Court File No. CV-23-00696017-CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LOYALTYONE, CO.

Applicant

REPLY FACTUM OF THE MONITOR

(Motion Returnable June 13 and 14, 2024)

June 10, 2024

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1. Bread has attempted to deflect from the actual evidence in the record, has overstated or misstated the law, and continues to try and extract LoyaltyOne's key remaining asset for its sole benefit, to the detriment of LoyaltyOne's creditors as a whole. The Monitor adopts the arguments set out in LoyaltyOne's reply factum. In this reply factum, the Monitor responds to select submissions made in Bread's factum dated June 5, 2024, focusing solely on the TUV issue.

2. **Bread misstates its own expert's evidence –** At paragraphs 28 and 53(a), Bread states that Mr. Davidson reached conclusions with respect to the consideration received by ***LoyaltyOne***. This is inaccurate. Mr. Davidson agreed on cross-examination what is clear from his first report: he performed ***no analysis*** of consideration at the LoyaltyOne level. He incorrectly focused only on LVI.[1] Moreover, despite Bread asserting at paragraph 19 of its factum that its indemnification obligations count as consideration, Mr. Davidson did not address that assertion in his analysis. In any event, Bread's purported obligation to pay CA$30 million if LoyaltyOne loses the Tax Dispute is significantly less than the potential CA$96 million that Bread purports to take from LoyaltyOne.[2]

3. At paragraph 58, Bread misstates the evidence Mr. Davidson gave on cross-examination regarding whether LoyaltyOne was insolvent at the Spin Date. Bread complains that Mr. Davidson's answer – that LoyaltyOne was insolvent – was based on accepting Mr. Harington's assumptions. That is wrong. Mr. Davidson was asked to "hold all ***your*** other assumptions stable, so the debt, all the other characteristics that you ***listed in your reports*** about LVI and LoyaltyOne",

[1] Davidson Cross, Q. 388-394, CL. No. A6229-A6230. The paragraphs cited by Bread in support of this position make this clear: section 8 from the Kroll First Report, Bread MR, Tab 4A, pp. 988-1022, CL No. B-1-1018- B-1-1042, addresses consideration only at the LVI level and sections 9.14, 9.17 and Schedule 5 of the Reply Expert Report of A. Scott Davidson dated April 15, 2024, Reply Motion Record of Bread, Tab 2A, pp. 202 and 213-214, CL No. B-1-1389 and B-1-1400- B-1-1401, address the *solvency* of (and not the consideration to/from) LoyaltyOne.

[2] The $30 million "get" mentioned by Mr. Motes is conspicuously less than the potential $96 million Tax Proceeds "give" Bread claims; Exhibit "T" to the Affidavit of Joseph L. Motes III affirmed February 9, 2024, Bread MR, Tab 2T, ss. 3, 8 and 11, CL. No. B-1-841-B-1-842, B-1-848 and B-1-853-B-1-855.

except to now assume that Sobeys would exit.[3] Mr. Davidson confirmed that, holding all of his own assumptions stable, and only changing his assumption about Sobeys, LoyaltyOne was insolvent on the Spin Date.

4. **Bread ignores clear evidence LoyaltyOne's insolvency –** At paragraph 27, Bread critiques the Monitor and LoyaltyOne for not initially putting forward any expert valuation evidence on value. But expert evidence is not necessary to establish that LoyaltyOne was insolvent at the Spin Date. The Monitor's Fifth Report – served seven months ago – explained that LoyaltyOne's balance sheets for November and December 2021 showed that its assets exceeded its liabilities by less than CA$168 million, not counting the US$675 million debt to the Lenders.[4] Obviously, when the US$675 million debt is considered a liability of LoyaltyOne (which it should be), LoyaltyOne was insolvent on the Spin Date. But even if only a portion of the US$675 million debt counted, LoyaltyOne was insolvent on the Spin Date, which is likely why Bread chose to focus its expert report on LVI only, and not on LoyaltyOne.

5. **The TUV analysis must focus on LoyaltyOne** – At paragraphs 45-51, Bread incorrectly asserts that the TUV analysis should consider the larger group enterprise (*i.e.*, LVI). That approach is inconsistent with the express statutory language cited in the Monitor's first factum, which Bread does not address,[5] and is not supported by the jurisprudence.

6. Bread incorrectly relies on *Re Urbancorp Toronto Management Inc*. In *Urbancorp*, the Court addressed which of the multiple parties involved in a transaction had received the transfer

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[3] Davidson Cross, Q. 36, CL No. A6122.

[4] Monitor's Fifth Report, paras 5(3-5) and Appendices G and G1. Applying four different approaches under the balance sheet test, Mr. Harington confirmed that LoyaltyOne was insolvent; Brattle First Report, paras. 285-286, L1 RMR, Tab 4A, p. 394, CL No. A5721. Notably, both valuation experts accept that the insolvency analysis should account for the US$675 million debt (Mr. Harington's opinion is that it all counts and Bread's position is that something less than all should be counted); Harington Cross, Q. 142-144, CL No. A7713-A7717; Brattle First Report, paras. 48-50, L1 RMR, Tab 4A, pp. 308-309, CL No. A5635-A5636; Kroll First Report, paras. 9.13, 9.37-9.38, 10.6, Bread MR, Tab 4A, pp. 1025, 1028-1030, CL No. B-1-1045 and B-1-1048-B-1-1050.

[5] The *CCAA* at s. 36.1(2)(c) converts the references to "debtor" in s. 96 of the *BIA* to "debtor company", making it even clearer that the "more expansive approach" sought by Bread is utterly inconsistent with the statute.

at issue, and were therefore "part[ies] to the transfer" under section 96 of the *BIA*. This point affected whether the transfer had been made by the debtor to arm's length parties or not (which is one of the factors in the TUV analysis).[6] The Court of Appeal stated that although the transaction may have involved multiple parties and multiple agreements, the parties to the ***transfer*** were the debtor and the counterparty to the specific agreement governing the transfer. Moreover, contrary to Bread's argument, the Court did not make any assessment as to the adequacy of the consideration.[7] Instead, the Court upheld the motion judge's conclusion that the transfer was not a TUV because the parties were arm's length and because fraudulent intent had not been established.

7. The Court in *Urbancorp* never suggested – as Bread advocates – that it would be appropriate to adopt a "group enterprise" approach to the "debtor company" (the statutory language) for a TUV analysis. Bread's proposed approach would undermine the purpose of the TUV regime, which is designed to protect the interests of the debtor's creditors from transactions that have the effect of reducing the assets available to those creditors.[8]

8. **Bread's critiques of Mr. Harington's work are ill-founded** – Mr. Harington's analysis was realistic and conservative.[9] In any event, many of Bread's critiques have no material impact on his conclusions.[10] The Monitor did not "gloss over" 9 of the 11 Harington adjustments.[11] Many of these adjustments were ultimately agreed upon by the experts.[12]

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[6] *Re Urbancorp Toronto Management Inc.*, 2019 ONCA 757 at paras. 4, 36-48, 61.
[7] *Urbancorp* at paras. 4, 38-39, 43-44, 46 and 59-61.
[8] Report of the Standing Senate Committee on Banking, Trade and Commerce, Debtors and Creditors Sharing the Burden: a Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (Ottawa: November 2003), p. 121, publications.gc.ca/pub?id=9.570627&sl=0; Roderick J. Wood, "Transfers at Undervalue: New Wine in Old Wineskins?", p. 5, L1 BOA Tab 5, CL. No. B-2-28.
[9] Harington Cross, Q. 265, CL. No. A7769.
[10] Harington Cross, Q. 262-264, 266, 267, CL. No. A7767-A7770.
[11] Bread factum, paras. 54-57, CL. No. B-1-1653-B-1-1654.
[12] Brattle Second Report, para. 18, L1 Supp. MR, Tab 2A, p. 25, CL. No. A5828.

9. At paragraph 56, Bread states that Mr. Harington revised the Spin Projections downward to reflect 100% of revenue lost from the BMO concessions "without any supporting evidence". But, of course, Mr. Harington did rely on evidence of statements made by Mr. Horn, LVI and Ms. Hageman that the BMO concessions were "reasonably expected" and would result in approximately $40 million less in pre-tax cash flow to Air Miles per year.[13]

10. At paragraphs 61 and 62, Bread complains that Mr. Harington allocated to LoyaltyOne the whole US$675 million debt under the Credit Agreement and failed to analyze Brand Loyalty's ability to contribute to that debt repayment. But any analysis of Brand Loyalty was entirely unnecessary because, under the Credit Agreement, LoyaltyOne was a "primary obligor and not a surety", responsible for the "prompt payment of the [debt] in full when due" with an [additional] obligation to "jointly and severally, promptly pay the [debt], without any demand or notice whatsoever". Bread ignores that obligation. Bread also does not address the clear evidence that Brand Loyalty lacked the cash flow to contribute in any meaningful way to the debt payments and that those payments were, in fact, funded by LoyaltyOne through dividends to LVI.[14]

11. At paragraph 63, Bread critiques Mr. Harington for assuming "Sobeys' departure as 100% certain". Mr. Harington was instructed to assume that Sobeys' exit was reasonably foreseeable, and satisfied himself that the instruction made sense based on the documents he reviewed.[15] He then applied his expertise to make necessary adjustments to LoyaltyOne's projected revenues (100% adjustment in light of the customer concentration).[16] Those adjustments appropriately treated the foreseeability of Sobeys' departure as certain because of the magnitude of the impact

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[13] Brattle First Report, paras. 160-162, L1 RMR, Tab 4A, p. 351-352, CL. No. A5678-A5679; Harington Cross, Q. 255, CL. No. A7766; Hageman April Affidavit, para. 54, L1 RMR, Tab 1, p. 20, CL. No. A5347.
[14] Hageman April Affidavit, para. 23, L1 RMR, Tab 1, pp. 12-13, CL. No. A5339-A5340.
[15] Brattle Second Report, para. 9, L1 Supp. MR, Tab 2A, CL. No. A5824.
[16] Brattle Second Report, para. 9, L1 Supp. MR, Tab 2A, CL. No. A5824; Harington Cross Q. 26-27 and 133-135, CL. No. A7678-A7679 and A7709-A7711.

that departure would have (and did have) on LoyaltyOne.[17] Mr. Davidson admitted on cross-examination "that [he had] not made a determination of whether there was a possibility or likelihood of Sobeys departure."[18] That leaves only Mr. Harington's opinion and the clear evidence regarding the likelihood of that departure. In any event, as explained in LoyaltyOne's factums, Sobeys' exit was more than reasonably foreseeable. Moreover, the only testimony from an operational executive at Air Miles about the Sobeys exit confirms the documentary record. During the examination of Blair Cameron (the CEO of LoyaltyOne in the time leading up to, at and immediately following the Spin Date), counsel for Bread put to Mr. Cameron Bread's theory that it was only post-Spin, in Q1 of 2022, that he was "aware that Sobeys was going to leave for sure". Mr. Cameron disagreed and confirmed that Sobeys' had made its intention to leave the Air Miles program known much earlier than that.[19]

12. To be clear, in the TUV context, the Court is ***not*** required to find that Bread believed Sobeys would exit or that Bread made an intentional misrepresentation – the question is only whether Sobeys' departure was reasonably foreseeable on the Spin Date, and it was.

13. Overall, it was a TUV for Bread to attempt to give itself the Tax Proceeds, in part because it loaded LoyaltyOne with a massive debt burden at the time LoyaltyOne was facing a massive hit to its Air Miles business from the loss of Sobeys. Bread has no basis for the relief it seeks.

June 10, 2024

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Meghan de Snoo

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[17] Harington Cross Q. 280, CL. No. A7774.
[18] Davidson Cross Q. 372, CL. No. A6223.
[19] Cameron Exam, Q. 400-406, CL. No. A5987-A5988.

SCHEDULE "A"

LIST OF AUTHORITIES

Jurisprudence	
1.	*Re Urbancorp Toronto Management Inc.,* 2019 ONCA 757
Secondary Sources	
2.	Report of the Standing Senate Committee on Banking, Trade and Commerce [37th Parliament, 2nd Session, 15th report], Debtors and Creditors Sharing the Burden : a Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act / The Honourable Richard H. Kroft, chair; The Honourable David Tkachuk, deputy chair (Ottawa: November 2003)
3.	Roderick J. Wood, *Transfers at Undervalue: New Wine in Old Wineskins?* (August 28, 2017)

SCHEDULE "B"

LIST OF RELEVANT STATUTES, REGULATIONS, BY-LAWS, ETC.

1.	*Bankruptcy and Insolvency Act*, RSC 1985, c. B-43, s. 96
2.	*Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, s. 36.1(2)(c)

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1404-0451-3548