

**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**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
FIRE & FLOWER HOLDINGS CORP., FIRE & FLOWER INC., 13318184 CANADA INC.,
11180703 CANADA INC., 10926671 CANADA LTD., FRIENDLY STRANGER HOLDINGS
CORP., PINEAPPLE EXPRESS DELIVERY INC., and HIFYRE INC.**

Applicants

**FACTUM OF THE APPLICANTS
(Re: Approval and Reverse Vesting Order and Extension of Stay of Proceedings)**

August 28, 2023

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TO: THE SERVICE LIST

PART I - OVERVIEW¹

1. The Applicants obtained relief under the CCAA by an Initial Order dated June 5, 2023, which was amended and restated on June 15, 2023. On June 19, 2023, this Court granted the SISP Order which approved the SISP and authorized the Applicants and the Monitor to immediately commence the SISP and approved the Stalking Horse Agreement solely for the purpose of constituting the Stalking Horse Bid under the SISP.

2. This factum is filed in support of the Applicants' motion for, among other things, (a) approval of a going-concern sale transaction for the business of the Applicants, to be implemented through the proposed draft Approval and Reverse Vesting Order; and (b) approval of the proposed claims process through the proposed Claims Procedure Order, pursuant to which claimants may file claims against the Applicants.

3. Approval of the Subscription Agreement and the Transactions contemplated therein, as well as approval of the Back-Up Subscription Agreement and the Back-Up Transactions contemplated therein (to the extent that the Transactions cannot close for any reason) is the best path forward for the Applicants and provides for a going concern exit from the CCAA Proceedings. The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts, which occurred both prior to and after the commencement of the CCAA Proceedings, as well as a Court-approved and robust SISP.

4. The reverse vesting structure is necessary and appropriate to preserve the going-concern value of the Applicants' business. The granting of the Approval and Reverse Vesting Order is a condition of the Subscription Agreement, which is justified by, among other things: (a) the numerous intellectual properties, licenses, and regulatory approvals that the Applicants maintain in the highly regulated cannabis industry, with such licenses and regulatory approvals being cumbersome or very time-consuming to transfer to a third-party purchaser; (b) several of the Applicants' contracts held with government entities and other strategic suppliers may be difficult to transfer, resulting in additional delays, costs, and uncertainty; and (c) the Applicants will preserve tax attributes which would be otherwise adversely impacted through an asset purchase structure.

5. The Transactions also provide tangible benefits to the Applicants and their stakeholders. Among other benefits, the Transactions provide for all of the Applicants' secured liabilities being satisfied, leaving millions of dollars for recovery to the Applicants' unsecured creditors and the Applicants continuing as a going concern, resulting in the potential for many of the Applicants'

¹ Capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the affidavit of Stephane Trudel sworn June 5, 2023 (the "**Initial Trudel Affidavit**"), the affidavit of Stephane Trudel sworn June 14, 2023 (the "**Second Trudel Affidavit**"), and the affidavit of Stephane Trudel sworn August 23, 2023 (the "**Third Trudel Affidavit**").

approximately 594 employees to preserve their employment, a substantial number of the Applicants' landlords and suppliers of goods and services being able to maintain their business relationship with the Applicants, and continuity of supply in provinces where the Applicants have distribution operations which play a critical part in the provincial supply chain.

6. As a result of the SISP generating bids in excess of the Applicants' secured debt, the proposed Claims Process will provide unsecured creditors with an opportunity to receive distributions on account of their claims. The proposed Claims Process is a fair, efficient, and reasonable process for the determination and resolution of all claims against the Applicants and their directors and officers.

PART II – FACTS

7. The facts underlying this motion are more fully set out in the Initial Trudel Affidavit, the Second Trudel Affidavit, and the Third Trudel Affidavit.

A. Background

8. FFHC, through its wholly-owned subsidiaries, is an independent cannabis retail chain with 72 retail cannabis stores open across Canada and two (2) licensed wholesale distribution facilities. Certain subsidiaries of FFHC also carry on business as a wholesale cannabis distributor and operate digital platforms which provide various services and software products relating to cannabis products.²

9. As a result of the Companies' liquidity issues and being unable to successfully restructure their operations or secure replacement financing or investment outside of formal insolvency proceedings, the Applicants sought and were granted protection under the CCAA pursuant to the Initial Order granted on June 5, 2023 (which was amended and restated by the ARIO). The Initial Order and ARIO, among other things:

- (a) appointed FTI as Monitor;
- (b) granted a stay of proceedings in favour of the Applicants until and including September 1, 2023;
- (c) approved the execution by the Applicants of the DIP Facility Agreement, pursuant to which the Applicants were authorized to borrow up to a total amount of \$9.8 million;

² Third Trudel Affidavit at para. 5.

(d) approved the KERP and granted a corresponding KERP Charge in the amount of \$1.16 million; and

(e) granted the Administration Charge in the amount of \$600,000, the DIP Lender's Charge in the amount of \$9.8 million, and the D&O Charge in the amount of \$2.8 million.³

10. On June 19, 2023, the Applicants sought and obtained the SISP Order, which, among other things: (a) approved the SISP and authorized the Applicants and the Monitor to immediately commence the SISP; and (b) approved the Stalking Horse Agreement between FFHC and ACT Investor, solely for the purpose of constituting the Stalking Horse Bid under the SISP.⁴

B. The Applicants' Solicitation Efforts

(i) The Pre-Filing Strategic Process

11. Prior to initiating these CCAA Proceedings, the Applicants made various efforts since September 2022 to raise additional liquidity and pursue strategic alternatives. As set out in the Initial Affidavit, in September 2022, a special committee of the Board of the Company was formed to assist the Board in reviewing and negotiating matters related to the Companies' existing strategic capital investments and financing arrangements.⁵

12. Shortly thereafter, in October 2022, the Company entered into (a) a loan agreement with ACT Investor in respect of a \$11 million working capital loan pursuant to a secured loan facility with ACT investor, which was fully drawn down on October 21, 2022; and (b) a Warrant and Share Transaction which contemplated a \$5 million equity investment by ACT Investor and amendments to certain terms of existing warrants held by ACT Investor. The Warrant and Share Transaction was subject to shareholder approval and the shareholders ultimately did not approve the Warrant and Share Transaction. Accordingly, the Companies did not receive the additional \$5 million of working capital.⁶

13. In April 2023, the Company formed the Special Committee to review and assess potential financing opportunities and strategic alternatives. The Special Committee engaged in discussions pertaining to potential financing, acquisitions and/or sale transactions with the ACT

³ *Ibid* at paras. 7-8.

⁴ *Ibid* at para. 9.

⁵ *Ibid* at para. 12.

⁶ *Ibid* at para. 13.

Investor, key stakeholders of the Company and other industry participants and financial institutions. Despite these efforts, the Applicants were unable to secure additional financing.⁷

(ii) Conduct of the SISP

14. Following the commencement of the CCAA Proceedings and approval by this Court of the SISP on June 19, 2023, the Monitor conducted the SISP, in consultation with the Applicants.⁸

15. The SISP solicited interest in and opportunities for: (a) one or more sales or partial sales of all, substantially all, or certain portions of the Property or the Business; and/or (ii) an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Applicants or their Business. Accordingly, the SISP provided the Applicants with the latitude to pursue both asset and share transactions (including through a reverse vesting structure).⁹

16. The Monitor sent a Teaser Letter to 138 Known Potential Bidders. The Monitor received executed confidentiality and non-disclosure agreements from 33 potential bidders and provided each of these parties with access to the virtual data room facilitated by the Monitor for purposes of the SISP. Following the Phase 1 Bid Deadline on July 13, 2023, the Monitor, in consultation with the Applicants, determined that 12 Phase 1 Qualified Bidders were deemed Phase 2 Qualified Bidders and should proceed to Phase 2 of the SISP.¹⁰

17. The Monitor received a total of eight (8) Binding Offers by the Phase 2 Bid Deadline on August 11, 2023. The Binding Offers included three (3) Sale Proposals and five (5) Partial Sale Proposals.¹¹

18. On August 13, 2023, the Special Committee held a meeting with the Applicants' counsel and the Monitor to discuss the Binding Offers received. Following careful consideration of the available options, the Special Committee, in consultation with and based on the recommendation of the Monitor and Applicants' counsel, determined that it was in the Applicants' and their stakeholders' best interest to designate the Bid by FIKA and one of the other Sale Proposals (the Unsuccessful Bid) to be Phase 2 Qualified Bids, and to hold the Auction with FIKA, the Unsuccessful Bidder, and the Stalking Horse Bidder (ACT Investor) participating in the Auction.¹²

⁷ *Ibid* at para. 14.

⁸ *Ibid* at para. 15.

⁹ *Ibid* at para. 16.

¹⁰ *Ibid* at para. 19.

¹¹ *Ibid* at para. 20.

¹² *Ibid* at para. 23.

19. The Auction was held virtually via videoconference on August 15, 2023. As a result of the Auction FIKA's Bid was declared as the Successful Bid and ACT Investor's Bid as the Back-Up Bid.¹³

20. At the conclusion of the Auction, FIKA and ACT Investor were notified by the Monitor that their Bids were designated as the Successful Bid and Back-Up Bid, respectively. Accordingly, (a) FFHC and FIKA entered into the Subscription Agreement; and (b) FFHC and ACT investor entered into the Back-Up Subscription Agreement.¹⁴

C. The Subscription Agreement and Transactions

21. The Transactions contemplated in the Subscription Agreement have been structured to form a "reverse vesting" transaction. In essence, instead of providing for a traditional asset sale transaction where all purchased assets are purchased and transferred to the purchaser on a "free and clear" basis and all excluded assets, excluded contracts and excluded liabilities remain with the debtor company, the Transactions provide for a share transaction whereby, essentially:

(a) FIKA will subscribe for and purchase new shares of FFHC for the purchase price of \$36 million, who will, in turn, cancel and terminate all of its existing shares so that FIKA may become the sole shareholder of FFHC and ultimately, each of the subsidiaries of FFHC; and

(b) all Excluded Contracts, Excluded Assets, and Excluded Liabilities with respect to the Applicants will be transferred and "vested out" to Residual Co., so as to allow FIKA to indirectly acquire the Applicants' business and assets on a "free and clear" basis.¹⁵

22. The Subscription Agreement represents the best possible outcome for the Applicants, its creditors, and other stakeholders in the circumstances. The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts on the part of the Applicants and the Monitor, which occurred both prior to and after the commencement of the CCAA Proceedings (as applicable).¹⁶

¹³ *Ibid* at paras. 26-27.

¹⁴ *Ibid* at para. 28; Exhibit "A" to the Supplementary Affidavit of Stephane Trudel sworn August 28, 2023.

¹⁵ *Ibid* at para. 36.

¹⁶ *Ibid* at para. 33.

D. The Back-Up Subscription Agreement and Back-Up Transactions

23. For the same reasons that the Subscription Agreement and the Transactions contemplated therein should be approved (which are set out below), this Court should approve the Back-Up Subscription Agreement and the Back-Up Transactions contemplated therein, but only to the extent that the Subscription Agreement and the Transactions contemplated therein do not close for any reason.¹⁷

E. Claims Process

24. As a result of the SISP generating bids in excess of the Applicants' secured debt, the Applicants are proposing to establish a Claims Process for the identification, quantification, and resolution of unsecured claims against the Applicants (which will be vested into Residual Co. following closing of the Transactions) and their directors and officers.¹⁸

25. The Applicants' proposed Claims Process is embodied in the Claims Procedure Order, which has been prepared by the Applicants in consultation with the Monitor and its counsel.¹⁹

PART III – ISSUES

26. The issues to be determined on this motion are whether this Court should:

- (a) approve the Subscription Agreement and the Transactions contemplated therein;
- (b) grant ancillary relief in respect of the shares being cancelled and the Articles of Amendment
- (c) approve the Back-Up Subscription Agreement and the Transactions contemplated therein;
- (d) grant the requested releases in favour of the Released Parties and Other Released Parties;
- (e) seal the Confidential Appendix to the Third Report, which contains a summary of the economic terms of the bids received in the SISP;
- (f) approve the proposed Claims Process;
- (g) approve the activities of the Monitor as outlined in the Monitor's Reports; and

¹⁷ *Ibid* at para. 60.

¹⁸ *Ibid* at para. 64.

¹⁹ *Ibid* at para. 66.

- (h) extend the Stay Period.

PART IV – LAW & ARGUMENT

A. The Subscription Agreement and the Transactions Should be Approved

(i) This Court has Jurisdiction to Approve a Reverse Vesting Transaction

27. A reverse vesting order (“**RVO**”) generally involves a series of steps whereby: (a) the purchaser becomes the sole shareholder of the debtor company; (b) the debtor company retains its assets, including key contracts and permits; and (c) the liabilities not assumed by the purchaser are vested out and transferred, together with any excluded assets, to a newly incorporated entity. The assets and liabilities that are vested in the separate entity or entities (referred to in the Approval and Reverse Vesting Order as “**Residual Co.**”) may then be addressed through a bankruptcy or similar process.²⁰

28. An RVO can be contrasted with a traditional vesting order, as contemplated by section 36(4) of the CCAA, in which the assets of the debtor company that a purchaser acquires are transferred out of the debtor entity and vested in the purchaser free and clear of any encumbrances or claims, other than those expressly assumed by the purchaser.²¹ All excluded assets and liabilities remain with the debtor company.

29. RVOs have been described as a relatively new structure to achieve the remedial objectives of the CCAA.²² Courts have expressed the view that they should not be the “norm” and that the Monitor and the Court should consider carefully whether this approach is warranted.²³ However, RVOs have been recognized on a number of occasions as an appropriate way for a debtor to sell its business as a going-concern where the circumstances justify such a structure.²⁴

30. Examples of recent RVOs approved by Courts include:

- (a) *Acerus*: RVO granted in June 2023 by the Superior Court of Justice (Ontario) (Commercial List) in respect of a pharmaceutical business²⁵;

²⁰ *Just Energy Group Inc. et. Al. v Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354 at para. 27. [*Just Energy*]

²¹ *Arrangement relatif à Black Rock Metals Inc.*, 2022 QCCS 2828 at para. 85, leave to appeal to QCCA denied, August 5, 2022. [*Blackrock Metals*]

²² *Ibid.*

²³ *Ibid* at para. 99, citing *Harte Gold (Re)*, 2022 ONSC 653 at para. 38. [*Harte Gold*]

²⁴ To name a few examples, see *Blackrock Metals*, *supra*; *Harte Gold*, *supra*; *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488, leave to appeal to SCC denied [*Nemaska*]; *Just Energy*, *supra*; *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314. [*Acerus*]; and in respect of companies in the cannabis industry: *CannaPiece Group Inc. v Marzilli*, 2023 ONSC 3291 [*Cannapiece*] and *Trichome Financial Corp. et al (Re)*, (April 6, 2023), Toronto, Court File No. CV-22-00689857-00CL (Approval and Vesting Order) (ONSC).

²⁵ *Acerus*, *supra*.

- (b) *Trichome*: RVO granted in April 2023 by the Superior Court of Justice (Ontario) (Commercial List) in respect of a cannabis producer²⁶;
- (c) *CannaPiece*: RVO granted in February 2023 by the Superior Court of Justice (Ontario) (Commercial List) in respect of a cannabis producer²⁷;
- (d) *Blackrock Metals*: RVO granted in July 2022 by the Superior Court of Quebec in respect of a metals and materials manufacturing business²⁸;
- (e) *Harte Gold*: RVO granted in February 2022 by the Superior Court of Justice (Ontario) (Commercial List) in respect of a gold producer operating a gold mine in northern Ontario²⁹; and
- (f) *Just Energy*: RVO granted in November 2022 by the Superior Court of Justice (Ontario) (Commercial List) in respect of a retail energy provider.³⁰

31. As submitted further below, compelling circumstances justifying a reverse vesting structure exist in the case at bar. Referring to the factors identified in *Harte Gold* as guideposts for this Court in considering a proposed RVO³¹, the Approval and Reverse Vesting Order is necessary in this case to give effect to the best possible outcome and a going-concern restructuring of the Applicants' business.

32. The jurisdiction to approve a transaction that is to be implemented through an RVO is found in section 11 of the CCAA, which gives the Court broad powers to make any order it thinks fit.³² Section 11 of the CCAA states:

“Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.”

33. Section 36 of the CCAA is also sometimes seen as providing jurisdiction for RVOs and/or providing guidance in respect of factors to be considered in assessing whether to exercise discretion to approve such a transaction, as further outlined below.³³

²⁶ *Trichome*, *supra*.

²⁷ *CannaPiece*, *supra*.

²⁸ *Blackrock Metals*, *supra*.

²⁹ *Harte Gold*, *supra*.

³⁰ *Just Energy*, *supra*.

³¹ *Harte Gold*, *supra* at para. 38.

³² *Blackrock Metals*, *supra* at para. 87; *Quest University (Re)*, 2020 BCSC 1883, at para. 27; *Harte Gold*, *supra* at paras. 36-37.

³³ *Just Energy*, *supra* at paras. 30-31.

(ii) The Subscription Agreement and the Transactions are Appropriate in the Circumstances

34. In *Harte Gold* and *Acerus*, Justice Penny held that scrutiny of a proposed reverse vesting transaction may be informed by the following enquiries:

- (a) why the reverse vesting order is necessary in this case;
- (b) whether the reverse vesting transaction structure produces an economic result at least as favourable as any other viable alternative;
- (c) whether any stakeholder is worse off under the reverse vesting transaction structure than they would have been under any other viable alternative; and
- (d) whether the consideration being paid for the debtors' business reflects the importance and value of the licenses and permits (or other intangible assets) being preserved under the reverse vesting transaction structure.³⁴

35. When exercising its jurisdiction under section 11 of the CCAA to approve a reverse vesting transaction, this Court has also concurrently considered the non-exhaustive factors enumerated under subsection 36(3) of the CCAA and those articulated in *Royal Bank v Soundair*. Together, these factors include:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the Court a report stating that in its opinion the sale or disposition would be more beneficial to creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties;
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value;

³⁴ *Harte Gold*, *supra* at para. 38; *In the Matter of the Companies' Creditors Arrangement Act and In the Matter of CannaPiece Group Inc.*, 2023 ONSC 841 at para. 52 [CannaPiece]; *Just Energy*, *supra* at para. 33.

- (g) whether sufficient effort has been made to obtain the best price and that the debtors have not acted improvidently;
- (h) the efficacy and integrity of the process by which officers have been obtained;
- (i) whether the interests of all parties have been considered; and
- (j) whether there has been unfairness in the working out of the process.³⁵

36. Applied here, the foregoing considerations and factors support the approval of the Subscription Agreement and the Transactions, and the granting of the Approval and Reverse Vesting Order.

(A) *Harte Gold and Acerus Factors*

37. ***The proposed reverse vesting restructure is necessary in the circumstances.*** Courts have held that RVOs are generally appropriate in at least three types of circumstances:

- (a) where the debtor operates in a highly-regulated environment in which its existing permits, licences or other rights are difficult or impossible to assign to a purchaser;
- (b) where the debtor is party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser; and
- (c) where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.³⁶

38. The Applicants operate in the cannabis industry which is heavily regulated. In order for the Companies to carry on their business, they are required to maintain various licenses. The licenses and contracts currently held by the Companies which would require transfer or re-establishment and/or new arrangements to be entered into if an asset transfer was implemented include but are not limited to:

- (a) cannabis retail and operator licenses;
- (b) cannabis wholesale permit and a limited distribution license;

³⁵ CCAA, *supra* s. 36(3); *Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 (Ont. CA) at para. 16. See also, *Harte Gold*, *supra* at paras. 20-21; *CannaPiece*, *supra* at paras. 53-54; *Just Energy*, *supra* at paras. 31-32.

³⁶ *Blackrock Metals*, *supra* at paras. 114-116; *Harte Gold*, *supra* at para. 71; *Quest University*, *supra* at para. 136, referring to the RVO granted in *Re Comark Holdings Inc et al*, (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. SCJ [Commercial List]) proceeding to preserve tax attributes, and para. 142, referring to the RVO granted in *JMB Crushing Systems Inc. (Re)*, 2020 ABQB 763 to preserve both licenses and tax attributes.

- (c) contracts with certain provincially operated cannabis distributors;
- (d) contracts with certain licensed cannabis producers;
- (e) contracts with certain suppliers of strategic data sources;
- (f) intellectual property; and
- (g) contracts with certain premises security and other service providers, whose services are required to maintain the applicable licenses and permits under the applicable cannabis laws.³⁷

39. Accordingly, the Subscription Agreement was structured as a reverse vesting transaction for a variety of factors, including, among others:

- (a) the Applicants maintain various licenses that are required to maintain its operations. The Applicants currently operate seventy-two (72) cannabis retail stores pursuant to cannabis retail and operator licenses in good standing, and two (2) wholesale distribution facilities pursuant to a cannabis wholesale permit and a limited distribution license. These licenses and permits are held across British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, and the Yukon;
- (b) the Applicants hold various contracts with government entities; and
- (c) the Companies have suffered operating losses.³⁸

40. Under a traditional asset sale transaction structure, some of the Applicants' licenses and contracts with government entities may be difficult to transfer to a purchaser and, to the extent that such transfer is possible, the steps required to proceed with such transfer will likely result in additional delays, costs and uncertainty.³⁹

41. Additionally, the reverse vesting structure permits the maintenance of the Applicants' tax attributes, which includes the Applicants' operating losses.⁴⁰

42. ***The Subscription Agreement and the Transactions produce an economic result more favourable than any other alternative.*** The Transactions contemplated in the Subscription Agreement represents the best possible outcome for the Applicants and their stakeholders in the circumstances.

³⁷ Third Trudel Affidavit, *supra* at paras. 38-40.

³⁸ *Ibid* at paras. 39-40 and 45.

³⁹ *Ibid* at para. 41.

⁴⁰ *Ibid* at para. 45.

43. The benefits of the Transactions include, among others:

- (a) based on the price payable under the Subscription Agreement, all of the Applicants' secured liabilities will be satisfied, leaving millions of dollars for recovery to the Applicants' unsecured creditors;
- (b) various unsecured and contingent liabilities will be assumed;
- (c) the Applicants will continue operations as a going concern, resulting in:
 - (i) the potential for many of the Applicants' approximately 594 employees to preserve their employment;
 - (ii) a substantial number of the Applicants' landlords and suppliers of goods and services being able to maintain their business relationships with the Applicants; and
 - (iii) continuity of supply in provinces where the Applicants have distribution operations which play a critical part in the provincial supply chain.⁴¹

44. The pre-filing strategic process leading up to the commencement of the CCAA Proceedings and the conduct of the Court-approved and robust SISP broadly canvassed the market of parties interested in the Applicants' business and assets and resulted in a robust and competitive Auction. Further, the timelines under the SISP were reasonable. Accordingly, the purchase price payable under the Subscription Agreement represents the best possible outcome for the Applicants and their stakeholders, which resulted from a broad canvass of the market and a competitive process.⁴²

45. The Monitor believes that the Subscription Agreement and the Transactions contemplated therein produce an economic result that would be at least as favourable as any other viable alternative, and likely leads to a better recovery.⁴³

46. ***The RVO structure does not result in stakeholders being worse off than they would have been under any other viable alternative.*** While a variety of liabilities will be vested out into Residual Co. in this structure, the same result would have occurred had the transaction been implemented in an asset transaction structure.⁴⁴

⁴¹ *Ibid* at para. 35.

⁴² *Ibid* at paras. 32 and 34.

⁴³ Third Report of the Monitor dated August 26, 2023 (the "Third Report") at para. 55.

⁴⁴ Third Trudel Affidavit, *supra* at para. 48.

47. The concept of Retained Liabilities in the Subscription Agreement provides a benefit for a variety of stakeholders that would not have otherwise had this benefit in a traditional asset vesting transaction structure. The Retained Liabilities include: (a) all Post-Filing Claims; (b) all liabilities of the Applicants arising from and after Closing; (c) tax liabilities; (d) Intercompany Claims; (e) indemnification obligations to current and former directors and officers of the Applicants, subject to certain conditions; (f) Priority Payments; and (g) Administration Expense Costs not otherwise paid by the F&F Group.⁴⁵

48. The Monitor believes that the reverse vesting structure produces an economic result that would be at least as favourable as any other viable alternative, and likely leads to a better recovery.⁴⁶

49. ***The consideration payable for the Purchased Shares pursuant to the Subscription is fair, reasonable, and reflects the importance of the assets being preserved under the RVO structure.*** The purchase price for the Purchased Shares is \$36 million. This purchase price is fair and reasonable, as confirmed by the results of the pre-filing strategic process and the Court-approved and robust SISF. The consideration allows for the satisfaction of all the Applicants' secured liabilities and millions of dollars of recovery for the Applicants' unsecured creditors. Further, the consideration provides the Applicants with the ability to implement the Transactions and exit the CCAA Proceedings as a going-concern.⁴⁷

50. As referenced above, the Applicants' hold numerous licenses and contracts with government entities, and same may be difficult to transfer. Further, the Applicants' tax attributes are also an important asset being preserved under the RVO structure.⁴⁸

(B) Section 36 CCAA Factors

51. ***The process leading up to the Subscription Agreement and the Transactions was reasonable.*** The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investments beginning as early as September 2022 and a SISF which was conducted properly by the Monitor, with support from the Applicants throughout, as required and necessary.⁴⁹

52. Such efforts included, among others:

- (a) the Applicants seeking refinancing or investment options;

⁴⁵ *Ibid.*

⁴⁶ Third Report, *supra* para. 55.

⁴⁷ Third Trudel Affidavit, *supra* at para. 35.

⁴⁸ *Ibid* at paras. 42 and 44-45.

⁴⁹ *Ibid* at para. 49.

- (b) the pre-filing strategic process which commenced as early as September 2022;
- (c) during the course of the CCAA the Monitor broadly canvassed the market under the SISP by sending a Teaser Letter to 138 Known Potential Bidders; and
- (d) the careful consideration of the Bids by the Special Committee and the Monitor, and their respective advisors and counsel of all available options.⁵⁰

53. The Monitor believes the process leading to the finalization of the Subscription Agreement and Back-Up Subscription Agreement was reasonable in the circumstances.⁵¹

54. **The Monitor approved the process leading up to the Subscription Agreement and the Transactions.** The SISP was developed in consultation with and supported by the Monitor.⁵² Further, the Monitor administered the SISP in accordance with its terms and the SISP Order. The Subscription Agreement is the product of the Applicants and the Monitor's continued efforts to solicit interest in the Applicants' business and/or assets and is supported by the Monitor.⁵³

55. **The Third Report states that the Subscription Agreement and the Transactions would be more beneficial to creditors than a sale or disposition under a bankruptcy.** The Monitor has conducted an analysis of whether the completion of the Transactions contemplated by the Subscription Agreement would be more beneficial to the Applicants' creditors and other stakeholders as compared to a sale or disposition of the business and assets of the Applicants under a bankruptcy.

56. The Monitor is of the view that the Transactions are far more favourable to the Applicants' creditors and stakeholders than a bankruptcy.⁵⁴

57. **Stakeholders were consulted during the sale process.** The Companies consulted with their largest secured creditor, ACT Investor, throughout the pre-filing strategic process. ACT Investor also acted as the Stalking Horse Bidder and was given the opportunity to participate in the Auction.⁵⁵

⁵⁰ *Ibid* at paras. 19, 23 and 49.

⁵¹ Third Report, *supra* at para. 54.

⁵² Second Trudel Affidavit, *supra* at para. 16.

⁵³ Third Trudel Affidavit, *supra* at para. 49.

⁵⁴ Third Report, *supra* at paras. 44 and 54.

⁵⁵ Third Trudel Affidavit, *supra* at para. 28.

58. ***The Subscription Agreement and the Transactions allows various stakeholders to maintain their rights.*** As referenced above, the Applicants' stakeholders are no worse off than they would have been under any other viable alternative.

59. In addition, the Transactions result in creditors maintaining rights that they would otherwise have in an asset sale transaction. In the case of parties with existing contracts with the Applicants, though no assignment of contracts (consensual or through an assignment order) is contemplated as part of the Transactions, the Subscription Agreement provides for all contracts, other than the Excluded Contracts, to remain with the Applicants. The contracting parties therefore have the opportunity to continue supplying goods and services to the Applicants post-emergence from the CCAA Proceedings.⁵⁶

60. While the Subscription Agreement does not require FIKA to cure pre-filing arrears under the Retained Contracts, contract counterparties have been served with the Applicants' motion record to provide them with notice that their contracts may be retained or excluded as part of the Transactions.⁵⁷

61. ***Sufficient effort has been made to obtain the best price and the Applicants have not acted improvidently.*** As referenced above, the execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investments beginning as early as September 2022. Further, the SISP was conducted in two separate phases and also resulted in a competitive Auction for the Applicants' business.⁵⁸

62. The Monitor believes that the Transactions are a result of the significant efforts of the Applicants and the Special Committee and represents the best possible outcome for the Applicants' business.⁵⁹

(iii) The Ancillary Features of the Approval and Reverse Vesting Order are Appropriate in the Circumstances

63. Consistent with RVOs previously granted by this Court⁶⁰, the proposed Approval and Reverse Vesting Order will terminate and cancel all options, securities and other rights held by any person that are convertible or exchangeable for any securities of FFHC (the "**Ancillary**

⁵⁶ *Ibid* at para. 46.

⁵⁷ *Ibid*.

⁵⁸ *Ibid* at paras. 23-26 and 46.

⁵⁹ Third Report, *supra* at para. 54.

⁶⁰ *In the Matter of a Plan of Compromise or Arrangement of FIGR Brands, Inc., FIGR Norfolk Inc. and Canada's Island Garden Inc.* (June 10, 2021), Toronto, CV-21-00655373-00CL (Approval and Vesting Order) (ONSC); *In the Matter of a Plan of Compromise or Arrangement of Superette Inc. et al.* (December 20, 2022), Toronto, CV-22- 00686245-00CL (Approval and Vesting Order) (ONSC) at paras 4, 5(g); *In the Matter of a Plan of Compromise or Arrangement of Harte Gold Corp.* (January 28, 2022), Toronto, CV-21-00673304-00CL (Approval and Reverse Vesting Order) (ONSC) at paras 6, 7(c); *In the Matter of a Plan of Compromise or Arrangement of Just Energy Group Inc. et al.* (November 3, 2022), Toronto, CV-21-00658423-00CL (Approval and Vesting Order) (ONSC) at paras 4, 5(e).

Relief”). FFHC, previously publicly traded on the TSX, will be taken private as a result of the transaction.

64. The shareholders of FFHC have been notified of the CCAA Proceedings and the proposed transaction by way of various press releases and notices issued by the Applicants and/or the Monitor.

65. Read together, subsection 36(1) and section 11 of the CCAA authorize this Court to grant the Ancillary Relief. Subsection 36(1) of the CCAA expressly authorizes this Court to approve sale transactions notwithstanding "any requirement for shareholder approval" – the logic of which has been extended to reverse vesting transactions and the cancellation of equity interests – while section 11 of the CCAA permits this Court to make "any order that it considers appropriate in the circumstances."⁶¹

66. As this Court recognized in *Harte Gold* and affirmed in *Just Energy*, where shareholders "have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders".⁶²

67. In this case, the Applicants submit that it is appropriate for this Court to exercise its discretion to approve the Ancillary Relief. To do otherwise would be contrary to the treatment of equity claims under subsections 6(8) and 22(1) of the CCAA.⁶³

68. FFHC was incorporated under the OBCA.⁶⁴ Pursuant to section 186(1) of the OBCA, "reorganization" means a court order made under the *Bankruptcy and Insolvency Act* or an order made under the CCAA approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), Justice Penny in *Harte Gold* viewed the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as a proposed transaction brought forward for the approval of the Court under the provisions of the CCAA.⁶⁵

69. Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of

⁶¹ CCAA, *supra* s. 11 and 36(1); *Harte Gold*, *supra* at paras. 59-64; *Just Energy*, *supra* at para. 58.

⁶² *Harte Gold*, *supra* at para. 64; *Just Energy*, *supra* at para. 58.

⁶³ CCAA, *supra* s. 6(8) and 22(1); *Harte Gold*, *supra* at paras. 63-64.

⁶⁴ Initial Trudel Affidavit, *supra* at para. 19.

⁶⁵ *Harte Gold*, *supra* at para. 61; OBCA, s. 186(1).

all or any of its shares. This provides the jurisdiction of the Court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.⁶⁶

B. The Back-Up Subscription Agreement and Back-Up Transactions Should be Approved

70. For the same reasons set out above with respect to why the Subscription Agreement and the Transactions contemplated therein should be approved, this Court should approve the Back-Up Subscription Agreement and the Back-Up Transactions contemplated therein, but only to the extent that the Subscription Agreement and the Transactions contemplated therein do not close for any reason.⁶⁷

71. Among other benefits, the Back-Up Subscription Agreement and Back-Up Transactions also result in the Applicants continuing operations as a going concern, with all of the Applicants' secured liabilities being satisfied and millions of dollars for recovery to the Applicants' unsecured creditors.⁶⁸

C. The Releases in the Approval and Reverse Vesting Order Should be Granted

(i) This Court has Jurisdiction to Approve the Releases Outside of a CCAA Plan of Compromise or Arrangement

72. The proposed Approval and Reverse Vesting Order includes Releases in favour of (a) the Released Parties (being the current directors, officers, employees, legal counsel, consultants and advisors to the Applicants and Residual Co.; and the Monitor and its current directors, officers, partners, employees and advisors) from the Released Claims; and (b) the Other Released Parties (being the Applicants, ACT Investor, in its capacity as the DIP Lender and the Stalking Horse Bidder, and FIKA) from the Other Released Claims.⁶⁹

73. The Released Claims covers any and all present and future claims against the Released Parties based upon any fact or matter of occurrence in respect of the CCAA Proceedings, the Subscription Agreement, or the Back-Up Subscription Agreement, as the case may be, and the completion of the Transactions or the Back-Up Transactions, as the case may be. The Released Claims do not release claims which are not permitted to be released pursuant to section 5.1(2) of the CCAA.⁷⁰

⁶⁶ *Harte Gold*, *supra* at [para. 62](#); OBCA, [s. 168](#) and [186\(2\)](#).

⁶⁷ Third Trudel Affidavit, *supra* at para. 60.

⁶⁸ *Ibid* at para. 61.

⁶⁹ *Ibid* at para. 50.

⁷⁰ *Ibid* at para. 51.

74. The Other Released Claims covers any and all present and future claims against the Other Released Parties based upon any fact or matter of occurrence in respect of any act or omission, transaction, dealing or other occurrence existing or taking place prior to the filing of the Monitor's Closing Certificate, or undertaken or completed in connection with or pursuant to the terms of the Approval and Reverse Vesting Order and that relate in any manner whatsoever to the Subscription Agreement or Back-Up Subscription Agreement, as the case may be, the completion of the Transactions or the Back-Up Transactions, as the case may be, the closing documents, any agreement, document, instrument, matter or transaction involving the Applicants arising in connection with or pursuant to any of the foregoing, and/or the consummation of the Transactions or the Back-Up Transactions, as the case may be.⁷¹

75. Releases for directors and officers, the Monitor and other advisors to debtor companies are a common feature of CCAA plans. The absence of a CCAA plan, however, does not deprive the court of the jurisdiction to approve releases for these parties. Section 5.1(1) of the CCAA, for example, which deals with releases relating to directors, is drafted permissively. It does not limit the jurisdiction of the Court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.⁷²

76. CCAA courts have, on multiple occasions, approved releases in the absence of a CCAA plan, both on consent and in contested matters, including in the case of RVOs. These releases have been in favour of, among other parties, directors, officers, monitors, counsel, employees, shareholders and advisors.⁷³

77. In *Harte Gold* and *Acerus*, Justice Penny, as part of an approval and vesting order in respect of a reverse vesting transaction, granted a release in favour of (a) the current and former directors and officers of the debtor company and the new companies to be incorporated pursuant to the RVO, the monitor, and the purchaser and its directors and officers.⁷⁴

78. Justice Penny in *Harte Gold*, citing Morawetz C.J.'s decision in *Lydian*, evaluated the requested release with reference to the following non-exhaustive factors:

- (a) Whether the claims to be released are rationally connected to the purpose of the plan;
- (b) Whether the plan can succeed without the releases;

⁷¹ *Ibid.*

⁷² CCAA, *supra* s. 5.1(1); *Green Relief Inc. (Re)*, 2020 ONSC 6837 at paras. 23 and 25. [*Green Relief*]

⁷³ *Green Relief*, *supra* at para. 76; *Nelson Education Limited (Re)*, 2015 ONSC 5557 at para. 49; *Golf Town Canada Holdings Inc. (Re)* (March 29, 2018), Toronto, CV-16-11527-00CL (CCAA Termination Order) (ONSC); *Green Growth Brands Inc. et al. (Re)*, (May 19, 2021), Toronto, Court File No. CV-20-00641220-00CL (Order Terminating CCAA Proceedings) (ONSC).

⁷⁴ *Harte Gold*, *supra* at para. 80; *Acerus*, *supra* at para. 38.

- (c) Whether the parties being released contributed to the plan;
- (d) Whether the releases benefit the debtors as well as the creditors generally;
- (e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and
- (f) Whether the releases are fair, reasonable and not overly-broad.⁷⁵

79. Justice Penny noted that, as in most discretionary exercises, it is not necessary for each of the above factors to apply in order for a release to be granted.⁷⁶

80. The Releases sought by the Applicants are consistent with those that have previously been approved by this Court and as will be described below, are aligned with the factors set out in *Lydian*.

(ii) The Releases Should be Granted in the Circumstances

81. The Releases are reasonable and appropriate in the circumstances and should be granted for the following reasons:

(a) ***The claims to be released are rationally connected to the purpose of the restructuring.*** The claims released are rationally connected to the Applicants' restructuring. The Releases will have the effect of diminishing claims against the Released Parties and Other Released Parties, which in turn will diminish indemnification claims by the Released Parties against the Administration Charge and the D&O Charge. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Applicants' restructuring.

(b) ***The Released Parties contributed to the restructuring.*** The Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of the Applicants were instrumental to the conduct of the pre-filing strategic process, the SISF and the continued operations of the Applicants during the CCAA Proceedings. With a proposed sale that, if approved by this Court and completed, will maintain the Applicants as a going concern, these CCAA Proceedings have had a successful outcome for the benefit of the Applicants'

⁷⁵ *Harte Gold*, supra at paras. 80-86; *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. [*Lydian*]. See also *Green Relief*, supra, where Justice Koehnen also cited Morawetz C.J.'s decision in *Lydian*.

⁷⁶ *Harte Gold*, supra at para. 80.

stakeholders. The Released Parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of the Released Claims.

(c) ***The Other Released Parties contributed to the restructuring.*** The Other Released Parties have also made significant contributions to the Applicants' restructuring. The same contributions above that the Released Parties made are equally applicable to the Applicants. With respect to ACT Investor, in its capacity as the DIP Lender and the Stalking Horse Bidder – the DIP Facility provided the Applicants with cash when the Applicants were facing an imminent liquidity crisis prior to commencement of the CCAA Proceedings, and the Stalking Horse Bid provided certainty that a going-concern solution for the Applicants had already been identified, set a baseline purchase price and deal structure in order to encourage superior bids from interested parties, and maximized value for the benefit of the Applicants' stakeholders.⁷⁷ The Subscription Agreement, which represents the highest and best offer for the Applicants, was submitted by FIKA. Given the successful outcome for the Applicants and their stakeholders, the time, energy, and resources that FIKA, ACT Investor and the Applicants have spent to achieve this outcome are deserving of the Other Released Claims.

(d) ***The Releases are fair, reasonable and not overly broad.*** The Releases are fair and reasonable. The Releases are sufficiently narrow in the circumstances, as the Releases carve out and preserve claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. Further, the Release in favour of the Released Parties only applies to the Applicants' current directors, officers, employees, legal counsel, consultants and advisors.⁷⁸ Accordingly, claimants may make a claim in the Claims Process against the Applicants' former directors and officers. Finally, the Releases do not preclude claimants from asserting claims in the Claims Process.

(e) ***The Applicants' restructuring may be jeopardized without the Releases.*** The Releases will bring certainty and finality for the Released Parties and Other Released Parties. Additionally, the Applicants and the Monitor believe that the Releases are also an essential component to the Transactions and Back-Up Transactions, as applicable.⁷⁹

⁷⁷ Third Trudel Affidavit, *supra* at para. 17.

⁷⁸ *Ibid* at para. 52.

⁷⁹ *Ibid* at para. 55.

(f) ***The Releases benefits the Applicants as well as the creditors generally.*** The Releases benefit the Applicants' creditors and other stakeholders by reducing the potential for the Released Parties to seek indemnification from the Applicants, thus minimizing further claims against the Applicants.

(g) ***Contract counterparties and creditors had knowledge of the nature and effect of the Releases.*** Creditors on the Service List were served with materials relating to this motion. The Applicants also took additional efforts to serve other creditors who are not on the Service List. To date, no creditor has objected to the Releases.

82. The Monitor believes that the Releases are appropriate in the circumstances and are an essential component to the Transactions and Back-Up Transactions, as applicable.⁸⁰

D. The Confidential Appendix to the Third Report Should be Sealed

83. Pursuant to the *Courts of Justice Act* (Ontario), this Court has the discretion to order that any document filed in a civil proceeding be treated as "confidential", sealed and not form part of the public record."⁸¹

84. The test to determine if a sealing order should be granted is set out in *Sierra Club* as recast in *Sherman Estate*:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.⁸²

85. The Supreme Court in *Sierra Club* and *Sherman Estate* explicitly recognized that commercial interests such as preserving confidential information or avoiding a breach of a confidentiality agreement are an "important public interest" for purposes of this test.⁸³

⁸⁰ Third Report, *supra* at para. 53.

⁸¹ *Courts of Justice Act*, R.S.O. 1990, c C.43, s. 137(2). See also *Target Canada Corp. Re*, 2015 ONSC 1487 at paras. 28-30.

⁸² *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 53 [*Sierra Club*]; *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 38 and 43. [*Sherman Estate*]

⁸³ *Sierra Club*, *supra* at para. 55; *Sherman Estate*, *supra* at paras. 41-43.

86. Courts have applied the Sierra Club and Sherman Estate tests in the insolvency context and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors.⁸⁴ In particular:

(a) Chief Justice Morawetz recently granted a sealing order in *Bridging Finance* in respect of bids and a receiver's summary of the economic terms of such bids, because they contained confidential information⁸⁵; and

(b) Justice Penny very recently granted a sealing order in *Acerus* in respect of a confidential summary of bids received in a SISP⁸⁶, which is substantially the same in all material respects to the Confidential Appendix that the Applicants are seeking a sealing order in respect of.

87. The Applicants respectfully request that this Court seals the Confidential Appendix to the Third Report, which contains a summary of the economic terms of the Bids received. This document contains commercially sensitive information that may, if the Transaction fails to close, affect the integrity of any future sale of the assets and/or business of the Applicants.

88. The salutary effects of the sealing order, which provides the Applicants with the ability to maximize value for its assets at a future date, far outweighs the deleterious effects of the public not knowing the exact details of the Bids received.

89. The Monitor supports the Applicants' request to seal the Confidential Appendix to the Third Report.⁸⁷

E. The Claims Process Should be Approved

90. The Court's general power under section 11 of the CCAA includes the authority to approve a process to solicit claims against a debtor company. This authority is "well accepted" in CCAA proceedings.⁸⁸

91. This Court routinely approves claims processes in connection with the CCAA restructuring process.⁸⁹

92. Claims processes assist organizations under the protection of the CCAA in determining the universe of claims against the debtor entity for the purposes of, among other things, voting

⁸⁴ *Re Danier Leather Inc.*, 2016 ONSC 1044 at para. 82; *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347 at paras. 23-28.

⁸⁵ *Ontario Securities Commission v. Bridging Finance Inc.*, 2022 ONSC 1857 at paras. 50-54. [*Bridging Finance*]

⁸⁶ *Acerus*, *supra* at para. 39.

⁸⁷ Third Report, *supra* at para. 40.

⁸⁸ *ScoZinc Ltd. Re.*, 2009 NSSC 136 at para. 25. [*ScoZinc*]

⁸⁹ *US Steel Canada Inc., Re.*, 2017 ONSC 1967 at paras. 5-6; *Laurentian University of Sudbury*, 2021 ONSC 3885.

on a Plan and/or determining potential distributions to creditors. A claims process provides certainty for the debtor and its stakeholders in making informed choices about restructuring options. These orders should be both flexible and expeditious.⁹⁰

93. The proposed Claims Process meets the purpose of claims processes generally, which is “to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost-efficient manner”.⁹¹

94. The proposed Claims Process is a fair, efficient, and reasonable process for the determination and resolution of all Claims against the Applicants and their directors and officers. The Claims Process has been tailored to the specific context of this CCAA Proceeding and provides for the efficient, cost-effective, and streamlined adjudication of all Claims against the Applicants and their directors and officers.

F. The Monitor’s Activities Should be Approved

95. In *Re Target Canada Co.*, Morawetz R.S.J. (as he then was) stated that a request to approve a monitor’s report “is not unusual”⁹² and that: there are good policy and practical reasons for the court to approve of Monitor’s activities and providing a level of protection for Monitors during the CCAA process... Specifically, Court approval:

- (a) allows the Monitor to move forward with next steps in the CCAA proceedings;
- (b) brings the Monitor’s activities before the Court;
- (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified;
- (d) enables the Court to satisfy itself that the Monitor’s activities have been conducted in prudent and diligent manners;
- (e) provides protection for the Monitor not otherwise provided by the CCAA; and
- (f) protects the creditors from the delay and distribution that would be caused by:
 - (i) re-litigation of steps taken to date; and

⁹⁰ *Timminco Ltd., Re*, 2014 ONSC 3393 at para. 40.

⁹¹ *Canwest Global Communications Corp., Re*, 2011 ONSC 2215 at para. 40.

⁹² *Re Target Canada Co.*, 2015 ONSC 7574 at para. 2 [*Target*], cited with approval in *Laurentian University of Sudbury*, 2022 ONSC 2927 at para. 9. (Monitor’s Website) [*Laurentian*]

- (ii) potential indemnity claims by the Monitor.⁹³

96. The form of the proposed Approval and Reverse Vesting Order with respect to approval of the First Report of the Monitor dated June 14, 2023, the Supplement to the First Report of the Monitor dated June 15, 2023, the Second Report of the Monitor dated July 5, 2023, and the Third Report of the Monitor dated August 26, 2023 (collectively, the “**Monitor’s Reports**”), and the Monitor’s activities described therein, is consistent with the language used in *Target* and subsequent proceedings.⁹⁴

97. In the present case, the Monitor’s Reports, and the conduct and activities of the Monitor referred to therein should be approved. The Monitor has acted responsibly and carried out its activities in a manner consistent with the provisions of the CCAA and in compliance with the ARIO. No party has put forward evidence to the contrary.

G. The Stay Extension Should be Granted

98. The current Stay Period expires on September 1, 2023. Pursuant to s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.⁹⁵

99. The Applicants are seeking to extend the Stay Period from September 1, 2023 to and including October 15, 2023. The extension of the Stay Period is necessary and appropriate in the circumstances to provide the Applicants with continued breathing space while they attempt to maximize value for the benefit of their stakeholders through the CCAA Proceedings and the Claims Process.⁹⁶

100. The Subscription Agreement contemplates an Outside Date of September 15, 2023 to close the Transactions. Additional time may be required to complete the Transactions contemplated under the Subscription Agreement.⁹⁷

101. Further, while Residual Co. (as an applicant in these CCAA Proceedings following closing of the Transactions) will likely return to this Court to seek other forms of relief prior to the proposed extended Stay Period, such as approval of distributions to ACT Investor from the

⁹³ *Target*, *supra* at para. 22.

⁹⁴ *Ibid* at paras. 7 and 26; *In the Matter of a Plan of Compromise or Arrangement of Old CLHC Company* (September 29, 2020), [Toronto, CV-19-631523-00CL](#).

⁹⁵ CCAA, *supra* s. 11.02(2) and (3).

⁹⁶ Third Trudel Affidavit, *supra* at para. 69.

⁹⁷ *Ibid* at para. 70.

purchase price under the Subscription Agreement, the Claims Process will likely run until at least October 15, 2023.⁹⁸

102. Since the granting of the ARIO, the Applicants have acted, and are continuing to act in good faith and with due diligence in these CCAA Proceedings. Among other things, the Applicants have (a) preserved the Applicants' liquidity and limited their cash burn; (b) negotiated terms of various lease amendments with landlords; (c) engaged with the applicable regulatory authorities to keep them apprised of the SISP and the CCAA Proceedings; and (d) responded to numerous creditor and stakeholder enquiries regarding these CCAA Proceedings.⁹⁹

103. No creditors are expected to suffer material prejudice as a result of the extension of the Stay Period to October 15, 2023.¹⁰⁰ As detailed in Updated Cash Flow Forecast, the Applicants are expected to maintain liquidity to fund operations up to October 15, 2023 (subject to closing the Transactions or extending the DIP Loan which extension has been secured by the Applicants).

104. No creditors are expected to suffer material prejudice as a result of the extension of the Stay Period to October 15, 2023. As detailed in Updated Cash Flow Forecast, the Applicants are expected to maintain liquidity to fund operations up to October 15, 2023.

105. The Monitor supports the proposed extension of the Stay Period to and including October 15, 2023.¹⁰¹

PART V – ORDER SOUGHT

106. For the reasons set out above, the Applicants respectfully submit that the Court should grant the Approval and Reverse Vesting Order and the Claims Procedure Order in the form attached to the Applicants' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28 day of August, 2023.


/s/

STIKEMAN ELLIOTT LLP

⁹⁸ *Ibid* at para. 71.

⁹⁹ *Ibid* at paras. 72-73.

¹⁰⁰ Third Trudel Affidavit, *supra* at para. 75. Note: paragraph 34 of the Applicants' Notice of Motion contains a typo, wherein it was stated that the proposed extension of the Stay Period will materially prejudice the Applicants' stakeholders.

¹⁰¹ Third Report, *supra* at para. 70.

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Just Energy Group Inc. et. Al. v Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354
2. *Arrangement relatif à Black Rock Metals Inc.*, 2022 QCCS 2828
3. *Harte Gold (Re)*, 2022 ONSC 653
4. *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488
5. *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314
6. *CannaPiece Group Inc. v Marzilli*, 2023 ONSC 3291
7. *Quest University (Re)*, 2020 BCSC 1883
8. *In the Matter of the Companies' Creditors Arrangement Act and In the Matter of CannaPiece Group Inc.*, 2023 ONSC 841
9. *Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 (Ont. CA)
10. *Green Relief Inc. (Re)*, 2020 ONSC 6837
11. *Nelson Education Limited (Re)*, 2015 ONSC 5557
12. *Lydian International Limited (Re)*, 2020 ONSC 4006
13. *Target Canada Corp. Re*, 2015 ONSC 1487
14. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41
15. *Sherman Estate v. Donovan*, 2021 SCC 25
16. *Re Danier Leather Inc.*, 2016 ONSC 1044
17. *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347
18. *Ontario Securities Commission v Bridging Finance Inc.*, 2022 ONSC 1857
19. *ScoZinc Ltd. Re*, 2009 NSSC 136
20. *US Steel Canada Inc., Re*, 2017 ONSC 1967

21. Laurentian University of Sudbury, 2021 ONSC 3885
22. Timminco Ltd., Re, 2014 ONSC 3393
23. Canwest Global Communications Corp., Re, 2011 ONSC 2215
24. Re Target Canada Co., 2015 ONSC 7574

SCHEDULE "B"
RELEVANT LEGISLATION

Companies' Creditors Arrangement Act, RSC 1985, c C-36

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

- (a)** relate to contractual rights of one or more creditors; or
- (b)** are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Payment — equity claims

6 (8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Stays, etc. — other than initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a)** staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

11.02 (3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Company may establish classes

22 (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under [section 4](#) or [5](#) in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Business Corporations Act, R.S.O. 1990, c. B.16

Amendments

168 (1) Subject to sections 170 and 171, a corporation may from time to time amend its articles to add, change or remove any provision that is permitted by this Act to be, or that is, set out in its articles, including without limiting the generality of the foregoing, to,

- (a) change its name;
- (b) Repealed: 1994, c. 27, s. 71 (20).
- (c) add, change or remove any restriction upon the business or businesses that the corporation may carry on or upon the powers that the corporation may exercise;
- (d) add, change or remove any maximum number of shares that the corporation is authorized to issue or any maximum consideration for which any shares of the corporation are authorized to be issued;
- (e) create new classes of shares;
- (f) Repealed: 1994, c. 27, s. 71 (20).
- (g) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued;
- (h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series;
- (i) divide a class of shares, whether issued or unissued, into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;
- (j) authorize the directors to divide any class of unissued shares into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;
- (k) authorize the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series;
- (l) revoke, diminish or enlarge any authority conferred under clauses (j) and (k);
- (m) subject to sections 120 and 125, increase or decrease the number, or minimum or maximum number, of directors; and
- (n) add, change or remove restrictions on the issue, transfer or ownership of shares of any class or series. R.S.O. 1990, c. B.16, s. 168 (1); 1994, c. 27, s. 71 (20).

Idem

(2) Where the directors are authorized by the articles to divide any class of unissued shares into series and determine the designation, rights, privileges, restrictions and conditions thereof, they may authorize the amendment of the articles to so provide. R.S.O. 1990, c. B.16, s. 168 (2).

Revocation of resolution

(3) The directors of a corporation may, if so authorized by a special resolution effecting an amendment under this section, revoke the resolution without further approval of the shareholders at any time prior to the endorsement by the Director of a certificate of amendment of articles in respect of such amendment. R.S.O. 1990, c. B.16, s. 168 (3).

Change of number name

(4) Despite subsection (1), where a corporation has a number name, the directors may amend its articles to change that name to a name that is not a number name. R.S.O. 1990, c. B.16, s. 168 (4).

Authorization

(5) An amendment under subsection (1) shall be authorized by a special resolution and an amendment under subsection (2) or (4) may be authorized by a resolution of the directors. R.S.O. 1990, c. B.16, s. 168 (5).

Special Act corporations excepted

(6) This section does not apply to a corporation incorporated by special Act, except that a corporation incorporated by special Act, including a corporation to which *The Railways Act*, being chapter 331 of the Revised Statutes of Ontario, 1950, applies, may under this section amend its articles to change its name. R.S.O. 1990, c. B.16, s. 168 (6).

Reorganization

186 (1) In this section,

“reorganization” means a court order made under [section 248](#), an order made under the [Bankruptcy and Insolvency Act \(Canada\)](#) or an order made under the [Companies Creditors Arrangement Act \(Canada\)](#) approving a proposal. 2000, c. 26, Sched. B, s. 3 (9).

Articles amended

(2) If a corporation is subject to a reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under [section 168](#). R.S.O. 1990, c. B.16, s. 186 (2).

Courts of Justice Act, R.S.O. 1990, c C.43

Sealing documents

137 (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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

AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF FIRE & FLOWER HOLDINGS CORP., FIRE & FLOWER INC.,
13318184 CANADA INC., 11180703 CANADA INC., 10926671 CANADA LTD., FRIENDLY STRANGER HOLDINGS CORP., PINEAPPLE
EXPRESS DELIVERY INC., and HIFYRE INC.

Applicants

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

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE APPLICANTS
(APPROVAL AND REVERSE VESTING ORDER
AND CLAIMS PROCEDURE ORDER)**

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