

**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  
(Third DIP Amendment and Stay Extension Order)**

June 23, 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**"), *inter alia*:

- (a) authorizing the execution by the Applicants of the Third Amendment to the Interim Financing Term Sheet, dated June 23, 2020 (the "**Third DIP Amendment**"), which will increase the maximum available borrowings under the current interim financing and associated charge by \$1.7 million (to a total of \$7.2 million); and
- (b) extending the current stay of proceedings to July 31, 2020 (collectively, the "**Third DIP Amendment and Stay Extension Order**").

### PART II: FACTS

2. 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 Fourth Report of the Monitor dated June 23, 2020, 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 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 (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 in these proceedings 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 to approve the Stalking Horse APA and vest in Trichome, or as it may direct, 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.

#### **B. Additional Funds from the DIP Loan**

12. Notwithstanding the increase in the maximum borrowings available under the DIP Loan pursuant to the First DIP Amendment, in order to fund the Applicants' business (namely, pay critical operating costs including payroll and vendors) to the end of June 2020, the Applicants

required additional funding in the amount of approximately \$25,000 greater than the amount authorized under the First DIP Amendment. This amount reduced the risk of any operational disruption to the Applicants' business and the Transaction.<sup>1</sup>

13. The Applicants are now seeking *nunc pro tunc* approval of this additional \$25,000 that was funded by the DIP Lender.

### **C. The Health Canada Licenses**

14. The Applicants hold two cannabis licenses from Health Canada which permit the cultivating, processing and sale of cannabis.<sup>2</sup>

15. The Transaction is conditional on valid assignments of those Health Canada Licenses, or the issuance of substantially similar replacement licenses. Therefore, the Transaction cannot close until the licenses have been secured, and the related regulatory matters have been resolved.<sup>3</sup>

16. The parties are actively working with Health Canada to deal with these matters but they are not yet resolved. The intention is still to close the Transaction upon obtaining the requisite Health Canada licenses and resolving the associated regulatory matters.<sup>4</sup>

### **D. Closing of the Transaction**

17. Pursuant to the Stalking Horse APA, the Transaction must close by June 30, 2020, unless otherwise agreed to by Trichome and the Applicants. Due to the fact that the Health Canada

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<sup>1</sup> Fourth Report of the Monitor, dated June 23, 2020 at 5.0(3).

<sup>2</sup> *Ibid.* at 2.0(4).

<sup>3</sup> *Ibid.* at 3.0(2).

<sup>4</sup> *Ibid.* at 3.0(3).

regulatory matters are unlikely to be resolved by that date, Trichome and the Applicants have mutually agreed to extend that date to July 10, 2020.<sup>5</sup>

18. In light of the above, the Applicants are seeking an extension of the Stay of Proceedings until July 31, 2020 so that these regulatory matters can be resolved and the Transaction can close, as well as to align with the new maturity date of the DIP Loan pursuant to the Third DIP Amendment.<sup>6</sup>

#### **E. The Third DIP Amendment**

19. Given the current status of the Transaction, the Applicants require additional funding to continue ordinary course business operations while the parties work with Health Canada to acquire the necessary licenses and address the related regulatory matters.

20. The Cash Flow Forecast of the Applicants demonstrates that the Applicants will need to borrow approximately \$7.2 million under the DIP Loan through to July 31, 2020.<sup>7</sup>

21. Consistent with this Forecast, the Third DIP Amendment would increase the DIP Loan, and the associated DIP Lender's Charge, by \$1.7 million for a total of \$7.2 million. In addition, the maturity date would be extended from June 30, 2020 to July 31, 2020.<sup>8</sup>

### **PART III: ISSUES**

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

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<sup>5</sup> *Ibid.* at 3.0(4-5).

<sup>6</sup> *Ibid.* at 6.0(1).

<sup>7</sup> *Ibid.* at 4.01(1).

<sup>8</sup> *Ibid.* at 5.0(2).

- (a) the Court should grant the Third DIP Amendment, increasing the amount of the DIP Loan and the associated DIP Lender's Charge; and
- (b) the Court should extend the Stay of Proceedings until and including July 31, 2020.

#### **PART IV: LAW AND ARGUMENT**

##### **A. The Third DIP Amendment Should be Granted**

23. Where an increase in DIP financing is sought, the factors in section 11.2 of the CCAA are considered again.<sup>9</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, as well as the subsequent increase to the DIP Loan and the DIP Lender's Charge pursuant to the First DIP Amendment Order, are still present and support the relief sought on this motion.

24. 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.”

25. 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.

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

26. 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.

27. 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, the following factors support the Third DIP Amendment:

- (a) the increase in amount is appropriate in light of the Applicants' Cash Flow Forecast which reflects that the Applicants will require the \$7.2 million through to July 31, 2020;
- (b) funding the business without disruption is in the best interests of all stakeholders as it will allow the Transaction to be completed which will maximize recoveries and continue employment for approximately 130 of the Applicants' employees;



- (c) the DIP Lender requires the additional advances be subject to the DIP Lender's Charge;
- (d) no stakeholder is prejudiced by the Third DIP Amendment; and
- (e) the Monitor is supportive of the Third DIP Amendment.<sup>10</sup>

28. The Applicants are also seeking *nunc pro tunc* approval of the additional approximate \$25,000 that was advanced in excess of the amount of the DIP Loan previously approved by this Court. This amount, while relatively insignificant in size, was critical to the ongoing operations of the Applicants' business, ensured that there was no operational disruption, and the advance was supported by the Monitor.<sup>11</sup>

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

29. 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.<sup>12</sup> 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.<sup>13</sup>

30. The Applicants are seeking to extend the Stay of Proceedings until and including July 31, 2020 for this very purpose, as it would provide additional time to pursue obtaining the requisite

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<sup>10</sup> Fourth Report of the Monitor, *supra* note 1 at 4.0(1) & 5.0(4).

<sup>11</sup> *Ibid.* at 5.0(3).

<sup>12</sup> CCAA, s. 11.02(3).

<sup>13</sup> [Century Services Inc v Attorney General \(Canada\), 2010 SCC 60](#) at para 14; [Target Canada Co. 2015 ONSC 303](#) at para 8.

licenses from Health Canada and deal with the related regulatory matters in order to close the Transaction.

31. 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 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 July 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.<sup>14</sup>

**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 Third DIP Amendment and Stay Extension Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

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June 23, 2020

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<sup>14</sup> Fourth Report of the Monitor, *supra* note 1 at 6.0.

## 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](#)

## 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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