

**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  
(DIP Amendment Order)**

May 7, 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 an order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") authorizing the execution by the Applicants of the First Amendment to Interim Financing Term Sheet, dated May 5, 2020 (the "**DIP Amendment**"), and increasing the maximum available borrowings under the current interim financing and associated charge by \$1.5 million (the "**DIP Amendment Order**").

2. On April 1, 2020, the Applicants obtained an initial order (the "**Initial Order**") which, *inter alia*, granted a stay of proceedings until April 10, 2020, appointed KSV Kofman Inc. as monitor (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 with Trichome Financial Corp. ("**Trichome**") as the DIP Lender (the "**DIP Loan**") 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.

3. 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. On that same date, the Applicants also obtained an order approving bidding procedures and a stalking horse asset purchase agreement to conduct a sale and investor solicitation process ("**SISP**") with Trichome acting as the stalking horse bidder.

4. The Applicants are now seeking the DIP Amendment Order to increase the total amount of the DIP Loan and DIP Lender's Charge to \$5,500,000 (an increase of \$1,500,000) in order to enable the Applicants to continue ongoing business operations while the SISP is completed.

**PART II: FACTS**

5. The facts underlying these proceedings are more fully set out in the affidavit of Philip Armstrong, sworn April 6, 2020, the affidavit of Nathan Woodworth, sworn March 31, 2020 and the Second Report of the Monitor dated May 4, 2020.

6. Since the Initial Order and the Amended and Restated Initial Order, the Applicants have continued ordinary course business operations in the cannabis industry while implementing the SISP in order to effect a going concern sale of the Applicants' business in the best interests of their stakeholders.

7. Largely due to the impact of COVID-19 on sales, as well as certain sales that were forecasted to occur in these proceeding but are now forecasted to occur at a later date, the Applicants have determined that they will require additional funding for the balance of these CCAA proceedings in order to continue ordinary course business operations while the SISP is completed.<sup>1</sup> The SISP provides for, *inter alia*, a bid deadline of May 15, 2020, an auction (if any) on May 22, 2020, and an approval and sale order hearing on May 29, 2020 (if an auction is not required) or June 5, 2020 (if an auction is required).<sup>2</sup>

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<sup>1</sup> Second Report of the Monitor dated May 4, 2020 at para 3.2(1) [Monitor's Report].

<sup>2</sup> Affidavit of Philip Armstrong sworn April 6, 2020 at para 38 [Armstrong Affidavit].

8. The Revised Cash Flow Forecast of the Applicants demonstrates that the Applicants are projected to require an additional \$1 million to continue ordinary course operations during this time. Trichome has advised that it is willing to increase the DIP Loan by \$1.5 million (for a total of \$5.5 million including an amount for contingencies) until the SISP is completed and a going concern sale is approved.<sup>3</sup> To implement this increase, the Applicants are seeking authorization to enter into the DIP Amendment.

9. The DIP Amendment provides that Trichome will earn an upfront fee equal to 3% of the increase in the DIP Loan, being \$45,000. This is the same percentage upfront fee that was included, and approved by the Court, in the original DIP Loan.<sup>4</sup>

10. On April 10, 2020, the Court approved the bidding procedures in connection with the SISP which provided that a "Qualified Bid" must include a base cash purchase price equal to or greater than \$11.95 million (comprised of: (i) the estimated amount of \$7.6 million payable as part of the stalking horse asset purchase agreement; (ii) the amount of the DIP Loan of \$4 million; (iii) the expense reimbursement in the asset purchase agreement of \$100,000; and (iv) a \$250,000 bid increment).<sup>5</sup>

11. As the minimum Qualified Bid includes the amount owing to Trichome under the DIP Loan, a Qualified Bid will now need to be at least \$13.45 million.<sup>6</sup>

12. Notice of the increased amount has been posted in the data room and on the Monitor's website; it was also served on the service list.<sup>7</sup> The notice advises that a motion is to be heard

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<sup>3</sup> Monitor's Report, *supra* note 1 at para 3.2(1).

<sup>4</sup> *Ibid* at para 3.2(4).

<sup>5</sup> Armstrong Affidavit, *supra* note 2 at para 38.

<sup>6</sup> Monitor's Report, *supra* note 1 at para 4.1(1).

<sup>7</sup> *Ibid* at para 4.1(2).

shortly to increase the maximum amount of the DIP Loan and its effect on the amount required to be a Qualified Bid. The notice advises interested parties to assume that the increase to the DIP Loan is approved by the Court; however, if it is not, a further notice will be provided to interested parties and the service list.

**PART III: ISSUES**

13. The sole issue to be considered on this motion is whether the Court should grant the DIP Amendment Order, increasing the amount of the DIP Loan and the associated DIP Lender's Charge.

**PART IV: LAW AND ARGUMENT**

14. Where an increase in DIP financing is sought, the factors in section 11.2 of the CCAA are considered again.<sup>8</sup> The bases for obtaining the DIP Loan and the DIP Lender's Charge in the Initial Order, and the Amended and Restated Initial Order, are still present and support the relief sought on this motion.

15. Subsection 11.2(1) 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.”

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<sup>8</sup> [PCAS Patient Care Automation Services Inc. Re, 2012 ONSC 2423](#) at para 9.

16. 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.

17. Subsection 11.2(4) 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,

- (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.

18. 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, the following factors support the increase to the DIP Loan and the DIP Lender's Charge in the DIP Amendment Order:

- (a) the increase in amount is appropriate in light of the Revised Cash Flow Forecast which reflects that the Applicants will require an additional \$1 million for ordinary course operations while the SISP is completed;

- (b) accessing an additional \$1.5 million will ensure that the Applicants have sufficient funds for ordinary course operations as well as contingencies that may arise between now and the conclusion of these CCAA proceedings;
- (c) the increased amount of the DIP Loan is required in order for the Applicants to continue to operate in the ordinary course during these CCAA proceedings, and to implement the SISF with a view to selling the Applicants' business as a going concern;
- (d) the increase to the DIP Loan is conditional on the increase to the DIP Lender's Charge being granted; and
- (e) the Monitor is supportive of the DIP Amendment Order.<sup>9</sup>

19. In connection with the DIP Loan, an upfront fee to Trichome of \$120,000 (3%) was approved and became payable after the comeback hearing. Consistent with this existing fee, the DIP Amendment includes an upfront fee to Trichome equal to 3% of the increase in the amount of the DIP Loan, being \$45,000. This fee is consistent with the existing terms of the DIP Loan, is supported by the Monitor, and is reasonable and appropriate in the circumstances.

**PART V: RELIEF REQUESTED**

20. 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 DIP Amendment Order.

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<sup>9</sup> Monitor's Report, *supra* note 1 at paras 3.1-3.2, 5.0(1).

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

*Bennett Jones LLP*

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May 7, 2020



## SCHEDULE A – LIST OF AUTHORITIES

### *Cases Cited*

1. [PCAS Patient Care Automation Services Inc, Re, 2012 ONSC 2423](#)

## SCHEDULE B – STATUTES RELIED ON

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

#### Section 11.2

##### **Interim financing**

(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.

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

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Proceedings commenced in Toronto

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