

CANADA / JUDGMENT

Nabis Holdings Inc. (Re)

2021 BCSC 1878

COURT

Supreme Court of British Columbia

DECIDED

14 September 2021

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2021 BCSC 1878 Nabis Holdings Inc. (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nabis Holdings Inc. (Re),

2021 BCSC 1878

Date: 20210914

Docket: S217962

Registry: Vancouver

In the Matter of Part 9, Division 5, s. 291 of the

Business Corporations Act, S.B.C. 2002, c. 57, as Amended

And

In the Matter of a Proposed Plan of Arrangement of Nabis Holdings Inc.

Petitioner

Before: Master Muir

Oral Reasons for Judgment Re Application to Call an Extraordinary Meeting of Noteholders

In Chambers

Counsel for Nabis Holdings Inc., appearing via telephone conference:

J. Walker

L. Lubke

Counsel for Caravel CAD Fund Ltd., appearing via telephone conference:

R.W. Staley

D. Luca

Place and Date of Hearing:

Vancouver, B.C.

September 13, 2021

Place and Date of Judgment:

Vancouver, B.C.

September 14, 2021

- [1] THE COURT: The application here is brought by the petitioner, Nabis Holdings Inc. ("Nabis"), pursuant to ss. 288 to 291 of the Business Corporations Act, S.B.C. 2002, c. 57 [BCA], for an order that Nabis be authorized to call, hold, and conduct an extraordinary meeting of the registered holders (the "noteholders") of Nabis' 5.3% Senior Unsecured Notes due January 25, 2023 (the "notes") as of the close of business on August 24, 2021, which meeting is to be held on September 27, 2021 at 8 p.m. Pacific Standard Time (the "noteholders' meeting") and such other orders as are standard in these plans of arrangement.
- [2] This application would not be anything unusual but for the fact that by stipulating the noteholders' meeting date of September 27, 2021, Nabis is effectively asking the court to grant an abridgment of the notice period normally required under the statute, which contemplates that at least 21 days' notice of a meeting of creditors is to be given.

Background Facts

- [3] Nabis is a BC incorporated company, and its shares and notes are listed on the Canadian Securities Exchange ("CSE"). Nabis apparently fell into financial difficulty in 2020 and, in January 2021, Caravel CAD Fund Ltd. ("Caravel"), which is an investment firm organized out of the Commonwealth of the Bahamas, sponsored a restructuring transaction. That ultimate proposal operated to cancel all of the then outstanding common shares and other equity claims to satisfy the convertible debt and other unsecured claims by the issuance of some unsecured notes and shares.
- [4] Caravel is opposed to the order sought and says that I lack jurisdiction to make the order and that even if I do have jurisdiction to make the order, I should not exercise it. As for Nabis, the company is now apparently in a position of substantial debt. Thus, its board of directors has proposed this arrangement process (the "proposed arrangement") and filed the petition in support of that on September 7, 2021.

- [5] The substance of the proposed arrangement is that Nabis will use the proceeds of a share purchase agreement it entered into with Caravel on or about August 23, 2021 to acquire the outstanding notes (the "share purchase agreement"). The share purchase agreement requires the sale of Nabis' 892,638 Class A subordinate voting shares in Verano Holdings Corp. ("Verano") for consideration of in excess of \$17 million. That is, I gather, the only asset of significance that Nabis holds.
- [6] Nabis submits that if the proposed arrangement is not approved, the company may be forced into bankruptcy. They support that with a fairness opinion received on August 25, 2021 from Stephen Avenue Securities Inc., in which the authors noted:
- a) that a liquidation of Nabis' sole material asset by way of incremental sale of the Verano shares on the CSE would likely result in materially less proceeds for the satisfaction of the notes;
 - b) if the arrangement is not approved, Nabis may be required to consider bankruptcy or Companies' Creditors Arrangement Act , R.S.C. 1985, c. C-36 [CCAA] proceedings;
 - c) the arrangement would permit continued participation by shareholders of Nabis in Nabis' growth and/or strategic initiatives while improving Nabis' solvency and liquidity; and
 - d) neither Stephen Avenue Securities Inc. nor Nabis are aware of any other feasible alternatives that are superior to the arrangement.
- [7] Nabis secured support for the proposed arrangement by obtaining support agreements from holders of 75% of the value of the notes (the "support agreement"). Those supporting noteholders include Caravel, apparently the largest noteholder, holding 46.1% of the value of the notes outstanding. The support agreements have certain provisions that both parties have urged upon me, but the principal one of concern today is that the support agreements require completion of the proposed arrangement by September 30, 2021.
- [8] Caravel advises that the timeliness of this proposed arrangement is important to it as the shares of Verano have decreased in value since the support agreement was executed. Caravel points out that under the provisions of the support agreement, first of all, Nabis cannot contravene any contract to which Nabis is a party or by which it is bound, that time is of the essence, and that Caravel is not obliged to support the proposed arrangement if Nabis files court materials or obtains court orders that are not acceptable to it.
- [9] Caravel submits that Nabis has mismanaged the proposed arrangement, that it has run out of time, and that there is no satisfactory explanation for the delay. Caravel submits that as a result of this and the requirement under the original indenture that noteholders shall be given not less than 21 days' notice of a meeting, means that Nabis, by bringing this application, if it is successful in abridging the 21-day notice period, will be in breach of the support agreement and, hence, Caravel will be no longer required to vote in favour of the proposed arrangement and does not intend to do so. Thus, Caravel submits that the court should not grant relief to Nabis over its objections and contrary to Nabis' contractual

obligation to Caravel, regardless of any discretion that I might have under the BCA.

Discussion

[10] Looking at the BCA itself, the legal basis for the proposed arrangement is found commencing at s. 288. Section 288(1) provides that:

Arrangement may be proposed

288 (1) Despite any other provision of this Act, a company may propose an arrangement with shareholders, creditors or other persons and may, in that arrangement, make any proposal it considers appropriate, including a proposal for one or more of the following:

...

- (e) a transfer of all or any part of the money, securities or other property, rights and interests of the company to another corporation in exchange for money, securities or other property, rights and interests of the other corporation;
- (i) a compromise between the company and its creditors or any class of its creditors, or between the company and the persons holding its securities or any class of those persons.
- (2) Before an arrangement proposed under this section takes effect, the arrangement must be
 - (a) adopted in accordance with section 289, and
 - (b) approved by the court under section 291.

Adoption of arrangement

289 (1) Despite sections 264 and 265, an arrangement is adopted for the purposes of section 288

(2) (a) if,

- (d) in respect of an arrangement proposed with creditors of the company or a class of creditors of the company, a majority in number and 3/4 in value of the creditors or class of creditors, as the case may be, present and voting, either personally or by proxy, approve the arrangement at a meeting if at least 21 days' notice of the meeting, and of the intention to propose the arrangement, has been sent to all of those creditors with whom the arrangement is proposed,

That is the section that requires the 21 days' notice of the meeting.

[11] Nabis relies on subsection s. 289(3), which provides:

- (3) If the court orders, under section 291(2)(b)(i), that a meeting be held to adopt an arrangement in addition to or in substitution for a meeting contemplated by subsection (1) of this section, the arrangement must not be submitted to the court for approval until after
 - (a) the arrangement has been adopted at that court ordered meeting, or

- (b) all of the persons who were entitled to vote at that meeting consent to the arrangement in writing.

[12] Then Nabis points to s. 291(2), which provides:

Roles of Court in arrangements

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- (2) The court may, in respect of a proposed arrangement, make any order it considers appropriate, including any of the following orders:
 - (b) an order requiring the company to do one or both of the following in the manner and with the notice the court directs:
 - (i) call, hold and conduct one or more meetings of the persons the court considers appropriate;

[13] Thus, Nabis argues that I have the discretion under s. 291(2)(b)(1) to order the meeting proceed on September 27, 2021, effectively abridging the notice that otherwise would be required under s. 289(1)(d). Caravel argues that the BCA cannot be read in that fashion and that I do not have the jurisdiction to order a meeting be held other than in accordance with s. 289(1)(d).

[14] Nabis points to the decision in TELUS Corporation (Re), 2012 BCSC 1919, at paras. 288 and 299 for the proposition that s. 291(2) of the BCA provides the court with discretion in making orders in relation to the proposed arrangement and that the court's discretion in making those orders is essentially unfettered, except, of course, that any discretion must be exercised judicially.

[15] I agree that s. 291(2)(b) does give me the discretion to make the order sought.

[16] Caravel argues, however, that if I do have that discretion, that I should not exercise it.

[17] In exercising discretion, there are factors to consider that include the rationale for the application, the reason for any delay, and a balancing of the prejudice. Of course, the ultimate goal is that the purposes of the BCA be effected and that any persons who are impacted by the BCA be treated fairly, including of course, Caravel, but also all of the other impacted parties.

[18] Caravel says the application is required due to Nabis' unexplained delay in proceeding with the proposed arrangement. Prejudice to Caravel arises, as noted, from the drop in the share price of the Verano shares. Caravel also argues that the support agreement has been breached and, thus, Caravel has no obligation to and will not vote in favour of the proposed arrangement. This, Caravel argues, will inevitably result in litigation and for me to grant the order sought would give Nabis an unfair leg up in any such action.

- [19] Caravel also argues that to make an order such as this would be futile given its position that it does not intend to vote in support of the proposed arrangement, and hence the issue is really moot. There will not be a favourable vote at the end of the day and hence no reason for me to exercise the discretion sought to allow Nabis to have the meeting.
- [20] The prejudice to Nabis and its creditors is clear. Based on the fairness opinion that I noted earlier, absent this proposed arrangement, Nabis is likely facing bankruptcy or a CCAA proceeding--either is unlikely to provide as much benefit as the proposed arrangement.
- [21] The question of delay is apparently explained by the fact that British Columbia has recently enacted a new statutory holiday on September 30th--the Reconciliation Day. Nabis argues that its plan was to have the meeting on September 30, 2021, that they would not have had a problem with the 21 days' notice requirements absent that new statutory holiday, but that they were unaware of the new statutory holiday when the plan was put in place. Caravel argues that that is not a sufficient explanation as the new statutory holiday was declared at the beginning of June, well before any of this was an issue. Therefore, the explanation is no explanation at all.
- [22] I am satisfied with the evidence that the new statutory holiday did not come to Nabis' attention and that it proceeded on this path with the expectation that the meeting could be held on September 30, 2021 and, hence, although it is not a particular good explanation, it is an explanation.
- [23] I am satisfied that the delay, such as it was, has been explained. Of course, the rationale for the application is to give ultimate effect to the dealings that Caravel and the other noteholders had with Nabis and, in particular, those who have signed the support agreements. I note that the other signatories to the support agreements have waived the 21-day notice requirement, but, as Caravel did not, Nabis did not have sufficient support for a waiver of that notice period.
- [24] Nabis also points out that there was a news release on July 28, 2021 where Nabis announced its intention to proceed with the proposed arrangement and set out its principal elements. In addition to that, Nabis filed a management information circular on SEDAR on September 3, 2021 that sets out a detailed description and summary of the proposed arrangement and a copy of the proposed plan of arrangement.
- [25] Nabis thus argues that there is no prejudice to anyone in shortening the notice period for this proposed September 27, 2021 noteholders' meeting because the components of the proposed arrangement have been broadly circulated already and, of course, in particular, the support agreement signatories have had full disclosure of the proposed arrangement.

Disposition

- [26] I am satisfied that the balance here leans in favour of granting the order sought. Although Caravel submits that the holding of such a noteholders' meeting would be futile, that is speculative. Things may change between now and the meeting date. The benefit of the proposed arrangement to Nabis and its creditors is significant, and the prejudice that Caravel says that it will suffer--the drop in the share price of the Verano shares--is prejudice that Caravel must have contemplated in concluding the support agreement with the September 30, 2021 end date.
- [27] The other prejudice to Caravel, in my view, is not prejudice at all. If Nabis has breached the contractual agreements that it has with Caravel or others, Caravel has its rights that flow from those breaches, regardless of what order I make or do not make today. Nabis' application is not to abridge or subvert the contractual rights of Caravel; it is simply to order a date for the proposed arrangement meeting under the terms of the statute. Caravel will be free to advance any claims it may have and, if its present intentions come to fruition, it will be in litigation with Nabis at the end of the day, during which its contractual rights and obligations can be fully canvassed and the court can determine whether there has been a breach and, if so, the impact of that breach on the parties.
- [28] Thus, as I see it, the prejudice to Caravel is not a real prejudice, and it is outweighed by the prejudice to Nabis and its creditors of not making this order. So the order is granted, and I will hear you on costs.

[SUBMISSIONS ON COSTS]

- [29] THE COURT: In the circumstances that Nabis would have made the application in any event, although they have obviously been successful, I am satisfied that the parties should bear their own costs.

"Master Muir"

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