \$1,200,000.00 by October 1, 2013. Attached hereto as **Exhibit M** is a copy of the Financial Due Diligence Report dated September 25, 2013.

34. On the morning of October 4, 2013, Len Kofman ("Kofman"), Chief Credit Officer at Bridging, called me to a meeting on short notice that afternoon without stating in advance the agenda or purpose of the meeting. The meeting was to be held at Jenny Coco's ("Coco") offices at Coco Paving Inc., in North York. Coco is a director of Bridging.

35. I attended the meeting with the belief that we would review the terms of the Loblaws contract signed two weeks earlier. Kofman and Coco attended the meeting in person. Sharpe joined the meeting by conference call.

36. To my surprise, Coco declared that the Lenders refused to fund the Facility D loan pursuant to the Forbearance Agreement. Kofman and Coco both stated they were uncomfortable having a conditional letter of intent for the sale of the Breadcrumbs Division as their primary reason not to honour the contractual agreement it had with Sun Pac. Bridging did not advise that it intended to place Sun Pac in default or call the loan. The meeting ended after 25 minutes

37. I called Sharpe after the meeting to remind her of the terms of the Forbearance Agreement, the November 6, 2013 milestone date for a Breadcrumbs Division Agreement of Purchase and Sale, the positive impact of the Loblaws contract, my view of financing negotiations with Firepower and the flow of information I had provided to her.

38. Sharpe stated that she had been “thrown under the bus”. She said that she had recommended payment of the Facility D loan and was overruled, despite Sun Pac obtaining i) a 6-year binding contract with Loblaws, ii) a letter of intent to purchase the Breadcrumbs Division for \$3,000,000.00, iii) the BDO Quality of Earnings Report which verifies the value of the Breadcrumbs Division, and iv) a report from their collateral examination firm, GDR, affirming there were no issues at Sun Pac.

39. It was a final decision.

40. The 25-minute meeting at Coco’s office and her declaration that the Lenders refused to fund the Facility D loan was the end of Sun Pac. The Lenders left Facilities A, B and C intact. The Lenders did not place Sun Pac in default or call the loan.

41. I received a letter from Taylor dated October 10, 2013, attached hereto as **Exhibit N**, purporting to outline the reasons the Facility D loan was not funded. The reasons cited were:

- (a) late reporting;
- (b) draw requests in excess of availability;
- (c) the inclusion of slow moving inventory in the Weekly Borrowing Base Report premised upon inaccurate and changing information;

- (d) failure to meet sales projections;
- (e) concern in respect of a quantity of frozen orange juice concentrate;
- (f) the Lender could no longer rely on information provided by management;
- (g) concerns with respect to working capital and the prospects and sustainability of the business; and
- (h) the Lenders' lack of confidence in management.

42. The statements made by Taylor were not made by Coco or Sharpe or any other Lenders representative before the meeting of October 4.

43. I responded to Taylor by email dated October 15, 2013, with copies to Sun Pac's corporate counsel, Sharpe, Kofman and Shone, a copy of which is attached hereto as **Exhibit O**, and made the following points:

- (a) Taylor's conclusions were inaccurate and based on incomplete, mistaken or out-of-date information;
- (b) Sun Pac's short-term working capital challenges were currently caused by Bridging having "reneged" on the Facility D advances;
- (c) Sun Pac relied on Bridging's financing commitment for the Facility C and D loans, made by Bridging's own initiative, in making critical operating decisions regarding production planning and cash flow management;

- (d) the management of Sun Pac dealt with Bridging in good faith; Bridging's proposal to abandon its contractual obligations lacked good faith;
- (e) at no time during dealings in respect of the Facility C and Facility D loans was there any material concerns that would warrant the failure to advance funds under Facility D nor was there ever any communication of any material concern to me as President, CEO and owner: not one e-mail, phone call or other communication;
- (f) the BDO Quality of Earnings report which fixed the amount to be funded under the Facility D loan was the only precondition to advancing the operating capital under Facility D and the report was prepared and delivered;
- (g) on Friday October 4, 2013, Coco told me that Bridging intended to default primarily because she was "uncomfortable funding" while there was a non-binding letter of intent for the sale of the Breadcrumbs Division;
- (h) Sharpe told me that she recommended approval of funding and was shocked and disappointed with Coco's position;
- (i) Bridging agreed to provide interim financing to Sun Pac in anticipation of Sun Pac signing an agreement with Loblaws;
- (j) Sun Pac signed the contract with Loblaws and was engaged in negotiations to finance that contract;
- (k) the gross value of the Loblaws contract was \$250,000,000.00;

- (l) Sun Pac's management delivered on its good faith representation that it would obtain this contract;
- (m) employees, landlords, suppliers, customers, regulators, alternative financing sources and Canada's largest food retailer had confidence in Sun Pac and its management;
- (n) performance of the Loblaws contract would fail due to Bridging reneging on the Facility D loan, which would cripple Sun Pac and its ability to complete financing for performance of the contract; and
- (o) the business and contractual relationship with Bridging and our good faith performance of our loan obligations did not justify Bridging's default.

44. I addressed specific issues raised by Taylor in his letter as follows:

- (a) weekly reporting had been consistently on time;
- (b) priority payable reporting was discussed with Bridging and was consistently on time since April 2013;
- (c) Financial Statement reporting was discussed at length with Bridging;
- (d) draw requests were explained and discussed with Bridging multiple times;
- (e) Sun Pac had advised Bridging on October 1, 2013 that the flow of funds came in late Mondays as funds came in from customers electronically over the weekend, and it was a timing issue to get the maximum benefit of the draw; and

- (f) the inclusion of slow moving inventory in the weekly borrowing base report was discussed in detail with Sean Rai at GDR and Kofman at Bridging, and the letter was inconsistent with the resolution agreed upon with GDR.

45. Despite the meeting with Bridging on October 4, 2013, and Taylor's letter with all of Bridging's purported concerns, allegations and lack of confidence in management, Bridging was not placing Sun Pac in default or calling the loan, and in fact continued funding Facility A, B and C right up to November 12, 2013, the date Sun Pac was ordered into receivership.

46. Sun Pac was unable to continue with daily manufacturing for more than a month without Facility D or new financing.

47. From October 11, 2013, I sought the assistance of Shone, legal counsel and my staff to find lenders willing to offer take-out financing for Sun Pac in an extremely compressed time frame.

48. Shone had introduced Sun Pac to potential lenders and private equity investors over the previous 12 months in anticipation of financing the Loblaws contract and paying out the Lenders.

49. Potential lenders and investors, including Indus Limited in Toronto and Saybrook Capital LLC in Los Angeles, California, were interested in providing short-term interim financing to help sustain Sun Pac and allow them to participate in permanent financing for Sun Pac's Loblaws contract performance. They were perplexed why the Lenders refused to honour their contractual obligations to advance funding in the face of the Loblaws contract.

50. The Lenders refused to postpone any of their security to new interim financing. The Lenders declared that they would proceed to exercise their rights forthwith by the appointment of a receiver.

51. The declarations in Taylor's letter crippled Sun Pac and the damage was critical when lenders and investors declared they were unable to start and complete due diligence for replacement financing in the time frame imposed by the Lenders for the appointment of a receiver.

52. I aggressively pursued replacement financing on short notice and continued seeking alternatives through to the evening before the receiver's liquidation sale.

53. Sun Pac's management was restrained from entering agreements outside of the ordinary course of business, except with the prior written consent of 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.

54. 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.

55. The entire undertaking of Sun Pac was liquidated by BDO as court appointed receiver.

56. The Lender's failure to fund the Facility D loan cut off Sun Pac's working capital and paralyzed its ability to continue operating.

57. As a result of the Lenders refusal to fund the Facility D loan, Sun Pac was forced to discontinue operations, lay off all of its employees and lost the chance to refinance and perform the Loblaws contract and grow its business with consequential sales to other retailers.

58. As a result of Sun Pac discontinuing operations, Liquibrands is unable to obtain repayment of its loan to Sun Pac.

59. The current receiver, BDO, has declared it does not intend to continue the stayed action by Sun Pac against the Lenders.

60. BDO demanded that Liquibrands honour its guarantee of Sun Pac's debt and the terms of its security agreement and transfer its Sun Pac shares to the receiver.

61. The tax losses associated with the shares of Sun Pac held by Liquibrands have a potential market value to the appropriate purchaser.

62. The current receiver may propose to pay out the proceeds of the liquidation of Sun Pac to the Lenders without trial of the Sun Pac and Liquibrands claims against the Lenders.

63. This affidavit is made in support of a request of the Court for the trial of an issue for a declaration that 852 and Bridging breached the terms of the Forbearance Agreement and for consequential damages.

64. To adjudicate the claims herein referred to, I am advised I must seek an order to lift the stay of proceedings in Court File CV-13-00492612-0000 (the "Action") and for leave for Sun Pac and Liquibrands to continue the Action against 852 and Bridging. A copy of the Statement of Claim is attached hereto as **Exhibit P**.

65. The plaintiffs in the Action assert, among other things:

- (a) the Lenders 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 Lenders' Facility A, B and C loans 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 the 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 Agreement, in funding the Facility D loan and facilitating the financing necessary to repay the defendants and perform the Loblaws contract;

- (k) the Lenders had an implied obligation to perform the lending 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 refinancing Sun Pac with long term financing; and
- (l) the defendants breached their duty of fair dealing and good faith in the performance of the contract.

66. The Action was issued prior to Sun Pac being placed into receivership by court order on November 12, 2013. Justice Mesbur ordered that the receiver was empowered and authorized to continue the prosecution of proceedings pending. The receiver declines to do so, however, the money from the sale of the assets of Sun Pac held by the receiver is to be paid in accordance with the terms of the order of the Court. The Order of Justice Mesbur dated November 12, 2013, is attached hereto as **Exhibit Q**.

67. I also seek an order declaring that Liquibrands is entitled, in the circumstances, to claim under its general security agreement in priority to claims by the Lenders against the realization of the Sun Pac proceeds.

68. As BDO was the company that prepared the Quality of Earnings Report for Sun Pac that was the precondition to the funding amount of the Facility D loan, its representatives will be witnesses should the proceedings be allowed to proceed. BDO as receiver has declared it does not intend to advance the proceedings.

69. Accordingly, I seek to appoint Spergel Inc. on behalf of Liquibrands, a secured creditor as receiver of the assets of Sun Pac for the purposes of advancing the litigation and disposing of the proceeds of realization and litigation if the action is allowed to proceed.

70. I seek the relief set out in the Notice of Motion.

71. I make this affidavit in support of this motion and for no other or improper purpose.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on the 3rd day of April, 2014.



Commissioner for Taking Affidavits
(or as may be)

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CSABA REIDER