

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-055629-188

DATE: March 13, 2019

BY THE HONOURABLE CHANTAL TREMBLAY, J.S.C.

**IN THE MATTER OF THE INTENTION TO MAKE A PROPOSAL OF
2964-3277 QUEBEC INC.**

Debtor

and

RICHTER ADVISORY GROUP INC.

Trustee

and

OHIO RACK INC.

Mise-en-cause

APPROVAL AND VESTING ORDER CONCERNING RACKING EQUIPMENT

- [1] The Court is being asked to authorize *nunc pro tunc* the sale of racking equipment (as defined below) outside the ordinary course of business by the Debtor under a Notice of Intention to Make a Proposal in Bankruptcy (**NOI**).
- [2] The racking equipment is defined as being: 10 130 Units of 48 x 48 Used All Steel Racks Poles Wire Deck with 4 removable posts 61in. (thereafter referred to as **Purchased Assets or Racking Equipment**).

- [3] The Court has the power to issue such an order under Section 65.13(1) of the *Bankruptcy and Insolvency Act* (**BIA**).
- [4] According to Section 65.13(4) BIA, the factors to be considered by the Court include the following:
- a) Whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - b) Whether the trustee approved the process leading to the proposed sale or disposition;
 - c) Whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - d) The extent to which the creditors were consulted;
 - e) The effects of the proposed sale or disposition on the creditors and other interested parties; and
 - f) Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
- [5] In accordance with Section 65.13(3) BIA, the Debtor gave notice of the Motion for the issuance of an Approval and Vesting Order with respect to the Sale of Racking Equipment to its secured creditors and to the principal unsecured creditors.
- [6] The Business Development Bank of Canada (**BDC**) is a secured creditor who has a first-ranking security interest on the Debtor's equipment. BDC has been kept informed of the sale process regarding the Racking Equipment and supports the motion.
- [7] The Canadian Imperial Bank of Commerce (**CIBC**) is a secured creditor who has a first ranking security on the receivables, inventory and intellectual property of the Debtor. CIBC has also been kept informed of the sale process regarding the Racking Equipment and supports the motion.
- [8] The Court considers that the consultation of creditors was sufficient.
- [9] On January 14, 2019, the Court granted a motion for the approval of a *Letter Agreement Governing Assets Disposition* with Gordon Brothers Canada ULG (**GB**) (**Consulting Agreement**).
- [10] The Sale and Solicitation Process (**SSP**) leading up to the Consulting Agreement was launched on November 29, 2018, with the issuance of a teaser to approximately 120 potential interested parties consisting of strategic buyers, financial investors and liquidators.

- [11] The Debtor, the Proposal Trustee and the secured creditors reached a consensus that the most advantageous offer was the one filed by GB, without collusion between the bidders.
- [12] However, the Consulting Agreement does not deal with the Debtor's equipment as BDC maintained all of its existing rights with respects to its realization.
- [13] The Racking Equipment was bought in the past by the Debtor from Ohio Racks inc. (**Ohio**) at the price of US\$65 per unit.
- [14] The Debtor began reselling the Racking Equipment to his main racking supplier, Ohio, in October 2018, prior to the commencement of the NOI and continued to resell same thereafter at a price of US\$50 per unit, representing approximately 77% of the value that the Debtor originally paid for it (**Repurchase Agreement or Transaction**).
- [15] Despite the Repurchase Agreement, the Debtor proceeded to seek purchase offers from any party interested in acquiring the Racking Equipment. This process resulted in the receipt of several offers from different interested entities, none of which were higher than what was provided for in the Repurchase Agreement.
- [16] Up to March 11, 2019, the Debtor has been able to sell to Ohio around 4,530 units of Racking Equipment for an amount of US\$226,500. The Debtor has still in its possession approximately 5,600 units of Racking Equipment, for an estimated amount of US\$280,000 and intends, with the Court's approval, to continue selling the Racking Equipment to Ohio, as it becomes available during the course of the inventory liquidation with the GB's assistance.
- [17] The Proposal Trustee is of the view that the amounts collected so far and the proceeds projected to be realized from the Repurchase Agreement should result in a realization that is at least equal to the value that would have been achieved by GB pursuant to their offer submitted through the SSP.
- [18] As for the effects of the Repurchase Agreement on the creditors and other interested parties, the Debtor has reported the following net proceeds generated from the sales of the Racking Equipment:
- a) US\$48,000 from the pre-filing sales deposited into the Debtor's account with CIBC;
 - b) US\$124,500 of net proceeds from pre and post-filing sales deposited into a trust account with counsel to the Debtor;
 - c) As of March 12, 2019, US\$54,000 remains unpaid and must be collected from Ohio.

- [19] The final factor listed in Section 65.13(4) BIA is whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
- [20] In view of the foregoing, the Court is satisfied that the consideration received to date and to be received for these assets is and will be reasonable and fair.

FOR THESE REASONS, THE COURT HEREBY:

- [21] ***NUNC PRO TUNC*** GRANTS the Motion;

SERVICE

- [22] **ORDERS** that any prior delay for the presentation of this Motion is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.
- [23] **PERMITS** service of this Order at any time and place and by any means whatsoever.

SALE APPROVAL

- [24] **ORDERS AND DECLARES *NUNC PRO TUNC*** that the Transaction is hereby approved, and the execution of the Repurchase Agreement by the Vendor is hereby authorized and approved, with such non-material alterations, changes, amendments, deletions or additions thereto as may be agreed to but only with the consent of the Debtor and the Trustee.

EXECUTION OF DOCUMENTATION

- [25] **AUTHORIZES** the Vendor and the Purchaser to perform all acts, sign all documents and take any necessary action to execute any agreement, contract, deed, provision, transaction or undertaking envisioned in the Repurchase Agreement and any other ancillary document which could be required or useful to give full and complete effect thereto.

AUTHORIZATION

- [26] **ORDERS** and **DECLARES** that this Order shall constitute the only authorization required by the Vendor to proceed with the Transaction and that no shareholder or regulatory approval, if applicable, shall be required in connection therewith.
- [27] **ORDERS** and **DECLARES** that all rights, title and interest in and to the Purchased Assets shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all claims, liabilities (direct, indirect, absolute or contingent), obligations, prior claims, right of retention, charges, hypothecs, deemed trusts, judgments, writs of seizure or execution, notices of sale, contractual rights relating to the Purchased Assets, encumbrances, whether or not

they have been registered, published or filed and whether secured, unsecured or otherwise (collectively, **Encumbrances**), including without limiting the generality of the foregoing all Encumbrances created by order of this Court and all charges, or security evidenced by registration, publication or filing pursuant to the *Civil Code of Québec* in movable / immovable property, and, for greater certainty, **ORDERS** that all of the Encumbrances affecting or relating to the Purchased Assets be cancelled and discharged as against the Purchased Assets, in each case effective as of the applicable time and date of this Order.

[28] **DECLARES** that upon issuance of this Order, the Transaction shall be deemed to constitute and shall have the same effect as a sale under judicial authority as per the provisions of the *Code of Civil Procedure* and a forced sale as per the provisions of the *Civil Code of Quebec*.

CANCELLATION OF SECURITY REGISTRATIONS

[29] **ORDERS** the *Quebec Personal and Movable Real Rights Registrar*, upon presentation of the required form with a true copy of this Order and the Certificate, to reduce the scope of the following registrations in connection with the Purchased Assets in order to allow the transfer to the Purchaser of the Purchased Assets free and clear of such registrations, namely:

- a. Deed of movable hypothec granted by the Debtor in favour of the BDC on March 12, 2013, for an amount of \$1,200,000, with interest at the rate of 25% per annum, charging the universality of the Debtor's equipment, machinery, tools, fixtures and any other similar movable asset of the Debtor, and registered at the Register of Personal and Movable Real Rights on March 14, 2013, under number 13-0188262-0001;
- b. Deed of movable hypothec granted by the Debtor in favour of BDC on August 2, 2012, for an amount of \$13,632,180, with interest at the rate of 25% per annum, charging the universality of all of the Debtor's movable property, corporeal and incorporeal, tangible and intangible, present and future, of whatever nature and wherever situated, and registered at the Register of Personal and Movable Real Rights on August 6, 2012, under number 12-0637376-0001;
- c. Deed of movable hypothec granted by the Debtor in favour of the CIBC on June 23, 2015, for an amount of \$48,000,000, with interest at the rate of 25% per annum, charging the universality of all of the Debtor's movable property, corporeal and incorporeal, tangible and intangible, present and future, of whatever nature and wherever situated, and registered at the Register of Personal and Movable Real Rights on June 25, 2015, under number 15-0591335-0001.

NET PROCEEDS

- [30] **ORDERS** that the net proceeds from the sale of the Purchased Assets (**Net Proceeds**) shall be remitted to the Debtor and shall be distributed in accordance with applicable legislation.
- [31] **ORDERS** that for the purposes of determining the nature and priority of the Encumbrances, the Net Proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that upon payment of the purchase price (pursuant to the Repurchase Agreement) by the Purchaser, all Encumbrances shall attach to the Net Proceeds with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

VALIDITY OF THE TRANSACTION

- [32] **ORDERS** that notwithstanding:

- (i) the pendency of these proceedings;
- (ii) any petition for a receiving order now or hereafter issued pursuant to the BIA and any order issued pursuant to any such petition; or
- (iii) the provisions of any federal or provincial legislation;

the vesting of the Purchased Assets contemplated in this Order, as well as the execution of the Repurchase Agreement pursuant to this Order, are to be binding on any trustee in bankruptcy that may be appointed, and shall not be void or voidable nor deemed to be a preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, as against the Vendor, the Purchaser or the Trustee.

GENERAL

- [33] **ORDERS** that the Purchaser or the Vendor shall be authorized to take all steps as may be necessary to effect the discharge of the Encumbrances.
- [34] **DECLARES** that this Order shall have full force and effect in all provinces and territories in Canada;
- [35] **REQUESTS** the aid and recognition of any court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order;

[36] **ORDERS** the provisional execution of the present Order notwithstanding any appeal and without the requirement to provide any security or provision for costs whatsoever;

[37] **THE WHOLE** without costs.


CHANTAL TREMBLAY, J.S.C.

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