Court File No. CV-20-00634911-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE WITH RESPECT TO CELADON GROUP, INC. AND THE AFFILIATED DEBTORS LISTED IN FOOTNOTE "1" HERETO

APPLICATION OF CELADON GROUP, INC. PURSUANT TO PART XIII OF THE *BANKRUPTCY AND INSOLVENCY ACT* AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.-43, AS AMENDED

FACTUM OF THE CHAPTER 11 DEBTORS AND THE FOREIGN REPRESENTATIVE

(Returnable January 23, 2020)

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PART I – OVERVIEW

1. This factum is filed by Celadon Group, Inc. ("**Celadon**"), in its capacity as Foreign Representative (as defined herein), on its own behalf and on behalf of certain subsidiaries listed in footnote 1 below[1] (together with Celadon, the "**Chapter 11 Debtors**"), in support of Celadon's application for an initial order, *inter alia*: (i) declaring that Celadon is a "foreign representative" pursuant to section 268(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), and is entitled to bring this application pursuant to the BIA and appointing Celadon as the foreign representative; and (ii) recognizing the proceedings commenced in respect of the Chapter 11 Debtors (the "**Chapter 11 Proceedings**") before the United States Bankruptcy Court for the District of Delaware (the "**U.S. Court**") as a "foreign main proceeding".

2. This factum is also filed by Celadon in support of its application for a supplemental order, *inter alia*: (i) recognizing and enforcing pursuant to section 272(1) of the BIA the terms of the Foreign Representative Order and Final DIP Order granted by the U.S. Court; (ii) granting a stay of proceedings in respect of the Chapter 11 Debtors or their Property; (iii) appointing KSV Kofman Inc. as receiver (in such capacity, the "**Receiver**") of the Property pursuant to section 272(1)(d) of the BIA and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended (the "**CJA**"); and (iv) granting the Receiver's Charge and DIP Charge.

3. Capitalized terms used herein and not otherwise defined have the meaning given to them in the affidavit of Kathryn Wouters sworn January 22, 2020 (the "**Wouters Affidavit**") and the exhibits thereto, including the declaration of Kathryn Wouters sworn December 8, 2019 (the "**Wouters Declaration**") filed in the Chapter 11 Proceedings.

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[1] Celadon Group, Inc.; A R. Management Services, Inc.; Bee Line, Inc.; Celadon Canadian Holdings, Limited ("**Celadon Canada**"); Celadon E-Commerce, Inc.; Celadon International Corporation; Celadon Logistics Services, Inc.; Celadon Mexicana, S.A. de C.V.; Celadon Realty, LLC; Celadon Trucking Services, Inc.; Distribution, Inc.; Eagle Logistics Services Inc.; Hyndman Transport Limited ("**Hyndman**"); Jaguar Logistics, S.A. de C.V.; Leasing Servicios, S.A. de C.V.; Osborn Transportation, Inc.; Quality Companies LLC; Quality Equipment Leasing, LLC; Quality Insurance LLC; Servicios Corporativos Jaguar, S.C.; Servicios de Transportacion Jaguar, S.A. de C.V.; Stinger Logistics, Inc.; Strategic Leasing, Inc.; Taylor Express, Inc.; Transportation Insurance Services Risk Retention Group, Inc.; Vorbas, LLC;

PART II - FACTS

4. The facts relating to the history of the Chapters 11 Debtors, including their current corporate structure and business operations, and the circumstances leading to the commencement of the Chapter 11 Proceedings, are set out in detail in the Wouters Affidavit and the Wouters Declaration.

PART III - ISSUES

5. The issues to be determined on this application are the following:

   (A) is Celadon a "foreign representative" and are the Chapter 11 Proceedings a "foreign proceeding" pursuant to sections 268 and 270 of the BIA?;

   (B) are the Chapter 11 Proceedings a "foreign main proceeding" pursuant to section 270 of the BIA?; and

   (C) is the relief sought in the Supplemental Order, including the appointment of the Receiver, appropriate?

PART IV – LAW AND ARGUMENT

(A) Celadon is a "Foreign Representative" and the Chapter 11 Proceedings are "Foreign Proceedings" under the BIA

6. Section 267 of the BIA states that the purpose of Part XIII of the statute is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote, *inter alia*, cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions and the fair and efficient administration of cross-border insolvencies that protect the interests of various stakeholders, including creditors and debtors, while protecting and maximizing the value of the debtors' property.[2]

7. Section 268(1) of the BIA provides that a "foreign representative" is a person or body who is authorized, in a foreign proceeding in respect of a debtor, to:

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[2] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B3, as am. at s. 267 ("**BIA**").

(a) administer the debtor's property or affairs for the purpose of reorganization or liquidation; or

(b) act as a representative in respect of the foreign proceeding.[3]

8. Pursuant to section 269(1) of the BIA, a "foreign representative" may apply to the court for recognition of a foreign proceeding in respect of which they are the foreign representative.[4]

9. Pursuant to the Order of the U.S. Court dated December 16, 2019, Celadon is authorized to act as the foreign representative for the Chapter 11 Debtors in the Chapter 11 Proceedings (the "**Foreign Representative Order**").[5]

10. The Foreign Representative Order authorizes Celadon to act as the foreign representative on behalf of the Chapter 11 Debtors' estates in connection with any judicial or other proceedings in a foreign country, including the within proceedings before this Court, and to seek recognition of the Chapter 11 Proceedings by this Court, to request that this Court lend assistance to the U.S. Court in protecting the Chapter 11 Debtors' property and seeking any other appropriate relief from this Court.[6]

11. As such, Celadon satisfies the BIA's requirements that it has the authority to act as the Chapter 11 Debtors' foreign representative and, thus, may apply to this Court for recognition of the Chapter 11 Proceedings.

12. A "foreign proceeding" is defined in the BIA as a judicial or administrative proceeding commenced in a jurisdiction outside of Canada dealing with the collective general interests of creditors under a law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purposes of reorganization or liquidation.[7]

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[3] BIA at s. 268(1).
[4] BIA at s. 269(1).
[5] Affidavit of Kathryn Wouters sworn January 22, 2020 at para. 15 (the "**Wouters Affidavit**").
[6] Wouters Affidavit at para. 16.
[7] BIA at s. 268(1).

13. As set out in the Wouters Affidavit, on December 8, 2019, the Debtors initiated the Chapter 11 Proceedings by filing petitions under the Bankruptcy Code.[8]

14. Pursuant to section 270(1) of the BIA, if the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court *shall* make an order recognizing the foreign proceeding.[9]

15. In the instant case, the Foreign Representative Order has clearly conferred upon Celadon the role of foreign representative of the Chapter 11 Debtors and the Chapter 11 Proceedings satisfy the BIA's requirements for a "foreign proceeding".

(B) The Chapter 11 Proceedings are "Foreign Main Proceedings" under the BIA

16. Having made a determination that a proceeding is a "foreign proceeding" for the purposes of Part XIII of the BIA, the Court is required to specify whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding".[10]

17. Pursuant to section 268(2) of the BIA, a "foreign main proceeding" is a foreign proceeding where the debtor has the centre of its main interests or "COMI".[11]

18. In *Hollander Sleep Products LLC*, et al, the Honourable Mr. Justice Hainey noted that the Court should consider the following factors in determining a debtor's COMI:

(a) the location where corporate decisions are made;

(b) the location of employee administrations, including human resource functions;

(c) the location of the company's marketing and communication functions;

(d) whether the enterprise is managed on a consolidated basis;

(e) the extent of integration of an enterprise's international operations;

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[8] See Wouters at para. 3.
[9] BIA at s. 270(1).
[10] BIA at s. 270(2).
[11] BIA at s. 268(2).

(f) the centre of an enterprise's corporate, banking, strategic and management functions;

(g) the existence of shared management within entities and in an organization;

(h) the location where cash management and accounting functions are overseen;

(i) the location where pricing decisions and new business development initiatives are created; and

(j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.[12]

19. In *Elephant & Castle*, the Honourable Mr. Justice Morawetz (as he then was) identified three COMI factors as being of particular importance:

(a) the location of the debtor's headquarters or head office functions or nerve centre;

(b) the location of the debtor's management; and

(c) the location which significant creditors recognize as being the centre of the company's operations.[13]

20. As noted in the Wouters Affidavit and the Wouters Declaration, Hyndman is a wholly-owned subsidiary of Celadon Canada and is the sole Canadian operating company within the group of companies that comprise the Chapter 11 Debtors. [14]

21. Hyndman operated out of logistics facilities located in Ayr and Wroxeter, Ontario and Winnipeg, Manitoba and since its acquisition by Celadon in 2015, Hyndman's day-to-day business operations have been fully integrated with the Chapter 11 Debtors. Although Hyndman maintains a registered office in Ontario, all of its material corporate governance, finance, treasury and managerial decisions are made from Celadon's corporate headquarters in Indianapolis, Indiana.[15]

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[12] *Hollander Sleep Products, LLC et al., Re*, 2019 ONSC 3238 (Ont. S.C.J.) at para. 32.
[13] *Massachusetts Elephant & Castle Group Inc., (Re)*, 2011 ONSC 4201 (Ont. S.C.J.) at para. 30.
[14] See Wouters Affidavit at para. 6.
[15] See Wouters Affidavit at paras. 7-8.

22. Hyndman's management is similarly integrated with Celadon's operations in the United States. As such, two of its three directors are United States residents and hold directorships with Chapter 11 Debtor entities in the United States. The corporate officers of both Hyndman and Celadon Canada are also based in the United States and hold similar roles within Celadon's operating companies in the United States. As a result of this integration, Hyndman has operated primarily in support of Celadon's operations and no longer has material customers of its own in Canada.[16]

23. Celadon respectfully submits that Hyndman's operations are so extensively integrated with those of the other Chapter 11 Debtors that the Court should find Hyndman's COMI to be in the United States and, as a result, that the Chapter 11 Proceedings constitute a "foreign main proceeding" for the purposes of Part XIII of the BIA.

(C) The Relief Sought in the Supplemental Order Should be Granted, Including the Appointment of the Receiver

24. In addition to the relief set out in section 271 of Part XIII of the BIA, section 272 provides that, if an order is made recognizing a foreign proceeding, the court may, on application by the foreign representative who applied for the aforementioned order, make any order that it considers appropriate it is satisfied that it is necessary to do so for the protection of the debtor's property or the interests of a creditor or creditors.[17]

25. Pursuant to the draft supplemental order, Celadon is seeking, *inter alia*, the Receiver's appointment, the recognition of the Final DIP Order and the granting of the Receiver's Charge and DIP Charge.

Appointment of the Receiver

26. Section 272(1)(d) of the BIA expressly contemplates that, upon recognition of a foreign insolvency proceeding, the court may make a supplemental order appointing a receiver of all or any part of the debtor's property that the court considers appropriate.[18]

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[16] See Wouters Affidavit at para. 9.
[17] BIA at s. 272.
[18] BIA at s. 271(d).

27. As set out in the Wouters Affidavit, with the exception of one of the Chapter 11 Debtors, the overall purpose of the Chapter 11 Proceedings is to effect an orderly wind down and liquidation of the remaining businesses of the Chapter 11 Debtors in the United States, Canada and Mexico.[19]

28. Hyndman's principal assets located in Canada are the real properties located in Ayr and Wroxeter, Ontario and Winnipeg, Manitoba. The Chapter 11 Debtors have filed the Canadian Private Sale Motions before the U.S. Court seeking approval of private sales of the Ayr and Winnipeg properties. The Canadian Private Sale Motions are returnable in the U.S. Court on January 30, 2020.[20]

29. In the event that the orders sought by the Chapter 11 Debtors are granted at that time, the Receiver (if appointed) will seek this Court's approval of the proposed private sales prior to the closing of either transaction. The Receiver would also seek further recognition of additional relief of the U.S. Court relating to the disposition of the assets of the Celadon Canada and Hyndman, as and when such orders may be entered by the U.S. Court.[21]

30. Celadon respectfully submits that it is just and convenient and consistent with the purposes of Part XIII of the BIA to appoint the Receiver as such an appointment is necessary to aid and assist the Chapter 11 Debtors in realizing upon their Canadian assets, to oversee the orderly marshalling of proceeds from the disposition of those assets pending further order of this Court and to act as this Court's officer in respect of the foreign recognition proceedings, and the Chapter 11 Proceedings generally.

Granting the Receiver's Charge and DIP Charge is Appropriate

31. Pursuant to the Final DIP Order, the Chapter 11 Debtors are authorized to, inter alia, obtain post-petition financing pursuant to the DIP Facility with the DIP Secured Parties in an aggregate principal amount of up to $11.25 million USD. Further in that regard, the Final

[19] See Wouters Affidavit at para. 3.
[20] See Wouters Affidavit at paras. 7 & 26.
[21] See Wouters Affidavit at para. 26.

DIP Order grants the DIP Secured Parties a super-priority security interest in the Chapter 11 Debtors' assets, including those located in Canada.[22]

32. Without access to the DIP Facility, the Chapter 11 Debtors would not have been able to secure the funding that has already been provided to Hyndman and its remaining and former employees on account of payments made pursuant to the Employee Wage Orders and to secure the ongoing funding necessary to assist the Chapter 11 Debtors and the Receiver in the orderly wind down of the Chapter 11 Debtors' Canadian businesses.[23]

33. With respect to the Receiver's Charge, the Receiver's appointment is necessary to aid and assist the Debtors in realizing upon their Canadian assets and in assisting this Court and Canadian creditors with the ongoing Chapter 11 Proceedings.

34. As part of its mandate, the Receiver will undertake statutory obligations under the *Wage Earner Protection Program Act* in respect of those Hyndman employees whose employment has been terminated and information regarding the within proceedings and the Chapter 11 Proceedings will be provided to the Chapter 11 Debtors' Canadian stakeholders by and through the Receiver. As such, the Receiver's Charge is reasonable in the circumstances of the instant case.

PART V - CONCLUSION

35. For the reasons set forth herein, Celadon respectfully requests that the Court grant the relief set out in its Notice of Application dated January 22, 2020.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of January, 2020.

DLA Piper (Canada) LLP

Lawyers for the Chapter 11 Debtors and the Foreign Representative

[22] See Wouters Affidavit at para. 18.
[23] See Wouters Affidavit at paras. 24.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Hollander Sleep Products, LLC et al., Re*, 2019 ONSC 3238 (Ont. S.C.J.).
2. *Massachusetts Elephant & Castle Group Inc., (Re),* 2011 ONSC 4201 (Ont. S.C.J.).

SCHEDULE "B"
STATUTES AND REGULATIONS

PART XIII

Cross-border Insolvencies

Purpose

267 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtors;

(d) the protection and the maximization of the value of debtors' property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

Interpretation

Definitions

268 (1) The following definitions apply in this Part.

foreign court means a judicial or other authority competent to control or supervise a foreign proceeding. (*tribunal étranger*)

foreign main proceeding means a foreign proceeding in a jurisdiction where the debtor has the centre of the debtor's main interests. (*principale*)

foreign non-main proceeding means a foreign proceeding, other than a foreign main proceeding. (*secondaire*)

foreign proceeding means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation. (*instances étrangères*)

foreign representative means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor, to

- **(a)** administer the debtor's property or affairs for the purpose of reorganization or liquidation; or
- **(b)** act as a representative in respect of the foreign proceeding. (*représentant étranger*)

- **Centre of debtor's main interests**

  (2) For the purposes of this Part, in the absence of proof to the contrary, a debtor's registered office and, in the case of a debtor who is an individual, the debtor's ordinary place of residence are deemed to be the centre of the debtor's main interests.

Recognition of Foreign Proceeding

Application for recognition of a foreign proceeding

- **269 (1)** A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

- **Documents that must accompany application**

  (2) Subject to subsection (3), the application must be accompanied by

  - **(a)** a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;
  - **(b)** a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and
  - **(c)** a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

- **Documents may be considered as proof**

  (3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

- **Other evidence**

  (4) In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

- **Translation**

  (5) The court may require a translation of any document accompanying the application.

Order recognizing foreign proceeding

- **270 (1)** If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

- **Nature of foreign proceeding to be specified**

  (2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

Effects of recognition of a foreign main proceeding

- **271 (1)** Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding,
    - **(a)** no person shall commence or continue any action, execution or other proceedings concerning the debtor's property, debts, liabilities or obligations;
    - **(b)** if the debtor carries on a business, the debtor shall not, outside the ordinary course of the business, sell or otherwise dispose of any of the debtor's property in Canada that relates to the business and shall not sell or otherwise dispose of any other property of the debtor in Canada; and
    - **(c)** if the debtor is an individual, the debtor shall not sell or otherwise dispose of any property of the debtor in Canada.

- **When subsection (1) does not apply**

  (2) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor at the time the order recognizing the foreign proceeding is made.

- **Exceptions**

  (3) The prohibitions in paragraphs (1)(a) and (b) are subject to the exceptions specified by the court in the order recognizing the foreign proceeding that would apply in Canada had the foreign proceeding taken place in Canada under this Act.

- **Application of this and other Acts**

  (4) Nothing in subsection (1) precludes the commencement or the continuation of proceedings under this Act, the *Companies' Creditors Arrangement Act* or the *Winding-up and Restructuring Act* in respect of the debtor.

Orders

- **272 (1)** If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order
    - **(a)** if the foreign proceeding is a foreign non-main proceeding, imposing the prohibitions referred to in paragraphs 271(1)(a) to (c) and specifying the exceptions to those prohibitions, taking subsection 271(3) into account;
    - **(b)** respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, debts, liabilities and obligations;

- **(c)** entrusting the administration or realization of all or part of the debtor's property located in Canada to the foreign representative or to any other person designated by the court; and
- **(d)** appointing a trustee as receiver of all or any part of the debtor's property in Canada, for any term that the court considers appropriate and directing the receiver to do all or any of the following, namely,
  - **(i)** to take possession of all or part of the debtor's property specified in the appointment and to exercise the control over the property and over the debtor's business that the court considers appropriate, and
  - **(ii)** to take any other action that the court considers appropriate.

- **Restriction**

  (2) If any proceedings under this Act have been commenced in respect of the debtor at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

- **Application of this and other Acts**

  (3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the *Companies' Creditors Arrangement Act* or the *Winding-up and Restructuring Act* in respect of the debtor.

Terms and conditions of orders

273 An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

Commencement or continuation of proceedings

274 If an order recognizing a foreign proceeding is made, the foreign representative may commence or continue any proceedings under sections 43, 46 to 47.1 and 49 and subsections 50(1) and 50.4(1) in respect of a debtor as if the foreign representative were a creditor of the debtor, or the debtor, as the case may be.

Obligations

Cooperation — court

- **275 (1)** If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

- **Cooperation — other authorities in Canada**

  (2) If any proceedings under this Act have been commenced in respect of a debtor and an order recognizing a foreign proceeding is made in respect of the debtor, every person who exercises any powers or performs duties and functions in any proceedings under this Act shall cooperate, to the

maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

- **Forms of cooperation**

  (3) For the purpose of this section, cooperation may be provided by any appropriate means, including

  - **(a)** the appointment of a person to act at the direction of the court;
  - **(b)** the communication of information by any means considered appropriate by the court;
  - **(c)** the coordination of the administration and supervision of the debtor's assets and affairs;
  - **(d)** the approval or implementation by courts of agreements concerning the coordination of proceedings; and
  - **(e)** the coordination of concurrent proceedings regarding the same debtor.
  -

Obligations of foreign representative

276 If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

- **(a)** without delay, inform the court of
  - **(i)** any substantial change in the status of the recognized foreign proceeding,
  - **(ii)** any substantial change in the status of the foreign representative's authority to act in that capacity, and
  - **(iii)** any other foreign proceeding in respect of the same debtor that becomes known to the foreign representative; and
- **(b)** publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

Multiple Proceedings

Concurrent proceedings

277 If any proceedings under this Act in respect of a debtor are commenced at any time after an order recognizing the foreign proceeding is made,

- **(a)** the court shall review any order made under section 272 and, if it determines that the order is inconsistent with any orders made in the proceedings under this Act, the court shall amend or revoke the order; and
- **(b)** if the foreign proceeding is a foreign main proceeding, the court shall make an order terminating the application of the prohibitions in paragraphs 271(1)(a) to (c) if the court

determines that those prohibitions are inconsistent with any similar prohibitions imposed in the proceedings under this Act.

Multiple foreign proceedings

- **278 (1)** If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor, an order recognizing a foreign main proceeding is made in respect of the debtor, the court shall review any order made under section 272 in respect of the foreign non-main proceeding and, if it determines that the order is inconsistent with any orders made under that section in respect of the foreign main proceedings, the court shall amend or revoke the order.

- **Multiple foreign proceedings**

  (2) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of the debtor, an order recognizing another foreign non-main proceeding is made in respect of the debtor, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order made under section 272 in respect of the first recognized proceeding and amend or revoke that order if it considers it appropriate.

Miscellaneous Provisions

Authorization to act as representative of proceeding under this Act

279 The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

Foreign representative status

280 An application by a foreign representative for any order under this Part does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other court order.

Foreign proceeding appeal

281 A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.

Presumption of insolvency

282 For the purposes of this Part, if a bankruptcy, an insolvency or a reorganization or a similar order has been made in respect of a debtor in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor is insolvent and proof of the appointment of the foreign representative made by the order.

Credit for recovery in other jurisdictions

- **283 (1)** If a bankruptcy order, a proposal or an assignment is made in respect of a debtor under this Act, the following shall be taken into account in the distribution of dividends to the debtor's creditors in Canada as if they were a part of that distribution:
    - **(a)** the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the debtor; and
    - **(b)** the value of any property of the debtor that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if the transfer were subject to this Act, would be a preference over other creditors or a transfer at undervalue.

- **Restriction**

  (2) Despite subsection (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim.

Court not prevented from applying certain rules

- **284 (1)** Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

- **Public policy exception**

  (2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

Court File No. CV-20-00634911-00CL

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE WITH RESPECT TO CELADON GROUP, INC. AND THE AFFILIATED ENTITIES LISTED IN FOOTNOTE "1" HERETO

APPLICATION OF CELADON GROUP, INC. PURSUANT TO PART XIII OF THE *BANKRUPTCY AND INSOLVENCY ACT* AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.-43, AS AMENDED

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto, Ontario

FACTUM OF THE CHAPTER 11 DEBTORS AND FOREIGN REPRESENTATIVE

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CITATION: Hollander Sleep Products, LLC et al., Re, 2019 ONSC 3238
COURT FILE NO.: CV-19-620484-00CL
DATE: 2019/05/30

SUPERIOR COURT OF JUSTICE – ONTARIO

- COMMERCIAL LIST

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

AND:

AND IN THE MATTER OF HOLLANDER SLEEP PRODUCTS, LLC, HOLLANDER SLEEP PRODUCTS CANADA LIMITED, DREAM II HOLDINGS, LLC, HOLLANDER HOME FASHIONS HOLDINGS, LLC, PACIFIC COAST FEATHER, LLC, HOLLANDER SLEEP PRODUCTS KENTUCKY, LLC, AND PACIFIC COAST FEATHER CUSHION, LLC

APPLICATION OF HOLLANDER SLEEP PRODUCTS, LLC UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: HAINEY J.

COUNSEL: *Shawn Irving and Marc Wasserman*, for the Applicant

Virginie Gauthier, for KSV Kofman Inc.

L. Joseph Latham, for Wells Fargo

Milly Chow and Kelly Bourassa, for Barings Finance LLC

HEARD: May 23, 2019

ENDORSEMENT

BACKGROUND

[1] On May 23, 2019 I granted the application brought by Hollander Sleep Products, LLC ("Hollander Sleep Products"), for orders pursuant to Section 46 through 49 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"). I made the following orders:

a) Recognition of the Chapter 11 Cases as foreign main proceedings pursuant to *Part IV of the CCAA;*

b) Recognition of certain First Day Orders;

c) Appointment of KSV Kofman Inc. ("KSV") as Information Officer;

d) Granting of the DIP ABL Charge; and

e) Granting of the Administration Charge.

[2] I indicated in my endorsement that written reasons would follow. These are my written reasons.

[3] Hollander Sleep Products brings this application in its capacity as the foreign representative (the "Foreign Representative") of itself and Hollander Sleep Products Canada Limited ("Hollander Canada"), Dream II Holdings, LLC, Hollander Home Fashions Holdings, LLC, Pacific Coast Feather, LLC, Hollander Sleep Products Kentucky, LLC, and Pacific Coast Feather Cushion, LLC (collectively, the "Chapter 11 Debtors", and with their other non-debtor affiliates, "Hollander").

FACTS

[4] Hollander is an industry leader in the bedding products market. Hollander manufactures bedding products including pillows, comforters and mattress pads for well-known licensed brands. Hollander also owns and manufactures bedding products under several of its own proprietary brands and also partners with major retailers and hotel chains.

[5] Hollander's corporate headquarters is in Boca Raton, Florida. Hollander has 13 manufacturing facilities located across North America – 11 in the United States and 2 in Canada -- and a primary show room in New York City. Most of Hollander's sales come from wholesale distribution.

Chapter 11 Cases

[6] On May 19, 2019 (the "Petition Date") each of the Chapter 11 Debtors filed voluntary petitions for relief pursuant to Chapter 11 of the *U.S. Bankruptcy Code* (the "Chapter 11 Cases") with the United States Bankruptcy Court for the Southern District of New York (the "U.S. Court"). Certain first day motions (the "First Day Motions") were also filed on May 19, 2019. On May 21, 2019, the U.S. Court heard several of the First Day Motions, and on May 22 and 23, 2019 the court entered various interim or final orders in respect of these motions (the "First Day Orders").

Chapter 11 Debtors

[7] The Chapter 11 Debtors operate on an integrated basis and are incorporated or established under the laws of the United States except for Hollander Canada, which is incorporated under the laws of British Columbia. Each of the Chapter 11 Debtors, including Hollander Canada, is a direct or indirect wholly-owned subsidiary of Dream II Holdings, LLC.

Hollander Canada

[8] Hollander Canada is a fully integrated subsidiary of Hollander. Hollander Canada operates one manufacturing facility in Toronto, one manufacturing facility in Montreal, and maintains a sales office in Toronto.

[9] Hollander Canada employs approximately 240 employees, all of whom are located in Canada. Hollander Canada's workforce is not unionized and it does not maintain any registered pension plans. Its primary stakeholders include employees, lenders, customers, landlords, creditors, and trade-suppliers.

[10] On a standalone basis, Hollander Canada is not profitable. Its 2018 financial statement reflects a net loss of approximately $2.6 million after allocation of selling, general and administrative expenses, including royalties and procurement fees, incurred by the U.S. Chapter 11 Debtors and allocated across the manufacturing facilities for which it provides these and other shared services (the "U.S. Shared Services"). Losses have continued for the four-month period ended April 30, 2019. Currently, approximately $7.2 million of Hollander Canada's $9 million of accounts payable is past due. If the amount owing to Hollander Canada from the U.S. Chapter 11 Debtors was written down to its realizable value and Hollander Canada's allocation of U.S. Shared Services was recorded for the four months ended April 30, 2019, Hollander Canada's shareholder equity would be entirely eroded.

[11] Hollander Canada is entirely dependent on Hollander's U.S. head office for managerial, administrative, IT, strategic services and decisions, and it uses intellectual property almost wholly owned by U.S. Hollander entities. Hollander Canada is also entirely reliant on supply arrangements and relationships of the Hollander enterprise.

Principal Indebtedness

[12] The Chapter 11 Debtors' principal pre-petition indebtedness consists of the following:

a) **Prepetition ABL Facility** – a $125 million senior revolving asset-based credit facility (the "ABL Facility") under which all the Chapter 11 Debtors, including Hollander Canada, are obligors. Hollander Canada may borrow a maximum of $40 million from this facility. Hollander Canada is not jointly or severally liable for the obligations of the U.S. Chapter 11 Debtors under the ABL Facility; however, the U.S. Chapter 11 Debtors are liable for Hollander Canada's borrowings under the ABL Facility. As of the Petition Date, approximately $61 million remains outstanding against the ABL Facility, not including approximately $5 million in letters of credit (the "Prepetition ABL Obligations"). The Prepetition ABL Obligations include approximately $6 million of borrowings by Hollander Canada.

b) **Prepetition Term Loan** – a $190 million senior secured term loan facility (the "Term Loan Facility"). Each Chapter 11 Debtor except Hollander Canada is an obligor under this facility. Hollander Canada is not a borrower or a guarantor of

the Term Loan Facility. As of the Petition Date, approximately $166.5 million remains outstanding against the Term Loan Facility.

Recent Events and Proposed Restructuring

[13] Recent substantial price increases on materials have significantly reduced Hollander's already low profit margins for many products. In addition, Hollander acquired one of its major competitors in June 2017. This necessitated the expenditure of additional capital. With approximately $233 million of outstanding indebtedness and limited access to credit, Hollander is facing severe liquidity constraints.

[14] These circumstances necessitated comprehensive restructuring negotiations with the Chapter 11 Debtors' primary constituency groups. The Chapter 11 Debtors recently agreed with their secured lenders and their majority equity-holder, Sentinel, on a comprehensive restructuring process to ensure the viability of the business. The Chapter 11 Debtors, 100% of the Term Loan Lenders, and Sentinel entered into a restructuring support agreement dated May 19, 2019 (the "RSA"). The RSA contemplates, and the Chapter 11 Debtors have filed, a comprehensive Chapter 11 restructuring plan (the "Plan").

[15] In connection with the RSA, Hollander's asset-based secured lenders have agreed to provide a $90 million debtor-in-possession asset-based loan facility (the "DIP ABL Facility") and certain Term Loan Lenders have agreed to provide an additional $28 million term loan facility (the "DIP Term Loan Facility" and together with the DIP ABL Facility, the "DIP Facilities") to fund the administration of the Chapter 11 Cases.

[16] I am not, at this time, being asked to approve or grant any relief in connection with the Plan. However, the Chapter 11 Debtors have negotiated and incorporated certain protections into the Plan to mitigate against any prejudice to current creditors of Hollander Canada that might result incidentally from a global restructuring. I am satisfied that the Plan represents the Chapter 11 Debtors' best prospect of reorganizing their business operations and emerging as a healthy going-concern enterprise, maximizing recoveries for all stakeholders.

[17] If the Chapter 11 Debtors do not obtain the relief requested on this application, including post-petition financing, they will be unable to restructure pursuant to the Plan. In such a case, a liquidation of the business and assets of the Chapter 11 Debtors, including Hollander Canada, will be the likely result. In a liquidation scenario, there will be a nominal recovery, if any, available for Hollander Canada's unsecured creditors.

Proposed Postpetition Financing

[18] On May 21, 2019, the U.S. Court heard certain of the First Day Motions, including the DIP Motion. At the hearing, the U.S. Court requested certain changes to the DIP Order, which were subsequently made by the Chapter 11 Debtors in consultation with the DIP Lenders. Access to the DIP Facilities is vital to the preservation and maintenance of the going-concern value of Hollander and the Chapter 11 Debtors' successful reorganization.

[19] The $90 million DIP ABL Facility is the critical facility from the perspective of Hollander Canada. Hollander Canada is neither a borrower nor a guarantor of the DIP Term Loan Facility. The DIP ABL Facility is a senior secured credit facility for which all the Chapter 11 Debtors, including Hollander Canada, are borrowers. The DIP ABL Facility provides for an initial "creeping (or gradual) roll-up" whereby the Chapter 11 Debtors will use receipts from the Chapter 11 Debtors' operations to pay down pre-filing obligations pending the issuance of the Final DIP Order, whereupon there will be a deemed draw on the DIP ABL Facility to satisfy the then outstanding prepetition debt, if any, under the ABL Facility. Hollander Canada is entitled to borrow up to $20 million under the DIP ABL Facility, less the amount of Hollander Canada's prepetition obligations under the ABL Facility that are to be rolled-up into the DIP ABL Facility.

[20] With respect to prepetition debt under the ABL Facility, Hollander Canada is not jointly or severally liable for amounts drawn down by the U.S. Chapter 11 Debtors. However, Hollander Canada will be jointly and severally liable with the other Chapter 11 Debtors in respect of borrowings under the DIP ABL Facility, including borrowings to repay amounts drawn down under the prepetition ABL Facility by the U.S. Chapter 11 Debtors. The DIP ABL Lenders have indicated they are unwilling to enter into the DIP ABL Facility unless Hollander Canada is jointly and severally liable for all obligations under the DIP ABL Facility, including those incurred by the U.S. borrowers.

[21] It is a condition of the DIP Facilities that the Chapter 11 Debtors obtain an order from this Court recognizing the DIP Order within three business days of when the DIP Order was issued by the U.S. Court. The DIP ABL Facility requires that the DIP Order be recognized by this Court before any borrowing by Hollander Canada will be permitted under the DIP ABL Facility.

[22] I have concluded that the ability of the Chapter 11 Debtors, including Hollander Canada, to maintain business relationships with their vendors, suppliers and customers, to pay their employees and otherwise finance their operations requires the availability of working capital from the DIP Facilities. The Chapter 11 Debtors, including Hollander Canada on a standalone basis, do not have sufficient available sources of working capital and financing to operate their businesses without immediate access to the DIP Facilities.

ISSUES

[23] I must decide the following issues:

a) Are the Chapter 11 Cases "foreign main proceedings" pursuant to Part IV of the CCAA?

b) If so, are the Chapter 11 Debtors entitled to the relief sought in the Initial Recognition Order and Supplemental Order, including,

(i) Granting the Stay of Proceedings;

(ii) Recognition of the First Day Orders;

(iii) Granting the DIP ABL Charge;

(iv) Appointing KSV as Information Officer; and

(v) Granting the Administration Charge?

ANALYSIS

Are the Chapter 11 Cases Foreign Main Proceedings?

Are the Chapter 11 Cases Foreign Proceedings?

[24] I must first determine if the Chapter 11 Cases are foreign proceedings. It is important to note that the purpose of Part IV of the CCAA is to facilitate the administration of cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada. Section 44 of the CCAA provides as follows:

> 44. The purpose of this Part is to provide mechanisms for dealing with cases of cross- border insolvencies and to promote
>
> (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (b) greater legal certainty for trade and investment;
>
> (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
>
> (d) the protection and the maximization of the value of debtor company's property; and
>
> (e) the rescue of financially troubled businesses to protect investment and preserve employment.

[25] Pursuant to S. 46(1) of the CCAA, a person who is a foreign representative may apply to the court for recognition of a foreign proceeding in respect of which that person is a foreign representative. Pursuant to S. 47 of the CCAA, the two following requirements must be met for an order recognizing a foreign proceeding:

a) the proceeding is a "foreign proceeding"; and

b) the applicant is a "foreign representative" in respect of that foreign proceeding.

[26] In the Chapter 11 Cases, an order was made appointing Hollander Sleep Products as foreign representative by the U.S. Court on May 23, 2019. (the "Foreign Representative Order").

[27] Section 45(1) of the CCAA defines a "foreign proceeding" as any judicial proceeding in a jurisdiction outside of Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization. Courts

have consistently recognized proceedings under Chapter 11 of the United States Bankruptcy Code to be foreign proceedings for the purposes of the CCAA.

[28] Because Hollander Sleep Products has been appointed a "foreign representative" by the U.S. Court in the Chapter 11 Cases, I am satisfied that the Chapter 11 cases should be recognized as a "foreign proceeding" pursuant to S. 47(1) of the CCAA.

Are the Chapter 11 Cases Foreign Main Proceedings?

[29] Once I have determined that a proceeding is a "foreign proceeding", I am required, pursuant to Section 47(2) of the CCAA, to specify in my order whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding." A "foreign main proceeding" is defined as a "foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests" ("COMI").

[30] The CCAA does not provide a definition of COMI. Section 45(2) of the CCAA establishes a rebuttable presumption that, in the absence of proof to the contrary, the location of a debtor company's registered office is deemed to be its COMI. Evidence regarding the debtor company's operations can rebut this presumption. Part IV of the CCAA does not specifically consider the circumstances facing corporate groups. It is therefore necessary to conduct the COMI analysis on an entity-by-entity basis.

[31] In this case the registered offices of all of the Chapter 11 Debtors except for Hollander Canada, are situated in the United States. Therefore, the presumption in s. 45(2) of the CCAA deems the COMI of each of those entities to be in the United States.

[32] Hollander Canada's registered head office is in Vancouver. Where a Canadian entity is operating as part of a larger corporate group, several Canadian authorities have considered how COMI should be determined. In *Angiotech*[1], the Court considered the following factors:

a) the location where corporate decisions are made;

b) the location of employee administrations, including human resource functions;

c) the location of the company's marketing and communication functions;

d) whether the enterprise is managed on a consolidated basis;

e) the extent of integration of an enterprise's international operations;

f) the centre of an enterprise's corporate, banking, strategic and management functions;

g) the existence of shared management within entities and in an organization;

h) the location where cash management and accounting functions are overseen;

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[1] *Angiotech Pharmaceuticals Inc. (Re)*, 2011 BCSC 115 at para 7.

i) the location where pricing decisions and new business development initiatives are created; and

j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

[33] In *Elephant & Castle*[2], Morawetz J. (as he then was) recognized the *Angiotech* factors listed above and identified what he considered to be the most significant factors as follows:

> However, it seems to me, in interpreting COMI, the following factors are usually significant:
>
> (a) the location of the debtor's headquarters or head office functions or nerve centre;
>
> (b) the location of the debtor's management; and
>
> (c) the location which significant creditors recognize as being the centre of the company's operations.

[34] The jurisprudence is clear that where a Canadian debtor company is the only Canadian entity among a number of other Chapter 11 debtors that are all incorporated in the United States, the COMI for the Canadian debtor company is the United States.

[35] I have concluded for the following reasons that Hollander Canada's COMI is in the United States:

a) Hollander Canada's business is closely integrated into Hollander's business in the U.S. and its registered office is listed in Canada only for corporate purposes;

b) Managerial functions for Hollander Canada, including finance, buying, logistics, marketing, and strategic decisions, are provided from Hollander's U.S. head office by Hollander Sleep Products;

c) Hollander Canada is almost wholly dependent on Hollander's U.S. office for administrative functions such as overhead services, accounting, and IT, which are provided by Hollander Sleep Products in the U.S.;

d) Data for Hollander Canada's operations is housed within IT systems, located and operated out of the U.S.;

e) Hollander Canada is reliant on the purchasing power and supplier relationships of the Hollander enterprise, and on its own could not replicate the supply arrangements necessary for its continued functioning;

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[2] *Massachusetts Elephant & Castle Group Inc., (Re),* 2011 ONSC 4201 (S.C.J. [Commercial List]).

f) Hollander Canada's books and records are maintained at Hollander's head office in Boca Raton, Florida;

g) All of Hollander Canada's directors reside in the United States;

h) Canadian revenues make up only 10.7% of Hollander's revenues;

i) Hollander Canada is entirely dependent on the U.S. Chapter 11 Debtors for the majority of licensing agreements, design partnerships, and company-owned brands;

j) Substantially all of the trademarks and intellectual property relied on by Hollander Canada are owned by the U.S. Chapter 11 Debtors;

k) The Chapter 11 Debtors, including Hollander Canada, operate an integrated, centralized cash management system; and

l) Hollander Canada is dependent on the U.S. Chapter 11 Debtors for the establishment, maintenance, and administration of certain customer promotional programs involving Hollander Canada's key customers.

[36] Since all the Chapter 11 Debtors except Hollander Canada have registered offices in the United States, and since a review of Hollander Canada's business indicates that its COMI is in the United States, The COMI of all the Chapter 11 Debtors is in the United States and therefore the Chapter 11 Cases should be recognized as "foreign main proceedings".

SHOULD THE INITIAL RECOGNITION ORDER AND SUPPLEMENTAL ORDER BE GRANTED?

Is a Stay of Proceedings Required and Appropriate?

[37] Section 48(1) of the CCAA provides that once the Court has found that a foreign proceeding is a "foreign main proceeding", it is required to grant certain mandatory relief, including a stay of proceedings:

[38] In addition to the automatic relief provided for in s. 48, s.49 of the CCAA grants me the broad discretion to make any appropriate order if I am satisfied that it is necessary for the protection of the debtor company's property or the interests of creditors.

[39] Section 52(1) of the CCAA requires that if an order recognizing a foreign proceeding is made, the Court "shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding."

[40] Because of the circumstances facing Hollander, Hollander Canada and the other Chapter 11 Debtors, I am satisfied that a stay of proceedings is necessary in order to implement the proposed restructuring.

Should the First Day Orders be Recognized?

[41] The central principle governing Part IV of the CCAA is comity, which mandates that Canadian courts should recognize and enforce the judicial acts of other jurisdictions, provided that those other jurisdictions have assumed jurisdiction on a basis consistent with principles of order, predictability and fairness.

[42] Canadian courts have emphasized the importance of comity and cooperation in cross-border insolvency proceedings to avoid multiple proceedings, inconsistent judgments and general uncertainty. Coordination of international insolvency proceedings is particularly critical in ensuring the equal and fair treatment of creditors regardless of their location.

[43] I am satisfied that the First Day Orders should be recognized for the following reasons:

a) The U.S. Court has appropriately taken jurisdiction over the Chapter 11 Cases, so comity will be furthered by this Court's recognition of and support for the Chapter 11 Cases already under way in the United States;

b) Coordination of proceedings in the two jurisdictions will ensure equal and fair treatment of all stakeholders, whether they are in the United States or Canada;

c) Given the close connection between Hollander and the United States, it is reasonable and sensible for the U.S. Court to have principal control over the insolvency process. This will produce the most efficient restructuring for the benefit of all stakeholders;

d) The Chapter 11 Debtors must act quickly because of the expeditious timetable established under the Plan for their restructuring. It is imperative that there be a centralized and co-ordinated process for these insolvency proceedings to maximize the prospect of a successful restructuring and preserve value for stakeholders; and

e) The Canadian and U.S. operations of Hollander are highly integrated.

Should the DIP ABL Charge be Granted?

[44] The Chapter 11 Debtors are facing a liquidity crisis and require DIP financing to fund their operations while they pursue a restructuring pursuant to the Plan or a sale in accordance with the marketing process to be conducted as part of the Chapter 11 proceeding. The ability of the Chapter 11 Debtors, including Hollander Canada, to maintain and finance their operations requires working capital from the DIP Facilities. If interim financing through the DIP Facilities is not obtained, neither the Chapter 11 Debtors as a whole, nor Hollander Canada on a standalone basis, have the funds to finance going-concern operations.

[45] The DIP ABL Facility includes an initial creeping roll-up provision pursuant to which the Chapter 11 Debtors will use receipts from their operations to pay down pre-filing obligations pending the issuance of the Final DIP Order. The amount borrowed under the DIP ABL Facility is proposed to be secured by, among other things, a court-ordered charge on Hollander Canada's property and the property of the other Chapter 11 Debtors in Canada (the "DIP ABL Charge").

[46] This court has concluded in previous proceedings that there is no impediment to granting approval of interim DIP financing including a full roll-up provision in foreign recognition proceedings under Part IV of the CCAA[3].

[47] In *Hartford*, an application under Part IV of the CCAA, this court recognized a DIP facility authorized by the U.S. Court that included a full roll-up, and emphasized the importance of comity in foreign recognition proceeding as follows:

> The Information Officer and Chapter 11 Debtors recognize that in CCAA proceedings, a partial "roll up" provision would not be permissible as a result of s.11.2 of the CCAA, which expressly provides that a DIP charge may not secure an obligation that exists before the Initial Order is made.
>
> Section 49 of the CCAA provides that, in recognizing an order of a foreign court, the court may make any order that it considers appropriate, provided the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of the creditor or creditors.
>
> It is necessary, in my view, to emphasize that this is a motion to recognize an order made in the "foreign main proceeding"....
>
> A significant factor to take into account is that the Final DIP Facility Order was granted by the U.S. Court. In these circumstances, I see no basis for this court to second guess the decision of the U.S. Court.

[48] For the same reasons I am satisfied that the DIP Order should be approved. The U.S. Court granted the DIP Order because it is necessary for the protection of Hollander's property and for the interests of creditors in Canada and the U.S.

[49] The DIP ABL Facility provides that Hollander Canada is jointly and severally liable for the borrowings of other Chapter 11 Debtors under the DIP ABL Facility.

[50] I have concluded that the following factors support recognizing Hollander Canada's joint and several liability under the DIP Order and the DIP ABL Charge:

a) The DIP ABL Charge furthers the objectives of the CCAA and is commercially reasonable as it allows the Chapter 11 Debtors to continue operations and pursue a restructuring or going-concern sale as outlined in the proposed Plan;

b) An estimated cash flow forecast extracted from the DIP budget reveals that Hollander Canada is projected to generate negative cash flow until at least July 1, 2019;

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[3] *Hartford Computer Hardware Inc., (Re)*, 2012 ONSC 964 at paras. 18-19.

c) The Chapter 11 Debtors, including Hollander Canada, need immediate access to the DIP ABL Facility to ensure their continued operations during these proceedings;

d) The DIP ABL Lenders are unwilling to provide funding to the Chapter 11 Debtors without Hollander Canada's joint and several liability under the DIP ABL Facility;

e) The proposed DIP Facilities and Plan are supported by all secured creditors with an economic interest in Hollander Canada; and

f) If the DIP ABL Charge is not granted, the restructuring contemplated by the Plan will not be implemented, likely resulting in liquidation. In a liquidation scenario, Hollander Canada's creditors will likely obtain only nominal recoveries, if any.

[51] To protect the interests of Hollander Canada and its creditors, the Chapter 11 Debtors negotiated certain protections to mitigate any prejudice to Hollander Canada's creditors. Specifically, the DIP Order includes a quasi-marshalling construct whereby the DIP ABL Agent is obligated to first look to proceeds of the Chapter 11 Debtors' U.S. collateral to satisfy any outstanding obligations of the U.S. Chapter 11 Debtors under the DIP ABL Facility, and to the proceeds of the Chapter 11 Debtors' Canadian collateral to satisfy any outstanding obligations of Hollander Canada under the DIP ABL Facility. Only once collateral in the U.S. has been exhausted can the DIP ABL Lenders look to the Canadian assets to satisfy any outstanding U.S. obligation.

[52] The absence of prejudice to creditors of Hollander Canada, and the DIP ABL Lenders' consent to the quasi-marshalling construct, are key factors distinguishing this case from *Payless Holdings Inc. LLC, (Re)*. In *Payless*, also a proceeding under Part IV of the CCAA, this court declined to approve a DIP order and lenders' charge that would have required the solvent Canadian applicants to guarantee borrowings from the DIP facility even though they would not receive advances from it. The DIP facility was opposed by the Canadian landlords who were uniquely prejudiced by its terms. The DIP facility in that case specifically precluded marshalling.

[53] I have concluded that the Court's decision in *Payless* is distinguishable from this case for the following reasons as set out in the applicant's factum:

a) In *Payless*, the Canadian Applicants were not insolvent, were not prepetition borrowers, had never granted security and were not borrowers under the DIP facility. In this case, Hollander Canada is insolvent, its assets are encumbered, and it is incapable of maintaining going concern operations without urgent funding support from the DIP ABL Facility. For instance, $7.2 million of Hollander Canada's accounts payable are currently past due; without support from the DIP ABL Facility, Hollander does not have sufficient liquidity to satisfy these obligations.

b) In *Payless*, there was evidence of material prejudice to Canadian creditors and certain Canadian creditor groups opposed the DIP order because they were

disadvantaged. In this case, no such material prejudice or unequal treatment exists with respect to the creditors of Hollander Canada or the other Chapter 11 Debtors.

c) In *Payless*, the Court intimated that if marshalling had been permitted, the inequitable treatment of Canadian creditors would have been resolved. In this case, the DIP ABL Lenders have specifically agreed to a quasi marshalling concept to ensure that Canadian assets are used first to satisfy Canadian DIP ABL indebtedness, and not applied to satisfy U.S. DIP ABL indebtedness until all U.S. assets are first exhausted.

[54] I have concluded that the DIP ABL Charge should be granted for these reasons.

SHOULD KSV BE APPOINTED INFORMATION OFFICER?

[55] I am satisfied that an information officer should be appointed to assist with the cooperation between the Canadian foreign recognition proceeding and the foreign representative and the U.S. Court. Further, KSV, a licensed insolvency trustee, is appropriate to act in this capacity.

SHOULD AN ADMINISTRATIVE CHARGE BE APPROVED?

[56] Finally, I am satisfied that an administration charge in the maximum amount of $200,000 is reasonable and appropriate.

CONCLUSION

[57] For these reasons I have granted the Initial Recognition Order and the Supplemental Order.

[58] I am grateful to the applicant's counsel for their helpful submission.

HAINEY J.

Date: May 30, 2019

CITATION: Massachusetts Elephant & Castle Group, Inc. (Re), 2011 ONSC 4201
COURT FILE NO.: CV-11-9279-00CL
DATE: 20110711

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS EASTERN DIVISION WITH RESPECT TO THE COMPANIES LISTED ON SCHEDULE "A" HERETO (THE "CHAPTER 11 DEBTORS")

UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

RE: **MASSACHUSETTS ELEPHANT & CASTLE GROUP, INC., Applicant**

BEFORE: MORAWETZ J.

COUNSEL: Kenneth D. Kraft, Sara-Ann Wilson, for the Applicant

Heather Meredith, for the GE Canada Equipment Financing GP

HEARD &
ENDORSED: July 4, 2011
REASONS: July 11, 2011

ENDORSEMENT

[1] Massachusetts Elephant & Castle Group, Inc. ("MECG" or the "Applicant") brings this application under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*"). MECG seeks orders pursuant to sections 46 – 49 of the *CCAA* providing for:

(a) an Initial Recognition Order declaring that:

(i) MECG is a foreign representative pursuant to s. 45 of the *CCAA* and is entitled to bring its application pursuant s. 46 of the *CCAA*;

(ii) the Chapter 11 Proceeding (as defined below) in respect of the Chapter 11 Debtors (as set out in Schedule "A") is a "foreign main proceeding" for the purposes of the *CCAA*; and

(iii) any claims, rights, liens or proceedings against or in respect of the Chapter 11 Debtors, the directors and officers of the Chapter 11 Debtors and the Chapter 11 Debtors' property are stayed; and

(b) a Supplemental Order:

(i) recognizing in Canada and enforcing certain orders of the U.S. Court (as defined below) made in the Chapter 11 Proceeding (as defined below);

(ii) granting a super-priority change over the Chapter 11 Debtors' property in respect of administrative fees and expenses; and

(iii) appointing BDO Canada Limited ("BDO") as Information Officer in respect of these proceedings (the "Information Officer").

[2] On June 28, 2011, the Chapter 11 Debtors commenced proceedings (the "Chapter 11 Proceeding") in the United States Bankruptcy Court for the District of Massachusetts Eastern Division (the "U.S. Court"), pursuant to Chapter 11 of the *United States Bankruptcy Code*, 11 U.S.C. § 1101-1174 ("*U.S. Bankruptcy Code*").

[3] On June 30, 2011, the U.S. Court made certain orders at the first-day hearing held in the Chapter 11 Proceeding, including an order appointing the Applicant as foreign representative in respect of the Chapter 11 Proceeding.

[4] The Chapter 11 Debtors operate and franchise authentic, full-service British-style restaurant pubs in the United States and Canada.

[5] MECG is the lead debtor in the Chapter 11 Proceeding and is incorporated in Massachusetts. All of the Chapter 11 Debtors, with the exception of Repechage Investments Limited ("Repechage"), Elephant & Castle Group Inc. ("E&C Group Ltd.") and Elephant & Castle Canada Inc. ("E&C Canada") (collectively, the "Canadian Debtors") are incorporated in various jurisdictions in the United States.

[6] Repechage is incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ("*CBCA*") with its registered office in Toronto, Ontario. E&C Group Ltd. is also incorporated under the *CBCA* with a registered office located in Halifax, Nova Scotia. E&C Canada Inc. is incorporated under the *Business Corporations Act*, R.S.O. 1990, c. B. 16, and its registered office is in Toronto. The mailing office for E&C Canada Inc. is in Boston, Massachusetts at the location of the corporate head offices for all of the debtors, including Repechage and E&C Group Ltd.

[7] In order to comply with s. 46(2) of the *CCAA*, MECG filed the affidavit of Ms. Wilson to which was attached certified copies of the applicable Chapter 11 orders.

[8] MECG also included in its materials the declaration of Mr. David Dobbin filed in support of the first-day motions in the Chapter 11 Proceeding. Mr. Dobbin, at paragraph 19 of the declaration outlined the sale efforts being entered into by MECG. Mr. Dobbin also outlined the purpose of the Chapter 11 Proceeding, namely, to sell the Chapter 11 Debtors' businesses as a

going concern on the most favourable terms possible under the circumstances and keep the Chapter 11 Debtors' business intact to the greatest extent possible during the sales process.

[9] The issues for consideration are whether this court should grant the application for orders pursuant to ss. 46 – 49 of the *CCAA* and recognize the Chapter 11 Proceeding as a foreign main proceeding.

[10] The purpose of Part IV of the *CCAA* is set out in s. 44:

> 44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
>
> (*a*) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (*b*) greater legal certainty for trade and investment;
>
> (*c*) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
>
> (*d*) the protection and the maximization of the value of debtor company's property; and
>
> (*e*) the rescue of financially troubled businesses to protect investment and preserve employment.

[11] Section 46(1) of the *CCAA* provides that "a foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative."

[12] Section 47(1) of the *CCAA* provides that there are two requirements for an order recognizing a foreign proceeding:

> (a) the proceeding is a foreign proceeding, and
>
> (b) the applicant is a foreign representative in respect of that proceeding.

[13] Canadian courts have consistently recognized proceedings under Chapter 11 of the *U.S. Bankruptcy Code* to be foreign proceedings for the purposes of the *CCAA*. In this respect, see: *Babcock & Wilcox Canada Ltd., Re* (2000), 5 B.L.R. (3d) 75 (Ont. S.C.); *Re Magna Entertainment Corp.* (2009), 51 C.B.R. (5th) 82 (Ont. S.C.); *Lear Canada (Re)* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.).

[14] Section 45(1) of the *CCAA* defines a foreign representative as:

> a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor company, to

(a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or

(b) act as a representative in respect of the foreign proceeding.

[15] By order of the U.S. Court dated June 30, 2011, the Applicant has been appointed as a foreign representative of the Chapter 11 Debtors.

[16] In my view, the Applicant has satisfied the requirements of s. 47(1) of the CCAA. Accordingly, it is appropriate that this court recognize the foreign proceeding.

[17] Section 47(2) of the *CCAA* requires the court to specify in its order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

[18] A "foreign main proceeding" is defined in s. 45(1) of the *CCAA* as "a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interest" ("COMI").

[19] Part IV of the *CCAA* came into force in September 2009. Therefore, the experience of Canadian courts in determining the COMI has been limited.

[20] Section 45(2) of the *CCAA* provides that, in the absence of proof to the contrary, the debtor company's registered office is deemed to be the COMI. As such, the determination of COMI is made on an entity basis, as opposed to a corporate group basis.

[21] In this case, the registered offices of Repechage and E&C Canada Inc. are in Ontario and the registered office of E&C Group Ltd. is in Nova Scotia. The Applicant, however, submits that the COMI of the Chapter 11 Debtors, including the Canadian Debtors, is in the United States and the recognition order should be granted on that basis.

[22] Therefore, the issue is whether there is sufficient evidence to rebut the s. 45(2) presumption that the COMI is the registered office of the debtor company.

[23] In this case, counsel to the Applicant submits that the Chapter 11 Debtors have their COMI in the United States for the following reasons:

(a) the location of the corporate head offices for all of the Chapter 11 Debtors, including the Canadian Debtors, is in Boston, Massachusetts;

(b) the Chapter 11 Debtors including the Canadian Debtors function as an integrated North American business and all decisions for the corporate group, including in respect to the operations of the Canadian Debtors, is centralized at the Chapter 11 Debtors head office in Boston;

(c) all members of the Chapter 11 Debtors' management are located in Boston;

(d) virtually all human resources, accounting/finance, and other administrative functions associated with the Chapter 11 Debtors are located in the Boston offices;

(e) all information technology functions of the Chapter 11 Debtors, with the exception of certain clerical functions which are outsourced, are provided out of the United States; and

(f) Repechage is also the parent company of a group of restaurants that operate under the "Piccadilly" brand which operates only in the U.S.

[24] Counsel also submits that the Chapter 11 Debtors operate a highly integrated business and each of the debtors, including the Canadian Debtors, are managed centrally from the United States. As such, counsel submits it is appropriate to recognize the Chapter 11 Proceeding as a foreign main proceeding.

[25] On the other hand, Mr. Dobbin's declaration discloses that nearly one-half of the operating locations are in Canada, that approximately 43% of employees work in Canada, and that GE Canada Equipment Financing G.P. ("GE Canada") is a substantial lender to MECG. GE Canada does not oppose this application.

[26] Counsel to the Applicant referenced *Re Angiotech Pharmaceuticals Limited*, 2011 CarswellBC 124 where the court listed a number of factors to consider in determining the COMI including:

(a) the location where corporate decisions are made;

(b) the location of employee administrations, including human resource functions;

(c) the location of the debtor's marketing and communication functions;

(d) whether the enterprise is managed on a consolidated basis;

(e) the extent of integration of an enterprise's international operations;

(f) the centre of an enterprise's corporate, banking, strategic and management functions;

(g) the existence of shared management within entities and in an organization;

(h) the location where cash management and accounting functions are overseen;

(i) the location where pricing decisions and new business development initiatives are created; and

(j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

[27] It seems to me that, in considering the factors listed in *Re Angiotech,* the intention is not to provide multiple criteria, but rather to provide guidance on how the single criteria, *i.e.* the centre of main interest, is to be interpreted.

[28] In certain circumstances, it could be that some of the factors listed above or other factors might be considered to be more important than others, but nevertheless, none is necessarily determinative; all of them could be considered, depending on the facts of the specific case.

[29] For example:

(a) the location from which financing was organized or authorized or the location of the debtor's primary bank would only be important where the bank had a degree of control over the debtor;

(b) the location of employees might be important, on the basis that employees could be future creditors, or less important, on the basis that protection of employees is more an issue of protecting the rights of interested parties and therefore is not relevant to the COMI analysis;

(c) the jurisdiction whose law would apply to most disputes may not be an important factor if the jurisdiction was unrelated to the place from which the debtor was managed or conducted its business.

[30] However, it seems to me, in interpreting COMI, the following factors are usually significant:

(a) the location of the debtor's headquarters or head office functions or nerve centre;

(b) the location of the debtor's management; and

(c) the location which significant creditors recognize as being the centre of the company's operations.

[31] While other factors may be relevant in specific cases, it could very well be that they should be considered to be of secondary importance and only to the extent they relate to or support the above three factors.

[32] In this case, the location of the debtors' headquarters or head office functions or nerve centre is in Boston, Massachusetts and the location of the debtors' management is in Boston. Further, GE Canada, a significant creditor, does not oppose the relief sought. All of this leads me to conclude that, for the purposes of this application, each entity making up the Chapter 11 Debtors, including the Canadian Debtors, have their COMI in the United States.

[33] Having reached the conclusion that the foreign proceeding in this case is a foreign main proceeding, certain mandatory relief follows as set out in s. 48(1) of the *CCAA*:

> 48. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,
>
> (*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the

> debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
>
> (*d*) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

[34] The relief provided for in s. 48 is contained in the Initial Recognition Order.

[35] In addition to the mandatory relief provided for in s. 48, pursuant to s. 49 of the *CCAA*, further discretionary relief can be granted if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors. Section 49 provides:

> 49. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order
>
> (*a*) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
>
> (*b*) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and
>
> (*c*) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

[36] In this case, the Applicant applies for orders to recognize and give effect to a number of orders of the U.S. Court in the Chapter 11 Proceeding (collectively, the "Chapter 11 Orders") which are comprised of the following:

> (a) the Foreign Representative Order;
>
> (b) the U.S. Cash Collateral Order;
>
> (c) the U.S. Prepetition Wages Order;
>
> (d) the U.S. Prepetition Taxes Order;

(e) the U.S. Utilities Order;

(f) the U.S. Cash Management Order;

(g) the U.S. Customer Obligations Order; and

(h) the U.S. Joint Administration Order.

[37] In addition, the requested relief also provides for the appointment of BDO as an Information Officer; the granting of an Administration Charge not to exceed an aggregate amount of $75,000 and other ancillary relief.

[38] In considering whether it is appropriate to grant such relief, portions of s. 49, s. 50 and 61 of the *CCAA* are relevant:

> 50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.
>
> ...
>
> 61. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.
>
> (2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

[39] Counsel to the Applicant advised that he is not aware of any provision of any of the U.S. Orders for which recognition is sought that would be inconsistent with the provisions of the CCAA or which would raise the public policy exception as referenced in s. 61(2). Having reviewed the record and having heard submissions, I am satisfied that the supplementary relief, relating to, among other things, the recognition of Chapter 11 Orders, the appointment of BDO and the quantum of the Administrative charge, all as set out in the Supplemental Order, is appropriate in the circumstances and is granted.

[40] The requested relief is granted. The Initial Recognition Order and the Supplemental Order have been signed in the form presented.

MORAWETZ J.

Date: July 11, 2011

SCHEDULE "A"

1. Massachusetts Elephant & Castle Group Inc.
2. Repechage Investments Limited
3. Elephant & Castle Group Inc.
4. The Elephant and Castle Canada Inc.
5. Elephant & Castle, Inc. (a Texas Corporation)
6. Elephant & Castle Inc. (a Washington Corporation)
7. Elephant & Castle International, Inc.
8. Elephant & Castle of Pennsylvania, Inc.
9. E & C Pub, Inc.
10. Elephant & Castle East Huron, LLC
11. Elephant & Castle Illinois Corporation
12. E&C Eye Street, LLC
13. E & C Capital, LLC
14. Elephant & Castle (Chicago) Corporation