

Extracts

[1] In a context in which the only remaining asset of the Debtors is a claim against its secured lender, Callidus Capital Corporation (**Callidus**), the Court is faced with the following issue: should it authorize the holding of a second creditors' meeting to allow Callidus to submit a new plan of arrangement (**New Plan**) and vote on it or, rather, should it grant the Debtors' Application for litigation funding and a litigation financing charge (**Debtors' Application**) in order to file a lawsuit against Callidus for damages in the range of \$200 million?

[2] For the following reasons, the **New Plan will not be submitted to the creditors' vote** and the **Debtors' Application will be granted.**

41 Moreover, the Court finds that Callidus' conduct, in the course of the CCAA proceedings, lacked transparency. In particular, Callidus allowed the Monitor and the Debtors to work on a valuation of the business and then the appointment of a chief restructuring officer, only to eventually adopt a different position before the Court.²¹ It seems that Callidus' strategy was to exhaust Mr. Duhamel financially.

42 Thereafter, on May 11, 2017, Callidus contested another extension of the Initial Order submitting that the CCAA process was not appropriate for the continuance of this matter since it concerned mainly a dispute between Mr. Duhamel and itself. Callidus' lawyers suggested that a proposal under the BIA would allow the creditors to vote and take position.²² The Court then concluded that "Callidus' opposition to the Application [extension of the Initial Order] appears to be motivated more by its interest in delaying the process, especially since it will be the defendant party under the most important claim of the Bluberi Retained Claims."²³ Also, the BIA would probably generate nothing for the creditors.

43 On September 11, 2017, the Debtors filed an Application for the issuance of an order extending the Stay of proceedings and authorizing an interim financing presentable on September 19th. This Application sought to allow the Debtors to pursue their claim against Callidus. At 3:00 p.m. on the day prior to the scheduled presentation,

Callidus filed an Application to be authorized to submit its own plan of arrangement to the creditors. This was the very first time Callidus had informed the Debtors, the Monitor or the Court that it intended to file a plan. Callidus' Plan explicitly provided for unidirectional releases, meaning that **Callidus would obtain a full release from the Debtors via the creditors vote but neither the Debtors nor the guarantor, Mr. Duhamel, would be released.**

(44) Once again, it is clear that Callidus' actions were solely motivated by the litigation with the Debtors and Mr. Duhamel. **Callidus owes nothing to the creditors and never before expressed any interest in their situation. Its offer to pay their claims, in total (ex-employees)** or in part, serves only to allow it to obtain broad releases²⁴ which it would otherwise not be entitled to obtain from the Debtors.²⁵ In other words, Callidus is buying releases from creditors who have no interest in the awarding of such releases.

(45) Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, **under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan,** especially when its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.

(46) As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.

(47) It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. Under the present circumstances, this approach **is both unfair and unreasonable.**

(48) Callidus' behavior is contrary to the "requirements of appropriateness, good faith, and due diligence [that] are baseline considerations that a court should always bear in mind when exercising CCAA authority."²⁶ In short, the Court finds that **Callidus intends to use its vote for an improper purpose and that it should not be allowed to do so.**

3. DEBTORS' APPLICATION

(60) The lawsuit that the Debtors intend to file against Callidus **does not appear to be frivolous** as appears from the allegations set out in the Debtors' Application:

