



Court File No. _____

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

B E T W E E N :

ELA CAPITAL INC.

Applicant

– and –

11157353 CANADA CORPORATION

Respondent

**APPLICATION UNDER s. 243 OF THE *BANKRUPTCY AND
INSOLVENCY ACT (CANADA)* AND s. 101 OF THE *COURTS
OF JUSTICE ACT (ONTARIO)***

NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following pages.

THIS APPLICATION will come on for a hearing:

- In person
- By telephone conference
- By video conference

at the following location: Video conference details to be uploaded to case lines.

On the 21st day of February, 2023, at 11 am.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer, or where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your other lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: February 15, 2023

Issued by: Gurwinderjit Singh Brar
Local Registrar

Digitally signed by Gurwinderjit
Singh Brar
Date: 2023.02.17 09:21:59 -05'00'

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APPLICATION

1. The full factual context and background is set out in the affidavit of Benjamin Trefler sworn February 15, 2023, filed at **tab “2”** of the Applicant’s application record (the “**Trefler Affidavit**”). Capitalized terms not otherwise defined herein have the meaning given to them in the Trefler Affidavit.

THE APPLICANTS MAKE AN APPLICATION FOR THE FOLLOWING ORDERS:

1. a Receivership Order pursuant to sections 243 of the BIA and 101 of the *Courts of Justice Act* (Ontario) on the terms of the draft receivership order included at **tab “3”** of the application record, which, *inter alia*, appoints KSV as the Receiver, without security, of all of the Property of the Respondent, other than Excluded Assets and Excluded Business, including without limitation the Shares; and
2. an Ancillary Order substantially in the form of the draft order included at **tab “5”** of the application record which:
 - a. approves the Sale Process for the Shares;
 - b. authorizes the Receiver to execute and implement, for purposes of constituting the stalking horse bid for the Materia Germany Shares in the Sale Process, the Stalking Horse SPA with the Germany Shares Stalking Horse Bidder;
 - c. approves the KERP with respect to the Manager, and a corresponding KERP Charge over the Property, which is proposed to rank behind the Receiver’s Charge and the Receiver’s Borrowings Charge; and
 - d. seals the terms of the KERP until 30 days after the completion of the Sale Process or further order of this Court.

THE GROUNDS FOR THIS APPLICATION ARE:

a. The parties

2. The Respondent is the parent holding company of the Materia Business. The Respondent has no operations except holding the Shares and employing the Manager to oversee the Materia Business. The Shares are the Respondent's only assets.

3. The Applicant is a secured creditor of the Respondent and its largest shareholder.

b. The Materia Business

4. The Respondent holds all the Shares of Materia Malta, Materia Germany, and Materia UK. Materia Malta operates a fully-licensed MCBP (medical cannabinoid-based products) import, manufacturing and export facility located in Malta. Materia Germany operates a certified MCBP import, labelling and distribution business located in Germany. Materia UK has no operations but has assets.

5. Materia Malta and Materia Germany operate valuable going-concern businesses that employ approximately 5 full-time employees and 8 contractors. Materia Malta and Materia Germany also hold valuable certifications.

c. The Applicant's loans and the Respondent's defaults, insolvency, and consent to enforcement under BIA s. 244

6. The Applicant extended loans to the Respondent pursuant to the Loan Agreements. The obligations of the Respondent to the Applicant are secured by the Security under the Applicant GSA. The Collateral under the Applicant GSA includes the Shares. The Security attached immediately in all the Collateral and has been properly registered under the PPSA.

7. The Respondent is in default under the Loan Agreements as it has failed to repay principal or interest as of the Maturity Date. The Respondent commits a further ongoing default under the Loan Agreements by failing to pay its debts as they become due, including the Kanabo Loans. The Respondent is insolvent.

8. The Respondent owes the Applicant a total of \$3,251,214 under the Loan Agreements as of January 25, 2023.

9. The Respondent executed a consent to enforcement in accordance with section 244 of the BIA.

d. The other secured creditors

10. Apart from the Applicant, there are two other secured creditors of the Respondent: Kanabo and the Germany Shares Stalking Horse Bidder. Both are on notice of the herein application.

e. The proposed Sale Process

11. The Respondent, the Manager and the Applicant, with the assistance of brokers and investment bankers, have actively undertaken extensive sale and investment solicitation efforts with respect to the Materia Business and the Shares since 2021, including the 2021 SISP, the Canadian Subsidiaries SP, and further sale efforts in 2022.

12. Given that the Respondent has no active operations, a sale process is necessary to realize and maximize the value of the Respondent's assets for the benefit of all stakeholders.

13. Considering, *inter alia*, the extensive sale and investment solicitation efforts already undertaken, a 30-day sale process led by an officer of the Court will ensure that the Respondent's value is maximized for stakeholders.

14. The proposed Sale Process is structured to allow potential bidders to bid for the purchase of:
 - a. the Germany Shares, in an amount that is superior to the Stalking Horse SPA;
 - b. the Materia Malta Shares; and/or
 - c. the Materia UK Shares.

15. The proposed Sale Process contemplates the following key milestones and deadlines:
 - a. Pre-marketing stage (s. 9) – As soon as practicable following the granting of the Receivership Order and the Ancillary Order, the Receiver will (i) prepare an initial offering summary, a Teaser Letter, a form of NDA, and a Confidential Information Memorandum, (ii) gather and review all due diligence materials it determines relevant, (iii) establish, populate and administer a secure electronic data room, and (iv) prepare a list of Potential Bidders.
 - b. Marketing stage (s. 10) – As soon as practicable following the granting of the Receivership Order and the Ancillary Order, the Receiver will arrange for the publication of a Notice of the Sale Process in relevant publications and media, and will provide the Teaser Letter and NDA to Potential Bidders.
 - c. Qualified Bidders and Due Diligence (s. 14-19) – Potential Bidders who are interested in participating in the Sale Process will deliver an executed NDA to the Receiver. The Receiver will grant access to the data room to these Qualified Bidders and oversee the due diligence process.
 - d. Submission of Qualified Bids and Bid Offer Deadline (s. 20-27) – Qualified Bidders who wish to bid for all or some of the Shares must submit a Qualified Bid within 30 days of the commencement of the Sale Process. A Qualified Bid must

consist of a Binding APA that complies with the criteria set out in the Sale Process, including without limitation,

- i. for bids with respect to the Matera Germany Shares, the bids must:
 1. be based on and provided with a comparison to the Stalking Horse SPA; and
 2. provide for payment of (i) a minimum incremental amount of \$6,000 in excess of the aggregate purchase price provided under the Stalking Horse SPA, (ii) the Expense Reimbursement, and (iii) Break Fee;
- ii. for all bids, the bid must:
 1. be provided with evidence satisfactory to the Receiver as to the bidder's ability to consummate the proposed Transaction;
 2. be unconditional and not subject to further due diligence;
 3. include a letter of acknowledgement that the bid is irrevocable and open for acceptance until the Receiver closes the Successful Bid(s), and that the contemplated Transaction will be on an "as is, where is" basis;
 4. provide a deposit of no less than 15% of the Purchase Price offered;
 5. contemplate closing within 5 business days of the Approval and Vesting Order; and
 6. comply with the further information set out in the Sale Process terms or that may be required by the Receiver;

- e. Consideration of the Binding APAs and Auction (s. 28-38) – The Receiver will exercise its reasonable discretion to evaluate all Binding APAs based upon the criteria set out in the Sale Process. Those criteria include, without limitation, the total consideration offered and factors affecting the speed and certainty of closing. If no Binding APA is received for the Matera Germany Shares other than the Stalking Horse SPA, then the Stalking Horse SPA will be deemed the Successful Bid for the Matera Germany Shares. If multiple Binding APAs are received for the same Shares, the Receiver may hold an Auction to determine the Successful Bid. After selecting the Successful Bid(s), the Receiver may elect to have Backup Bid(s) in the event that a Successful Bid does not close.
- f. Court approval (s. 42-46) – As soon as reasonably practicable following the selection of the Successful Bid(s), the Receiver will bring a motion for an Approval and Vesting Order; and
- g. Closing of successful Transaction(s) (s. 6) – Closing will occur as soon as reasonably practicable, and in any event within 5 business days, after the granting of the Approval and Vesting Order.

16. The proposed Sale Process is fair, reasonable, just, convenient, and in the interest of stakeholders.

f. The Stalking Horse SPA

17. The Applicant, the Receiver and the Matera Germany Shares Stalking Horse Bidder have negotiated the Stalking Horse SPA. The Applicant seeks Court approval of the Stalking Horse SPA for purposes of constituting the stalking horse bid for the Matera Germany Shares in the Sale Process. The presence of the Stalking Horse SPA in the Sale Process will benefit the Sale Process

by, *inter alia*, stimulating market interest and competition for the Shares by confirming that there is already a committed buyer. This is in the interest of stakeholders.

18. The main terms of the Stalking Horse SPA are as follows:

- a. Purchase Price (s. 2.2, 2.3) – €400,000, payable through a credit of the Matera Debt (being approximately €309,089 owing under the Crawford Loan Agreement and the December Promissory Note as of January 30, 2023) and a portion of the Receiver Debt (being the Receivership Financing amounts borrowed by the Receiver from the Germany Shares Stalking Horse Bidder under the Receiver’s Borrowings Charge, as further discussed below).
- b. “As is, where is” (s. 3.3) – the Purchased Shares are being purchased on an “as is, where is” basis as they exist at Closing.
- c. Target Closing Date (s. 4.1) – 5 Business Days following the Approval and Vesting Order.
- d. Conditions to Closing (s. 6.1) – generally, that the Stalking Horse SPA be the Successful Bid for the Matera Germany Shares, and that a final Approval and Vesting Order be granted in respect of the transaction.
- e. Expense Reimbursement and Break Fee (s. 7.3) – if the Stalking Horse SPA is not the transaction completed by the Receiver for the Matera Germany Shares at the conclusion of the Sale Process, the Germany Shares Stalking Horse Bidder will be entitled to (i) an Expense Reimbursement in the maximum amount of C\$25,000, and (ii) a C\$20,000 Break Fee.

19. The terms of the Stalking Horse SPA, including the Purchase Price, the Expense Reimbursement and the Break Fee, are fair and reasonable.

g. The KERP, KERP Charge and sealing order

20. The KERP and the KERP Charge are intended to allow the Respondent to continue to employ the Manager and to pay him the compensation set out in the KERP. The Manager's knowledge and expertise will be essential during the receivership and Sale Process, particularly where the Receiver is not taking Possession of certain cannabis-related Excluded Assets and Excluded Business. But for the approval of the KERP and the KERP Charge, the Manager would resign. The KERP is therefore necessary, fair, reasonable, and in the interest of stakeholders.

21. The sought KERP Charge is proposed to rank below the Receiver's Charge and the Receivers' Borrowings Charge. The KERP Charge does not represent a large amount relative to the Respondent's other liabilities, but is necessary to provide the Manager with security that the amounts due under the KERP will be paid. The KERP Charge is therefore necessary and reasonable.

22. The sealing order sought is with respect to the terms of the KERP, which contain confidential information, the disclosure of which would cause a prejudice and no benefit. The sealing order sought is limited in time to 30 days following the conclusion of the Sale Process without the need for a further Court Order. The sealing order sought meets the applicable legal test articulated by the Supreme Court of Canada in *Sherman Estate*.

h. Financing of the receivership proceeding and Materia Business during the proposed receivership

23. The Respondent has exhausted its available financing options. Accordingly, there is no form of lending or investment reasonably available other than on the basis of a prior-ranking charge.

24. The Germany Shares Stalking Horse Bidder and the Applicant have agreed to collectively make up to €400,000 available to the Receiver as the Receivership Financing in order to finance: (i) the costs of these receivership proceedings; (ii) the ongoing operations of Materia Malta and Materia Germany during the Sale Process; and (iii) the KERP. The Receivership Financing is anticipated to be sufficient to finance these costs until the closing of the Successful Bid(s) transaction(s) in the Sale Process.

25. The Receivership Financing will be provided under “Receiver’s Certificates” and secured by the Receiver’s Borrowings Charge. It is proposed that the Receiver’s Borrowings Charge will be a second-ranking priority charge, ranking behind the Receiver’s Charge but ahead of the KERP Charge.

26. The Receivership Financing is necessary to allow the receivership and the Sale Process to proceed in the interest of stakeholders. The continued operation of Materia Germany and Materia Malta will preserve their businesses and the corresponding value of the Shares for stakeholders.

i. Relief sought is necessary, just, convenient, and in the interest of stakeholders

27. For all the reasons set out above and in the Trefler Affidavit, the Receivership Order and the Ancillary Order provide for a necessary, reasonable, fair, and convenient relief that is in the best interest of stakeholders of the Respondent, Materia Malta, and Materia Germany.

j. Statutory provisions

28. The *Courts of Justice Act*, [R.S.O. 1990, c. C.43](#), including ss. 101, 106 and 137(2);

29. the *Bankruptcy and Insolvency Act*, [R.S.C. 1985, c. B-3](#), including ss. 243 and 244;

30. the *Rules of Civil Procedure*, [R.R.O. 1990, Reg. 194](#), including Rules 1.04, 2.03, 3.02, and 14.05(3)(g);

31. the inherent jurisdiction of this Court; and

32. such further and other grounds as counsel may advise and this Honorable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:

1. the Trefler Affidavit and the Exhibits thereto;

2. the pre-filing report of the Receiver;

3. the consent of KSV Restructuring Inc. to act as Receiver; and

4. such further and other materials as counsel may advise and this Honorable Court may permit.

February 15, 2023

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COURTS OF JUSTICE ACT
SUPERIOR COURT OF JUSTICE
Proceedings commenced at Toronto

NOTICE OF APPLICATION
(Receivership Order and other relief)

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