CV-13-00492612-0000

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SUN PAC FOODS LIMITED and LIQUIBRANDS INC.

Plaintiffs

and

8527504 CANADA INC. and BRIDGING CAPITAL INC.

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANT(S):

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date November 12, 2013 Issued by A. Chiudlen
Local Registrar

Address of court office: 393 University Avenue, 10th Floor
Toronto, Ontario
M5G 1E6

TO: Bridging Capital Inc.
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Toronto, Ontario
M5K 1 K7

8527504 CANADA INC.
BRIDGING CAPITAL INC.
77 King Street West
Suite 2925, P.O. Box 3 22
Toronto, Ontario
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CLAIM

1. The plaintiffs claim: *(State here the precise relief claimed.)*

(a) the sum of $100,000,000.00 as general damages for breach of contract, breach of fiduciary duty to the plaintiffs as de facto managers of Sun Pac Foods Limited and waiver of tort; loss of goodwill and loss of future economic value of Sun Pac Foods Limited as a going concern;

(b) the sum of $500,000.00 as exemplary, aggravated and punitive damages;

(c) prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(d) post judgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(e) the substantial indemnity costs of this proceeding, plus all applicable taxes; and

(f) such further and other Relief as to this Honourable Court may seem just.

2. The plaintiff, Sun Pac Foods Limited ("Sun Pac"), is a corporation incorporated under the laws of Ontario, known for its production of fruit juices, frozen juices, juice concentrates and other beverage products in Brampton, Ontario, which are distributed throughout Canada, the U.S. and the Caribbean.

3. The plaintiff, Liquibrands Inc. ("Liquibrands"), is a corporation incorporated under the laws of Ontario which owns the shares of Sun Pac.

4. The defendant, 8527504 Canada Inc. ("852"), is a corporation incorporated under the laws of Canada and is in the private lending business.

5. The defendant, Bridging Capital Inc. ("BCI"), is a corporation incorporated under the laws of Canada and is in the private lending business.

6. Sun Pac began negotiations with Canada's largest food retailer in August, 2012 to manufacture carbonated juice, sports drinks and soft drinks. Long and detailed negotiations commenced and continued during the winter and into the spring of 2013.

7. Sun Pac required interim financing pending completion of the negotiations and approached BCI.

8. BCI made demand credit facilities available to Sun Pac on September, 2012 (the "Loan Agreement").

9. The plaintiffs gave security for the loan. Sun Pac machinery, accounts receivable, equipment and collateral manufacturing operations had a value of approximately $8,000,000.00.

10. BCI assigned the Loan Agreement and Security to 852.

11. Negotiation of the food retailer contract continued during the spring and summer of 2013 and resulted in a signed agreement dated September 24, 2013. The contract creates potential gross revenue for Sun Pac in the amount of $250,000,000.00 and a five year exit value of approximately $70,000,000.00

12. Prior to completion of the food retailer contract 852 demanded repayment of indebtedness owing under the September, 2012 and January, 2013 Loan Agreement from Sun Pac.

13. 852 agreed to forbear enforcing its security pursuant to a Forbearance Agreement on September 13, 2013 (the "Agreement"). The Agreement was entered into in anticipation of the completion of the food retailer contract and a period of time for financing the purchase of machinery to perform the food retailer contract through to December 6, 2013.

14. On September 4, 2013, Sun Pac owed the defendants $3,950,039.57. Sun Pac had no other debt other than ordinary course trade supplier invoices.

15. Liquibrands guaranteed $1,000,000.00 of Sun Pac debt.

16. 852 agreed to finance Sun Pac pending completion of the food retailer contract negotiations and agreed not to enforce its security prior to the earlier of December 9, 2013 or an Event of Default.

17. 852 extended Sun Pac additional demand credit facilities consisting of:

(a) Facility C: a demand non-revolving loan of Five Hundred Thousand Dollars ($500,000), and

(b) Facility D: a demand non-revolving loan in the amount of up to 2 times EBITDA of the Breadcrumbs Division as determined by BDO Canada Transaction Advisory Services, Inc. ("BDO") in its report dated September 25, 2013 to Sun Pac and 852 less the amount advanced to Sun Pac under the Facility C Loan.

18. 852 advanced the Facility C Loan.

19. Sun Pac signed the retailer supply contract on September 24, 2013. Sun Pac met the conditions for an advance on the Facility D loan on October 1, 2013.

20. On October 1, 2013 the amount available under the Facility D loan was $1.1 million.

21. On October 4, 2013 the defendants refused to advance the Facility D Loan. The defendants knew or ought to have known acting reasonably that breach of their obligation to advance the Facility D loan endangered the continued operations of Sun Pac until it could arrange financing for execution of the food retailer contract; close the sale of the Breadcrumb Division and continue operations in the ordinary course until December 6, 20113.

22. The defendants continued to take predatory interest on the Facility C loan of 36% calculated on the daily outstanding balance, compounded monthly, not in advance and with no deemed reinvestment of monthly payments.

23. The Facility C Loan and the Facility D Loan were to be repaid the earlier of (i) the Forbearance Termination Date; (ii) the sale of the Breadcrumbs Division; and (iii) demand being made by 852. Repayment is not due.

24. Sun Pac solicited interim financing to repay the defendants. The defendants refused to postpone their security to facilitate the financing notwithstanding their failure satisfy their obligation to fund the Facility D loan.

25. The defendants' management used their lending position to take de facto control of Sun Pac. Sun Pac's management *inter alia*:

(a) is restrained from entering agreements outside of the ordinary course of business, except with the prior written consent of 852;

(b) must market and sell the croutons and breadcrumbs division that manufactures and produces products under the McDowell Ovens brand (the "Breadcrumbs Division");

(c) shall not accept any offer to purchase the Breadcrumbs Division without 852's prior written approval and shall deliver to 852 any proceeds of sale;

(d) shall not make any capital expenditures without the prior written consent of 852 in its sole discretion;

(e) shall not encumber, sell, transfer, convey, lease or otherwise dispose of any of their respective assets or property out of the ordinary course of business without the prior written consent of 852;

(f) shall not surrender, terminate, repudiate or amend, vary or modify in a manner adverse to 852 acting reasonably, any material contract with respect to their respective business without the prior written consent of 852 ;

(g) deliver a binding sale agreement for the sale of the Breadcrumbs Division, that is acceptable to 852 by November 6, 2013; and

(h) complete sale of the Breadcrumbs Division and payment to 852 by December 6, 2013.

26. Liquibrands was obliged on default to transfer the shares of Sun Pac held by Liquibrands (the "Shares") to the defendants for $10.00.

27. The defendants had discretion to withhold consent to any matters requiring their consent.

28. The defendants breached the Agreement with the plaintiffs by refusing to fund the Facility D loan.

29. Notwithstanding their default under the Agreement the defendants' 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.

30. It was within the reasonable contemplation of the parties at the time the Agreement was executed that if the defendants breached their obligations to fund the Facility D loan Sun Pac would be unable to find replacement financing to perform the retail contract; unable to continue as a going concern and unable to sell the Breadcrumb Division by December 6, 2013 to satisfy the defendants' loan.

31. It was within the reasonable contemplation of the parties at the time the Agreement was executed that if the defendants breached their obligations to fund the Facility D loan the value of Liquibrands Inc. shares in Sun Pac would be negligible and Liquibrands Inc. would lose approximately $70,000,000.00 of exit value for Sun Pac in five years.

32. The Agreement granted the defendants authority and powers to demand and receive confidential business, operations and financial information about Sun Pac not otherwise available to any but directors, officers and confidential advisers of a corporation. The Agreement gave the defendants the ability to harm Sun Pac by its breach of the agreement to fund, to devalue Liquibrands shares of Sun Pac and exploit Sun Pac's business affairs in their own interests and contrary to the interests of Sun Pac.

33. The plaintiffs plead that the defendants demand for and use of confidential business and operations information and the exercise of powers granted the defendants in the Forbearance Agreement created a fiduciary relationship between the defendants and plaintiffs in that:

(a) The defendants were aware that their financing was intended to bridge the period between the commencement of negotiations of the food retailer contract and the commencement of operations to fulfill the contract;

(b) The defendants were aware that financing was required to provide working capital for Sun Pac pending permanent financing for the execution of the food retailer contract;

(c) The defendants demanded and received confidential business information and controlled the use of funds advanced while retaining predatory financing charges;

(d) The defendants knew that failure to fund the Facility D loan or postpone security for alternative interim financing would cause irreparable damage to the plaintiffs;

(e) The defendants had and exercised daily management decision making powers to limit the ability of Sun Pac to carry on business other than in the interest of the defendants;

(f) The defendant knew that alternative financing was impossible without the defendants cooperation and agreement;

(g) The defendants knew that Sun Pac was vulnerable to financial impairment failing the advance of the Facility D loan or postpone of security for take out financing.

34. The plaintiffs performed their obligations and provided the defendants with daily and weekly confidential operating financial information, real time information on the negotiation of the contracts for sale of the Breadcrumb Division, financing proposals to third parties containing business plans and revenue expectations, and every other business, financial and operating record in the company.

35. The defendants unjustly enriched itself by wrongfully abusing of their rights as a lender and ignoring their contractual obligations and in equity and good conscience defendants should not be permitted to retain that by which it has been enriched by such abuse.

36. 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 retail food contract.

37. The plaintiffs put their trust and faith in the defendants to perform their obligations under the lending agreement reasonably, honestly and in good faith; to not perform their obligations in a fashion that eviscerated the very purpose of the Agreement and to use confidential business, operations and financial information only for the purpose for which it was provided, in particular to monitor the execution of the retail contract, the sale of the Breadcrumb business and refinancing Sun Pac with long term financing.

38. The defendants breached their duty of fair dealing and good faith in the performance of the contract in that they failed to act reasonably in asserting their rights under the Agreement and exercised their rights for collateral purposes contrary to the reasonable expectations of the parties and in particular the plaintiffs and in pursuing unforeseen commercially unreasonable conduct even for a predatory lender.

39. The defendants took over management and control of the plaintiffs and compelled the company to operate solely in the interests of the defendants for the realization of its security notwithstanding the plaintiffs were not in default of the loan agreement and the defendants defaulted in providing the very financing necessary to facilitate the continued success of Sun Pac.

40. The plaintiffs plead that the defendants breached their contract in bad faith; and that in the circumstances of the relationship between the parties, the purpose of the Agreement; the disclosure of confidential information to the defendants; the defendants obligations under the Agreement, the impediments caused by the defendants to refinancing and the failure to fund the Facility D loan absence of default under the Agreement, the defendants breached a fiduciary duty to the plaintiffs arising from the special relationship created by the Agreement.

41. As a result of the defendants' breach, the plaintiffs are unable to sell the Breadcrumbs Division, or start and complete the food retailer 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 Inc.

42. The plaintiffs propose that this action be tried in Toronto, Ontario.

November 12, 2013

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Plaintiff Defendant

CV-13-00492612-00CL

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SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

STATEMENT OF CLAIM

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