

**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 JAMES E. WAGNER CULTIVATION
CORPORATION, JAMES E. WAGNER CULTIVATION LTD., JWC 1
LTD., JWC 2 LTD., JWC SUPPLY LTD. AND GROWTHSTORM INC.**

Applicants

FACTUM OF THE APPLICANTS

May 25, 2020

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FACTUM OF THE APPLICANTS

PART I: INTRODUCTION

1. On April 1, 2020, James E. Wagner Cultivation Corporation ("**JWC**"), James E. Wagner Cultivation Ltd., JWC 1 Ltd., JWC 2 Ltd., JWC Supply Ltd. and GrowthStorm Inc. (collectively, the "**Applicants**") obtained an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "**CCAA**") which, *inter alia*, granted a stay of proceedings until April 10, 2020 (the "**Stay of Proceedings**"), appointed KSV Kofman Inc. as monitor (the "**Monitor**"), approved DIP financing (the "**DIP Loan**"), and granted certain limited charges over the Applicants' property.
2. On April 9, 2020, the Applicants obtained an Amended and Restated Initial Order, *inter alia*, extending the Stay of Proceedings, appointing a chief restructuring officer (the "**CRO**") and increasing the amounts of the charges over the Applicants' property.
3. On that same day, the Applicants also obtained a Bidding Procedures and Stalking Horse APA Approval Order, which approved a stalking horse asset purchase agreement (the "**Stalking Horse APA**"), as well as a sale and investor solicitation process (the "**SISP**") and related bidding procedures (the "**Bidding Procedures**"), in which Trichome Financial Corp. ("**Trichome**"), the Applicants' first lien lender, acted as stalking horse bidder.
4. The SISP is now complete and no other bids were received. As such, the Applicants are seeking the Approval and Vesting Order approving the Stalking Horse APA as the successful bid and vesting title in and to the purchased assets to Trichome's designee (the "**Transaction**").

5. The Applicants are also seeking an Ancillary Order to extend the Stay of Proceedings by four days (from June 26, 2020 to June 30, 2020) in order to facilitate the closing of the Transaction, and a non-material amendment to the existing DIP financing terms, as amended (the "**DIP Term Sheet**").

PART II: FACTS

6. The facts underlying these proceedings are more fully set out in the affidavit of Philip Armstrong, sworn April 6, 2020 (the "**Armstrong Affidavit**") and the affidavit of Nathan Woodworth, sworn March 31, 2020 (the "**Woodworth Affidavit**"). For this motion, the Applicants are also relying upon the Third Report of the Monitor, dated May 25, 2020.

7. Since the granting of the Initial Order and the Amended and Restated Initial Order, the Applicants have continued ordinary course business operations, while Stoic Advisory Inc. ("**Stoic**") conducted the SISP under the supervision of the special committee of the board of directors of JWC (the "**Special Committee**") and the Monitor.

B. Stalking Horse APA and Trichome

8. As a result of the Applicants' extensive discussions with Trichome in an effort to address their liquidity crisis, Trichome agreed to act as the stalking horse bidder in the SISP pursuant to the Stalking Horse APA. Trichome is also the DIP lender in these CCAA proceedings.

9. Trichome is a specialty finance company focused on providing flexible and creative capital solutions to the global legal cannabis market.

10. On April 9, 2020, the Court authorized the Applicants to enter into the Stalking Horse APA with Trichome.

11. The Stalking Horse APA is a credit bid, and the purchase price has an estimated value of approximately \$13.2 million, which includes the amounts expected to be owing under Trichome's first lien debt (estimated to be \$7.6 million) and the amount of the DIP Loan as of the expected closing date (estimated to be approximately \$5.5 million). Substantially all assets of the Applicants will be purchased with the exception of the Applicants' benefit plans and other agreements not specifically assumed.¹

12. The Stalking Horse APA included an expense reimbursement fee up to a maximum of \$100,000 (inclusive of HST) in the event Trichome was not the successful bidder, however this fee will no longer be paid as Trichome is the only bidder.

13. The closing of the Transaction is subject to the Approval and Vesting Order being obtained and valid assignments of the Applicants' Health Canada Licenses, or the issuance of substantially similar replacement licenses.²

C. The SISP

14. The SISP was conducted by Stoic under the supervision of the Special Committee and the Monitor. Stoic is a boutique corporate finance advisory firm focused on the global cannabis industry.

15. The SISP provided for, *inter alia*, a bid deadline of May 15.

¹ Third Report of the Monitor KSV Kofman Inc. dated May 25, 2020 at para 3.4(2) [Monitor's Report].

² *Ibid.*

16. The SISP was conducted in accordance with the Court-approved Bidding Procedures.

17. A more detailed summary of the SISP is provided in the Third Report of the Monitor. In short, a "Teaser" was sent to 93 prospective purchasers; a data room was maintained which parties could access upon signing a confidentiality agreement; due to the impact of COVID-19, the Applicants retained a third party to prepare a video presentation of the Applicants' facilities for those that could not attend the premises in person; and Stoic connected interested parties in need of capital with potential financial partners who needed operational expertise.³

18. 26 parties executed the confidentiality agreement and numerous parties conducted extensive diligence.⁴

19. However, no party submitted an offer other than Trichome pursuant to the Stalking Horse APA.

PART III: ISSUES

20. The issues to be considered on this motion are whether:

- (a) the Approval and Vesting Order should be granted;
- (b) the Court should extend the Stay of Proceedings; and
- (c) the amendment to the DIP Term Sheet should be approved.

³ *Ibid* at para 3.1(1).

⁴ *Ibid* at para 3.3(1).

PART IV: LAW AND ARGUMENT

A. Approval and Vesting Order

21. Pursuant to section 36 of the CCAA, this Court has the jurisdiction to approve a sale of assets outside of the ordinary course of business. Subsection 36(3) sets out the following list of non-exhaustive factors for the Court to consider in determining whether to approve a debtor's sale of assets outside the ordinary course:

- (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.⁵

⁵ *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, s 36 [CCAA].

22. These factors are not intended to be exhaustive, nor are they intended to be a formulaic check list that must be followed in every CCAA sale transaction.⁶ CCAA courts have also considered the *Soundair* principles for approval of a sale of assets, which largely correspond with the subsection 36(3) criteria:

- (a) Whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- (b) The interests of all parties;
- (c) The efficacy and integrity of the process by which offers have been obtained; and
- (d) Whether there has been unfairness in the working out of the process.⁷

23. In addition, the business judgment exercised by the Applicants and the Monitor (and in this case, Stoic) should also be given due consideration.⁸

24. The Applicants submit that the factors in subsection 36(3) and the *Soundair* factors set out above support the approval of the Transaction:

- (a) The sale process was conducted by Stoic in accordance with the Court-approved SISP and Bidding Procedures under the supervision of the Special Committee and the Monitor.

⁶ [Target Canada Co. Re, 2015 ONSC 1487](#) at para 16.

⁷ [Re Canwest Publishing Inc, 2010 ONSC 2870](#) at para 13; [Eddie Bauer of Canada Inc, Re \(2009\), OJ No. 3784](#) at para 21; [Royal Bank v Soundair Corp, \[1991\] 4 OR \(3d\) 1](#) at para 16.

⁸ [Bloom Lake, g.p.l., Re, 2015 QCCS 1920](#) at para 28.

- (b) The process was fair and reasonable in the circumstances, including, for example, implementing additional measures to address the COVID-19 pandemic.
- (c) No creditor has objected to the Transaction.
- (d) The Transaction provides for the greatest recovery available in the circumstances, and is more beneficial to creditors than a sale or disposition in a bankruptcy.
- (e) Stoic, who has extensive experience in the sector, believes the consideration to be received is fair and reasonable.
- (f) The Transaction preserves employment and a going concern business, contemplating the continuation of the Applicants' operations and the preservation of approximately 160 jobs.⁹

25. To implement the Transaction, the Applicants are seeking a vesting order pursuant to subsection 36(6) of the CCAA:

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.

26. The vesting order is required by Trichome as part of the Transaction and is necessary to effect a proper sale transaction. Such vesting orders are routinely granted in connection with sales under section 36 of the CCAA.¹⁰

⁹ Monitor's Report, *supra* note 1 at para 3.6(1).

¹⁰ [Canwest Global Communications Corp.](#), (September 8, 2010), Toronto, CV-09-8396-00CL (Approval and Vesting Order); [Great Slave Helicopters Ltd.](#), (November 23, 2018), Toronto, CV-18604434-00CL (Approval and Vesting Order); [Clover Leaf Holdings Company](#), (January 28, 2020), Toronto, CV-19-631523-00CL (Approval and Vesting Order).

B. The Stay of Proceedings

27. In order to extend the Stay of Proceedings, this Court must be satisfied that circumstances exist that make the order appropriate and that the Applicants have acted, and are acting, in good faith and with due diligence.¹¹

28. The Applicants are seeking to extend the Stay of Proceedings by four days (until June 30, 2020) to align with the outside date of the Transaction and the maturity date of the DIP Loan.

29. Since the granting of the Initial Order, the Applicants have acted and continue to act in good faith and with due diligence to complete a going concern sale under the CCAA, while maintaining ordinary course business operations. The Monitor supports the requested extension of the Stay of Proceedings, the Applicants are forecast to have sufficient liquidity to fund their operations until June 30, 2020, and no creditor will be prejudiced by the four-day extension.¹²

C. DIP Amendment

30. An amendment is being sought to the existing DIP Term Sheet to (i) authorize Trichome to assign the DIP Term Sheet without the written consent of the Monitor, provided that Trichome guarantees the funding obligations of any assignee, and (ii) require that any reports prepared by the CRO or the Special Committee for the other be shared with Trichome. This amendment provides Trichome with flexibility to re-capitalize the Applicants, which is in the best interest of the business, while also ensuring that the Applicants will continue to be funded in accordance with

Order); [Aralez Pharmaceuticals Inc. \(December 7, 2018\), Toronto, CV-18-603054-00CL](#) (Approval and Vesting Order).

¹¹ CCAA, *supra* note 5 s 11.02(3).

¹² Monitor's Report, *supra* note 1 at paras 6.0(2), 7.0(1)-(2).

the DIP Term Sheet. It also provides Trichome with certain additional information now that the SISP has concluded and Trichome is the successful bidder.¹³

31. The Monitor supports the proposed amendment, and no creditor will be prejudiced by the amendment.¹⁴ As such, the Applicants request that this Court grant the proposed amendment to the DIP Term Sheet.

PART V: RELIEF REQUESTED

32. The Applicants submit that they meet all of the qualifications required to obtain the requested relief and request that this Court grant the proposed form of Approval and Vesting Order, and the related relief sought herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 25, 2020

¹³ *Ibid* at paras 5.0(1)-(2).

¹⁴ *Ibid* at para 5.0(1).

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [*Aralez Pharmaceuticals Inc*, \(December 7, 2018\), Toronto, CV-18-603054-00CL](#) (Approval and Vesting Order)
2. [*Bloom Lake, g.p.l., Re*, 2015 QCCS 1920](#)
3. [*Canwest Global Communications Corp*, \(September 8, 2010\), Toronto, CV-09-8396-00CL](#) (Approval and Vesting Order)
4. [*Clover Leaf Holdings Company*, \(January 28, 2020\), Toronto, CV-19-631523-00CL](#) (Approval and Vesting Order)
5. [*Eddie Bauer of Canada Inc, Re* \(2009\), OJ No. 3784](#)
6. [*Great Slave Helicopters Ltd*, \(November 23, 2018\), Toronto, CV-18604434-00CL](#) (Approval and Vesting Order)
7. [*Royal Bank v Soundair Corp*, \[1991\] 4 OR \(3d\) 1](#)
8. [*Re Canwest Publishing Inc*, 2010 ONSC 2870](#)
9. [*Target Canada Co, Re*, 2015 ONSC 1487](#)

SCHEDULE B – STATUTES RELIED ON

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Section 11.02

Stays, etc. – Initial Application

(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.

Stays, etc. — other than initial application

(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

(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.

Section 36

Restriction on disposition of business assets

(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.

Marginal note: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.

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JAMES E. WAGNER CORPORATION,
JAMES E. WAGNER CULTIVATION LTD., JWC 1 LTD., JWC 2 LTD., JWC SUPPLY LTD AND GROWTHSTORM INC.**

Court File No. CV-20-00639000-00CL

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Proceedings commenced in Toronto

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