

**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

April 6, 2020

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FACTUM OF THE APPLICANTS

PART I: INTRODUCTION

1. 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**") are seeking the granting of an amended and restated initial order (the "**Amended and Restated Initial Order**") and an order approving bidding procedures and a stalking horse asset purchase agreement (the "**Bidding Procedures and Stalking Horse APA Approval Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

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**"), approved DIP financing, and granted certain limited charges over the Applicants' property. In accordance with the CCAA, the relief sought in the Initial Order was limited to that reasonably necessary for the ordinary course business operations of the Applicants during the initial 10-day period.

3. The Applicants are now seeking further relief under the CCAA to supplement the limited relief obtained under the Initial Order.

4. The Applicants' business is a vertically integrated premium cannabis brand, focusing on producing clean and consistent cannabis using their advanced and proprietary aeroponic platform. Shortly before obtaining the Initial Order, the Applicants were in a liquidity crisis and were unable to meet their obligations as they became due, the most pressing of which was a \$350,000 payroll obligation due on April 1, 2020.

5. Following the Initial Order, the Applicants have paid their critical obligations and continued operations in the ordinary course of business, while also focusing efforts on developing a sale process with the assistance of their M&A advisor, Stoic Advisory Inc., and the Monitor. The Applicants are seeking relief to implement the sale process and ultimately a consensual restructuring that would see the Applicants' business emerge from these CCAA proceedings as a going concern with a deleveraged balance sheet.

6. In this motion, the Applicants are seeking the following relief (among other things) pursuant to the Amended and Restated Initial Order:

- (a) Extension of the stay of proceedings to June 26, 2020;
- (b) The appointment of a chief restructuring officer and a sealing order with respect to payment terms thereunder; and
- (c) An increase to the amounts of the charges granted in the Initial Order:
 - (i) increase in Administration Charge to \$600,000 (from \$500,000);
 - (ii) increase in Director's Charge to \$1,050,000 (from \$450,000); and
 - (iii) increase in DIP Lender's Charge to \$4,000,000 (from \$800,000).

7. The Applicants also seek the following relief (among other things) pursuant to the Bidding Procedures and Stalking Horse APA Approval Order:

- (a) approval of the stalking horse asset purchase agreement (the "**Stalking Horse APA**") including an expense reimbursement provision; and

- (b) approval of a sale and investor solicitation process (the "**SISP**") and related bidding procedures (the "**Bidding Procedures**").

8. The relief being sought herein is the logical next step in these CCAA proceedings with a view to continuing the Applicants' business as a going concern and maximizing recoveries in the best interests of the Applicants' stakeholders.

PART II: FACTS

9. 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 "**Initial Affidavit**"). All capitalized terms used but not defined herein have the meanings ascribed to them in the Initial Affidavit and the Armstrong Affidavit.

A. The Initial Order

10. The Initial Order obtained on April 1, 2020 granted the following relief (among other things):

- (a) a stay of proceedings in favour of the Applicants and their directors and officers until and including April 10, 2020 (the "**Stay of Proceedings**");
- (b) an Administration Charge in the amount of \$500,000;
- (c) a Director's Charge in the amount of \$450,000;
- (d) approval of DIP financing in the amount of \$4,000,000 with Trichome Financial Corp. ("**Trichome**") as the DIP Lender (the "**DIP Loan**") and a corresponding DIP

Lender's Charge in the amount of \$800,000, being the amount to be funded in the initial 10 days as the amount necessary to continue ordinary course business operations during that time; and

(e) the appointment of the Monitor.¹

B. Following the Initial Order

11. Since the granting of the Initial Order, the Applicants have continued ordinary course business operations. The limited portion of the DIP Loan required for that purpose (\$800,000) was funded and used to pay critical expenses including the impending payroll obligations of the Applicants and rent.²

12. The Applicants, with the assistance of the Monitor, have also communicated with their suppliers and other stakeholders, worked to stabilize the business, negotiated and entered into an engagement letter with the proposed chief restructuring officer, and have finalized the sale process in respect of which relief is sought today.³

C. Chief Restructuring Officer

13. In order to assist with a successful restructuring, the Applicants are seeking the appointment of Howard Capital LLC ("**HC**") as chief restructuring officer ("**CRO**"). On April 5, 2020, the Applicants entered into an engagement letter with HC (the "**CRO Engagement Letter**"). Howard Steinberg, HC's managing member and sole owner, will be the primary person providing

¹ [*James E. Wagner Cultivation Corporation*](#), (April 1, 2020) Toronto, CV-20-00639000-00CL at paras 13-18, 20, 22, 32, 33, 36 (Initial Order) [Initial Order].

² Affidavit of Philip Armstrong sworn April 6, 2020 at para 10 [Armstrong Affidavit]; First Report of the Monitor KSV Kofman Inc. dated April 6, 2020 at para 3.1 [Monitor's Report].

³ Armstrong Affidavit, *ibid* at para 10; Monitor's Report, *ibid* at para 3.0.

CRO services.⁴ The Monitor believes that the Companies would benefit by augmenting the senior management team to add stability to the business during the CCAA proceedings, and Mr. Steinberg has extensive experience in the cannabis sector and with distressed companies and restructurings.⁵

14. As further detailed in the Armstrong Affidavit, the CRO will be responsible for restructuring initiatives focused on improving operations, growing sales and improving profitability.⁶ As Mr. Steinberg is currently on the Board of Directors of Trichome, the CRO will not have any role in the SISP, and will instead focus solely on operational restructuring.⁷ While Mr. Steinberg was appointed to the board of directors of JWC as a nominee of Trichome, and is a member of the Special Committee, he will resign from both positions contemporaneously with Court approval of the CRO Engagement Letter.⁸

15. Pursuant to the CRO Engagement Letter, HC will receive a monthly management fee, plus the cost of consultants and other expenses. In the event that the Applicants consummate a successful transaction in the SISP to a party other than Trichome, HC is entitled to a success fee. HC is entitled to a further success fee if all secured creditors of the Applicants are paid in full through the SISP.⁹ Due to the sensitive nature of these amounts, the Applicants are seeking a sealing order with respect to the payment terms under the CRO Engagement Letter.

16. The CRO Engagement Letter also provides for an indemnity in respect of the CRO, Mr. Steinberg and their consultants.

⁴ Armstrong Affidavit, *ibid* at para 11.

⁵ *Ibid* at para 13; Monitor's Report, *supra* note 2 at paras 7.0(1), 7.0(6).

⁶ Armstrong Affidavit, *ibid* at para 15.

⁷ *Ibid* at para 20.

⁸ *Ibid* at para 14.

⁹ *Ibid* at paras 16-17; Monitor's Report, *supra* note 2 at para 7.0(5).

17. The Applicants are seeking an increase to the Administration Charge to, among other things, cover the monthly fee and expenses of the CRO. No charge is sought in respect of the CRO's success fees or the indemnity under the CRO Engagement Letter.

D. Stalking Horse APA

18. As a result of extensive discussions with Trichome (the Applicants' first lien lender) 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, in addition to acting as DIP Lender. Trichome is a specialty finance company focused on providing flexible and creative capital solutions to the global legal cannabis market.¹⁰

19. The Stalking Horse APA is a credit bid, and the purchase price has an estimated value of approximately \$11.7 million, which includes the amounts expected to be owing under Trichome's first lien debt and the amount of the DIP Loan as of the closing date. The Stalking Horse APA includes an expense reimbursement fee up to a maximum of \$100,000 (inclusive of HST) in the event Trichome is not the successful bidder (the "**Expense Reimbursement**"). There is no additional break fee. The Stalking Horse APA is subject to standard conditions being fulfilled or performed.¹¹

E. The SISP

20. Pursuant to the proposed SISP, Stoic Advisory Inc., in its capacity as M&A advisor to the Applicants ("**Stoic**"), will, under the supervision of the Special Committee and the Monitor, be

¹⁰ Armstrong Affidavit, *ibid* at paras 23-25.

¹¹ *Ibid* at para 26; Monitor's Report, *supra* note 2 at paras 6.4, 6.5.

responsible for the marketing and sale of the Applicants' business. Stoic is a boutique corporate finance advisory firm focused on the global cannabis industry that has a pre-existing relationship with the Applicants.¹²

21. Stoic is also a minority shareholder of Trichome (holding less than 3%) as well as an informal advisor to Trichome. Stoic has no control or influence over Trichome. The Applicants have inserted restrictions in the proposed approval order to address this relationship, including that Stoic is not permitted to discuss any aspect of the SISP with Trichome.¹³

22. As Stoic was initially engaged by the Applicants prior to these CCAA proceedings, the Applicants and Stoic (with the assistance of the Monitor) have entered into an addendum to their previous engagement letter (collectively, the "**Stoic Engagement Letter**") to reflect the terms of the SISP. The Stoic Engagement Letter contemplates a one-time work fee in the amount of \$75,000 upon the Court's approval of the Successful Bid under the SISP as well as a success fee in the event a successful transaction is consummated with a party other than Trichome. The percentage of the success fee increases with the amount by which the successful transaction exceeds the value of the Stalking Horse APA:¹⁴

Amount by which successful transaction exceeds Stalking Horse APA	Success Fee %
\$500,000	15%
\$500,000-\$1,000,000	25%
\$1,000,000 - \$1,500,000	30%
\$1,500,000+	10%

¹² Armstrong Affidavit, *ibid* at paras 28, 31.

¹³ *Ibid* at para 32.

¹⁴ *Ibid* at para 28-29.

23. 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).¹⁵

24. Due to the impact of COVID-19, the Applicants have retained a third party to prepare a video presentation of the critical aspects of the Applicants' facilities for those that cannot attend the premises in person.¹⁶

F. The Bidding Procedures

25. The Bidding Procedures set forth the process by which Stoic intends to conduct the SISP, under the supervision of the Special Committee and the Monitor, for the sale of all or substantially all of the Applicants' business including, but not limited to, conducting the solicitation process and an auction, if necessary. The Stalking Horse APA will serve as the stalking horse bid in the SISP and shall be subject to higher or otherwise better offers received as part of the SISP.¹⁷

26. While the Applicants are seeking bids to purchase some or all of their assets, the Applicants will also consider a bid that contemplates a plan of compromise or arrangement under the CCAA, provided it is otherwise a Qualified Bid (as defined in the Bidding Procedures).¹⁸

27. The base purchase price for 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

¹⁵ *Ibid* at para 34.

¹⁶ *Ibid*.

¹⁷ *Ibid* at para 27.

¹⁸ *Ibid* at para 37.

as part of the Stalking Horse APA; (ii) the amount of the DIP Loan of \$4 million; (iii) the Expense Reimbursement of \$100,000; and (iv) a \$250,000 bid increment).¹⁹

28. The Applicants believe that the SISP and Bidding Procedures will result in a fair and equitable process that will fairly canvass the market in order to maximize value for the Applicants' assets resulting in the best outcome for the Applicants' stakeholders.²⁰

PART III: ISSUES

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

- (a) the Court should extend the Stay of Proceedings;
- (b) the proposed CRO should be appointed and a sealing order granted over the payment terms under the CRO Engagement Letter;
- (c) the Court should increase the amount of the charges granted in the Initial Order;
- (d) the Stalking Horse APA should be approved; and
- (e) the SISP and Bidding Procedures, including the Stoic Engagement Letter, should be approved.

¹⁹ *Ibid* at para 38.

²⁰ *Ibid* at para 39.

PART IV: LAW AND ARGUMENT

A. The Stay of Proceedings

30. 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.²¹ 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.²²

31. As submitted in respect of the Initial Order, the Applicants require the Stay of Proceedings to prevent enforcement action from Trichome, that has issued demands and enforcement notices, as well as from other creditors. At this time, the Applicants (with the assistance of the Monitor and Stoic) are seeking to implement the SISF and are intending to return to Court for approval of the Successful Bid prior to June 26, 2020. It would be detrimental to their ability to do so, and destructive to the overall value of the business, if proceedings were commenced or continued or rights and remedies were executed against the Applicants.²³

32. 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 restructuring under the CCAA, while maintaining ordinary course business operations.²⁴ The Monitor supports the requested extension of the Stay of Proceedings, and the Applicants are forecast to have sufficient liquidity to fund their obligations

²¹ *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, s 11.02(3) [CCAA].

²² [Century Services Inc v Attorney General \(Canada\), 2010 SCC 60](#) at para 14; [Target Canada Co., 2015 ONSC 303](#) at para 8.

²³ Armstrong Affidavit, *supra* note 2 at paras 48-49.

²⁴ *Ibid* at para 50.

and the costs of the CCAA proceeding through the end of the proposed extension to the Stay of Proceedings.²⁵

33. The Applicants believe the extension of the Stay of Proceedings to and including June 26, 2020 is appropriate in the circumstances.²⁶

B. Appointment of the CRO and Sealing Order

1. Engagement of the CRO

34. Pursuant to section 11 of the CCAA, the Court has the "authority to allow the applicants to enter into arrangements to facilitate restructuring. This includes the retention of expert advisors where necessary to help with the restructuring efforts."²⁷ Where the engagement of a CRO is appropriate and will assist with a successful restructuring, the appointment of the CRO has been approved.²⁸ Courts have also considered whether the quantum and nature of remuneration to be paid to the CRO is fair and reasonable, including whether the monitor is supportive.²⁹

35. The Monitor has indicated that based on its involvement with the Applicants and the Special Committee since the commencement of these proceedings, it appears that the Applicants would benefit by augmenting the senior management team to add stability to the business during the CCAA proceedings.³⁰ In this case, the Applicants will benefit from the CRO's expertise and experience, including restructurings in the cannabis space.³¹ The CRO's focus on operational restructuring will add stability to the business during the CCAA proceedings and may well enhance

²⁵ Monitor's Report, *supra* note 2 at paras 8, 9.0(2); *Ibid* at para 42.

²⁶ Armstrong Affidavit, *ibid* at paras 47-48.

²⁷ [Re Victorian Order of Nurses for Canada, 2015 ONSC 7371](#) at para 27 [*Victorian Order*].

²⁸ [Ibid](#); [Re Walter Energy Canada Holdings, Inc, 2016 BCSC 107](#) at para 35 [*Walter Energy*].

²⁹ [Victorian Order](#), *ibid* at para 28.

³⁰ Monitor's Report, *supra* note 2 at paras 7.0(1), 7.0(6).

³¹ Armstrong Affidavit, *supra* note 2 at para 13; Monitor's Report, *ibid* at para 7.0(1).

the overall value of the business, while allowing the Applicants and other parties to focus on the SISP, among other things.³²

36. The remuneration of the CRO consists of a monthly fee and success fees that are triggered if the Applicants consummate a successful transaction in the SISP with a party other than Trichome, or a transaction that results in all secured creditors of the Applicants being repaid in full, respectively. The Special Committee and the Monitor believe the quantum and nature of the remuneration is fair and reasonable in the circumstances, that Mr. Steinberg has the experience to perform the mandate, and is supportive of the relief sought in connection with the CRO. In addition, the retention of HC as the CRO is a condition of the DIP Loan.³³

37. In these circumstances, the Applicants believe the appointment of the CRO will assist in a successful resolution to these CCAA proceedings, and the terms of the CRO Engagement Letter are reasonable and appropriate in the circumstances.

2. Sealing Order

38. Courts should exercise their discretion to grant sealing orders where the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and the salutary effects of the order outweigh its deleterious effects.³⁴ A sealing order in respect of a CRO has been granted on the basis that the information in the engagement letter was commercially sensitive, in that it could impair the CRO's ability to obtain market rates in other engagements, and the salutary effects of the order outweighed "the minimal impact on the principle of open courts."³⁵

³² Monitor's Report, *ibid.*

³³ Armstrong Affidavit, *supra* note 2 at paras 3, 13, 16-18; *Ibid.*

³⁴ [*Sierra Club of Canada v Canada \(Minister of Finance\)*, 2002 SCC 41](#) at para 53.

³⁵ [*Victorian Order*](#), *supra* note 27 at para 28.

39. The same considerations apply here. The payments terms of the CRO Engagement Letter are commercially sensitive, and the salutary effects of the order, which include being able to retain the CRO in the circumstances outlined above, outweigh the minimal deleterious effect.³⁶

C. Increase to Charges

40. Pursuant to the Initial Order, the Applicants obtained an Administration Charge in the amount of \$500,000, a Directors' Charge in the amount of \$450,000 and a DIP Lender's Charge in the amount of \$800,000. These amounts were obtained in consideration of sections 11.001 and 11.2(5) of the CCAA, as the limited amounts reasonably necessary for the continued operations of the Applicants in the ordinary course of business for the initial 10-day period. The Applicants are now seeking to increase these charges for the amounts reasonably required during these CCAA proceedings.

1. Administration Charge

41. The Applicants are seeking to increase the Administration Charge from \$500,000 to \$600,000 in order to provide security for the monthly fees and expenses of the proposed CRO.

42. The jurisdiction to grant a charge for professional fees, including for a CRO, is found in section 11.52 of the CCAA:

11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

...

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act;...

³⁶ Armstrong Affidavit, *supra* note 2 at para 12.

43. Such a charge has been recognized as necessary to ensure the involvement of such professionals and achieve the best possible outcome for stakeholders.³⁷ In *Canwest Publishing*, Justice Pepall (as she then was) set out a non-exhaustive list of factors to be considered:

- (a) the size and complexity of the businesses being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the Monitor.³⁸

44. In these circumstances, the Applicants' business is in a highly regulated and complex industry, and having the CRO focus on operational restructuring will maximize the value of the Applicants' business in the best interests of its stakeholders. It is important to the success of these CCAA proceedings to have the increased Administration Charge in place to ensure the continued involvement of the CRO (the appointment of which is also a condition of the DIP Loan). In light of the CRO's mandate pursuant to the CRO Engagement Letter, there is no unwarranted duplication of roles. The Monitor believes the quantum of the proposed charge is fair and reasonable, and is supportive of the relief sought. Trichome, the first-lien lender, is also supportive of the increase to the Administration Charge.³⁹

³⁷ *Walter Energy*, *supra* note 28 at para 41; *U.S. Steel Canada Inc. 2014 ONSC 6145* at para 22.

³⁸ *Canwest Publishing Inc. 2010 ONSC 222* at para 54.

³⁹ Armstrong Affidavit, *supra* note 2 at paras 15-18, 20, 40-41.

2. Directors' Charge

45. In the Initial Order, the Applicants obtained a Directors' Charge in the amount of \$450,000 to secure the indemnity of their directors and officers for liabilities they may incur during the CCAA Proceedings, which may include unpaid accrued wages and unpaid accrued vacation pay, together with unremitted excise, sales, goods and services, and harmonized sales taxes.⁴⁰

46. The amount of the Directors' Charge was limited to the estimated exposure up until the date of the Comeback Hearing. At this time, the Applicants seek to increase the Directors' Charge to \$1,050,000, which is an estimation of the maximum potential liability the directors and officers could have during these CCAA proceedings.⁴¹ The directors and officers will only be entitled to the benefit of the Directors' Charge to the extent insurance coverage is unavailable or insufficient, and it is anticipated that payroll and sales tax liabilities will continue to be paid in the ordinary course.⁴²

47. In granting the Initial Order, this Court found that the requirements for the Directors' Charge were satisfied, and the amount sought was appropriate and reasonably necessary for continued business operations during the initial 10-day period.⁴³ The criteria which satisfied the Directors' Charge in the Initial Order remain the same; the Applicants are merely seeking an increase to an amount that reflects an estimation of the maximum potential liability the directors

⁴⁰ [Initial Order](#), *supra* note 1 at paras 19-21.

⁴¹ Armstrong Affidavit, *supra* note 2 at para 42; Amended and Restated Initial Order, dated April 9, 2020 at para 20 [Amended and Restated Initial Order].

⁴² Monitor's Report, *supra* note 2 at para 10.2.

⁴³ [Re James E. Wagner Cultivation Corporation \("JWC"\) v et al](#), (April 9, 2020) Toronto, CV-20-00639000-00CL at para 15 (Endorsement).

and officers could have during the entirety of the CCAA proceedings.⁴⁴ The Monitor supports the increase of the Directors' Charge, as does Trichome, the first-lien lender and DIP Lender.⁴⁵

3. DIP Lender's Charge

48. In the Initial Order, the DIP Loan of \$4,000,000 was approved, but only \$800,000, the amount proposed to be funded prior to the Comeback Hearing and necessary for ordinary course operations during the initial 10-day period, was subject to the DIP Lender's Charge. The Applicants now seek to have the amount of the DIP Lender's Charge increased to \$4,000,000, being the entirety of the DIP Loan.⁴⁶

49. The criteria supporting the granting of the DIP Loan and the DIP Lender's Charge in the Initial Order are still present; the Applicants are merely seeking to increase the quantum of the DIP Lender's Charge to a maximum of \$4,000,000, the maximum amount available to the Applicants under the DIP Loan. The DIP Loan is still 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. Additional draws under the DIP Loan are conditional on the increase to the DIP Lender's Charge being granted.⁴⁷

50. In accordance with subsection 11.2(1) of the CCAA, notice of the increase being sought has been provided to the secured creditors, the proposed charge will not secure obligations incurred prior to the CCAA proceedings, and the amount proposed to be funded is the amount of the DIP Loan that was approved at the Initial Order.

⁴⁴ Armstrong Affidavit, *supra* note 2 at paras 42-43.

⁴⁵ *Ibid* at para 43; Monitor's Report, *supra* note 2 at para 10.2(6).

⁴⁶ Armstrong Affidavit, *ibid* at paras 44-45; Amended and Restated Initial Order, *supra* note 41 at paras 37, 40.

⁴⁷ Armstrong Affidavit, *ibid* at paras 45-46.

D. Approval of Stalking Horse APA

51. Approval of the Stalking Horse APA is only being sought at this stage for purposes of approving it as the stalking horse bid under the Bidding Procedures, and approving the Expense Reimbursement. If the Stalking Horse APA is ultimately designated as the “Successful Bid”, further approval from this Court will be sought.

52. Stalking horse agreements facilitate sales by establishing a baseline price and deal structure for superior bids from interested parties, maximizing the value of a business for the benefit of its stakeholders and enhancing the fairness of the sale process. Stalking horse agreements have been approved concurrently with a sale process under the CCAA in other proceedings.⁴⁸

53. In this case, the Stalking Horse APA is the product of extensive negotiations with Trichome, the Applicants' first lien lender and the DIP Lender, and provides a purchase price that establishes a valuable baseline price that is intended to improve the bids received in the SISP. The purchase price under the Stalking Horse APA is estimated to be \$11.7 million, including the "Assumed Obligations" which includes the DIP Loan of \$4 million. This baseline price will assist in maximizing the value of the Applicants' business as it may contribute to a higher valuation and assist in obtaining the highest and best bids for the Applicants' business. In addition, the Monitor is supportive of the approval of the Stalking Horse APA.⁴⁹

54. The Stalking Horse APA includes an Expense Reimbursement of \$100,000 (inclusive of HST) if Trichome is not the Successful Bidder. Such a fee is intended to compensate stalking

⁴⁸ [Nortel Networks Corp. Re \(2009\), OJ No. 3169](#) at para 56 [*Nortel*]; [Aralez Pharmaceuticals Inc.](#), (October 20, 2018) Toronto, CV-18-603054-00CL at para 6 (Order Re Bidding Procedures Approval); [Clover Leaf Holdings Company](#), (December 20, 2019) Toronto, CV-19-631523-00CL at para 6 (Bidding Procedures, Stalking Horse Approval and Stay Extension Order).

⁴⁹ Armstrong Affidavit, *supra* note 2 at para 27; Monitor's Report, *supra* note 2 at paras 6.4, 6.5, 6.6, 6.7.

horse purchasers for the time and resources spent in developing a stalking horse agreement. Courts have recognized that some premium over simply providing for expenses may be expected, due in part to the risk that is undertaken by stalking horse purchasers. However, in this case, only an expense reimbursement in respect of actual legal, diligence and other costs incurred by Trichome is being sought; there is no break fee. When considering break or termination fees, courts have recognized that break fees in the range of 3% and expense reimbursements in the range of 2% have been approved,⁵⁰ and there is an overall range of 1.8% to 5% of the value of the bid.⁵¹ Agreeing to such payments is a matter of business judgment and therefore judicial deference is appropriate provided the decision falls within a range of reasonableness.⁵²

55. In this case, the Expense Reimbursement is approximately 0.85% of the estimated value of the Stalking Horse APA of \$11.7 million. This falls well below the range described in the above cases. In addition, the Monitor is of the view that the Expense Reimbursement is reasonable in the circumstances and is supportive of its approval.⁵³

56. The Applicants believe that the Stalking Horse APA, including the Expense Reimbursement, is fair and reasonable in the circumstances.

⁵⁰ [Danier Leather Inc. Re, 2016 ONSC 1044](#) at paras 41-42 [*Danier*].

⁵¹ [CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd, 2012 ONSC 1750](#) at para 13.

⁵² [Danier](#), *supra* note 50 at para 44; [Brainhunter Inc. Re. \(2009\), 183 ACWS \(3d\) 905](#) at para 20 [*Brainhunter*].

⁵³ Armstrong Affidavit, *supra* note 2 at paras 38-39; Monitor's Report, *supra* note 2 at paras 6.5, 6.7.

E. The SISP and Bidding Procedures Should be Approved

57. The remedial nature of the CCAA confers broad powers to facilitate restructurings, including the power to approve a sale process in relation to a CCAA debtor's business and assets, prior to or in the absence of a plan of compromise and arrangement.⁵⁴

58. In *Nortel*, the Court identified several factors to be considered in determining whether to approve a sale process:

- (a) Is a sale warranted at this time?
- (b) Will the sale be of benefit to the whole "economic community"?
- (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?⁵⁵

59. While not technically applicable at the sale process stage, the factors set out in subsection 36(3) of the CCAA have also been considered when deciding whether to approve a sale process:

- (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;

⁵⁴ *Nortel*, *supra* note 48 at paras 47-48; CCAA, *supra* note 21 s 11, s 36.

⁵⁵ *Nortel*, *ibid* at para 49; *Brainhunter*, *supra* note 52 at para 13; *Danier*, *supra* note 50 at para 23.

- (c) Whether the monitor filed with the court a report stating that in its 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.⁵⁶

60. In consideration of the above criteria and factors, the SISP and Bidding Procedures should be approved as:

- (a) a sale of the Applicants' business will maximize value and allow the Applicants to continue as a going concern in the best interests of all stakeholders;
- (b) to date, no creditor has objected to the SISP and in the circumstances the Applicants do not believe any creditor has a reasonable basis to object to the SISP;
- (c) the combination of the Stalking Horse APA and Bidding Procedures will benefit the whole economic community as:
 - (i) the Stalking Horse APA sets a floor for other sale transactions and may contribute to a higher valuation, increasing the potential consideration to be

⁵⁶ [U.S. Steel Canada Inc. \(Re\), 2015 ONSC 2523](#) at para 8.

received, while also providing an outcome that is beneficial to all stakeholders should the SISP not produce a better bid;

- (ii) the Bidding Procedures are designed and intended to solicit the highest and best bid, and provide a market test for the benefit of all stakeholders;
- (d) the SISP will be led by Stoic, which has extensive experience and knowledge in the cannabis sector;
- (e) Trichome, the first-lien lender and the DIP Lender, has been consulted and involved throughout and is supportive of the SISP and Bidding Procedures; and
- (f) the Monitor is supportive of the approval of the SISP and Bidding Procedures.

61. The Applicants submit that the SISP and Bidding Procedures provide an appropriate framework that will fairly canvass the market to obtain the best offer for the Applicants' business which will maximize value for the Applicants' stakeholders.⁵⁷ The extensive experience and knowledge of Stoic will be greatly beneficial to the success of the SISP and the Applicants believe the terms of the Stoic Engagement Letter, including the work fee and potential success fee, are fair and reasonable in the circumstances, including in consideration of the time and effort that Stoic will invest conducting the SISP and the considerable risk that a transaction superior to the Stalking Horse APA may not be completed.⁵⁸

62. For the above reasons, the Applicants submit that the SISP and Bidding Procedures, including the Stoic Engagement Letter, should be approved.

⁵⁷ Armstrong Affidavit, *supra* note 2 at para 39.

⁵⁸ *Ibid* at paras 30-31.

PART V: RELIEF REQUESTED

63. 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 Amended and Restated Initial Order and Bidding Procedures and Stalking Horse APA Approval Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 6, 2020

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [*Aralez Pharmaceuticals Inc.*](#), (October 20, 2018) Toronto, CV-18-603054-00CL (Order Re Bidding Procedures Approval)
2. [*Brainhunter Inc, Re.*](#) (2009), 183 ACWS (3d) 905
3. [*Canwest Publishing Inc, Re.*](#) 2010 ONSC 222
4. [*CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd.*](#) 2012 ONSC 1750
5. [*Century Services Inc v Attorney General \(Canada\).*](#) 2010 SCC 60
6. [*Clover Leaf Holdings Company.*](#) (December 20, 2019) Toronto, CV-19-631523-00CL (Bidding Procedures, Stalking Horse Approval and Stay Extension Order).
7. [*Danier Leather Inc, Re.*](#) 2016 ONSC 1044
8. [*Nortel Networks Corp, Re*](#) (2009), OJ No. 3169
9. [*Re Victorian Order of Nurses for Canada.*](#) 2015 ONSC 7371
10. [*Re Walter Energy Canada Holdings, Inc.*](#) 2016 BCSC 107
11. [*Sierra Club of Canada v Canada \(Minister of Finance\).*](#) 2002 SCC 41
12. [*Target Canada Co.*](#) 2015 ONSC 303
13. [*U.S. Steel Canada Inc.*](#) 2014 ONSC 6145
14. [*U.S. Steel Canada Inc, \(Re\).*](#) 2015 ONSC 2523

SCHEDULE B – STATUTES RELIED ON

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

Section 11

General power of court

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.

Section 11.001

Relief reasonably necessary

An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

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.

Section 11.51

Security or charge relating to director's indemnification

(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, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

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

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Section 11.52

Court may order security or charge to cover certain costs

(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

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

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.**

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