

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

8527504 CANADA INC.

Applicant

- and -

SUN PAC FOODS LIMITED

Respondent

APPLICATION UNDER Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C 1985, c. B-3,
and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

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LIQUIBRANDS INC.

Respondent

APPLICATION UNDER Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C 1985, c. B-3,
and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

RESPONDING MOTION RECORD
(re motions returnable June 22, 2015)

June 12, 2015

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Court File No. CV-13-10331-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
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BETWEEN:

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Court File No. CV-14-10543-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
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BETWEEN:

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Applicant

- and -

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and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

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Tab	Document
1.	Affidavit of George Benchetrit sworn June 12, 2015
A.	Exhibit "A" – Second Report of the Receiver dated April 10, 2014 (without appendices)
B.	Exhibit "B" – E-mail dated November 25, 2014
C.	Exhibit "C" – Supplementary Factum of 8527504 Canada Inc.
D.	Exhibit "D" – Notice of Motion for Leave to Appeal of Liquibrands Inc.
E.	Exhibit "E" – Factum of Liquibrands Inc.
F.	Exhibit "F" – Endorsement of Madam Justice Feldman dated April 2, 2015

TAB 1

1
Court File No. CV-13-10331-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
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Court File No. CV-14-10543-00CL

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APPLICATION UNDER Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C 1985, c. B-3,
and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

AFFIDAVIT OF GEORGE BENCHETRIT

(sworn June 12, 2015)

I, **GEORGE BENCHETRIT**, of the City of Toronto, in the Province of Ontario,
MAKE OATH AND SAY AS FOLLOWS:

1. I am a partner at the law firm of Chaitons LLP ("**Chaitons**"), lawyers for 8527504 Canada Inc. ("**852**") in these proceedings. The facts set forth herein are within my personal knowledge or determined from the face of the documents attached hereto as exhibits and from information and advice provided to me by others. To the extent that I have relied on the information and advice of others, I have identified the source of such information and advice and verily believe that information and advice to be true.

2. I have reviewed the affidavit of Csaba Reider sworn May 14, 2015 (the "**Reider Affidavit**") and Mr. Reider's Notice of Motion dated May 20, 2015. I understand that Mr. Reider is seeking, among other things, an order declaring that he is entitled to control the action commenced by Sun Pac Foods Limited ("**Sun Pac**") and Liquibrands Inc. ("**Liquibrands**") against 852 and Bridging Capital Inc. by way of statement of claim dated November 12, 2013 bearing Court File No. CV-13-00492612-0000 (the "**Action**").

Receiver's Second Report

3. Pursuant to the Order of Madam Justice Mesbur dated November 12, 2013, BDO Canada Limited ("**BDO**") was appointed as receiver ("**Receiver**") of the assets, undertakings and properties of Sun Pac.

4. The Receiver's Second Report to the Court was dated April 10, 2014 (the "**Second Report**"). Its stated purposes included informing the Court of and seeking approval for its

activities as set out therein. A copy of the Second Report, without appendices, is attached hereto and marked as **Exhibit "A"**.

5. In paragraphs 48 and 49 of the Second Report, the Receiver set out a brief description of the Action, and in paragraphs 52 and 53 of the Second Report, stated that:

"The Receiver neither has the funding nor sufficient knowledge of the history or allegations to pursue either of the litigation claims referenced above.

The Receiver has contacted Liquibrands through its counsel, Wires Jolly LLP, to enquire about Csaba Reider and/or Liquibrands' interest in purchasing the aforementioned litigation claims. To date, the Receiver has not received a response."

Liquibrands' Motion

6. Liquibrands brought a motion in the Sun Pac receivership proceedings pursuant to a Notice of Motion dated April 4, 2014, a copy of which is included in Tab 3 to Mr. Reider's Motion Record dated May 20, 2015. That motion, along with a motion by the Receiver and a receivership application commenced by 852 against Liquibrands, were heard together by Mr. Justice Newbould on November 28, 2014.

7. On Tuesday November 25, 2014 at approximately 4:35 pm, Chaitons, as counsel to 852, served via e-mail a Supplementary Factum on counsel to Liquibrands and the Receiver in connection with the hearing on November 28, 2014. A copy of the e-mail from Chaitons is attached hereto and marked as **Exhibit "B"**. A copy of the Supplementary Factum is attached hereto and marked as **Exhibit "C"**.

8. At paragraph 4 of its Supplementary Factum, 852 submitted as follows:

“852 respectfully submits that, in the event that the Court determines that there is a genuine issue requiring a trial, the appropriate ancillary order is for the Court to authorize and direct the Receiver to conduct a marketing process for the sale of the Claim, as opposed to appointing a new receiver to prosecute the Claim.”

9. I have been informed by Messrs. Harvey Chaiton and Sam Rappos, the lawyers at Chaitons that have principal carriage of these proceedings for 852, that at no time prior to or during the hearing did counsel to Liquibrands request an adjournment of the hearing to respond to the Supplementary Factum or otherwise.

November 28 Hearing, Orders and Reasons

10. As noted above, the hearings of the motions by Liquibrands and the Receiver and the receivership application by 852 took place on November 28, 2014 before Justice Newbould. Justice Newbould released his Reasons on December 4, 2014, a copy of which is included at Tab 8 in Mr. Reider’s Motion Record. In the Reasons, Justice Newbould, among other things, dismissed Liquibrands’ motion, appointed BDO as receiver of Liquibrands and authorized BDO as receiver of both Sun Pac and Liquibrands to market the Action for sale.

11. At Tab 9 of Mr. Reider’s Motion Record are copies of the three Orders dated December 4, 2014 that were granted by Justice Newbould (the “**December 4 Orders**”). One of the orders dismissed the motion by Liquibrands. Another order appointed BDO as receiver of Liquibrands, and included as Schedule “A” a description of the sale process with respect to the Action. The other order dealt with the Receiver’s motion, and also included (at paragraph 9) a description of the sale process with respect to the Action.

12. I have been informed by Mr. Rappos that he, along with counsel to Liquibrands and counsel to BDO as receiver of Sun Pac and Liquibrands, negotiated the terms of the December 4 Orders and appeared before Justice Newbould in chambers on February 4, 2015 to settle the orders. All of the parties agreed to the terms of the December 4 Orders as issued by Justice Newbould.

Leave to Appeal

13. Liquibrands brought a motion before a single judge of the Court of Appeal seeking leave to appeal the December 4 Orders. Attached hereto and marked as **Exhibit "D"** is a copy of Liquibrands' Notice of Motion for leave to appeal dated December 15, 2014.

14. As set out in paragraphs 55 and 56 of the Notice of Motion for leave to appeal, Liquibrands claimed that:

“The Motions Judge erred in finding that the Action was collateral.

The Motions Judge erred in ordering BDO to conduct a marketing process for the sale of the Action.”

15. A copy of 852's Supplementary Factum referred to above, along with the e-mail from Chaitons dated November 25, 2014, were collectively included as Tab 8 in Liquibrands' Motion Record for leave to appeal.

16. In its Factum dated February 12, 2015, a copy of which is attached hereto and marked as **Exhibit "E"**, Liquibrands stated in paragraphs 2, 12, 14, 47 and 48 as follows:

“2. Justice Newbould ordered BDO to conduct a marketing process for the sale of the Action. No party sought that relief.^[1]

...

12. The Sun Pac receiver declined to continue the litigation. Liquibrands sought leave to continue it and appoint another Sun Pac receiver for that purpose.

...

14. The Motions Judge put Liquibrands into receivership and authorized the receiver to sell the Sun Pac/Liquibrands litigation ...

...

47. The Motions Judge erred in finding that the Action was collateral or property used in the business of Sun Pac for the purposes of the receivership.

48. The Motions Judge erred in ordering BDO to conduct a marketing process for the sale of the Action ...”

17. Liquibrands’ motion for leave to appeal was heard on March 31, 2015. In an Endorsement dated April 2, 2015, Justice Feldman dismissed Liquibrands’ motion. A copy of the Endorsement of Justice Feldman is attached hereto and marked as **Exhibit “F”**.

18. At paragraph 11 of her Endorsement, Justice Feldman wrote as follows:

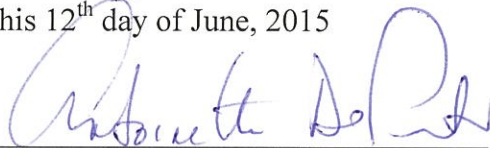
“The third issue involved the procedure for dealing with the lawsuit against 852, which was considered by the receiver as an asset of the Sun Pac receivership (and of the Liquibrands receivership once ordered) ... The motion judge, following the procedure endorsed in *Central 1 Credit Union v. UM Financial Inc.*, 2012 ONSC 1893, directed the receiver to conduct a

¹ Liquibrands included the following footnote: “The marketing process for the sale of the Action was proposed by 852 in its Supplementary Factum dated November 25, 2014, which was short-served and which sought new relief not otherwise before the Court...”

marketing process for the sale of the action, the terms of which were contained in the ultimate order.”

19. In denying Liquibrands’ motion for leave to appeal, Justice Feldman held at paragraph 14 of the Endorsement that:

“...[Justice Newbould’s decisions] to make the orders he did were grounded in law and reason and were based on the facts and the documents presented. They are owed deference by this court.”

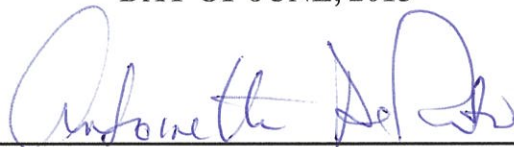
SWORN before me at the City)
of Toronto, Province of Ontario)
this 12th day of June, 2015)
)
A Commissioner, Etc.)



GEORGE BENCHETRIT

**Antoinette DePinto, a Commissioner, etc.,
Province of Ontario, for Chaitons LLP,
Barristers and Solicitors.
Expires September 10, 2017.**

**THIS IS EXHIBIT "A" TO
THE AFFIDAVIT OF GEORGE BENCHETRIT
SWORN BEFORE ME THIS 12TH
DAY OF JUNE, 2015**



A Commissioner etc.

Court File No. CV-13-10331-OOCL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

8527504 Canada Inc.

Applicant

- and -

Sun Pac Foods Limited

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF *THE BANKRUPTCY AND INSOLVENCY ACT*, R.S.C 1985, c. B-3 AS AMENDED AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O 1990, c. C. 43, AS AMENDED

**SECOND REPORT OF BDO CANADA LIMITED, IN ITS CAPACITY
AS COURT APPOINTED RECEIVER**

April 10, 2014

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INTRODUCTION AND BACKGROUND

Introduction

1. By Order of the Honourable Madam Justice Mesbur made November 12, 2013 (the "Receivership Order") BDO Canada Limited was appointed as Receiver ("BDO" or the "Receiver") over the properties, assets and undertakings (the "Property") of Sun Pac Foods Limited ("Sun Pac" or the "Company") pursuant to the application of 8527504 Canada Inc. ("852"). A copy of the Receivership Order is annexed hereto as Appendix A.

2. In accordance with the Receivership Order, the Receiver conducted a sales process (the "Sales Process") to market for sale the Company's Property (as defined in the Receivership Order).

3. A description and the outcome of the Receiver's Sales Process is more fully detailed in the Receiver's First Report and the Confidential Supplement to the Receiver's First Report both dated January 3, 2014 (collectively referred to hereinafter as the "First Report") attached hereto (excluding appendices) as Appendix B. Ultimately, the Receiver recommended completing a transaction pursuant to a Liquidation Services Agreement with Maynards Industries Inc. ("Maynards") to have it act as the agent for the Receiver to liquidate Sun Pac's Property by public auction (the "Maynards Transaction").

Purpose of the Report

4. The purposes of this report dated April 10, 2014 (the "Second Report") are to:
- a) report on the completion of the Maynards Transaction;
 - b) seek the Court's approval of the Receiver's Schedule of Receipts and Disbursements;
 - c) seek the Court's approval of the proposed distributions of proceeds in the hands of the Receiver as set out in the "Distributions" section of this Second Report and authority and direction to make such distributions;
 - d) seek the Court's approval of the fees and disbursements, as set out herein, of the Receiver and its counsel, Lipman, Zener & Waxman LLP ("LZW"); and
 - e) inform the Court and seek its approval of the Receiver's activities and conduct since the First Report as set out in this Second Report.

Disclaimer

5. This Second Report is prepared solely for the use of the Court, for the purpose of assisting the Court in making a determination whether to approve the Receiver's proposed distributions, and other relief being sought. It is based on the Receiver's analysis of information provided to it by the management and directors of Sun Pac, which included unaudited financial statements and internal financial reporting. The Receiver's procedures did not constitute an audit or review engagement of Sun Pac's financial reporting. The Receiver has relied upon the financial statements and

financial and other records of Sun Pac in reaching the conclusions set out in this Second Report.

6. Unless otherwise stated, all monetary amounts contained in this Second Report are expressed in Canadian dollars.

Background

7. Sun Pac is a corporation incorporated pursuant to the *Business Corporations Act* (Ontario). Sun Pac is a privately owned corporation which manufactured juices and sport drinks under the Sun Pac brand and for private label customers. Sun Pac also manufactured croutons and breadcrumbs under the "McDowell Ovens" banner.

8. The Receiver understands that in November 2011, Sun Pac was acquired by Liquibrands Inc. ("Liquibrands"), a private investment firm owned by Csaba Reider, at which time Csaba Reider became President and Chief Executive Officer of Sun Pac. Liquibrands is the sole shareholder of Sun Pac.

9. Sun Pac's head office and manufacturing facility was located at a leased facility municipally known as 10 Sun Pac Boulevard, Brampton, Ontario (the "Premises").

10. Additional background information concerning Sun Pac and the events leading to its receivership proceeding can be found in Paragraphs 3 to 19 of the Affidavit of Len Kofman dated November 12, 2013 annexed hereto as Appendix C.

852's Security

11. Pursuant to an Amended and Restated Letter Agreement accepted by Sun Pac and Liquibrands on January 18, 2013, (as amended, the "Credit Agreement") Bridging Capital Inc. ("Bridging") provided credit facilities to Sun Pac which were payable on demand and secured, by *inter alia*, a General Security Agreement dated October 1, 2012. Liquibrands guaranteed \$1.0 million, plus interest and costs, of Sun Pac's debt.

12. The Credit Agreement was assigned by Bridging to 852 in May 2013.

13. Sun Pac and 852 entered into a Forbearance Agreement dated September 11, 2013 (the "Forbearance Agreement") pursuant to which, *inter alia*, 852 agreed not to take any further enforcement steps until the earlier of December 9, 2013 or the occurrence of an event of default under the Forbearance Agreement.

14. Sun Pac defaulted on its obligations under the Forbearance Agreement, ceased operations on November 7, 2013 and had previously consented to the appointment of a receiver in the event of a default.

15. By virtue of the Credit Agreement assignment, 852 is the Company's senior secured lender. 852 was owed approximately \$3.1 million at the receivership date.

Security Opinion

16. The Receiver requested that its independent legal counsel, LZW, provide the Receiver with a security opinion on the validity and enforceability of 852's security. A copy of LZW's security opinion is attached hereto as Appendix D. 852 appears, by virtue of a subordination agreement entered into between Liquibrands and Bridging, and subject to the assumptions and qualifications set out in the security opinion, to have a valid and enforceable first ranking security interest against the Property of Sun Pac.

Other Secured Creditors

17. Liquibrands, by virtue of subordinating its security interest in the Property of Sun Pac in favour of Bridging, is a subordinate ranking secured creditor that is owed approximately \$2.7 million.

18. Menkes GTA Holdings Inc. ("Menkes" or the "Landlord") is the Landlord and also, pursuant to various lease amendments and arrangements, is a subordinate ranking secured creditor that is owed approximately \$447,491.

19. The Receiver does not expect to make any distributions to either Liquibrands or Menkes given that the senior secured creditor, 852, will likely suffer a significant shortfall on the loans it advanced to Sun Pac.

ACTIVITIES OF THE RECEIVER

20. In addition to the initial activities of the Receiver as described in the First Report, the Receiver has engaged in the following activities since that time.

Menkes Litigation

21. In July of 2013, Bridging entered into an "Agreement of Landlord" with Menkes (the "Landlord Agreement") which provided, *inter alia*, that certain Sun Pac assets, as defined in Schedules "A" and "C" of the agreement, would not be deemed fixtures or part of the real estate but would be considered personal property. Additionally, the Landlord Agreement afforded Bridging, or any Receiver (private or Court-appointed) a rent free period for a term of 12 weeks (the "Rent Free Period") to deal with Sun Pac's Property in a security enforcement scenario.

22. On January 8, 2014, the solicitors for Menkes notified the Receiver that Menkes was objecting to the sale by the Receiver of the Ammonia Compressors (defined below) which the Landlord considered fixtures or leasehold improvements and not property owned by Sun Pac.

23. On January 9, 2014, the Honourable Mr. Justice Brown granted an Approval and Vesting Order (the "Approval and Vesting Order") in connection with, *inter alia*, the Maynards Transaction. The Approval and Vesting Order is annexed hereto as Appendix E.

24. While Mr. Justice Brown approved the Approval and Vesting Order, he ordered, with the consent of the Receiver, Maynards, Menkes and 852 to exclude the Ammonia Compressors (defined below) from the auction sale unless the respective parties reached an agreement with respect to same or until the issue was decided by further order of this Court. A copy of the endorsement is annexed hereto as Appendix F.

25. An agreement could not be reached between 852 and Menkes with respect to the 12 Vilter ammonia compressors that were connected to the freezers used at the Premises to preserve and store frozen juice products ("the "Ammonia Compressors").

26. Menkes not only sought in its responding motion to exclude the Ammonia Compressors from the Receiver's auction sale but also brought a separate motion to invalidate the Landlord Agreement on a legal technicality thereby eliminating the Rent Free Period and resulting in Bridging, or possibly the Receiver, having to pay \$675,107 in occupation rent for the 12 week period from November 12, 2013 to February 4, 2014. The motions were both returnable on February 7, 2014, four days before the Receiver's planned auction sale.

27. The aforementioned motions were heard by the Honourable Mr. Justice McEwen who rendered a decision in his endorsement dated February 8, 2014 annexed hereto as Appendix G. Ultimately, it was determined that 1) the Ammonia Compressors were owned by Menkes and therefore excluded from the Receiver's auction sale; 2) 852 was not liable for occupation rent as there was a valid agreement in place notwithstanding the technical error in recording the Landlord Agreement; and 3) Mr. Justice McEwen accepted the Receiver's position regarding equitable estoppel

in that the Receiver had relied on the Rent Free Period in conducting the receivership administration.

Completion of the Maynards Transaction

28. The Maynards Transaction initially provided for a net minimum guarantee ("NMG") from the auction sale of \$1,010,000. Additionally, the Receiver could further benefit from an "up-side" sharing provision if the gross realization from the auction sale exceeded a certain dollar threshold above the NMG.

29. After reviewing Sun Pac's vendor agreements, the Receiver was advised by its counsel that certain private label inventory and packaging, representing a significant dollar value of Sun Pac's inventory, had to be exclusively sold to the respective Sun Pac customers for which such inventory was produced (the "Private Label Inventory"). Given that the Receiver was prevented from selling private label goods to third parties, the Private Label Inventory had to be excluded from the public auction sale.

30. In view of having to exclude the Ammonia Compressors and the Private Label Inventory from the public auction sale, Maynards' NMG was reduced by \$130,000 from \$1,010,000 down to \$880,000 (the "Adjusted NMG"). Manyards nevertheless agreed to liquidate what Sun Pac inventory could be sold by the Receiver on a 15% commission basis.

31. In accordance with the Approval and Vesting Order the Receiver completed the Maynards Transaction and received the Adjusted NMG the day before the auction sale as set out the in the Liquidation Services Agreement.

32. The Receiver has received Maynards' sale accounting report from the auction sale. Based on the figures reported in Maynards' sale accounting, gross sale proceeds of approximately \$998,695 were generated from the auction sale.

33. Based on the gross recovery from the auction, the Receiver received an additional recovery of approximately \$38,948 above the Adjusted NMG from the auction sale.

Accounts Receivable Collection Efforts

34. The Receiver maintained the Company's blocked accounts with Bank of Montreal so as not to disturb any electronic funds transfer ("EFT's") from the larger retailers paying their respective accounts for pre-receivership sales. After allowing EFT's to post into the blocked accounts for approximately 1 month, the Receiver then contacted the larger retailers and reconciled Sun Pac's accounts.

35. The Receiver also signified the remaining smaller accounts receivable by sending collection letters.

36. Based on the Receiver's dealings with Sun Pac's customers and the Receiver's collections efforts to date, the Receiver has been able to collect approximately \$273,338 of a total balance of \$361,707 in outstanding accounts receivable.

37. The remaining outstanding accounts receivable balances totaling \$88,369 have been determined to be not collectible for a myriad of reasons mostly relating to overstated balances due to Sun Pac accounting errors, and to a lesser extent, provision for rebates and discounts.

Inventory Realization

38. The book value of the inventory at the date of the receivership was estimated to have a value of \$1,592,000. The inventory consisted of \$524,000 worth of finished goods and a \$1,068,000 of raw materials. The finished goods valued at \$524,000 included \$295,000 worth of private label product. As stated earlier, the contracts under which the private label/branded goods were manufactured would not permit the Receiver from selling those goods to third parties.

39. Loblaws, Walmart and Metro were contacted in an attempt to sell the private labeled goods. Loblaws was concerned about the reputational risk associated with the quality of the goods so they refused to purchase those goods. Metro had switched suppliers and had delisted all of its branded products with Sun Pac due to the latter's inability to fill customer orders given its cash flow constraints prior to the receivership. Consequently, Metro would not purchase any of the private labeled goods from the Receiver.

40. The raw materials valued at \$1,068,000 included packing materials valued at \$715,000. A significant portion of the packaging on hand was branded and subject to the same sale restrictions as the Private Label Inventory while the remaining packaging was also not saleable.

41. Sales of unrestricted inventory amount to approximately \$75,949.

42. In the end, in excess of \$1.0 million worth of Sun Pac's inventory was not commercially saleable. The majority of the inventory had to be either donated to pre-approved charities or destroyed along with the packaging in compliance with environmental regulations at a significant cost to the Receiver.

Losses For Tax Purposes

43. In reviewing the Company's 2012 tax return, it was determined that there are over \$26 million of losses that could be of interest to potential purchasers.

44. The Receiver initially indicated the availability of the losses to certain purchasers as part of its Sales Process. The Receiver made similar statements in a "teaser" letter to prospective purchasers identified through the Sales Process and to numerous additional parties disclosed to the Receiver by Bridging. Attached as Appendix H, is a copy of the "teaser letter" and a list of the parties that received the "teaser" letter.

45. The Company's internal financial statements show a further operating loss for the 9 months ended September 30, 2013 of approximately \$4.5 million.

46. The Receiver is advised by Bridging that it has had ongoing discussions with parties interested in entering into a transaction that would allow Sun Pac to receive value for its losses which may require the Receiver in the future to 1) file a Proposal under the *Bankruptcy and Insolvency Act* ("BIA") on behalf of the Company; and 2) file the Company's corporate income tax return for fiscal 2013.

Statutory Government Returns

47. The Receiver may be required to file the Company's outstanding 2013 corporate income tax return and has completed all pre-receivership outstanding HST and T4 returns for 2013.

Choses in Action

48. At the date of the Receivership the Company was involved as a Plaintiff (or Plaintiff by Counterclaim) in ongoing litigation as follows: 1) Sun Pac and Liquibrands against 852 and Bridging as action CV-13-492612 (the "Bridging Action") and; 2) the counterclaim by Sun Pac against John A. Riddell as action CV-12445723 (the "Riddell Counterclaim").

49. The Bridging Action is a claim of Sun Pac and Liquibrands against 852 and Bridging in excess of \$100 million for, *inter alia*, breach of contract for allegedly

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failing to advance the agreed upon "Facility D" loan pursuant to the Forbearance Agreement which allegedly caused irreparable damage to Sun Pac's business and ultimately lead to its demise. A copy of the Bridging Action is included hereto as Appendix I.

50. The initial claim of John A. Riddell against Sun Pac appears to be for breach of a consulting agreement which was a condition, among others, of the closing of the acquisition of the shares of Sun Pac by Liquidbrands.

51. The Riddell Counterclaim is a counterclaim of Sun Pac against the former owner, John A. Riddell, in excess of \$10 million for, *inter alia*, allegedly misappropriating funds, breach of fiduciary duties to Sun Pac and failing to act honestly and in the best interests of Sun Pac by making false representations about Sun Pac's position, history, accounts receivable, inventory, accounts payable, and accrued liabilities, that artificially inflated the value of Sun Pac and its assets, and which had the result of inducing Liquibrands to purchase the shares of Sun Pac at a higher price than it would otherwise pay. A copy of the Riddell Counterclaim is attached hereto as Appendix J.

52. The Receiver neither has the funding nor sufficient knowledge of the history or allegations to pursue either of the litigation claims referenced above.

53. The Receiver has contacted Liquidbrands through its counsel, Wires Jolly LLP, to enquire about Csaba Reider and/or Liquidbrands' interest in purchasing the aforementioned litigation claims. To date, the Receiver has not received a response.

Landlord Communications

54. During the course of the receivership, representatives of the Receiver were in regular contact with representatives from Menkes. The Receiver together with a representative from Maynards met with Menkes at the Premises to discuss machinery, equipment and "tank-farm" removal procedures following the auction sale and to discuss maintaining the ammonia compressors and freezers.

55. In order to reduce the exorbitant monthly utility costs, the Receiver engaged a licensed refrigerator contractor to shut down the "sub-zero" flash freezer and to raise the temperature in the plant cooler and larger primary freezer. The refrigerator contractor conducted regular inspections of the ammonia compressors and restored the cooler and both freezers to original working condition a few days prior to the Receiver relinquishing vacant possession of the Premises to the Landlord on Saturday, March 15, 2014.

56. The Receiver provided the Landlord with WSIB certificates and evidence of insurance for the rigger engaged by Maynards to remove the machinery, equipment and "tank-farm". Representatives of the Landlord frequented the Premises regularly while the equipment, machinery and "tank-farm" were being dismantled and removed.

57. The Receiver conducted a "walk-through" inspection of the Premises with Menkes on March 12, 2014 (the "Inspection"), three days prior to vacating the premises. The Landlord provided a list of its concerns and alleged deficiencies to the Receiver immediately following the Inspection.

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58. Over the course of the next two days the Receiver again met with representatives from Menkes to address its concerns and to correct certain deficiencies deemed by the Receiver to be its responsibility to correct.

59. The Receiver invited the Landlord to attend at the premises on Saturday, March 15, 2014 to conduct a final inspection before the Receiver relinquished vacant possession of the Premises, however, the Landlord did not attend the requested meeting.

60. On Monday, March 17, 2014 the Receiver couriered a Notice of Vacant Possession effective March 15, 2014 together with the keys to the premises and a cheque for \$135,404.07 for the outstanding rent as set out in the Landlord's invoice covering the period March 1, 2014 to March 15, 2014. Copies of the Notice of Vacant Possession and rent cheque are enclosed hereto as Appendix K.

61. The Landlord has not made the Receiver aware of any significant issues with regard to the Premises since receiving the Notice of Vacant Possession so the Receiver therefore concludes that the Premises was turned over in satisfactory condition.

DEEMED TRUSTS & PRIORITY CLAIMS

62. The Receiver scheduled an audit with Canada Revenue Agency ("CRA") for the Company's payroll account. CRA completed its audit and filed a deemed trust claim of \$31,352.28 for outstanding payroll source deductions. This deemed trust in respect of the employee portion of unremitted payroll source deductions enjoys a super-priority

over Sun Pac's Property. Attached as Appendix L, is a copy of the deemed trust claim filed by CRA.

63. The Receiver sent notice to former Sun Pac employees advising them of the existence of, and their rights under, the WEPPA. The Receiver also provided the former Sun Pac employees with a Proof of Claim form in order for them to file claims with the Receiver for outstanding wages, expenses, vacation, termination and severance pay. The Receiver determined that up to \$3,102.79 is payable by the Receiver, out of any recovery from the current assets of Sun Pac, in respect of subrogated employee claims under WEPPA that are otherwise payable by the Receiver under Section 81.4 (1) of the BIA in priority to 852. Copies of Service Canada's WEPPA Payment Letters are attached hereto as Appendix M.

64. The Receiver is aware of an additional \$4,192.06 owing in respect of vacation pay that is payable to two former Sun Pac's executives out of the current assets of the Company by virtue of the deemed trust provisions contained in Section 40(1) of the *Employment Standards Act* (Ontario) ("ESA") and the priority afforded to this deemed trust pursuant to Section 30 (7) of the *Personal Property Security Act* (Ontario) ("PPSA").

65. Sun Pac had set up a contributory defined benefit pension plan for its employees registered with the Financial Services Commission of Ontario ("FSCO") as plan registration number 0368381 (the "Pension Plan"). Following the receivership, FSCO appointed Mercer (Canada) Limited ("Mercer") as the Administrator of the Pension Plan.

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66. The Receiver has received a pension claim from Mercer in respect of the Pension Plan totaling \$3,813,966 annexed hereto as Exhibit N. In accordance with section 81.6(1) of the BIA, unremitted employee withholdings in respect of pension contributions including the employer's normal contributions totaling \$55,914 is a secured claim with priority status in a receivership. Accordingly, \$55,914 of the pension claim received from Mercer has priority over the secured claim of 852.

DISTRIBUTIONS

Receipts and Disbursements

67. Attached hereto as Appendix O is the Receiver's Schedule of Receipts and Disbursements ("R&D Statement"). The R&D Statement reports actual receipts over disbursements from November 12, 2013 to April 1, 2014 of approximately \$719,117 before provision for payment of future professional fees, final operating costs and a reserve for contingencies.

68. Recovery from all of the Company's Property is expected to yield a significant shortfall to 852. No other creditor ranking in priority to 852 with respect to the proceeds, is affected by the Receiver's proposed distributions.

69. The Receiver proposes making an interim distribution in the amount of \$477,942 (the "Interim Distribution") as summarized below:

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Receipts over Disbursements (Receiver's R&D Statement)	\$719,117
Professional Fees Outstanding	(175,574)
Reserve for Professional Fees	(30,000)
Reserve for Future Operating Costs	(25,600)
Sub Total	<u>487,942</u>
Less: Holdback re Contingencies	(10,000)
Funds Available for Distribution	<u>\$477,942</u>

Proposed Distribution to:

Canada Revenue Agency (deemed trust payroll deductions)	(\$31,352)
Vacation Pay (deemed trust per ESA)	(4,192)
WEPPA (pursuant to S. 81.4(1) of BIA)	(3,103)
Mercer re: Pension Claim (pursuant to S. 81.6(1) of BIA)	(55,914)
8527504 Canada Inc.	(383,381)
Total Distribution	<u>(\$477,942)</u>

70. The Receiver has provided for its estimate of the future professional fees and operating costs that it will likely incur to finalize the administration of the receivership.

71. Following the Interim Distributions and subject to retaining the aforementioned reserves and an additional \$10,000 in the estate bank account as a "holdback" to cover any contingencies (collectively, the "Reserves"), the Receiver proposes to distribute to: i) BDO and LZW monies sufficient to cover the professional fees and disbursements rendered in this matter as set out in the respective fee affidavits appended to this Second Report as Appendix P and Appendix Q; and (ii) to 852, the balance of the Reserves, if any, together with any monies remaining in the Sun Pac estate, up to a maximum amount of the Company's indebtedness of approximately \$3.1 million (the "Secondary Distributions") without further order of the Court.

FEES AND DISBURSEMENTS

72. Pursuant to the Receivership Order, the Receiver has provided services and incurred disbursements which are more particularly described in the affidavit and detailed invoices attached hereto as Appendix P.

73. The detailed time descriptions contained in the invoices provide a fair and accurate description of the services provided and the amounts charged by BDO as Receiver. Included with the invoices is a summary of the time charges of partners and staff, whose services are reflected in the invoices, including the total fees and hours billed.

74. Additionally, the Receiver has incurred legal fees of its counsel, LZW, in respect of these proceedings, including the 852 security review, as per the fee affidavit and exhibits attached hereto as Appendix Q.

75. The Receiver has reviewed LZW's fee affidavit and believes same to be fair and reasonable in the circumstances.

76. The Receiver requests that the Court approve its interim accounts from November 12, 2013 to March 31, 2014 in the amount of \$296,420.02 inclusive of HST of \$34,101.42.

77. The Receiver also requests that the Court approve the accounts of its legal counsel for the period November 12, 2013 to March 27, 2014 in the amount of \$83,355.86 inclusive of HST of \$9,575.00

78. Additional time will be required to complete the Receiver's mandate. To complete the receivership proceedings the Receiver estimates its future professional fees and that of its counsel, provided no unforeseen issues arise, will be no greater than \$20,000 and \$10,000 respectively (together the "Fee Reserves" which form part of the Reserves). Accordingly, the Receiver requests the Court approve the Fee Reserves.

SUMMARY AND RECOMMENDATIONS

79. Based on the foregoing, the Receiver recommends that the Court:
- a) approve this Second Report of the Receiver, and the activities and conduct of the Receiver set out herein;
 - b) approve the Receiver's R&D Statement;
 - c) authorize and direct the Receiver to make the Interim Distributions and the Secondary Distributions as recommended herein; and
 - d) approve the professional fees and disbursements of the Receiver and its counsel, LZW, and the Fee Reserves as set out herein.

All of which is respectfully submitted this 10th day of April, 2014.

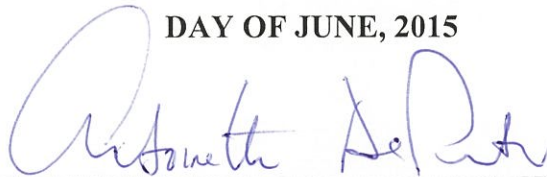
**BDO CANADA LIMITED Court Appointed Receiver of
Sun Pac Foods Limited
Per:**



Blair Davidson, CPA, CA, CIRP, CBV, CMC
President

**THIS IS EXHIBIT "B" TO
THE AFFIDAVIT OF GEORGE BENCHETRIT
SWORN BEFORE ME THIS 12TH**

DAY OF JUNE, 2015

A handwritten signature in blue ink, appearing to read "Richard DeRosa", is written over a horizontal line.

A Commissioner etc.

Sam P. Rappos

From: Sam P. Rappos
Sent: Tuesday, November 25, 2014 4:35 PM
To: jspetter@lzwlaw.com; kbulmer@wiresjolleyllp.com; dewires@wiresjolleyllp.com
Cc: Harvey G. Chaiton; Lynn Lee
Subject: RE: 8527504 Canada Inc. v. Liquibrands Inc. (Action No. CV-14-10543-00CL) 8527504 Canada Inc. Sun Pac Foods Limited (Action No. CV-13-10331-00CL)
Attachments: DOCS-#3196553-v1-BCI_Sun_Pac_-_Supplementary_Factum_re_November_28__2014.pdf; DOCS-#3196975-v1-BCI_Sun_Pac_-_Supplemental_Brief_of_Authorities.PDF
Importance: High
Categories: DM, #48398 : 3196989

Please find attached the supplementary factum and brief of authorities of 8527504 Canada Inc., served upon you pursuant to the *Rules of Civil Procedure*.

Please confirm whether you wish hard copies to follow by courier.

Best regards,
Sam Rappos

From: Sam P. Rappos
Sent: Monday, November 24, 2014 12:35 PM
To: jspetter@lzwlaw.com; kbulmer@wiresjolleyllp.com; dewires@wiresjolleyllp.com
Cc: Harvey G. Chaiton
Subject: RE: 8527504 Canada Inc. v. Liquibrands Inc. (Action No. CV-14-10543-00CL) 8527504 Canada Inc. Sun Pac Foods Limited (Action No. CV-13-10331-00CL)
Importance: High

Please find attached the factum and brief of authorities of 8527504 Canada Inc., served upon you pursuant to the *Rules of Civil Procedure*. Hard copies will follow by courier.

Best regards,
Sam

From: mafisher@wiresjolleyllp.com [<mailto:mafisher@wiresjolleyllp.com>]
Sent: Tuesday, November 18, 2014 2:12 PM
To: Sam P. Rappos; Harvey G. Chaiton; jspetter@lzwlaw.com
Cc: kbulmer@wiresjolleyllp.com; dewires@wiresjolleyllp.com
Subject: 8527504 Canada Inc. v. Liquibrands Inc. (Action No. CV-14-10543-00CL) 8527504 Canada Inc. Sun Pac Foods Limited (Action No. CV-13-10331-00CL)

Counsel,

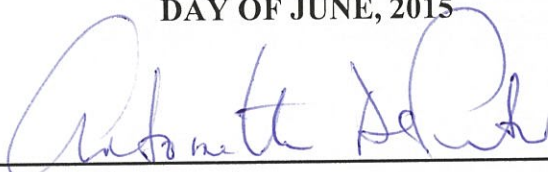
Attached please find the factum and book of authorities of the respondent/moving party, Liquibrands Inc., served upon you pursuant to the Rules of Civil Procedure. Due to the file size of the joint transcript, exhibit and undertaking brief, it will be delivered to you later today.

Mary Ann

Mary Ann Fisher
Legal Assistant
Wires Jolley LLP
Barristers and Solicitors
90 Adelaide Street West
Suite 200
Toronto, Ontario M5H 3V9
Tel: 416-366-0000 ext 229
Fax: 416-366-0002
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This email is confidential and is intended only for the person(s) named above and below. Its contents may also be protected by privilege, and all rights to privilege are expressly claimed and not waived. If you have received this email in error, please call us immediately (collect if necessary) and destroy the entire email. If this email is not intended for you any reading, distribution, copying, or disclosure of this email is strictly prohibited.

**THIS IS EXHIBIT "C" TO
THE AFFIDAVIT OF GEORGE BENCHETRIT
SWORN BEFORE ME THIS 12TH
DAY OF JUNE, 2015**



A Commissioner etc.

Court File No. CV-13-10331-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

8527504 CANADA INC.

Applicant

- and -

SUN PAC FOODS LIMITED

Respondent

APPLICATION UNDER Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C 1985, c. B-3, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

Court File No. CV-14-10543-00CL

**ONTARIO
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- and -

LIQUIBRANDS INC.

Respondent

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SUPPLEMENTARY FACTUM OF 8527504 CANADA INC.
(re receivership application and motions returnable November 28, 2014)

CHAITONS LLP

Barristers and Solicitors
5000 Yonge Street, 10th Floor
Toronto, Ontario M2N 7E9

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E-mail: harvey@chaitons.com

Sam Rappos (LSUC #51399S)

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Lawyers for Liquibrands Inc.

AND TO: LIPMAN, ZENER, WAXMAN LLP
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Lawyers for the Receiver, BDO Canada Limited

Court File No. CV-13-10331-00CL

**ONTARIO
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SUPPLEMENTARY FACTUM OF 8527504 CANADA INC.
(re receivership application and motions returnable November 28, 2014)

1. This factum is filed as a supplement to the factum filed by 8527504 Canada Inc. dated November 24, 2014 (the “Factum”). Capitalized terms used and not otherwise defined herein shall have the meanings ascribed to them in the Factum.

2. Liquibrands is seeking an order directing the trial of an issue for a declaration that 852 breached the terms of the Forbearance Agreement by not advancing Facility D to Sun Pac, and an order preventing the Receiver from making any distribution to 852 until the trial of the issue has been determined.

3. In the event that the Court directs the trial of the issue, and at trial a declaration is granted that 852 breached the terms of the Forbearance Agreement by not advancing Facility D to Sun Pac, Liquibrands intends to seek an order, *inter alia*:

- (a) granting leave for Sun Pac and Liquibrands to continue the action commenced by Sun Pac and Liquibrands against 852 and Bridging (the “Claim”) and appointing msi Spergel Inc. as receiver for the purposes of advancing the Claim; and
- (b) declaring that the Guarantee granted by Liquibrands in favour of 852 is unenforceable.

4. 852 respectfully submits that, in the event that the Court determines that there is a genuine issue requiring a trial, the appropriate ancillary order is for the Court to authorize and direct the Receiver to conduct a marketing process for the sale of the Claim, as opposed to appointing a new receiver to prosecute the Claim.

5. Additionally, 852 submits that Liquibrands is not entitled to the relief it will be seeking in connection with the Guarantee, as it specifically contracted out of and waived any defence that could result in a court declaring the Guarantee to be unenforceable.

Receiver Appropriate Party to Market the Claim

6. A similar issue as to the one before the Court arose in the Commercial List receivership proceeding of UM Financial Inc. and UM Capital Inc. (“UM”). In that proceeding, the secured creditor, Central 1 Credit Union (“Central 1”), commenced a receivership application against UM. Prior to the hearing of the application, UM commenced an action against Central 1 Credit

Union seeking, *inter alia*, \$50,000,000 in general damages for breach of contract, breach of confidence and bad faith.

7. Central 1 brought a motion in the receivership proceeding seeking a declaration that its security extended over the claim commenced by UM. In reasons dated March 22, 2012, The Honourable Mr. Justice C. Campbell held that the claim constituted collateral that was subject to the existing receivership proceeding.¹

8. The Court-appointed receiver subsequently brought a motion seeking Court approval to conduct a marketing process for the sale of the claim. Such relief was granted by The Honourable Mr. Justice C. Campbell in an Order dated May 18, 2012.²

9. 852 respectfully submits that in the event that the Court is of the view that there is a genuine issue requiring a trial, the appropriate ancillary order is for the Court to authorize and direct the Receiver to conduct a marketing process for the sale of the Claim. This will maximize recovery on the Claim as an asset of the receivership estate for the creditors of Sun Pac in a timely manner, and eliminates the uncertainty and costs that may be incurred by the Sun Pac receivership estate in prosecuting the Claim.

Liquibrands Contracted Out of and Waived Defenses that Guarantee is Unenforceable

10. Liquibrands intends to seek an order declaring that the Guarantee is unenforceable in the event that a trial judge determines that 852 breached the Forbearance Agreement. 852 submits that Liquibrands is not entitled to that relief as it expressly contracted out of and waived its rights to seek such relief under the terms of the Guarantee.

11. Pursuant to section 2 of the Guarantee, Liquibrands' obligations as guarantor are continuing, unconditional and absolute and would not be released, discharged, diminished, limited or otherwise affected by (and Liquibrands waived, to the fullest extent permitted by applicable law) *inter alia*:

¹ *Central 1 Credit Union v. UM Financial Inc.*, 2012 ONSC 1893; Order of The Honourable Mr. Justice Campbell dated March 22, 2012, Court File No. CV-11-9144-00CL

² Notice of Motion (returnable May 18, 2012) of Grant Thornton Limited as Receiver, Court File No. CV-11-9144-00CL; Ninth Report of the Receiver dated May 14, 2012, Court File No. CV-11-9144-00CL; Order of The Honourable Mr. Justice Campbell dated May 18, 2012, Court File No. CV-11-9144-00CL

“... (b) any modification or amendment of or supplement to the Obligations, including any increase or decrease in the principal, the rates of interest or other amounts payable thereunder...

(e) the existence of any claim, set-off or other rights which the Guarantor may have at any time against the Debtor, the Creditor, or any other person, whether in connection herewith or any unrelated transactions; ...

(l) any defence arising by reason of any incapacity, lack of authority, or other defence of the Debtor or any other person, or by reason of any limitation, postponement, prohibition on the Creditor's right to payment of the Obligations or any part thereof, or by reason of the cessation from any cause whatsoever of the liability of the Debtor or any other person with respect to all or any part of the Obligations, or by reason of any act or omission of the Creditor or others which directly or indirectly results in the discharge or release of the Debtor or any other person or all or part of any of the Obligations or any security or guarantee therefor, whether by contract, operation of law or otherwise;...

(p) any dealing whatsoever with the Debtor or other person or any security, whether negligently or not, or any failure to do so; ...

(q) any defence based upon or arising out of any bankruptcy, insolvency, reorganization, moratorium, arrangement, readjustment of debt, liquidation or dissolution proceeding commenced by or against the Debtor or any other person, including any discharge of, or bar against collecting, any of the Obligations, in or as a result of any such proceeding; or

(r) any other act or omission to act or delay of any kind by the Debtor, the Creditor, or any other person or any other circumstances whatsoever, whether similar or dissimilar to the foregoing, which might, but for the provisions of this Section 2, constitute a legal or equitable discharge, limitation or reduction of the Guarantor's obligations hereunder (other than the payment or extinguishment in full of all of the Obligations).” [emphasis added]³

12. Any doubt as to the enforceability of such waivers of rights was removed by the

³ Sharpe Affidavit, Exhibit “D” – Guarantee and Postponement Agreement, s. 2

Supreme Court of Canada in *Bauer v. Bank of Montreal*, where the Supreme Court held that:

“The duty of a creditor holding security for the performance of the obligations of a debtor or a surety is clearly established. The creditor, in the absence of agreement to the contrary with the debtor or the surety, must protect and preserve the security and be in a position, unless excused by other agreement, to return or reassign the security to the debtor or surety on repayment of the debt...

Despite this rule, it is open to the parties to make their own arrangements, and a surety is competent to contract himself out of the protection of the equitable rule requiring preservation of his security.”⁴

13. It is respectfully submitted that Liquibrands contracted out of and has waived any defenses that could result in a court declaring the Guarantee to be unenforceable, and thus the contemplated declaration that the Guarantee is unenforceable has no chance of success.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 25, 2014



Harvey Chaiton and Sam Rappos
CHAITONS LLP

Lawyers for 8527504 Canada Inc.

⁴ *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, paras. 5-7

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SCHEDULE "A"

CASE AUTHORITIES

1. *Central 1 Credit Union v. UM Financial Inc.*, 2012 ONSC 1893
2. *Order of The Honourable Mr. Justice Campbell dated March 22, 2012*, Court File No. CV-11-9144-00CL
3. *Notice of Motion (returnable May 18, 2012) of Grant Thornton Limited as Receiver*, Court File No. CV-11-9144-00CL
4. *Ninth Report of the Receiver dated May 14, 2012*, Court File No. CV-11-9144-00CL
5. *Order of The Honourable Mr. Justice Campbell dated May 18, 2012*, Court File No. CV-11-9144-00CL
6. *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102

45
8527504 CANADA INC.
Applicant

8527504 CANADA INC.
Applicant

- and -

- and -

SUN PAC FOODS LIMITED
Respondent

Court File No. CV-13-10331-00CL

LIQUIBRANDS INC.
Respondent

Court File No. CV-14-10543-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at TORONTO

SUPPLEMENTARY FACTUM OF
8527504 CANADA INC.

(re receivership application and
motions returnable November 28, 2014)

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, Ontario M2N 7E9

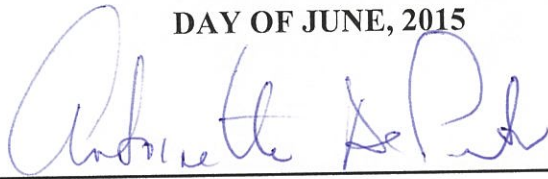
Harvey Chaiton (LSUC #21592F)
Tel: (416) 218-1129
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Sam Rappos (LSUC #51399S)
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Fax: (416) 218-1837
E-mail: samr@chaitons.com

Lawyers for 8527504 Canada Inc.

**THIS IS EXHIBIT "D" TO
THE AFFIDAVIT OF GEORGE BENCHETRIT
SWORN BEFORE ME THIS 12TH**

DAY OF JUNE, 2015

A handwritten signature in blue ink, appearing to read "Robert H. ...", is written over a horizontal line.

A Commissioner etc.

M44532

Court File No. CV-13-10331-00CL
Court of Appeal File No.

COURT OF APPEAL FOR ONTARIO

BETWEEN:

8527504 CANADA INC.

Applicant
(Respondent)

and

SUN PAC FOODS LIMITED

Respondent

APPLICATION UNDER Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43

NOTICE OF MOTION FOR LEAVE TO APPEAL

The moving party creditor, Liquibrands Inc. ("Liquibrands"), will make a motion in writing to the Court of Appeal, pursuant to Rule 61.03.1 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. The Court of Appeal will hear the motion in writing 36 days after service of the moving party's motion record, factum and transcripts, if any, or on the filing of the moving party's reply factum, if any, whichever is earlier.

PROPOSED METHOD OF HEARING:

The Motion is to be heard in writing under subrule 61.03.1(1) and the moving party requests that this motion be heard together with the motion for leave to appeal in Court File No.: CV-14-10543-00CL, which is the companion appeal to the within appeal.

THE MOTION IS FOR THE FOLLOWING RELIEF:

1. An order, if necessary, to extend the time to serve and file the moving party's motion record and factum to 30 days after the parties receive a signed, issued and entered order from The Honourable Justice Newbould of the Ontario Superior Court of Justice.
2. An order granting the moving party leave to appeal to the Court of Appeal from the Order of Justice Newbould dated December 4, 2014, in which he failed:
 - (a) to direct the trial of an issue for a declaration that 8527504 Canada Inc. ("852") and Bridging Capital Inc. ("Bridging") breached the terms of a "Forbearance Agreement" (defined below) among those parties, Sun Pac Foods Limited ("Sun Pac") and Liquibrands as herein described; and
 - (b) to require Sun Pac's current receiver, BDO Canada Limited ("BDO"), to pay the proceeds of realization of the assets of Sun Pac payable to 852 and/or Bridging into Court, or alternatively to be held in trust by counsel to BDO, pending a final decision of the Court on the declaration and the action thereafter, if any, or pending further Court order.
3. If the order for leave to appeal be granted, an order that this appeal and the appeal from the order in Court File No. CV-14-10543-00CL be consolidated or heard together.
4. An order granting the moving party its costs of the motion.
5. Such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

The Appeal

1. The moving party cannot proceed until there is a signed, issued and entered order in its motion record from which leave to appeal is sought.

2. Justice Newbould heard the Liquibrands motion on November 28, 2014 and released his endorsement on December 4, 2014.

3. The motion was brought by Liquibrands in its capacity as a creditor within an Application under Section 243 of the *Bankruptcy and Insolvency Act*. Leave to appeal to the Court of Appeal is required pursuant to section 193(e) of the *Bankruptcy and Insolvency Act*.

4. Liquibrands seeks leave to appeal the decision made by Justice Newbould in three matters heard together on November 28, 2014 and in respect of which a single endorsement was released December 4, 2014:

(a) a motion brought by Liquibrands in Court File No: CV-13-10331-00CL for, *inter alia*, an order for the trial of an issue to determine whether 852 and Bridging (collectively the "Lenders") were in breach of a Forbearance and Amending Agreement between 852, Liquibrands and Sun Pac dated September 11, 2013 ("Forbearance Agreement) and, if so, appointing a receiver over the litigation commenced by Sun Pac and Liquibrands against 852 and Bridging and for leave to continue the litigation;

(b) a motion brought by BDO in Court File No: CV-13-10331-00CL for approval of receiver's reports and for distribution of liquidation proceeds; and

(c) an application brought by 852 in Court File No. CV-14-10543-00CL for an order appointing a receiver over Liquibrands.

5. The appeals are closely related and the orders arise from a single written endorsement as a result of the motions and application being heard together, so it would be inappropriate for this motion or for the appeals to be determined independently.

6. The issues raised in the proposed appeal are of general importance to the practice in bankruptcy/insolvency matters and to the administration of justice as a whole; are *prima facie* meritorious; and the appeal will not unduly hinder the progress of the insolvency proceeding since the liquidation is complete and the majority of liquidation proceeds have been disbursed, with the exception of the disbursement to 852.

7. Sections 182(2), 193 and 195 of the *Bankruptcy and Insolvency Act*; Rules 61.03.1(1), 61.16(1), 63.02(1) of the *Rules of Civil Procedure*; and sections 6(1)(b), 6(2) of the *Courts of Justice Act*.

Applicable Law

8. This appeal will address four points of law:

- I. **Whether the organizing principle of good faith and the common law duty of honesty is implied in a lending agreement and guarantee and is preserved by the terms of the agreement and guarantee**

9. The moving party asserts that under the rule in *Bhasin v. Hrynew*, 2014 SCC 71 (CanLII) a duty of honesty applies to the lending agreements and the guarantee, and the Lenders breached the duty.

10. The moving party asserts that a duty of good faith arises when necessary to ensure that the parties do not act in a way that defeats the objects of the very contract the parties have entered. An implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties is implied to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into. *Barclays Bank PLC v. Devonshire Trust*, 2013 ONCA 494 (CanLII); *Nareerux Import Co. Ltd. v. Canadian Imperial Bank of Commerce*, 2009 ONCA 764 (CanLII).

11. The Motions Judge erred in finding the Forbearance Agreement and the Liquibrands guarantee excluded those duties.

II. Whether an action by a debtor against a lender forms part of the lender's security and can be sold as part of the security transferred to a receiver

12. The moving party adopts the rule in *239745 Ontario LTD v. Bank of America Canada*, 1999 CarswellOnt. 2665 (S.C.J.) that it is “absurd and manifestly unfair” if a security agreement gives the lender the right, upon default, to pursue causes of action belonging to the debtor against the lender itself. To avoid the absurdity, a security agreement applies only to causes of action against third parties and not the debtor.

13. The Motions Judge erred in directing BDO to auction the Sun Pac Action.

III. Whether an event of default under a loan agreement caused by a lender's breach of contract to advance funds is actionable

14. The appellant adopts the principle and rule in *Barclays Bank PLC v. Devonshire Trust*, 2013 ONCA 494 that a party is precluded from taking advantage of and benefitting from a state of affairs produced by its own wrong. A party who seeks to obtain a benefit under a continuing

contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations.

IV. Whether the appellants as second secured lenders must show a proprietary interest in the proceeds of realization of a first security lender for the proceeds to be paid into court under Rule 45.02 pending determination of the threshold issue whether the lender's breach of contract caused a default.

15. The appellants adopt the rule in *Sadie Moranis Realty Corporation v. 1667038 Ontario Inc.*, 2012 ONCA 475 (CanLII) that rule 45.02 requires that the legal right to the specific fund claimed by the plaintiff need not be a proprietary right.

Background Facts and the Decision of Newbould J. (Note: These mirror the Background Facts in the Notice of Motion for Leave to Appeal in Court File No. CV-14-10543-00CL)

16. Bridging provided financing to Sun Pac.

17. Bridging assigned the loan to 852.

18. 852 is a shell corporation.

19. Liquibrands is second secured creditor of Sun Pac. Liquibrands is also the sole shareholder of Sun Pac.

20. Liquibrands asserts that the Lenders relied upon an Event of Default created by their own wrong to place Sun Pac into receivership.

21. Pursuant to the Forbearance Agreement, 852 agreed, among other things, to advance a Facility D loan calculated to be \$1.15 million on or about October 1, 2013, and agreed not to

take any steps to enforce any loan agreement or security prior to the earlier of: (a) December 9, 2013; or (b) the occurrence of an Event of Default.

22. The purpose of the loan was to finance Sun Pac while it sold its "Breadcrumb Division" and while it refinanced.

23. The Forbearance Agreement is underpinned by the general organizing principle of good faith and honest performance.

24. Liquibrands is a party to the Forbearance Agreement.

25. Liquibrands gave additional security for the Forbearance Agreement.

26. On October 4, 2013 the Lenders refused to advance the Facility D Loan.

27. Failure to advance the Facility D loan made continued operation of Sun Pac impossible while it refinanced to execute a new advantageous contract to supply Loblaws.

28. Between October 4, 2013 and November 12, 2013 Sun Pac solicited interim financing to repay the defendants. The defendants refused to postpone their security to facilitate the financing notwithstanding their failure to satisfy their obligation to fund the Facility D loan.

29. Between October 4, 2013 and November 12, 2013 Sun Pac was unable to find alternative financing.

30. Liquibrands and Sun Pac issued a Statement of Claim on November 12, 2013 (the "Action") against 852 and Bridging prior to the Order of Justice Mesbur dated November 12, 2013 placing Sun Pac into receivership (the "Receivership Order"). The Action asserted the defendants breached an agreement to fund the Facility D loan.

31. Liquibrands and Sun Pac asserted in the Action:

- (a) it within the reasonable contemplation of the parties to the Forbearance Agreement that if the lenders breached their obligations to fund the Facility D loan Sun Pac would be to unable to continue as a going concern, complete anticipated replacement equity financing and sell the Breadcrumb Division to satisfy the lender's loan.
- (b) 852 owed a duty of honesty and good faith in the performance of the Forbearance Agreement, in funding the Facility D loan and facilitating the financing necessary to repay the lenders and perform the Loblaws contract.

32. 852's breach of contract eviscerated the purpose of the Forbearance Agreement. 852 acted in a way that defeated the objectives of the agreement that the parties entered into.

33. On November 12, 2013, 852 applied for the appointment of a receiver on the ground Sun Pac defaulted in its obligation to 852 to continue operating.

34. Justice Mesbur appointed a Receiver of "the assets, undertakings and properties of the Sun Pac acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property")".

35. Justice Mesbur ordered that "no Proceeding in respect of Sun Pac be continued except with the written consent of the Receiver or with leave of the Court and any and all Proceedings under way in respect of Sun Pac were stayed and suspended pending further Order of Court."

36. The Action was outstanding on the date of the Receivership. Liquibrands concluded the Action was stayed.

37. The order authorized BDO to continue prosecution of proceedings. BDO declined to continue the Action against 852 and Bridging.

38. Liquibrands sought leave to appoint a receiver to continue the Action on behalf of Sun Pac.

39. 852 sought to put Liquibrands into receivership as a guarantor of Sun Pac.

40. The Motions Judge found:

(a) In August 2013 Sun Pac decided to sell the Breadcrumbs Division for \$3.1 million and requested additional funding to continue operating.

(b) On September 11, 2013, 852, Sun Pac and Liquibrands signed a Forbearance and Amending Agreement to provide Sun Pac with a temporary bridge loan pending obtaining equity and debt financing for an anticipated Loblaws contract; to complete a sale of a Breadcrumbs Division to repay the bridge loan.

(c) 852 agreed not to take any steps to enforce any of the loans or its security prior to the earlier of December 9, 2013 or the occurrence of an Event of Default.

(d) On November 11, 2013, 852's lawyers were informed by Sun Pac's insolvency lawyers that Sun Pac's operations had been shut down on November 7, 2013, at which time all but a few employees were terminated. As a result, 852 commenced a receivership application heard on November 12, 2013.

(e) BDO was appointed as receiver of Sun Pac on November 12, 2013.

41. Liquibrands applied for an Order directing the trial of an issue for a declaration that the lenders breached the terms of the Forbearance Agreement and, if the declaration be given, an Order:

(a) lifting the stay of proceedings in the Action and for leave for Sun Pac and Liquibrands to continue the Action against 852 and Bridging;

- (b) declaring Liquibrands entitled to claim under its general security agreement in priority to claims by 852 and Bridging;
- (c) appointing msi Spergel Inc. ("Spergel") as receiver of the remaining assets of Sun Pac for the purposes of advancing the litigation and disposing of the proceeds of realization and litigation; and
- (d) declaring that Liquibrands' guarantee of Sun Pac debt is unenforceable; and an Order requiring BDO to pay the proceeds of realization of the assets of Sun Pac payable to 852 and/or Bridging into Court, or alternatively to be held in trust by counsel to BDO, pending a final decision of the Court on the declaration and the action thereafter, if any, or pending further Court order.

42. Liquibrands argued that there was a threshold issue of whether the lenders breached their duty of honest performance and their obligation to advance the Facility D loan.

43. The Motions Judge acknowledged there was a dispute among the parties as to whether 852 was in breach of the Forbearance Agreement in failing to advance the loan but he erred in concluding, "I do not intend to get into that issue, although I was invited to do so."

44. Liquibrands took the position the order of Mesbur J. stayed the Action and, as BDO declined to advance the Action, Liquibrands sought an order appointing a receiver to advance Sun Pac's Action.

45. The Motions Judge found BDO and Liquibrands was entitled to continue the Action on behalf of Sun Pac without the necessity of obtaining leave to do so.

46. Liquibrands sought an order that the remaining proceeds of Sun Pac's liquidation be paid into Court pending determination of the threshold issue.

47. The Motions Judge erred in finding that Liquibrands was not entitled to an order for payment of the proceeds of the Liquidation into Court as it did not have a proprietary claim against specific funds beyond the funds utility to satisfy the plaintiffs claim against the defendant. Liquibrands, as a second creditor, has security over the assets of Sun Pac second to the security of 852.

48. The Motions Judge erred in finding there is no question that the security of 852 is valid and what Liquibrands was doing is attempting to secure before judgment its claim for damages against 852 and Bridging and the claim amounted to a collateral attack on the order of Mesbur J.

49. Liquibrands asserted there was a serious issue to be tried on the lenders breach of contract and if the contract was breached the lenders claim on the proceeds of realization.

50. The Motions Judge erred in finding there was no serious issue to be tried regarding Liquibrands' claim to the proceeds of the sale of Sun Pac's assets held by BDO and that 852 has the right to those proceeds.

51. The Motions Judge found there may be a serious issue to be tried regarding the Action for damages by Sun Pac and Liquibrands against 852 and Bridging.

52. Liquibrands asserted that its guarantee included a duty of honesty and good faith pursuant to section 16 of the *Personal Property Security Act* and as repeated in the lenders' responding affidavit.

53. The provisions of the Guarantee provided:

(7) Due Execution, etc. This Guarantee has been duly executed and delivered by or on behalf of the Guarantor and constitutes a valid and binding obligation of the Guarantor enforceable in accordance with its terms, except as enforceability may be limited by general principals of equity (regardless of whether enforcement is sought in a proceeding in equity or at law.

54. The Motions Judge erred in finding Liquibrands contracted out of the equitable rules regarding guarantees and the terms of the guarantee precluded Liquibrands from contending that the guaranteed may be unenforceable if it succeeded in its action against 852.

55. The Motions Judge erred in finding that the Action was collateral.

56. The Motions Judge erred in ordering BDO to conduct a marketing process for the sale of the Action.

57. The Motions Judge erred in approving the distribution of the proceeds of realization to pay fees and disbursements and to make a distribution to 852 and/or Bridging.

58. A party is precluded from taking advantage of and benefitting from a state of affairs produced by its own wrong. A party cannot use its own breach or default in satisfying a condition precedent as a basis for being relieved of its contractual obligations.... *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2010 ONCA 310 (CanLII), 2010 ONCA 310, 104 O.R. (3d) 784, at para. 13:

59. [N]o man can take advantage of his own wrong.... A party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations. *Alghussein Establishment v. Eton College*, [1991] 1 W.L.R. 587 H.L. (Eng.), at p. 594.

60. 852's default put Sun Pac in the position that it could not pay employees. That, in turn, caused 852 to declare a default by Sun Pac ceasing business operations. 852 impermissibly

benefited by its own breach or wrong by relying on the cessation of business operations as an Event of Default.

61. 852's failure to make the Facility D loan payments was a material contributing cause of Sun Pac's insolvency. 852 is barred by its own wrong from relying on Sun Pac's cessation of operations as a basis for terminating the transaction.

62. A commercial contract is to be interpreted: (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective; (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said; (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract); (d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity. *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 (CanLII) at para. 24

63. 852's conduct breached the common law duty to perform the terms of the Forbearance Agreement honestly, and specifically: (i) 852 unilaterally accelerated the date for Sun Pac to present a contract for the sale of its breadcrumbs division; (ii) 852 misled Sun Pac about its intention to place Sun Pac into receivership; and (iii) 852 refused to advance funds it was to obliged to advance contrary to the terms of the Agreement knowing that the failure to advance funds would result in the termination of Sun Pac's operations and the inability to finance an advantageous contract with Loblaws.

64. Contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing a contract.

65. The motions judge erred by declining to direct the trial of an issue with respect to 852's breach of contract by failing to advance a loan.

66. Security agreements are interpreted so as to avoid commercial absurdity.

67. The motions judge erred in finding that Sun Pac and Liquibrands claim is a collateral attack on the Sun Pac Receivership. The Action was issued and counsel to 852 was notified of the Action prior to obtaining the receivership order against Sun Pac on November 12, 2014.

68. The Motions judge erred by failing to find that the Liquibrands guarantee was subject to the laws of equity and by finding that the terms preclude Liquibrands from contending that the guarantee may be unenforceable.

69. It would be an absurd commercial result for a guarantee to remain enforceable despite the demand being made on the guarantee as a consequence of the lender's wrongful and dishonest conduct.

70. The motions judge erred in finding that the Subordination, Assignment, Postponement and Standstill Agreement dated October 1, 2012, precluded Liquibrands from challenging or objecting to any act taken or proceeding commenced by 852 in connection with the enforcement of 852's security. If enforcement is 852's security is upheld despite the lenders' wrongful and dishonest conduct, this creates a commercially absurd result.

71. The motions judge failed to inquire into the substance of the motion to determine whether 852 was in breach of the Forbearance Agreement and breached its common law duty of honesty in the performance of the Forbearance Agreement.

72. The motions judge erred in finding that Liquibrands must have a proprietary claim against the specific funds to satisfy its motion under Rule 45.

73. The motions judge erred in determining that it was just and convenient to appoint a receiver over Liquibrands.

74. Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) The endorsement of Justice Newbould dated December 4, 2014;
- (b) The Order of Justice Newbould dated December 4, 2014;
- (c) Relevant portions of the record from the proceedings below; and
- (d) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

December 15, 2014

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Applicant

-and- LIQUIBRANDS INC.
Respondent

Court File No. CV-13-10331-00CL
Court of Appeal File No:

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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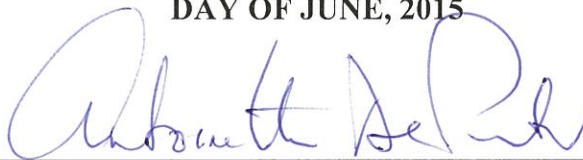
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**THIS IS EXHIBIT "E" TO
THE AFFIDAVIT OF GEORGE BENCHETRIT
SWORN BEFORE ME THIS 12TH**

DAY OF JUNE, 2015

A handwritten signature in blue ink, appearing to read "Anthony De Rosa", written over a horizontal line.

A Commissioner etc.

Court File No. CV-13-10331-00CL
Court of Appeal File No. M44532

COURT OF APPEAL FOR ONTARIO

BETWEEN:

8527504 CANADA INC.

Applicant
(Respondent)

and

SUN PAC FOODS LIMITED

Respondent

APPLICATION UNDER Section 243 of the *Bankruptcy and Insolvency Act*,
R.S.C. 1985, c.B-3, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43

Court File No. CV-14-10543-00CL
Court of Appeal file No. M44533

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and

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Respondent
(Moving Party)

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MOVING PARTY'S FACTUM

February 12, 2015

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Court File No. CV-13-10331-00CL
Court of Appeal File No. M44532

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I N D E X

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Court File No. CV-13-10331-00CL
Court of Appeal File No. M44532

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R.S.C. 1985, c.B-3, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43

MOVING PARTY'S FACTUM

PART I - IDENTITY OF MOVING PARTY, PRIOR COURT & RESULT

1. Liquibrands Inc. ("Liquibrands"), the respondent/moving party creditor, seeks leave to appeal the decision of Justice Newbould dated December 4, 2014¹, in three matters heard together on November 28, 2014 and in respect of which a single endorsement was released giving rise to three separate orders:

- (a) An Order dismissing Liquibrands' motion for, *inter alia*, an Order directing the trial of an issue to determine whether 8527504 Canada Inc. ("852") and Bridging Finance Inc. ("Bridging") (collectively referred to as the "Lenders") were in breach of the Forbearance and Amending Agreement between 852, Sun Pac Foods Inc. ("Sun Pac") and Liquibrands dated September 11, 2013 (the "Forbearance Agreement") and, if so, appointing a receiver over the litigation commenced by Sun Pac and Liquibrands against the Lenders on November 12, 2013 (the "Action") and for leave to continue the Action (the "Liquibrands Motion");²
- (b) An Order granting a motion brought by the court-appointed receiver, BDO Canada Limited ("BDO"), in Court File No: CV-13-10331-00CL for approval of receiver's reports and for distribution of liquidation proceeds (the "BDO Motion");³ and
- (c) An order granting an application brought by 852 in Court File No. CV-14-10543-00CL (the "852 Application") for an order appointing BDO as receiver over Liquibrands.⁴

¹ Endorsement of Justice Newbould dated December 4, 2014 ("Newbould Endorsement"), Motion Record, Tab 4.

² Order of Justice Newbould dated December 4, 2014 ("Liquibrands Order"), Motion Record, Tab 5.

³ Order of Justice Newbould dated December 4, 2014 ("BDO Order"), Motion Record, Tab 6.

⁴ Order of Justice Newbould dated December 4, 2014 ("852 Order"), Motion Record, Tab 7.

2. Justice Newbould ordered BDO to conduct a marketing process for the sale of the Action.⁵
No party sought that relief.⁶

PART II - SUMMARY OF FACTS AND THE DECISION OF NEWBOULD J.

3. Anticipating a \$250 million supply contract with Canada's largest retailer, Loblaws Inc. ("Loblaws"), 852 agreed to finance Sun Pac so it could fulfil early stages of the contract, sell a division to repay the Lenders and finalize new financing.
4. Csaba Reider ("Reider") owns Liquibrands and Liquibrands owns Sun Pac. Liquibrands is the second secured creditor of Sun Pac.⁷
5. 852 agreed with both Sun Pac and Liquibrands to fund Sun Pac's continuing operations.
6. Sun Pac required funding to continue operations as it refinanced and sold a division to repay the Lender. The parties knew that absent funding, operations would be suspended.
7. On October 4, 2013, the Lenders refused to advance funds.⁸
8. Sun Pac operations were suspended.
9. 852 declared Sun Pac in default for failing to continue operations.
10. Liquibrands and Sun Pac sued 852.

⁵ See the 852 Order ¶ 2(j), Motion Record, Tab 7, and the BDO Order ¶ 9, Motion Record, Tab 6.

⁶ The marketing process for the sale of the Action was proposed by 852 in its Supplementary Factum dated November 25, 2014, which was short-served and which sought new relief not otherwise before the Court. See the email from Sam Rappos dated November 25, 2014 at 4:35 PM attaching 852's supplementary factum and brief of authorities, Motion Record, Tab 8.

⁷ Affidavit of Csaba Reider sworn April 3, 2014 ("Reider Affidavit") ¶¶ 4 & 9, Motion Record, Tab 9.

⁸ Reider Affidavit ¶ 21.

11. 852 put Sun Pac into receivership and liquidated the company. The receivership order stayed the action.
12. The Sun Pac receiver declined to continue the litigation. Liquibrands sought leave to continue it and to appoint another Sun Pac receiver for that purpose.
13. The Motions Judge acknowledged a dispute whether 852 was in breach of the lending agreement in failing to advance the loan. He declared, "I do not intend to get into that issue, although I was invited to do so." It is the primary material issue for Liquibrands and Sun Pac and its creditors.
14. The Motions Judge put Liquibrands into receivership and authorized the receiver to sell the Sun Pac/Liquibrands litigation. 852 is permitted to bid and arguably bid with the proceeds of the loans 852 declared owning when it declined to fund and appointed a receiver.
15. 852 is a shell corporation.⁹ 852 is the assignee of the loan from Bridging.
16. The Lenders default suspended Sun Pac's operation and the Lenders declared the suspension of operations justified the Sun Pac receivership.¹⁰ The Lenders relied on the consequence of their default to allege Sun Pac's default. Under the order appealed, neither Sun Pac nor Liquibrands will be able to advance that claim.
17. The particulars of the loan are as follows: Pursuant to a "Forbearance Agreement" dated September 11, 2013, 852 agreed to lend a "Facility D" loan calculated to be \$1.15 million on or

⁹ Reider Affidavit ¶¶ 6, 13, 14, Motion Record, Tab 9. See also the transcript of the Cross-Examination of Natasha Sharpe dated June 9, 2014 ("Sharpe Cross"), P.168, Q 824 – P.170, Q.836, Motion Record, Tab 10; Assignment of contracts made as of May 23, 2013 between Bridging and 852, Exhibit 37 to Sharpe Cross, Motion Record, Tab 11.

¹⁰ Reider Affidavit ¶¶ 55-58; transcript of the Cross-Examination of Csaba Reider on July 17, 2014 ("Reider Cross"), P.126, Q.510, Motion Record, Tab 12 .

about October 1, 2013, and agreed not to take any steps to enforce any loan agreement or security prior to the earlier of: (a) December 9, 2013; or (b) the occurrence of an Event of Default.¹¹

18. The Lenders enforced security on November 12, 2013 alleging suspension of operations constituted default.

19. The purpose of the loan was to finance Sun Pac while it sold its "Breadcrumbs Division", repaid its loan and refinanced. The lending agreement gave Sun Pac to November 6 2013 to enter an agreement to sell the "Breadcrumbs Division".¹² The Lenders declared they would not advance on October 4, 2013 a month before the date for the sale of the "Breadcrumbs Division". The declaration crippled Sun Pac.

20. Both Sun Pac and Liquibrands are parties to the "Forbearance Agreement"¹³ and both have a contract claim and loss from the Lenders default. Liquibrands bound itself to the agreement and gave security for the agreement¹⁴ in the belief that all parties were bound to perform honestly in the performance of their obligations in a manner that fulfilled the reasonable expectations of each party.¹⁵

21. Sun Pac lost the advantageous contract to supply Loblaws as a result of the receivership.¹⁶

¹¹ Reider Affidavit ¶¶ 25, 26, 31, Motion Record, Tab 9; Forbearance and Amending Agreement dated September 11, 2013 between Sun Pac, Liquibrands and 852 ("Forbearance Agreement"), s.31(iv), Exhibit J to Reider Affidavit, Motion Record, Tab 9J.

¹² Reider Affidavit ¶¶ 13, 16; Transcript of the Rule 39 Examination of Jenny Coco dated May 22, 2014 ("Coco Exam") P.43, Q.213-215, Motion Record, Tab 13.

¹³ Forbearance Agreement, Motion Record, Tab 9J.

¹⁴ Ibid s. 20(c); Sharpe Cross PP.138-140, Q.660-671, Motion Record, Tab 14.

¹⁵ See *Bhasin v. Hrynew* infra note 55.

¹⁶ Reider Affidavit ¶¶ 21, 56, 57

22. Between October 4, 2013 and November 12, 2013, Sun Pac solicited interim financing to repay the defendants.¹⁷ The defendants refused to postpone their security to facilitate the financing notwithstanding their failure to satisfy their obligation to fund the Facility D loan.¹⁸

23. Sun Pac was unable to find alternative financing with the Lenders' security attached to assets.¹⁹ Sun Pac could not continue operations.

24. Liquibrands and Sun Pac issued their Action against the Lenders prior to Mesbur J.'s receivership order.

25. The Action asserted the defendants breached an agreement to fund the Facility D loan.²⁰ Liquibrands and Sun Pac asserted in the Action:

(a) The parties contemplated that if the Lenders breached their obligations to fund Sun Pac, it would be to unable to continue operations, complete equity financing and sell the Breadcrumbs Division to satisfy the loan.

(b) 852 owed a duty of honesty and good faith in the performance of the lending agreement, in funding the Facility D loan and facilitating the financing necessary to repay the lenders and perform the Loblaws contract.²¹

26. 852's breach of contract eviscerated and defeated the objectives of the agreement that the parties entered into.^{22 23}

¹⁷ Reider Affidavit ¶¶ 51, 52, Motion Record, Tab 9.

¹⁸ Ibid ¶¶ 24, 54

¹⁹ Reider Cross, p. 111, Q. 435-436, Motion Record, Tab 15.

²⁰ Exhibit P to Reider Affidavit, ¶30, Motion Record, Tab 9P.

²¹ Exhibit P to Reider Affidavit, ¶¶ 30, 36.

²² Exhibit P to Reider Affidavit, ¶ 37.

²³ Exhibit Q to Reider Affidavit ¶ 2, Motion Record, Tab 9Q.

27. Mesbur J.'s order appointed a Receiver of "the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property")".²⁴

28. Mesbur J. ordered that "no Proceeding in respect of Sun Pac be continued except with the written consent of the Receiver or with leave of the Court and any and all Proceedings under way in respect of Sun Pac were stayed and suspended pending further Order of Court".²⁵

29. The Action was a proceeding outstanding on the date of the Receivership and stayed.

30. The order authorized BDO to continue prosecution of proceedings. BDO declined to continue the Action.²⁶

31. Liquibrands sought leave to appoint a receiver to continue the Action on behalf of Sun Pac.²⁷

32. In response, 852 sought to put Liquibrands into receivership as a guarantor of Sun Pac.²⁸

33. The Motions Judge found:

(a) In August 2013, Sun Pac decided to sell the Breadcrumbs Division for \$3.1 million and requested additional funding to continue operating.²⁹

(b) On September 11, 2013, 852, Sun Pac and Liquibrands signed a Forbearance and Amending Agreement to provide Sun Pac with a temporary bridge loan pending

²⁴ Exhibit Q to Reider Affidavit ¶ 8, Motion Record, Tab 9Q.

²⁵ Reider Affidavit ¶ 59, Motion Record, Tab 9.

²⁶ Reider Affidavit, Motion Record Tab 9.

²⁷ See the Liquibrands Motion, Motion Record, Tab 16.

²⁸ See the 852 Application, Motion Record, Tab 17.

²⁹ Newbould Endorsement ¶ 7, Motion Record, Tab 4.

obtaining equity and debt financing for an anticipated Loblaws contract; to complete a sale of a Breadcrumbs Division to repay the bridge loan.³⁰

(c) 852 agreed not to take any steps to enforce any of the loans or its security prior to the earlier of December 9, 2013 or the occurrence of an Event of Default.³¹

(d) On November 11, 2013, 852's lawyers concluded that Sun Pac's operations had shut down on November 7, 2013. As a result, 852 commenced a receivership application heard on November 12, 2013.³²

(e) BDO was appointed as receiver of Sun Pac on November 12, 2013.³³

34. Liquibrands applied for an Order directing the trial of an issue that the Lenders breached the terms of the Forbearance Agreement and, if the declaration be given, an Order:

- (a) lifting the stay of proceedings in the Action and for leave for Sun Pac and Liquibrands to continue the Action against 852 and Bridging;
- (b) declaring Liquibrands is entitled to claim under its general security agreement in priority to claims by 852 and Bridging;
- (c) appointing msi Spergel Inc. ("Spergel") as receiver of the remaining assets of Sun Pac for the purposes of advancing the litigation and disposing of the proceeds of realization and litigation; and

³⁰ Newbould Endorsement ¶ 8, Motion Record, Tab 4.

³¹ Ibid ¶ 9.

³² Ibid ¶ 16.

³³ Ibid.

(d) declaring that Liquibrands' guarantee of Sun Pac debt is unenforceable; and an Order requiring BDO to pay the proceeds of realization of the assets of Sun Pac payable to 852 and/or Bridging into Court, or alternatively to be held in trust by counsel to BDO, pending a final decision of the Court on the declaration and the action thereafter, if any, or pending further Court order.³⁴

35. The threshold issue and indeed the material issue for Liquibrands and Sun Pac was whether the Lenders breached their duty of honest performance and their obligation to advance the loan.³⁵

36. The Motions Judge acknowledged there was a dispute and erred in concluding, "I do not intend to get into that issue, although I was invited to do so."³⁶

37. Liquibrands took the position the order of Mesbur J. stayed the Action and, as BDO declined to advance the Action.

38. The Motions Judge found BDO and Liquibrands was entitled to continue the Action on behalf of Sun Pac without the necessity of obtaining leave to do so.³⁷

39. Liquibrands sought an order that the remaining proceeds of Sun Pac's liquidation be paid into Court pending determination of the threshold issue.

40. Liquibrands, as a second creditor, has security over the assets of Sun Pac behind the security of 852.³⁸ The Motions Judge erred in finding that Liquibrands was not entitled to the payment into court order as it did not have a proprietary claim against specific funds.

³⁴ Liquibrands Motion, Motion Record, Tab 16.

³⁵ Newbould Endorsement ¶ 14, Motion Record, Tab 4.

³⁶ Ibid.

³⁷ Ibid ¶ 20.

41. The Action issued and counsel to 852 was notified of the Action prior to obtaining the receivership order against Sun Pac on November 12, 2014. The Motions Judge erred in finding the claim amounted to a collateral attack on the order of Mesbur J.³⁹

42. Liquibrands asserted there was a serious issue to be tried on the Lenders breach of contract and if the contract was breached the Lender's claim on the proceeds of realization.

43. The Motions Judge found there may be a serious issue to be tried regarding the Action for damages by Sun Pac and Liquibrands against 852 and Bridging.⁴⁰ The Motions Judge erred in finding there was no serious issue to be tried regarding Liquibrands' claim to the proceeds of the sale of Sun Pac's assets held by BDO and that 852 alone had the right to those proceeds.⁴¹

44. Liquibrands asserted that its guarantee included a duty of honesty and good faith pursuant to section 16 of the *Personal Property Security Act* as repeated in the lenders' affidavit evidence.⁴² Its guarantee preserved its equitable remedies.

45. The provisions of the Guarantee provided:

24. Representations and Warranties: The Guarantor represents and warrants to the Creditor, upon each of which representations and warranties the Creditor specifically relies, as follows:

...

(7) Due Execution, etc. This Guarantee has been duly executed and delivered by or on behalf of the Guarantor and constitutes a valid and binding obligation of the Guarantor enforceable in accordance with its terms, except as enforceability may be limited by

³⁸ Newbould Endorsement ¶ 24, Motion Record, Tab 4.
³⁹ Ibid ¶¶ 24, 25.
⁴⁰ Ibid.
⁴¹ Ibid ¶ 26.
⁴² Affidavit of Natasha Sharpe sworn May 13, 2014 (Sharpe Motion Affidavit) ¶ 52, Motion Record, Tab 18; Affidavit of Natasha Sharpe sworn April 11, 2014 ("Sharpe Application Affidavit") ¶ 20(e), Motion Record, Tab 19.

general principals of equity (regardless of whether enforcement is sought in a proceeding in equity or at law.⁴³

46. The Motions Judge erred in finding Liquibrands contracted out of equitable rules. The guarantee is unenforceable if Liquibrands succeeds in its action against 852.⁴⁴

47. The Motions Judge erred in finding that the Action was collateral or property used in the business of Sun Pac for the purposes of the receivership.⁴⁵

48. The Motions Judge erred in ordering BDO to conduct a marketing process for the sale of the Action.⁴⁶ The order permits the Lenders to profit from their own breach of contract.

49. The Motions Judge erred in approving the distribution of the proceeds of realization to pay fees and disbursements and to make a distribution to 852 and/or Bridging, and failing to order that those funds be held in trust pending the outcome of the Action.⁴⁷

PART III - LIST OF ISSUES

50. Should leave to appeal the order of Justice Newbould dated December 4, 2014 be granted?

51. If yes, should this appeal be heard together with the appeal in Court File No.: CV-14-10543-00CL (Court of Appeal file no.: M44533)?

PART IV - LAW AND AUTHORITIES

52. Section 193 of the *Bankruptcy and Insolvency Act* ("BIA") states:

⁴³ S. 24(7) Guarantee and Postponement, Exhibit D to Sharpe Application Affidavit, Motion Record, Tab 19D.

⁴⁴ Newbould Endorsement ¶ 32, Motion Record, Tab 4.

⁴⁵ Newbould Endorsement ¶ 37.

⁴⁶ Newbould Endorsement ¶¶ 37 & 38.

⁴⁷ Newbould Endorsement ¶ 39.

193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.⁴⁸

53. This Court has asserted that there is no automatic right of appeal from a receivership order.⁴⁹

54. Section 195 of the BIA states that all proceedings under an order appealed from are stayed until the appeal is disposed of.⁵⁰

50. The test for granting leave to appeal under section 193 of the BIA is set out by this Court in *Pine Tree Resorts*:

[29] Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(e) of the Bankruptcy and Insolvency Act is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,

- (a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
- (b) is *prima facie* meritorious, and

⁴⁸ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("BIA") s. 193.

⁴⁹ *Business Development Bank of Canada v. Pine Tree Resorts Inc.* 2013 ONCA 282 (CanLII) ("*Pine Tree Resorts*")

¶ 12, *Liquibrands' Book of Authorities* ("Authorities"), Tab 4.

⁵⁰ BIA section 195.

(c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.⁵¹

55. This appeal involves a question of honesty and fairness and whether a party to a contract may profit from their own breach.

56. 852's default put Sun Pac in the position that it could not pay employees. That, in turn, caused 852 to declare a default by Sun Pac ceasing business operations. 852 impermissibly benefited by its own breach or wrong by relying on the cessation of business operations as an Event of Default.

57. 852's failure to make the Facility D loan payments was a material contributing cause of Sun Pac's insolvency. 852 is barred by its own wrong from relying on Sun Pac's cessation of operations as a basis for terminating the transaction.

58. A party is precluded from taking advantage of and benefitting from a state of affairs produced by its own wrong. A party cannot use its own breach or default in satisfying a condition precedent as a basis for being relieved of its contractual obligations....⁵²

[N]o man can take advantage of his own wrong.... A party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations.⁵³

59. A commercial contract is to be interpreted: (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective; (b) by determining the intention of the parties in accordance with the language they

⁵¹ *Pine Tree Resorts* ¶ 29, Authorities, Tab 4.

⁵² *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2010 ONCA 310 (CanLII) ("Southcott"), ¶ 13, Authorities, Tab 6.

⁵³ *Barclays Bank PLC v. Devonshire Trust*, 2013 ONCA 494 (CanLII) ¶ 149, (citing *Alghussein Establishment v. Eton College* ("Eton College"), [1991] 1 W.L.R. 587 H.L. (Eng.), at p. 594), Authorities, Tab 1.

have used in the written document and based upon the "cardinal presumption" that they have intended what they have said; (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract); and (d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity.⁵⁴

60. 852's conduct breached the common law duty to perform the terms of the Forbearance Agreement honestly, and specifically: (i) 852 unilaterally accelerated the date for Sun Pac to present a contract for the sale of its Breadcrumbs Division; (ii) 852 misled Sun Pac about its intention to place Sun Pac into receivership; and (iii) 852 refused to advance funds it was to obliged to advance contrary to the terms of the Agreement knowing that the failure to advance funds would result in the termination of Sun Pac's operations and the inability to finance an advantageous contract with Loblaws.

61. The Supreme Court of Canada has declared that contracting parties must be able to rely on a minimum standard of honesty and good faith from their contracting partner in relation to performing a contract.⁵⁵

62. The facts of this case invite the application of the evolving doctrine of equitable subordination⁵⁶: 852 and Liquibrands rank *pari passu* as secured creditors of Sun Pac; Liquibrands alleges that 852 committed a wrong entitling it to an equitable remedy; the misconduct resulted in

⁵⁴ *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 (CanLII) ("*Ventas*") ¶ 24, Authorities, Tab 8.

⁵⁵ *Bhasin v. Hrynew* 2014 SCC 71 (CanLII) ¶¶ 74-75 & 80, Authorities, Tab 2.

⁵⁶ See *CDIC v. Canadian Commercial Bank* [1992] 3 SCR 558 at p. 609, 1992 CanLII 49 (SCC), Authorities, Tab 5; see also *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 SCR 271, 2013 SCC 6 (CanLII) ¶ 77, Authorities Tab 7.

the unfair advantage of 852 over Liquibrands and other creditors; and equitable subordination is not inconsistent with the BIA⁵⁷. In *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 SCR 271, 2013 SCC 6 (CanLII), the Supreme Court of Canada acknowledged the evolving law of equitable subordination, the expectation of future determination and the relevant of evidence of lenders wrong or inequitable conduct, saying:

[77] Counsel for the Executive Plan's members argues that the doctrine of equitable subordination should apply to subordinate Indalex U.S.'s subrogated claim to those of the Plan Members. This Court discussed the doctrine of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, 1992 CanLII 49 (SCC), [1992] 3 S.C.R. 558, but did not endorse it, leaving it for future determination (p. 609). I do not need to endorse it here either. Suffice to say that there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct, and no party has contested the validity of Indalex U.S.'s payment of the US\$10 million shortfall.

63. The Motions Judge erred by declining to direct the trial of an issue with respect to 852's breach of contract by failing to advance a loan and Liquibrands' equitable defences to the claim on the guarantee.

64. Where orders permit a secured party to profit from their own default, the result is a commercial absurdity. Security agreements are interpreted so as to avoid commercial absurdity.⁵⁸

65. Liquibrands was entitled to defend the guarantee claim on the terms of the guarantee and the evolving law of equitable subordination. The Motions Judge erred by failing to find that the Liquibrands guarantee was subject to the laws of equity and by finding that the terms preclude Liquibrands from contending that the guarantee may be unenforceable.

⁵⁷ *CDIC* supra at pp. 609-610, Authorities, Tab 5; See also *Bulut v. Brampton (City)*, 2000 CanLII 5709 ¶¶ 48-53 (Ont. CA) where the Ontario Court of Appeal applied equitable principles to subordinate a prior secured claim to a subsequent charge, Authorities, Tab 3.

⁵⁸ *Ventas* supra ¶ 24, Authorities, Tab 8.

66. It would be an absurd commercial result for a guarantee to remain enforceable despite the demand being made on the guarantee as a consequence of the lender's wrongful and dishonest conduct.

67. Sun Pac and Liquibrands were entitled to a hearing on their claims. The Motions Judge acknowledged the claims and effectively barred Liquibrands and Sun Pac from showing that 852 was in breach of the Forbearance Agreement and breached its common law duty of honesty in the performance of the Forbearance Agreement.

68. The appeals are closely related and the orders arise from a single written endorsement as a result of the motions and application being heard together, so it would be inappropriate for this motion or for the appeals to be determined independently.

69. The issues raised in the proposed appeal are:

- (a) of general importance to the practice in debtor/creditor and bankruptcy/insolvency matters and to the administration of justice as a whole; and
- (b) are *prima facie* meritorious.


70. The appeal will not unduly hinder the progress of the insolvency proceeding since the liquidation of Sun Pac is complete and the majority of liquidation proceeds have been disbursed.

71. The proposed appeal raises an issue of general importance to the practice of bankruptcy and insolvency given the recent recognition of the common law obligation to perform contractual obligations in good faith and the Supreme Court of Canada's declaration that the doctrine of


equitable subordination is left for future determination. Without leave, the issue cannot be determined.

72. Sections 182(2), 193 and 195 of the *Bankruptcy and Insolvency Act*; Rules 61.03.1(1), 61.16(1), 63.02(1) of the *Rules of Civil Procedure*; and sections 6(1)(b), 6(2) of the *Courts of Justice Act*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this day of February, 2015.



David E. Wires



Krista Bulmer

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SCHEDULE "A"
LIST OF AUTHORITIES

- 1 *Barclays Bank PLC v. Devonshire Trust*, 2013 ONCA 494 (CanLII)
- 2 *Bhasin v. Hrynew*, 2014 SCC 71 (CanLII)
- 3 *Bulut v. Brampton (City)* 2000 CanLII 5709
- 4 *Business Development Bank of Canada v. Pine Tree Resorts Inc.* 2013 ONCA 282 (CanLII)
- 5 *CDIC v. Canadian Commercial Bank* [1992] 3 SCR 558
- 6 *Southcott Estates Inc. v. Toronto Catholic School Board*, 2010 ONCA 310 (CanLII)
- 7 *Sun Indalex Finance, LLC v. United Steelworkers* [2013] 1 SCR 271
- 8 *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 (CanLII)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Appeals

Court of Appeal

193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.

R.S., 1985, c. B-3, s. 193; 1992, c. 27, s. 68.

Stay of proceedings on filing of appeal

195. Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

R.S., 1985, c. B-3, s. 195; 1992, c. 27, s. 69.

No stay of proceedings unless ordered

8527504 CANADA INC. (Applicant / Respondent)
8527504 CANADA INC. (Applicant / Respondent)

-and- SUN PAC FOODS LIMITED (Respondent)
-and- LIQUIBRANDS INC. (Respondent / Appellant)

Court File No. CV13-10331-00CL / CV-14-10543-00CL
Court of Appeal File No. M44532 / M44533

COURT OF APPEAL FOR ONTARIO

MOVING PARTY'S FACTUM

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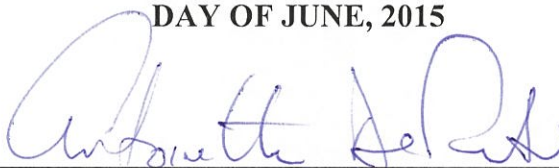
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Lawyers for the respondent/moving party
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**THIS IS EXHIBIT "F" TO
THE AFFIDAVIT OF GEORGE BENCHETRIT
SWORN BEFORE ME THIS 12TH
DAY OF JUNE, 2015**

A handwritten signature in blue ink, appearing to read "Anthony DePaola", written over a horizontal line.

A Commissioner etc.

COURT OF APPEAL FOR ONTARIO

DATE: 20150402
DOCKET: M44532
M44533

Feldman J.A. (Chambers)

APPLICATION UNDER Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C 1985, c. B-3, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

DOCKET: M44532

BETWEEN

8527504 Canada Inc.

Responding Party (Applicant)

and

Sun Pac Foods Limited

Respondent

DOCKET: M44533

AND BETWEEN

8527504 Canada Inc.

Responding Party (Applicant)

and

Liquibrands Inc.

Moving Party (Respondent)

David E. Wires and Krista Bulmer, for the moving party, Liquibrands Inc.

Harvey Chaiton and Sam Rappos, for the responding party, 8527504 Canada Inc.

Anthony O'Brien, for the responding party, BDO Canada Limited, Court-Appointed Receiver

Heard: March 31, 2015

On appeal from the order of Justice Newbould of the Superior Court of Justice, dated December 4, 2014, with reasons reported at 2014 ONSC 7015.

ENDORSEMENT

[1] This is a motion by Liquibrands Inc. ("Liquibrands") for leave to appeal the decision of Newbould J., dated December 4, 2014, wherein he made three orders on motions brought by Liquibrands, 8527504 Canada Inc. ("852") and BDO Canada Limited ("BDO"), the receiver for Sun Pac Foods Limited ("Sun Pac") appointed by the court under s. 243 of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3.

[2] For the reasons that follow, leave to appeal is denied.

Background

[3] The factual background was succinctly explained by the motion judge, at paras. 3-17 of his reasons:

[3] Sun Pac was a Canadian manufacturer of private label and branded beverage products, and a

manufacturer of croutons and bread crumbs and other private label brands (the "Breadcrumbs Division").

[4] Sun Pac was acquired by Liquibrands in November 2011. Liquibrands is the sole shareholder of Sun Pac. Mr. Csaba Reider is the sole shareholder, officer and director of Liquibrands. He was also the sole officer and director of Sun Pac.

[5] [Bridging Canada Inc. ("Bridging")] provides middle-market commercial customers with alternative financing solutions to borrowers who are unable to obtain financing from traditional lenders. 852 is a company related to Bridging and took an assignment of the loans and security for loans made by Bridging to Sun Pac.

[6] On October 1, 2012, Bridging advanced a revolving loan of up to \$5 million based on a lending formula under Facility A, \$500,000.00 (before facility fees) on January 18, 2013 under a Facility B term loan on equipment, and the balance of the facility B loan, \$1,182,524.00 (before facility fees), was advanced on January 31, 2013. The loans were secured on the assets of Sun Pac. Liquibrands guaranteed \$1 million of the Sun Pac Facility A loan and provided security over all of its assets to support the guarantee.

[7] Mr. Reider was in discussion with Loblaws to produce private label drinks for Loblaws. However Sun Pac was running short of working capital and in August 2013 was in default of its loan obligations to 852. He decided to sell the Breadcrumbs Division for \$3.1 million and he requested additional funding to continue operating.

[8] On September 11, 2013 852, Sun Pac and Liquibrands signed a Forbearance and Amending Agreement dated September 11, 2013. The Forbearance Agreement was entered into to provide Sun Pac with a temporary bridge loan in the hopes of obtaining equity and debt financing for the anticipated Loblaws contract and to complete a sale of the Breadcrumbs Division to repay the bridge loan. In the

Forbearance Agreement, Sun Pac acknowledged that it was in default of the terms of its loans.

[9] Notwithstanding the default, 852 agreed not to take any steps to enforce any of the loans or its security prior to the earlier of December 9, 2013 or the occurrence of an Event of Default.

[10] In the Forbearance Agreement, 852 agreed to extend a temporary bridge loan to Sun Pac in two tranches. Facility C was a demand non-revolving loan in the amount of \$500,000 less fees. Facility C was advanced to Sun Pac in the amount of \$475,000 on or about September 13, 2013.

[11] Facility D was a demand non-revolving loan in the maximum amount of 2 times EBITDA of the Breadcrumbs Division as determined by a report from BDO Canada Limited, less the amount advanced under Facility C. Paragraph 13 of the Forbearance Agreement provided:

Provided that 852 has received and is satisfied with the report to be prepared by BDO at the expense of Sun Pac, 852 shall, promptly following the execution of this Agreement, advance to Sun Pac as a Facility D Loan advance a single advance in an amount equal to 2 times EBITDA of the Breadcrumbs Division (as defined below) (as determined by BDO in its report to Sun Pac and 852 in its sole discretion), less the Facility C Principal Amount ... Each advance shall be conditional on there being no Event of Default under this Agreement and the Loan Agreement.

[12] One event of default contained in the Forbearance Agreement was if Sun Pac failed to have a binding agreement for the sale of the Breadcrumbs Division by November 6, 2013 that was acceptable to 852 in its sole and absolute discretion and failed to close it by December 6, 2013.

[13] BDO prepared a report dated September 25, 2013, which it delivered to Sun Pac and 852 on September 30, 2013. Based on the report, the Facility D loan was to be approximately \$1.15 million. 852 took no issue with the amount of the EBITDA as reported by BDO.

[14] 852 did not advance the Facility D loan. There is a dispute among the parties as to whether 852 was in breach of the Forbearance Agreement in failing to advance the loan. I do not intend to get into that issue, although was invited to do so.

[15] On October 4, 2013, 852 informed Mr. Reider that it was not prepared to advance Facility D without certain matters being addressed. According to 852, they were not addressed.

[16] On November 11, 2013, 852's lawyers were informed by Sun Pac's insolvency lawyers that Sun Pac's operations had been shut down on November 7, 2013, at which time all but a few employees were terminated. As a result, 852 commenced an urgent receivership application heard on November 12, 2013. Sun Pac and Liquibrands had counsel attend the hearing but did not oppose the receivership application. BDO was appointed as receiver of Sun Pac on November 12, 2013.

[17] On the morning of November 12, 2013, Liquibrands and Sun Pac commenced an action against 852 and Bridging seeking, *inter alia*, general damages of \$100 million for breach of the Forbearance Agreement by not advancing Facility D in the amount of approximately \$1.15 million. Sun Pac had signed an agreement with Loblaws made as of September 18, 2013 containing terms regarding the sale of drink products by Sun Pac to Loblaws, and the damage claim is for alleged lost profits that would have been earned under that agreement.

Decision Below

[4] The first motion before Newbould J. was a request by the receiver, BDO, for an order approving its reports and permitting it to pay the amount realized on the assets of Sun Pac to 852. Liquibrands, as second secured creditor, asked that those funds be paid into court pending the determination by a trial of the issues raised in the lawsuit brought by Sun Pac and Liquibrands against 852 for alleged wrongdoing that caused Sun Pac to fail. Pursuant to rule 45.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Liquibrands framed its claim as a right to a specified fund.

[5] The motion judge granted the receiver's motion. He held that rule 45.02 did not assist Liquibrands. As 852 had valid security that ranked ahead of Liquibrands' security, Liquibrands was essentially attempting to secure judgment on its claim for damages against 852. Furthermore, Liquibrands' action against 852 was commenced hours before the Sun Pac receivership order was made. Both Sun Pac and Liquibrands were represented at the receivership proceeding by experienced insolvency counsel who did not object to the receivership order being made. The motion judge concluded that the debtors could not now contend that the money was not owing to 852, as that would amount to a collateral attack on the receivership order.

[6] It followed that there was no serious issue to be tried regarding 852's entitlement to the funds. The fact that there may be a serious issue to be tried in the lawsuit against 852 did not affect its entitlement, over any alleged entitlement of Liquibrands, to the realized assets of Sun Pac.

[7] The second motion was brought by 852 for an order appointing BDO as receiver of Liquibrands. Demand was made under Liquibrands' guarantee in April 2014 and no payment was received. There was therefore an event of default in respect of valid security.

[8] Liquibrands submitted that no receiver should be appointed pending the outcome of its action against 852. It argued that, following the decision in *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551, it might be relieved of liability under its guarantee if the lawsuit were successful based on wrongdoing by the lender.

[9] The motion judge rejected that argument. He found that Liquibrands had contracted out of its equitable rights by the wording of paragraph 2 of the guarantee: *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102. Moreover, in the Subordination, Assignment, Postponement and Standstill Agreement, Liquibrands had agreed to not to take steps to challenge or impede 852's enforcement of its security.

[10] As Liquibrands was therefore precluded from asserting priority over 852, the motion judge found it just and equitable to appoint BDO as receiver of Liquibrands.

[11] The third issue involved the procedure for dealing with the lawsuit against 852, which was considered by the receiver as an asset of the Sun Pac receivership (and of the Liquibrands receivership once ordered). Liquibrands requested the appointment of a separate receiver to pursue the litigation on the grounds that the current receiver, BDO, did not intend to spend money on the litigation. The motion judge, following the procedure endorsed in *Central 1 Credit Union v. UM Financial Inc.*, 2012 ONSC 1893, directed the receiver to conduct a marketing process for the sale of the action, the terms of which were contained in the ultimate order.

Analysis

[12] The exercise of granting leave to appeal under s. 193 of the *Bankruptcy and Insolvency Act* is discretionary, flexible and contextual. In the recent case *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29, this court stated that the three “prevailing considerations” are whether the proposed appeal (1) raises an issue of general importance to bankruptcy law or the administration of justice that this court

should address; (2) is *prima facie* meritorious; and (3) would not unduly hinder the progress of the proceedings.

[13] Liquibrands asserts that the issue of importance for this appeal is whether the lender should be entitled to profit from its breach of the Forebearance Agreement by creating a *fait accompli* of the receivership and the disposal of the litigation against it. The motion judge determined that he did not need to address the merits of the proposed litigation in order to determine the three issues before him. That is disputed by Liquibrands. It wants to see the litigation continued and concluded before the rights of the debtors and the lender to the proceeds of the receivership are finally determined.

[14] Mr. Wires, on behalf of Liquibrands, has presented this issue in a very interesting and compelling way. However, to proceed as he suggests would essentially turn the process inside out. It would effectively allow the debtors, through a funded receiver, to use the funds realized in the receivership to fund their litigation, rather than to pay the lender, 852. That is not to say that the motion judge could not have made the orders sought by Liquibrands had he determined that such orders were warranted in the circumstances. However, his decisions not to do so and to make the orders he did were grounded in law and reason and were based on the facts and the documents presented. They are owed deference by this court.

[15] Before concluding these reasons, I add the following. On the motion as argued, I did not understand Liquibrands to be objecting to the procedure for the marketing of the lawsuit, in the event that its request that a separate receiver be appointed to pursue the lawsuit was rejected. I raised some issues in oral argument regarding the propriety of that procedure, particularly with respect to who should be permitted to bid and how to fairly determine the value of the lawsuit. Counsel for the receiver advised the court that all issues regarding the propriety of any proposed sale of the action could be raised at the approval hearing. In the circumstances of this case, the denial of leave to appeal is not to be taken as an endorsement of all aspects of the procedure for marketing the lawsuit against the creditor.

Conclusion

[16] In my view, leave to appeal should not be granted, particularly on the ground that the appeal is not *prima facie* meritorious. The motion for leave to appeal is therefore dismissed with costs to 852 fixed at \$15,000 inclusive of disbursements and HST.

K. Felton J.A.

8517504 CANADA INC.

Applicant

- and -

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Applicant

- and -

SUN PAC FOODS LIMITED

Respondent

Court File No. CV-13-10331-00CL

LIQUIBRANDS INC.

Respondent

Court File No. CV-14-10543-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceedings commenced at TORONTO

**AFFIDAVIT OF
GEORGE BENCHETRIT**
(sworn June 12, 2015)

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RESPONDING MOTION RECORD

(re motions returnable June 22, 2015)

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