

**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

July 24, 2020

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FACTUM OF THE APPLICANTS

PART I: INTRODUCTION

1. James E. Wagner Cultivation Corporation, James E. Wagner Cultivation Ltd., JWC 1 Ltd., JWC 2 Ltd., JWC Supply Ltd. and GrowthStorm Inc. (collectively, the "**Applicants**") are seeking the granting of two orders under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), *inter alia*:

- (a) approving the execution by the Applicants of the Fourth Amendment to the Interim Financing Term Sheet, dated July 22, 2020 (the "**Fourth DIP Amendment**"), which will increase the maximum available borrowings under the current interim financing and associated charge by \$1 million (to a total of \$8.2 million) and extending the current stay of proceedings to August 31, 2020 (collectively, the "**Fourth DIP Amendment and Stay Extension Order**"); and
- (b) terminating, upon filing of a certificate with the Court (the "**Discharge Certificate**"), these CCAA proceedings and authorizing KSV Kofman Inc. in its capacity as the CCAA Monitor (the "**Monitor**") and/or the Applicants to file assignments into bankruptcy on behalf of the Applicants (the "**CCAA Termination Order**").

PART II: FACTS

2. The facts underlying these proceedings are more fully set out in the affidavit of Nathan Woodworth, sworn March 31, 2020, the affidavit of Philip Armstrong, sworn April 6, 2020, and

the Fifth Report of the Monitor dated July 24, 2020 (the "**Fifth Report**"), which is relied upon for purposes of this motion.

A. The CCAA Proceedings

3. On April 1, 2020, the Applicants, which operate in the cannabis industry, obtained an initial order (the "**Initial Order**") which, *inter alia*, granted a stay of proceedings until April 10, 2020 (the "**Stay of Proceedings**"), appointed the Monitor, and granted certain limited charges over the Applicants' property. The Initial Order also approved DIP financing in the amount of \$4,000,000 (the "**DIP Loan**") with Trichome Financial Corp. ("**Trichome**") as the DIP Lender and a corresponding charge in the amount of \$800,000 (the "**DIP Lender's Charge**"), being the amount to be funded in the initial 10 days as the amount necessary to continue ordinary course business operations during that time.

4. Trichome, in addition to being the DIP Lender, is the Applicants' first lien lender.

5. On April 9, 2020, the Applicants obtained an amended and restated initial order (the "**Amended and Restated Initial Order**"), *inter alia*, extending the Stay of Proceedings until June 26, 2020 and increasing the DIP Lender's Charge to \$4,000,000, being the total amount of the DIP Loan approved pursuant to the Initial Order.

6. On that same date, the Applicants also obtained a Bidding Procedures and Stalking Horse APA Approval Order, which approved a stalking horse asset purchase agreement with Trichome (the "**Stalking Horse APA**"), as well as a sale and investor solicitation process (the "**SISP**") and related bidding procedures, in which Trichome acted as the stalking horse bidder.

7. On May 11, 2020, the Applicants sought and obtained the First DIP Amendment Order which, among other things, increased the maximum borrowings available under the DIP Loan, and the associated DIP Lender's Charge, up to \$5.5 million (an increase of \$1.5 million).

8. This increase was required largely due to the impact of the COVID-19 pandemic on sales, as well as certain sales that were originally forecasted to occur during the forecast period but were subsequently forecasted to occur at a later date. As a result of these events, the Applicants required additional funding in order to continue ordinary course business operations while the SISP was completed.

9. The SISP was subsequently completed pursuant to the court-approved bidding procedures, however no other qualified bids were received. As a result, the Applicants sought approval of the Stalking Horse APA as the successful bid (the "**Transaction**").

10. On June 2, 2020, the Applicants obtained the Approval and Vesting Order which approved the Stalking Horse APA and vests in Trichome's designee all of the Applicants' rights, title and interest in and to the Purchased Assets under the Stalking Horse APA. In addition, on that same day, the Court granted the Second DIP Amendment Order which, among other things, permitted Trichome to assign the DIP Term Sheet without the prior written consent of the Monitor, provided that Trichome guaranteed the funding obligations of any assignee. Additionally, it required that any reports prepared by the Chief Restructuring Officer for the Special Committee, or vice versa, be shared with Trichome. This non-material Second DIP Amendment was mainly intended to provide Trichome with flexibility to re-capitalize the Applicants.

11. On that same day, the Applicants also obtained an Ancillary Order to extend the Stay of Proceedings by four days (from June 26, 2020 to June 30, 2020) in order to align the Stay of Proceedings with the maturity date of the DIP Loan at that time.

12. On June 30, 2020, the Applicants obtained an order extending the Stay of Proceedings to July 31, 2020 and authorizing the Third DIP Amendment to increase the maximum available borrowings and associated charge by \$1.7 million (to a total of \$7.2 million) (the "**Third DIP Amendment and Stay Extension Order**").

13. The main reason behind the Third DIP Amendment and Stay Extension Order was the ongoing delay with respect to regulatory matters. In particular, the Transaction is conditional on the issuance of licenses that are substantially similar to the two Health Canada licenses held by the Applicants. The Health Canada licenses and associated regulatory matters had not yet been resolved and therefore the parties required more time to resolve the issues, and additional funding to continue ordinary course business operations during that time.

B. The Outstanding Health Canada Matters

14. Subsequent to the Third DIP Amendment and Stay Extension Order, the Applicants and Trichome continue to make progress with Health Canada, and the regulatory approval process is advancing. However, it is not yet complete and the parties require additional time to obtain the requisite approvals to close the Transaction.¹

15. It is for this reason that the Applicants are seeking a further extension of the Stay of Proceedings until August 31, 2020 and an increase in the DIP Loan, and the associated DIP

¹ Fifth Report of KSV Kofman Inc. as Monitor, dated July 24, 2020, at s. 1.0 (9), (11) [**Fifth Report**].

Lender's Charge, of \$1 million for a total of \$8.2 million. The Transaction cannot close until the licenses have been secured, and the related regulatory matters have been resolved.²

16. The parties have agreed to extend the Outside Date of the Transaction to August 31, 2020 and are working diligently to close the Transaction. They are optimistic that the necessary regulatory approvals will be obtained by August 31, 2020.³

C. Cash Flow Forecast

17. The Cash Flow Forecast demonstrates that the Applicants require an additional \$1 million of funding to the end of August 2020.⁴

D. CCAA Termination and Related Relief

18. At this time, the Applicants are also seeking the CCAA Termination Order which, *inter alia*:

- (a) Terminates, upon the filing of the Discharge Certificate, these CCAA proceedings and discharges the Monitor;
- (b) Authorizes the Monitor and/or the Applicants to file assignments into bankruptcy on behalf of the Applicants;
- (c) Upon filing of the Discharge Certificate, releases the Monitor from liability;
- (d) Approves the activities of the Monitor; and

² *Ibid.* at s. 1.1(g), 3.0(2) & 5.0.

³ *Ibid.* at s. 3.0(2)

⁴ *Ibid.* at s. 4.0.

(e) Approves the fees and disbursements as set out in the Fifth Report.

19. Following closing of the Transaction, all matters will have been completed in these CCAA proceedings. In order to avoid the costs of bringing another motion at that time, the Applicants are seeking the CCAA Termination Order on this motion.⁵

20. Once the Transaction closes, the Applicants will have sold all or substantially all of their business and assets; to completely and appropriately wind down their operations, assignments in bankruptcy are to be filed by the Applicants. In the event that the Boards of Directors of the Applicants do not pass a resolution to file those assignments, the Applicants are seeking an order authorizing the Monitor to do so.⁶

PART III: ISSUES

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

- (a) the Court should approve the Fourth DIP Amendment and related relief;
- (b) the Court should extend the Stay of Proceedings until and including August 31, 2020; and
- (c) the Court should grant the CCAA Termination Order.

⁵ *Ibid.* at s. 7.0(1).

⁶ *Ibid.* at s. 7.0(2).

PART IV: LAW AND ARGUMENT

A. The Fourth DIP Amendment Should be Approved

22. Where an increase in DIP financing is sought, the factors in section 11.2 of the CCAA are considered again.⁷ The bases for obtaining the DIP Loan and the DIP Lender's Charge in the Initial Order, and the Amended and Restated Initial Order, as well as the subsequent increases to the DIP Loan and the DIP Lender's Charge pursuant to the First DIP Amendment Order and Third DIP Amendment and Stay Extension Order,⁸ are still present and support the relief sought on this motion.

23. Subsection 11.2(1) of the CCAA provides the Court with the statutory jurisdiction to grant a DIP financing charge “on notice to the secured creditors who are likely to be affected by the security or charge – in an amount that the court considers appropriate...having regard to [the debtors’] cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.”

24. In accordance with this provision, notice has been provided to the secured creditors and, as with the existing DIP Lender's Charge, the charge does not secure an obligation that exists before the order is made.

25. Subsection 11.2(4) of the CCAA sets out the following non-exhaustive factors to be considered by the Court in deciding whether to grant a DIP financing charge:

11.2(4) *Factors to be considered.* – In deciding whether to make an order, the court is to consider, among other things,

⁷ [PCAS Patient Care Automation Services Inc. Re. 2012 ONSC 2423](#) at para 9.

⁸ As described in paragraph 10 of this Factum, the Second DIP Amendment Order was a non-material amendment and did not increase the amount of the DIP Loan.

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

26. In addition to the considerations relied upon by this Honourable Court in granting the DIP Loan and the DIP Lender's Charge in the Initial Order and the Amended and Restated Initial Order, and the considerations relied upon in granting the First DIP Amendment Order and Third DIP Amendment and Stay Extension Order, the following factors support the Fourth DIP Amendment:

- (a) the increase in amount is appropriate in light of the Applicants' Cash Flow Forecast which reflects that the Applicants will require an additional \$1 million to the end of August 2020 (an additional \$100,000 is being sought to provide the Applicants with an amount to cover contingencies);
- (b) the additional funding is required to continue ordinary course business operations while the outstanding regulatory matters are addressed;
- (c) funding the business without disruption is in the best interests of all stakeholders as it will allow the Applicants to continue to operate the business while the

Transaction is completed which will maximize recoveries and continue employment for approximately 110 employees;

- (d) the DIP Lender requires the additional advance be subject to the DIP Lender's Charge;
- (e) no stakeholder is prejudiced by the Fourth DIP Amendment; and
- (f) the Monitor is supportive of the Fourth DIP Amendment.⁹

B. The Extension to the Stay of Proceedings Should be Granted

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.¹⁰ A stay of proceedings is appropriate to provide the debtor with breathing room while it seeks to restore its solvency and emerge from the CCAA on a going concern basis.¹¹

28. The Applicants are seeking to extend the Stay of Proceedings until August 31, 2020 for this very purpose, as it would provide additional time to pursue obtaining the requisite licenses from Health Canada and deal with the related regulatory matters in order to close the Transaction.

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, namely the

⁹ Fifth Report, *supra* at s. 5.0.

¹⁰ CCAA, s. 11.02(3).

¹¹ [Century Services Inc v Attorney General \(Canada\), 2010 SCC 60](#) at para 14; [Target Canada Co., 2015 ONSC 303](#) at para 8.

implementation of the Transaction, while maintaining ordinary course business operations. In addition:

- (a) the Monitor supports the requested extension of the Stay of Proceedings;
- (b) the Applicants are forecast to have sufficient liquidity to fund their operations until August 31, 2020;
- (c) no creditor will be prejudiced by the extension; and
- (d) the Applicants are not aware of any party opposed to the proposed extension.¹²

C. CCAA Termination and Related Relief

30. In order to avoid the costs of bringing another motion after the Transaction closes, the Applicants are seeking the CCAA Termination Order, and related relief, at this time. The termination of these CCAA proceedings will only occur after the Transaction closes and the Monitor files the Discharge Certificate with this Court. The corresponding relief granting the Monitor the authority to file assignments into bankruptcy will only be exercised if the Board of Directors does not pass a resolution to file the assignments, and is the most efficient and effective way to wind down any remaining business operations and assets following the closing of the Transaction.¹³

31. The Applicants submit that the related relief in the CCAA Termination Order, including approval of fees and the releases granted to the Monitor and counsel to the Monitor, are appropriate

¹² Fifth Report, *supra* at s. 6.0.

¹³ *Ibid.* at s. 7.0.

in these circumstances and consistent with prior orders that have been granted by this Honourable Court.¹⁴

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 Fourth DIP Amendment and Stay Extension Order, and the CCAA Termination Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Bennett Jones LLP

July 24, 2020

¹⁴ See e.g.

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [*PCAS Patient Care Automation Services Inc, Re*, 2012 ONSC 2423](#)
2. [*Century Services Inc v Attorney General \(Canada\)*, 2010 SCC 60](#)
3. [*Target Canada Co*, 2015 ONSC 303](#)
4. [*Canwest Publishing Inc.*, 2013 CarswellOnt 19473 \(SCJ\)](#)

SCHEDULE B – STATUTES RELIED ON

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

Section 11.02

Stays, etc. – 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.

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 11.2

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the

terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

**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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