

COUNSEL SLIP

COURT FILE

NO.: CV-21-669781-00CL

DATE: _____

08-FEB-2022

NO. ON LIST 2

TITLE OF
PROCEEDING

MEDIFOCUS INC.

COUNSEL FOR:

PLAINTIFF(S)

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JUDICIAL NOTES:

Conway J. Endorsement

Medifocus Inc. (the “**Applicant**”) is in CCAA proceedings. It brings this motion to approve a sale transaction with Asset Profits Inc., the sole secured creditor of the Applicant and the source of its DIP financing (the “**Purchaser**”). The transaction is to be structured as a Reverse Vesting Order (“**RVO**”) in which the non-assumed liabilities (the unsecured liabilities) will be transferred to “**Residualco**”, which will be added as a CCAA applicant, placed into bankruptcy and the Monitor will then be discharged. The Applicant will emerge from CCAA under the sole ownership of the Purchaser.

The Applicant further seeks a brief extension of the stay to complete the transaction, a release in favour of the professionals and existing directors and officers, and a discharge of the Monitor to avoid the need and expense of a further court attendance.

The motion is unopposed. I am satisfied that service was adequate. The Monitor supports and recommends all of the relief sought.

With respect to the sale itself (apart from its structure as an RVO, addressed below), I am approving it under s. 36(3) of the CCAA. The sales process was fair, transparent and reasonable. The Purchaser was the court-approved stalking horse bidder. The assets were marketed in accordance with the sales process approved by this court (unopposed by creditors) and overseen by the Monitor. They were exposed to the market in both the U.S. and Canada. No other bidders came forward and the stalking horse bidder was the successful one. The Monitor has confirmed that the value of the transaction substantially exceeds the liquidation of the company’s assets. The only alternative to the sale would be a bankruptcy – this will preserve the business of the company as a going concern. I am satisfied that the sale meets the test for approval set out in *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA) and *Re Brainhunter Inc.*, (2009), 62 C.B.R. (5th) 41.

I now turn to the structure of the RVO. The use of this structure was recently analyzed by Penny J. in depth in the case of *Harte Gold Corp. Re*, 2022 ONSC 653. Counsel for the Applicant has filed a supplementary factum that squarely addresses the concerns raised by Penny J. about RVOs and the analytical framework that the court should use in determining whether or not to approve an RVO.

Based on the framework outlined in *Harte Gold* and the record before me, I am satisfied that the RVO should be approved in this case.

The evidence is that the underlying reason for using the RVO is to preserve the regulatory approvals and licenses (FDA and Asia Approvals) that are key to the Applicant's operations and its value as a going concern entity. The only alternative to the RVO is a bankruptcy, which as noted by the Monitor and set out above, would yield an inferior result to stakeholders. No stakeholder is worse off because of the RVO – only the Purchaser (the sole secured creditor) has an economic interest in the Applicant's business. According to the Monitor, the unsecured creditors and shareholders will obtain no recovery in a bankruptcy. Further, the evidence before me is that the Applicant's investors have been kept well informed about the insolvency proceedings.

The evidence is that the Purchaser is paying more for the business than it is worth in a bankruptcy. It is credit bidding its secured debt and the priority DIP loan, all for the purpose of continuing the company as a going concern. Finally, there is no issue that the RVO is being used to circumvent the protections of the CCAA. Specifically, the evidence is that all contracts are in good standing and that the RVO is not being used to escape cure costs under those contracts.

I am therefore approving the use of the RVO structure in this case.

The remaining relief sought is acceptable. The stay extension is sought to March 15, 2022. The Applicant has been acting in good faith and with due diligence. No creditor will be prejudiced. There is sufficient liquidity to operate through the extension period.

The releases are unopposed. They are reasonably connected to the proposed restructuring and the releasees contributed to that restructuring process. They are not overly broad. There are no known claims against the released parties. I approve the releases.

Finally, I approve the addition of Residualco as a CCAA applicant. I approve the fees and activities of the Monitor and its counsel. I approve the discharge of the Monitor on the terms set out in the draft order.

Order to go as signed by me and attached to this endorsement. This order is effective from today's date and is enforceable without the need for entry and filing.

A handwritten signature in blue ink, appearing to read "Conway J.", is located at the bottom left of the page.