

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N :

ELA CAPITAL INC.

Applicant

– and –

11157353 CANADA CORPORATION

Respondent

FACTUM OF THE APPLICANT

(Application for Receivership Order and Approval of Sale Process, Stalking Horse SPA,
KERP and KERP Charge)
(returnable February 21, 2023)

February 17, 2023

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1. Capitalized terms not otherwise defined herein have the meaning given to them in the affidavit of Benjamin Trefler sworn February 15, 2023, filed at tab 2 of the Applicant's application record (the "**Trefler Affidavit**").¹

I. NATURE OF THIS APPLICATION

2. This is an application for:

- (a) a Receivership Order² pursuant to sections 243 of the BIA³ and 101 of the CJA⁴ which, *inter alia*, appoints KSV as the Receiver, without security, of all of the Respondent's Property, including without limitation the Shares (but excluding the Excluded Assets and Excluded Business, which are cannabis-related); and
- (b) an Ancillary Order⁵ which:
 - i. approves the Sale Process for the Shares;
 - ii. authorizes the Receiver to execute and implement the Stalking Horse SPA for purposes of constituting the stalking horse bid for the Materia Germany Shares in the Sale Process;
 - iii. approves the KERP with respect to the Respondent's Manager and a corresponding KERP Charge, which is proposed to rank behind the Receiver's Charge and the Receiver's Borrowings Charge; and
 - iv. seals the terms of the KERP until 30 days after the completion of the Sale Process or further order of this Court.

¹ The Trefler Affidavit is at **tab 2 (page 18)** of the application record.

² A draft of the Receivership Order is provided at **tab 3 (page 300)** of the application record, and a comparison of the draft Receivership Order to the Commercial List model receivership order is included at **tab 4 (page 319)** of the application record.

³ *Bankruptcy and Insolvency Act*, [R.S.C., 1985, c. B-3](#).

⁴ *Courts of Justice Act*, [R.S.O. 1990, c. C.43](#).

⁵ A draft of the Ancillary Order is provided at **tab 5 (page 344)** of the application record.

II. FACTUAL OVERVIEW

3. The Respondent is the parent company of the Materia Business. The Respondent holds all the shares of Materia Malta, Materia Germany, and Materia UK. Materia Malta and Materia Germany operate valuable going-concerns in the cannabis industry in Europe. Materia UK has no activities but owns marketable assets. The Respondent has no activity other than holding the Shares and employing the Manager to oversee the activities of Materia Malta and Materia Germany.⁶

4. The Respondent is insolvent and is in default under its loan agreements with the Applicant.⁷ The Respondent is unable to repay its creditors, to continue to finance the activities of Materia Malta and Materia Germany, or to continue to finance the sale efforts necessary to monetize its assets. In such circumstances, the requested relief is necessary to preserve and maximize the value of the Shares and the going-concern businesses of Materia Germany and Materia Malta.⁸

5. The Applicant is the largest secured creditor of the Respondent.⁹ The Applicant brings this application to protect its interests and the interest of all stakeholders.

6. The objectives underlying the relief sought by the Applicant are:

- (a) to realize and maximize the value of the Shares; and
- (b) to preserve the Materia Malta and Materia Germany going-concerns during the Sale Process.

⁶ Trefler Affidavit, paras. 13-33.

⁷ Trefler Affidavit, paras. 45-50.

⁸ Trefler Affidavit, paras. 102-109.

⁹ Trefler Affidavit, paras. 38-44; Pre-filing report of KSV Restructuring Inc. as proposed receiver dated February 17, 2023 (the “**Pre-Filing Report**”), para. 1.0-2.

7. Achieving those objectives is in the interest of all stakeholders. The Receivership Order and Ancillary Order are designed to achieve those objectives:

- (a) the Receivership Order allows the Receivership Financing under the Receiver's Borrowings Charge. The Receivership Financing will enable the funding of the receivership, the Sale Process, the operations of Materia Malta and Materia Germany during the Sale Process, and the KERP;¹⁰
- (b) the Sale Process, managed by the Receiver, will maximize market exposure in the circumstances and realize the value of the Shares;¹¹
- (c) the Stalking Horse SPA will constitute the stalking horse bid for the Materia Germany Shares in the Sale Process, which ensures a satisfactory monetization of the Materia Germany Shares while stimulating market interest and competition for the Shares generally;¹² and
- (d) the KERP and KERP Charge are necessary for the Manager to remain with the Respondent, which is necessary and valuable for purposes of the Sale Process and the receivership.¹³

8. The Applicant therefore applies for the requested relief.

9. The full factual background and context is described in the Trefler Affidavit.

III. ISSUES

10. The issues on this application are: **(a)** whether the Court should grant the Receivership Order; **(b)** whether the Court should approve the Sale Process; **(c)** whether the Court should

¹⁰ Trefler Affidavit, paras. 102-106.

¹¹ Trefler Affidavit, paras. 85-93.

¹² Trefler Affidavit, paras. 75-84.

¹³ Trefler Affidavit, paras. 94-101.

approve the Stalking Horse SPA for purposes of constituting the stalking horse bid for the Materia Germany Shares in the Sale Process; (d) whether the Court should approve the KERP and the KERP Charge; and (e) whether the Court should grant a temporary sealing order.

11. As is further discussed below, the Applicant respectfully submits that this Court should answer each of the above questions in the affirmative.

IV. LAW AND ARGUMENT

a. The Receivership Order should be granted

i. It is “just or convenient” to appoint the Receiver

12. Courts have the discretion to appoint a receiver where it is “just or convenient to do so”.¹⁴ The BIA also requires that the applicant be a secured creditor, that the debtor be insolvent,¹⁵ and that the applicant complied with the notice and 10-day requirements of s. 244 of the BIA.¹⁶ All of the latter requirements are met in this case:

- (a) the Applicant is a secured creditor of the Respondent under the Applicant GSA and the PPSA;¹⁷
- (b) the Respondent is insolvent because it is unable to meet its debts as they become due as evidenced by, *inter alia*, the defaults and amounts due and owing to the Applicant and Kanabo;¹⁸ and

¹⁴ CJA, s. 101 and BIA, s. 243.

¹⁵ Section 2 of the BIA defines “insolvent person” as including a person unable to meet its obligations as they generally become due for any reason, or that has ceased paying its current obligations in the normal course of business.

¹⁶ BIA, s. 243.

¹⁷ Trefler Affidavit, paras. 38-44.

¹⁸ Trefler Affidavit, paras. 45-46.

- (c) the Applicant sent the Respondent a demand and notice in accordance with s. 244 of the BIA on January 25, 2023. In response to the demand, the Respondent consented to enforcement.¹⁹

13. It is also “just or convenient” to appoint the Receiver. In deciding whether it is just or convenient to appoint a receiver, the Courts will “*have regard to all circumstances*” including:²⁰

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| <p>(a) the fact that the debtor is insolvent or in financial difficulty and is not able to satisfy its debts in the normal course;</p> <p>(b) the fact that the debtor is in default towards the applicant and others;</p> <p>(c) the amounts owed;</p> <p>(d) the fact that the applicant has an enforceable security interest over the subject property;</p> <p>(e) whether the debtor consents to the appointment of a receiver;</p> <p>(f) the potential loss to the subject property or the applicant’s security if a receivership is not ordered;</p> <p>(g) the interests of the debtor, creditors and affected third parties;</p> | <p>(h) the maximization of the return on the subject property and the maximization of creditor recovery;</p> <p>(i) the fact that a receivership would facilitate the orderly and commercially reasonable disposition of the subject property through an efficient and transparent sale or liquidation process;</p> <p>(j) the fact that a receivership would facilitate the resolution of outstanding issues such as any issue of priority among creditors; and</p> <p>(k) the fact that a receivership provides relief that is beneficial to the objectives of the receivership and the interest of stakeholders generally.</p> |
|---|---|

14. The above factors illustrate that the appointment of the Receiver is just and convenient in this case. The Respondent is in default under the Loan Agreements and owes more than \$3,251,214 to the Applicant.²¹ The Applicant’s Security covers all present, future and after-acquired property, assets and undertakings of the Respondent and proceeds thereof.²² The Applicant is entitled to

¹⁹ Trefler Affidavit, paras. 47-50.

²⁰ See, *inter alia*, *Bank of Nova Scotia v Freure Village of Clair Creek*, [1996 CanLII 8258 \(ON SC\)](#) (Blair J. (as he then was)); *1529599 Ontario Limited v Dalcour Inc.*, [2012 ONSC 5707](#) (Brown J. (as he then was)), paras. 40-42; *First National Financial GP Corporation v 3291735 Nova Scotia Limited*, [2018 NSSC 235](#) (Brothers J.) (“*First National*”), paras. 3-17; and *Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited*, [2022 ONSC 6186](#) (Osborne J.) (“*Hypoint*”), paras. 22-42.

²¹ Trefler Affidavit, paras. 45-48.

²² See the Applicant GSA, Exhibit “G” to the Trefler Affidavit ([page 122](#) of the application record), s. 10.

enforce.²³ The Respondent consents to enforcement in accordance with s. 244 of the BIA.²⁴ The Receivership Order will allow the Receivership Financing and the Sale Process, which will preserve and maximize the value of the Shares. The Receivership Financing will also allow the continuation of Materia Malta and Materia Germany as going-concern businesses for the duration of the Sale Process, which is in the interest of all stakeholders.

15. As stated by Justice Osborne of this Court in the recent matter of *Hypoint*, the “*overarching objective*” of receiverships “*is to enhance and facilitate the preservation and realization of a debtor’s assets, for the benefit of all creditors,*” and “*to maximize proceeds*”.²⁵ The proposed receivership process will meet these goals through the Receivership Financing, the Sale Process, the Stalking Horse SPA, and the KERP.

16. The Receiver consents to act as such, if appointed.²⁶ The Receiver has obtained significant knowledge of the Respondent’s business and the operations of its subsidiaries since it was engaged by the Applicant to prepare for these receivership proceedings, which will assist it in carrying out its duties.²⁷

17. Therefore, the Applicant submits that the appointment of KSV Restructuring Inc. as Receiver is just and convenient.

²³ Trefler Affidavit, paras. 42-44. See the Applicant GSA, Exhibit “G” to the Trefler Affidavit (page 122 of the application record), s. 17-18.

²⁴ Trefler Affidavit, para. 50.

²⁵ *Hypoint*, paras. 22, 40.

²⁶ Consent of KSV Restructuring Inc. to act as receiver, tab 6 (page 363) of the application record.

²⁷ First Report, para. 1.0-4.

ii. The Excluded Assets and Excluded Business should be excluded from the Receiver's Possession

18. As more fully set out in the Receivership Order, the Receiver shall not be in Possession of the Excluded Assets and Excluded Business (as such terms are defined in the Receivership Order). The Excluded Assets and Excluded Business generally include any activity, business or thing for which a permit or license is issued or required in accordance with any cannabis-related legislation in Canada or other relevant jurisdictions.²⁸

19. The exclusion of cannabis-related assets and businesses from the receiver's possession is common practice in receiverships involving cannabis-related business activities. It is to avoid the potential violation of any cannabis-related legislation. Materia Germany and/or Materia Malta hold the relevant licenses and authorizations and will therefore be able to remain in Possession of the Excluded Assets and the Excluded Business, under the oversight of the Manager, throughout the Sale Process and receivership.²⁹ Accordingly, it is appropriate for the Receiver to not take possession of the Excluded Assets and Excluded Business in the circumstances.³⁰

iii. The Receiver's Charge and the Receiver's Borrowings Charge should be granted

20. The proposed Receivership Order provides for a Receiver's Charge and a Receiver's Borrowings Charge, which are both part of the Commercial List model order.

21. The Receiver's Charge will secure the payment of the receiver's and its counsel's fees incurred in respect of these proceedings. The Receiver is essential to the proposed process. The Receivership Order also provides transparency to stakeholders regarding the receivership costs by

²⁸ See paragraphs 2 to 6 of the draft Receivership Order provided at **tab 3 (page 300)** of the application record.

²⁹ Trefler Affidavit, paras. 25-33.

³⁰ See, *inter alia*, *2056706 Ontario Inc. v Pure Global Cannabis Inc.*, [2021 ONSC 5533](#) (Dunphy J.), paras. 6-8.

providing that the Receiver's accounts remain subject to a passing of accounts before the Court, as is the practice on the Commercial List.³¹ This charge is therefore necessary and appropriate for the appointment of the Receiver.³²

22. The proposed Receivership Order allows the Receiver to borrow up to \$575,000 Canadian Dollars in Receivership Financing from the Applicant and the Germany Shares Stalking Horse Bidder. The terms of the Receivership Financing were heavily negotiated between the Receiver, the Applicant and the Germany Shares Stalking Horse Bidder. Those terms are reflected in the term sheet among the parties, appended and further described in the Receiver's Pre-Filing Report,³³ and in the form of Receiver's Certificate included with the draft Receivership Order.³⁴

23. The Receiver's Borrowings Charge is intended to secure the repayment of the Receivership Financing. The Receiver's Borrowings Charge is proposed to be a second-ranking charge, ranking after the Receiver's Charge but ahead of the KERP Charge. The Germany Shares Stalking Horse Bidder and the Respondent would not advance the Receivership Financing without the Receiver's Borrowings Charge.

24. The Receivership Financing is in the interest of stakeholders. It will allow the Materia Malta and Materia Germany businesses to continue as going-concerns which will preserve and maximize the value of the Shares. Therefore, the Receivership Financing and the Receiver's Borrowings Charge are necessary and reasonable.³⁵

³¹ Draft Receivership Order, **tab 3 (page 300)** of the application record, para. 23.

³² See the BIA, s. 243(6).

³³ Pre-Filing Report, section 8.0. A copy of the term sheet is **appendix "B" (page 35)** to the Pre-Filing Report.

³⁴ The Draft Receivership Order is at **tab 3 (page 300)** of the application record.

³⁵ Trefler Affidavit, paras. 102-106.

25. The Receivership Order also specifies that the Receiver may use the Receivership Financing to pay the Applicant's reasonable legal fees. This is a clarification of the Commercial List model receivership order which already provides that "*the Applicant shall have its costs... paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine*" (emphasis added). This clarification also complements the PPSA, which provides that (i) a secured creditor's reasonable expenses and charges incurred in obtaining and maintaining possession of the collateral and its preservation are chargeable to the debtor and are secured by the collateral,³⁶ and (ii) the proceeds of disposition of collateral are first applied to the expenses of the secured party, including the cost and charges incurred with respect to the disposition of the collateral.³⁷

26. The Receivership Order's provision that the Receivership Financing may be used to pay the Applicant's reasonable legal fees is fair and appropriate in the circumstances. The Applicant has incurred the costs of bringing this application which is in the interest of all stakeholders. The Applicant's costs in doing so are analogous to a debtor company's costs incurred to commence and participate in an insolvency process, which are regularly paid in priority in debtor-in-possession proceedings such as BIA proposals or proceedings under the *Companies' Creditors Arrangement Act*.³⁸

³⁶ *Personal Property Security Act*, [R.S.O. 1990, c. P.10](#) (the "PPSA"), s. 17(2).

³⁷ PPSA, s. 63.

³⁸ See the BIA, s. 64.2, and the *Companies' Creditors Arrangement Act*, [R.S.C., 1985, c. C-36](#), s. 11.52.

27. The Receiver is of the opinion that the terms of the Receivership Financing are consistent with such financing used in other cannabis restructurings, and that the Receivership Financing will provide the Receiver with the liquidity required in connection with these proceedings.³⁹

28. For those reasons, the terms of the proposed Receivership Order are fair, commercially reasonable, just, convenient, and in the interest of stakeholders.

b. The Sale Process should be approved

29. The Court has jurisdiction to approve a sale process under section 101(2) of the CJA and section 243(1)(c) of the BIA.⁴⁰ While the Commercial List model receivership order provides a receiver the power to sell assets, it is a common practice to seek the Court's pre-approval of any comprehensive sale process to provide certainty and transparency to all stakeholders and the Court.

30. The Applicant seeks this Court's approval of a sale process with a stalking horse bid. Stalking horse sale processes are a common occurrence in Canadian insolvency proceedings given the value that stalking horse bids add to a sale process.⁴¹ As articulated by Justice Penny in *Danier*

Leather:

The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings

³⁹ First Report, paras. 8.0-1 to 8.0-3.

⁴⁰ CJA s. 101(2): a receivership appointment order “may include such terms as are considered just”; BIA s. 243(1)(c): the Court “may appoint a receiver to... take any other action that the Court considers advisable.”

⁴¹ The notable precedents referenced throughout the discussion below are *Nortel Networks Corporation (Re)*, [2009 CanLII 39492 \(ON SC\)](#) (Morawetz J. (as he then was)) (“*Nortel*”), *Brainhunter Inc. (Re)*, [2009 CanLII 72333 \(ON SC\)](#) (Morawetz J. (as he then was)) (“*Brainhunter*”), *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#) (Brown J. (as he then was)) (“*CCM*”), *Callidus Capital Corporation v Xchange Technology Group LLC*, [2013 ONSC 6783](#) (Morawetz J., as he then was) (“*Callidus*”), *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#) (Penny J.) (“*Danier Leather*”), *First National*, and *Cannapiece Group Inc v Carmela Marzili*, [2022 ONSC 6379](#) (Penny J.) (“*Cannapiece*”).

to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties.⁴²

31. In considering whether to approve a stalking horse sale process in a receivership proceeding, the Courts consider (i) the fairness, transparency and integrity of the proposed process, (ii) the commercial efficacy of the proposed process in light of the specific circumstances of the case, and (iii) whether the sale process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.⁴³ The Courts also consider whether the proposed sale process aligns with the *Soundair* factors, which will be applicable to the subsequent approval of a sale.⁴⁴

32. The above-noted factors support the Court's approval of the proposed Sale Process. Given that the Respondent has no active operations,⁴⁵ there is no reasonable alternative to a sale process. A sale process is necessary to realize and maximize the value of the Respondent's assets for the benefit of all stakeholders.

33. The Sale Process led by an officer of the Court will complement and complete the Respondent's pre-existing and extensive sale and investment solicitation efforts.⁴⁶ The Sale Process follows the typical sequence developed by insolvency professionals to maximize market exposition, transparency, fairness and commercial efficacy. Those steps are: a marketing stage, a

⁴² *Danier Leather*, para. 20. See also *Cannapiece*, para. 8.

⁴³ *CCM*, para. 6.

⁴⁴ Those factors are: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently, (ii) the efficacy and integrity of the process by which offers are obtained, (iii) whether there has been unfairness in the working out of the process, and, (iv) the interests of all parties. *CCM*, para. 6, citing *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#); see also *Callidus*, para. 21, and *Danier*, para. 35.

⁴⁵ Trefler Affidavit, para. 15.

⁴⁶ Trefler Affidavit, paras. 63-74.

due diligence phase, an auction (if required) and a subsequent, separate motion for an approval and vesting order.⁴⁷

34. The Sale Process contains specific criteria for bidders to comply with in order to create a commercially efficient process.⁴⁸ These criteria are usual and commercially reasonable.⁴⁹

35. Throughout the proposed Sale Process, the Receiver is given appropriate discretion to make reasonable amendments to the Sale Process deadlines and terms, if necessary or beneficial, with a view to completing the best possible transaction for the Shares. If the Receiver determines that a change is material, it will bring a motion to the Court for approval, as provided in the Sale Process. Such reasonable out-of-Court flexibility was underlined in *Danier* as a desirable aspect of a sale process, allowing the process to be adaptable to factual developments without necessarily requiring a motion to Court.⁵⁰

36. The duration of the Sale Process, providing for a due diligence period of 30 days before the Binding Offer Deadline, is reasonable in the circumstances. In considering whether the length of a sale process is reasonable, the Courts have considered any past sale efforts in respect of the assets.⁵¹ In this case, the Sale Process is the continuation of extensive sale and investment solicitation efforts actively ongoing since April 2021, being 22 months. This indicates the reasonableness of the proposed 30-day Sale Process.⁵²

⁴⁷ See, *inter alia*, *CCM*, para. 9, and *Nortel*, para. 58.

⁴⁸ See the Sale Process terms, schedule “A” to the draft Ancillary Order (page 351 of the application record), s. 20-27.

⁴⁹ See the Sale Process terms, schedule “A” to the draft Ancillary Order (page 351 of the application record), s. 28-37.

⁵⁰ *Danier Leather*, para. 36.

⁵¹ *Callidus*, para. 15; see also *Danier Leather*, para. 38, and *First National*, para. 31.

⁵² Trefler Affidavit, paras. 63-74 and 91-92.

37. Moreover, the duration of the proposed Sale Process balances the need for expeditiousness and efficiency, appropriate market exposure, and costs. In particular, the amount of the Receivership Financing is a practical limit to the length of the Sale Process. In *CCM* and *Danier*, the Court considered that the limits of available financing was a central consideration as to the length of the sale process.⁵³ If more time is required, the Receiver retains the discretion to extend the Sale Process, as seen above.

38. The Receiver believes that the Sale Process is appropriate for the reasons more fully set out in its Pre-Filing Report, including: (i) that the Sale Process provides for further marketing of the Shares while leveraging the efforts already made, and (ii) that the duration of the Sale Process is sufficient to allow interested parties to perform diligence and submit offers, given the extensive past marketing efforts and the limited resources available to fund an extended sale process.⁵⁴

39. Overall, the proposed Sale Process terms are “fair, transparent, and commercially efficacious” as is required by the caselaw,⁵⁵ and the Sale Process is in the interest of stakeholders. Therefore, the Sale Process should be approved.

c. The Stalking Horse SPA should be approved

40. The Court has jurisdiction to approve a stalking horse bid pursuant to section 101 of the CJA and section 243 of the BIA.

41. As discussed above, Courts support the use of stalking horse bids in sale processes as they stimulate market interest and competition, while ensuring that there will be a successful outcome

⁵³ *CCM*, para. 14; *Danier Leather*, para. 29.

⁵⁴ Pre-Filing Report, para. 5.2-1.

⁵⁵ *CCM*, para. 14; see also *Danier Leather*, para. 32.

to the sale process. In determining whether to approve a stalking horse bid, the Courts consider whether the stalking horse bid is fair, reasonable and in the best interests of stakeholders.

42. The presence of the Stalking Horse SPA in the Sale Process is in the interest of stakeholders. The Stalking Horse SPA will stimulate market interest and competition for the Shares by confirming that there is already a committed buyer. It will also enhance the efficiency of the Sale Process by “weeding out” inferior bids and providing an objective basis for the valuation of the Matera Germany Shares.⁵⁶

43. The Receiver is supportive of the Stalking Horse SPA for the reasons described in its Pre-Filing Report, including that the Stalking Horse SPA protects against the risk that no superior offer will be received in the Sale Process.⁵⁷

44. When assessing whether the purchase price of a stalking horse bid is fair and reasonable, the Court considers whether the bid “*represents a fair and reasonable benchmark for all other bids*” in the sale process.⁵⁸ That standard is met. The Applicant believes that the terms of the Stalking Horse SPA, including the total consideration provided and the Credit Bid, are fair and reasonable in the circumstances.⁵⁹ Furthermore, the Applicant believes that the Stalking Horse SPA represents a satisfactory monetization of the Matera Germany Shares should it constitute a Successful Bid at the conclusion of the Sale Process.⁶⁰

45. The Break Fee and the Expense Reimbursement (together, the “**Bid Protections**”) provided for in the Stalking Horse SPA are also fair and reasonable. Break fees and expense

⁵⁶ Trefler Affidavit, paras. 79-83.

⁵⁷ Pre-Filing Report, para. 5.2-1.

⁵⁸ *Danier Leather*, para. 40.

⁵⁹ Trefler Affidavit, paras. 75-83.

⁶⁰ Trefler Affidavit, para. 79.

reimbursement provisions are common in stalking horse bids in insolvency proceedings. The rationale is to reflect the stalking horse bidder's investment with regard to, *inter alia*, due diligence and transaction documents, and to maintain incentives for stalking horse bids, which provide value in insolvency sale processes.⁶¹

46. Given the important rationale for stalking horse bids, Courts will approve break fees and expense reimbursement provisions if they are not so unreasonably high as to overly disincentivize other bids.⁶² The Courts recognize that break fees and expense reimbursement provisions are subject to the exercise of business judgment and will, therefore, afford the provisions deference as long as they are commercial reasonable.⁶³

47. The Bid Protections provided in the Stalking Horse SPA are fair and commercially reasonable. The Break Fee and the Expense Reimbursement are a requirement of the Germany Shares Stalking Horse Bidder which was extensively negotiated. The Break Fee and the Expense Reimbursement reflect the Germany Shares Stalking Horse Bidder's commitment and the value that the Stalking Horse SPA brings to the Sale Process.⁶⁴

48. The Bid Protections are only payable if the Stalking Horse SPA is not a Successful Bid at the conclusion of the Sale Process. The Break Fee represents approximately 3.5% of the Purchase Price (converted to Canadian Dollars) under the Stalking Horse SPA and the Expense Reimbursement provision refers to amounts actually incurred with a cap of C\$25,000.⁶⁵

⁶¹ See *Danier Leather*, para. 41, and *Nortel*, para. 56.

⁶² See *CCM*, paras. 8, 15, and *Danier Leather*, para. 44.

⁶³ *Cannapiece*, para. 5; *Brainhunter*, para. 20.

⁶⁴ Trefler Affidavit, para. 82.

⁶⁵ Trefler Affidavit, para. 82.

49. The Bid Protections collectively represent approximately 7.85% of the Purchase Price under the Stalking Horse SPA. The Receiver is of the view that the Bid Protections are reasonable as the percentage of bid protections tend to increase in relation to the purchase price in smaller sized transactions. Moreover, the Receiver is of the view that the Bid Protections will not discourage bidders from participating in the Sale Process.⁶⁶

50. In addition, the Germany Shares Stalking Horse Bidder provides interim financing as part the Receivership Financing, which is another valuable contribution that the Germany Stalking Horse Bidder makes to this process. Courts have considered the stalking horse bidder's contribution to the process as a relevant factor in respect of the approval of break fee provisions.⁶⁷

51. For the above reasons, the Stalking Horse SPA should be approved for purposes of constituting the stalking horse bid for the Materia Germany Shares in the Sale Process.

d. The KERP and the KERP Charge should be granted

52. The Court has jurisdiction to approve the KERP and the KERP Charge pursuant to s. 101 of the CJA and s. 243 of the BIA.⁶⁸

53. Employee retention plans are less common in receiverships because the receiver is usually put in possession of the assets and business in lieu of the debtor. However, this Court has granted a KERP under its BIA and CJA jurisdiction in receivership proceedings where the debtor remained in possession of part of its business and assets.⁶⁹ Such are the factual circumstances here, as the

⁶⁶ Pre-Filing Report, paras. 5.1-2 to 5.1-4.

⁶⁷ See *Cannapiece*, para. 5; Pre-Filing Report, para. 5.1-4.

⁶⁸ CJA s. 101(2): a receivership appointment order “*may include such terms as are considered just*”; BIA s. 243(1)(c): the Court “*may appoint a receiver to... take any other action that the Court considers advisable.*”

⁶⁹ See *Ontario Securities Commission v Bridging Finance Inc.*, [2021 ONSC 4347](#) (Morawtz C.J.), paras. 11-17.

Respondent will remain in possession and control of the Excluded Assets and Excluded Business as seen above.

54. The Court has developed the following non-exhaustive list of factors when determining whether to approve a KERP and KERP Charge: (i) whether the Court officer supports the retention plan; (ii) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan; (iii) whether the employees who are the subject of the retention plan are truly “key employees” whose continued employment is critical to the success of the insolvency proceeding; (iv) whether the quantum of the proposed retention payments is reasonable; and (v) the business judgment of the relevant actors regarding the necessity of the retention payments.⁷⁰

55. The above factors support this Court’s approval of the proposed KERP. The Manager is a key employee of the Respondent. Without the KERP, the Manager has advised that he would resign from his position, which would not be in the interest of stakeholders.⁷¹ His continued employment is critical to the success of the Sale Process as well as the preservation of the going-concern businesses and the value of the Shares. Specifically, the Manager’s knowledge and expertise is essential during the receivership and Sale Process for the following reasons:

- (a) the Manager has the critical role of operating and managing a portion of the Material Business (i.e. the Excluded Assets and the Excluded Business) during the receivership proceeding;

⁷⁰ *Re Grant Forest Products Inc.*, [2009 CanLII 42046 \(ON SC\)](#) (Newbould J.), at paras. 8-22, summarized in *Danier Leather*, para. 76; see also *Cannapiece*, paras. 17-18.

⁷¹ Trefler Affidavit, para. 97.

- (b) the Manager's comprehensive understanding of the Materia Business and the cannabis industry will assist the Receiver to, without limitation, populate the data room, create the list of Potential Bidders, and answer any questions that may arise about the Materia Business; and
- (c) the continued involvement of the Manager will provide stability to the Materia Business and comfort to the market during the Sale Process.⁷²

56. Moreover, the quantum of the KERP is nominal compared to the assets and liabilities of the Respondent. The benefit of the KERP in incentivizing the continued involvement of the Manager during the receivership proceeding far outweighs the KERP's nominal cost.

57. In order to provide the Manager comfort that the payments under the KERP are secured,⁷³ the Applicant seeks a Court-ordered KERP Charge. The KERP Charge is proposed to rank third, below the Receiver's Charge and the Receivers' Borrowings Charge, but above all secured creditors, including the Applicant.

58. The Receiver notes that it will require the assistance of the Manager in these proceedings to ensure that cannabis operations in Germany and Malta continue in the ordinary course without disruption.⁷⁴ The Receiver has reviewed the terms of the KERP, including the amounts payable thereunder, and believes they are reasonable in light of the critical assistance the Manager will provide to the Receiver.⁷⁵

⁷² Trefler Affidavit, paras. 94-96.

⁷³ Trefler Affidavit, para. 99.

⁷⁴ Pre-Filing Report, paras. 1.0-4, 6.0-2.

⁷⁵ Pre-Filing Report, paras. 6.0-4 and 6.0-5.

59. For these reasons, the Applicant respectfully submits that this Court should approve the proposed KERP and KERP Charge.

e. The Court should make a temporary sealing order for the terms of the KERP

60. The Applicant applies for a sealing order with respect to the terms of the KERP, which sealing order will automatically expire 30 days following the conclusion of the Sale Process.

61. The Court has jurisdiction to grant sealing orders under s. 137(2) of the CJA.⁷⁶ In deciding whether to grant a sealing order, the Supreme Court of Canada in *Sherman Estate* held that Courts must consider whether: (i) Court openness poses a serious risk to an important public interest; (ii) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (iii) as a matter of proportionality, the benefits of the order outweigh its negative effects.⁷⁷

62. The Courts have regularly recognized that sealing orders with respect to KERP terms meet the *Sherman Estate* test.⁷⁸ As explained by this Court recently in *Just Energy*:

All 3 factors are satisfied here. The documents the applicants seek to seal contain the names of the KERP recipients and the amounts each will receive. Publicly disclosing employee compensation violates the privacy interest of those employees. The employees themselves have not initiated any Court proceeding that would require production of that information. Broad publication of confidential income data could create risks for employee retention in this and other CCAA proceedings.

... The limitation on the open Courts principle is minimal. The order is proportional. It benefits in protecting privacy interests of non-party employees outweigh the very limited impact on the open Courts principle.⁷⁹

⁷⁶ CJA, s. 137(2).

⁷⁷ *Sherman Estate v Donovan*, [2021 SCC 25](#), para. 38.

⁷⁸ See, *inter alia*, *Danier Leather*, paras. 79-86; *Re Essar Steel Algoma Inc. et al.*, [2015 ONSC 7656](#) (Newbould J.), paras. 20-26; and *Just Energy Group Inc. et al.*, [2021 ONSC 7630](#) (Koehnen J.) (“*Just Energy*”), paras. 26-29.

⁷⁹ *Just Energy*, paras. 27-29.

63. The same principles apply here. There is an important public policy interest in protecting the privacy of non-party employees particularly in the context of insolvency proceedings. The Manager has indicated that the inclusion of the KERP terms in the public record would *inter alia* negatively affect his negotiating position with future employers. This is a legitimate and reasonable concern that cannot be solved without a sealing order.⁸⁰

64. The sealing order adequately balances the competing public policy interests of protecting the privacy of non-parties and court openness by limiting the length of the sealing order to 30 days following the conclusion of the Sale Process or further order of this Court. In such circumstances, the sealing order minimally limits the open-courts principle.

65. The Receiver is not aware of any party that would be prejudiced by the sealing order, and believes that the sealing order sought is appropriate in the circumstances.⁸¹

66. Therefore, the Applicant respectfully submits that the requested sealing order is appropriate in the circumstances.

f. Conclusion

67. The Applicant has worked with its advisors, the Receiver, the Stalking Horse Bidder and the Respondent to create a comprehensive receivership process intended to preserve and maximize the Respondent's value for stakeholders. The requested relief is necessary, fair, reasonable, just, convenient, and in the interest of stakeholders in the circumstances.

68. The Respondent has no active operations to generate income in order to repay its debts, or to continue to finance the activities of Matera Malta and Matera Germany, or to continue to

⁸⁰ Trefler Affidavit, para. 101.

⁸¹ Pre-Filing Report, para. 7.0-2.

finance sale efforts. The only conceivable alternative to the proposed receivership process would be a bankruptcy. A bankruptcy presents no advantage over the receivership process and in fact would have a material adverse effect to the detriment of stakeholders of the Respondent, Materia Malta and Materia Germany because:

- (a) the bankruptcy would be complex and costly considering that a trustee-in-bankruptcy would not be automatically vested with the Shares given that the same would be subject to the rights of secured creditors;⁸²
- (b) without the Receivership Order and the possibility of the Receivership Financing, there is a risk that the bankruptcy trustee would not be able to finance a sale process with the same level of market exposure as the Sale Process;
- (c) without the Receivership Order and the possibility of the Receivership Financing, the value of the Shares may be negatively affected as a bankruptcy trustee may be unable to finance the continued operations of Materia Malta and Materia Germany;
and
- (d) the lack of Receivership Financing could also affect Materia Malta and Materia Germany's ability to maintain their valuable certifications, which would represent a substantial loss of value.

V. RELIEF REQUESTED

69. The Applicant therefore seeks the Receivership Order and the Ancillary Order in the form of the draft orders filed at tab 3 (page 300) and tab 5 (page 344) of the application record.

⁸² See the BIA, s. 69.3(2), 71, and 136 *in limine*.

[23]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of February, 2023.

Reconstruct LLP

RECONSTRUCT LLP
Lawyers for the Applicants

SCHEDULE A – LIST OF AUTHORITIES

- 1 *Bank of Nova Scotia v Freure Village of Clair Creek*, [1996 CanLII 8258 \(ON SC\)](#)
- 2 *1529599 Ontario Limited v Dalcour Inc.*, [2012 ONSC 5707](#)
- 3 *First National Financial GP Corporation v 3291735 Nova Scotia Limited*, [2018 NSSC 235](#)
- 4 *Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited*, [2022 ONSC 6186](#)
- 5 *2056706 Ontario Inc. v Pure Global Cannabis Inc.*, [2021 ONSC 5533](#)
- 6 *Nortel Networks Corporation (Re)*, [2009 CanLII 39492 \(ON SC\)](#)
- 7 *Brainhunter Inc. (Re)*, [2009 CanLII 72333 \(ON SC\)](#)
- 8 *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#)
- 9 *Callidus Capital Corporation v Xchange Technology Group LLC*, [2013 ONSC 6783](#)
- 10 *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#)
- 11 *First National, and Cannapiece Group Inc v Carmela Marzili*, [2022 ONSC 6379](#)
- 12 *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)
- 13 *Ontario Securities Commission v Bridging Finance Inc.*, [2021 ONSC 4347](#)
- 14 *Re Grant Forest Products Inc.*, [2009 CanLII 42046 \(ON SC\)](#)
- 15 *Sherman Estate v Donovan*, [2021 SCC 25](#)
- 16 *Re Essar Steel Algoma Inc. et al*, [2015 ONSC 7656](#)
- 17 *Just Energy Group Inc. et al.*, [2021 ONSC 7630](#)

SCHEDULE B – RELEVANT STATUTES

Bankruptcy and Insolvency Act, [R.S.C., 1985, c. B-3](#):

Interpretation; Definitions

2 In this Act,

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

Stays of proceedings — bankruptcies; Secured creditors

69.3 (2) Subject to sections 79 and 127 to 135 and subsection 248(1), the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his or her security in the same manner as he or she would have been entitled to realize or deal with it if this section had not been passed, unless the Court otherwise orders, but in so ordering the Court shall not postpone the right of the secured creditor to realize or otherwise deal with his or her security, except as follows:

(a) in the case of a security for a debt that is due at the date the bankrupt became bankrupt or that becomes due not later than six months thereafter, that right shall not be postponed for more than six months from that date; and

(b) in the case of a security for a debt that does not become due until more than six months after the date the bankrupt became bankrupt, that right shall not be postponed for more than six months from that date, unless all instalments of interest that are more than six months in arrears are paid and all other defaults of more than six months standing are cured, and then only so long as no instalment of interest remains in arrears or defaults remain uncured for more than six months, but, in any event, not beyond the date at which the debt secured by the security becomes payable under the instrument or law creating the security.

Vesting of property in trustee

71 On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which

shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

Scheme of Distribution; Priority of claims

136 (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows: [...].

Secured Creditors and Receivers; Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a Court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the Court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the Court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the Court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the Court considers it appropriate to appoint a receiver before then.

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a Court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the Court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the Court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of *disbursements*

(7) In subsection (6), *disbursements* does not include payments made in the operation of a business of the insolvent person or bankrupt.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Personal Property Security Act, [R.S.O. 1990, c. P.10](#):

17 (2) Unless otherwise agreed, where collateral is in the secured party's possession,

(a) reasonable expenses, including the cost of insurance and payment of taxes and other charges incurred in obtaining and maintaining possession of the collateral and in its preservation, are chargeable to the debtor and are secured by the collateral;

63 (1) Upon default under a security agreement, the secured party may dispose of any of the collateral in its condition either before or after any commercially reasonable repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied consecutively to,

(a) the reasonable expenses of the secured party, including the cost of insurance and payment of taxes and other charges incurred in retaking, holding, repairing, processing and preparing for disposition and disposing of the collateral and, to the extent provided for in the security agreement, any other reasonable expenses incurred by the secured party; and

(b) the satisfaction of the obligation secured by the security interest of the party making the disposition,

and the surplus, if any, shall be dealt with in accordance with section 64.

Courts of Justice Act, [R.S.O. 1990, c. C.43](#):

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the Court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

Sealing Documents

137 (2) A Court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

ELA CAPITAL INC.

Court File No. CV-23-00694886-00CL

Applicant

– and –

11157353 CANADA CORPORATION

Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceedings commenced at Toronto

FACTUM OF THE APPLICANT
(Application for Receivership Order and Approval of
Sale Process, Stalking Horse SPA, KERP and
KERP Charge)
(returnable February 21, 2023)

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