

**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 TRICHOME FINANCIAL CORP., TRICHOME JWC ACQUISITION CORP., MYM NUTRACEUTICALS INC., TRICHOME RETAIL CORP., MYM INTERNATIONAL BRANDS INC., AND HIGHLAND GROW INC.

Applicants

**FACTUM OF THE APPLICANTS
(Returnable November 17, 2022)**

November 14, 2022

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TO: THE SERVICE LIST

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PART I: OVERVIEW

1. On November 7, 2022, Trichome Financial Corp., Trichome JWC Acquisition Corp., MYM Nutraceuticals Inc., Trichome Retail Corp., MYM International Brands Inc. and Highland Grow Inc. (collectively, the "**Applicants**") sought and obtained an order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").
2. The Initial Order was tailored to provide the Applicants with the relief reasonably necessary to maintain the *status quo* and continue the Canadian Business' (as defined below) ordinary course operations during an initial 10-day period (the "**Initial Stay Period**").
3. Upon the expiration of the Initial Stay Period, the Applicants will require an extension and expansion of the relief provided under the Initial Order to facilitate and advance their restructuring efforts and these CCAA proceedings. To this end, the Applicants now seek an amended and restated Initial Order (the "**Amended and Restated Initial Order**") pursuant to the CCAA, among other things:
 - (a) extending the Stay of Proceedings (as defined below) beyond the Initial Stay Period; and
 - (b) increasing the Directors' Charge and the DIP Lender's Charge (each as defined below) to the maximum amounts of \$2,922,000 and \$4,875,000, respectively.
4. The relief proposed under the Amended and Restated Initial Order will enable the Applicants to continue the Canadian Business' ordinary course operations and pursue their restructuring objectives for the benefit of their stakeholders. In each case, the requested relief is supported by the Court-appointed Monitor in these CCAA proceedings (the "**Monitor**"), and

Cortland Credit Lending Corporation, in its capacities as agent for and on behalf of the Applicants' senior secured lenders (in such capacity, the "**Agent**") and debtor-in-possession lenders (in such capacity, the "**DIP Lender**").

PART II: FACTS

5. The facts underlying this motion are more fully set out in the affidavits of Michael Ruscetta, sworn November 7, 2022 and November 11, 2022 (together, the "**Ruscetta Affidavits**").¹ All capitalized terms used but not defined herein have the meanings ascribed to them in the Ruscetta Affidavits.

A. The Need for these CCAA Proceedings and the Initial Order

6. The Applicants, with the exception of Trichome, which is a direct subsidiary, are all indirect wholly owned subsidiaries of IM Cannabis Corp. ("**IMCC**"). IMCC is a publicly listed international cannabis company operating in Israel, Canada and Germany (the "**International Company**"). IMCC is headquartered in Israel and is not an Applicant in these CCAA proceedings.²

7. IMCC conducts its business operations in Canada through the Applicants. Through their licensed operating subsidiaries, TJAC and Highland, the Applicants cultivate, process and sell premium and ultra-premium cannabis for the adult-use market in Canada (the "**Canadian Business**"). Following months of liquidity challenges and despite concerted efforts to improve

¹ Affidavit of Michael Ruscetta sworn on November 7, 2022 [Initial Order Affidavit], Applicant's Motion Record dated November 11, 2022 at Tab 2A [Motion Record]; Affidavit of Michael of Michael Ruscetta sworn on November 11, 2022 [Second Ruscetta Affidavit], Motion Record at Tab 2.

² Second Ruscetta Affidavit, *ibid* at para 5, Motion Record at Tab 2.

their financial position, conserve costs and restructure the Canadian Business, the Applicants recently faced a dire liquidity crisis.³

8. Having regard to the best interests of the Applicants and their stakeholders, and after extensive review and careful consideration of the strategic options and alternatives available, each of the Applicants' board of directors resolved to seek urgent relief under the CCAA. Accordingly, the Applicants sought, and on November 7, 2022, obtained the Initial Order.⁴

9. Among other things, the Initial Order:

- (a) appointed KSV Restructuring Inc. as the Monitor;
- (b) stayed, until November 17, 2022, all proceedings and remedies taken or that might be taken in respect of the Applicants, the Monitor or the Applicants' directors and officers (collectively, the "**Directors and Officers**"), or affecting the Canadian Business or the Property (as defined below), except with the written consent of the Applicants and the Monitor, or with leave of the Court (the "**Stay of Proceedings**");
- (c) approved the Applicants' ability to borrow under a debtor-in-possession ("**DIP**") credit facility (the "**DIP Facility**") pursuant to a DIP facility agreement dated November 6, 2022 (the "**DIP Agreement**"), among TJAC, as borrower (the "**Borrower**"), Trichome, TRC, MYM, MYMB and Highland, as guarantors (together with the Borrower, the "**Credit Parties**"), and the DIP Lender;
- (d) authorized the Applicants to pay, with the consent of the Monitor (based on its consideration of certain non-exhaustive factors enumerated under the Initial Order)

³ *Ibid* at para 6, Motion Record at Tab 2.

⁴ *Ibid* at para 7, Motion Record at Tab 2.

and the DIP Lender, amounts owing for goods and services actually supplied to the Applicants prior to the date of the Initial Order; and

- (e) granted certain priority charges (collectively, the "**Charges**") over the Applicants' current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (collectively, the "**Property**").⁵

10. The relief sought pursuant to the Initial Order was limited to that reasonably necessary to provide the stability, breathing room and financing required to prevent the immediate cessation of the Canadian Business' going concern operations and address the Applicants' severe liquidity crisis during the Initial Stay Period.⁶

B. The Applicants' Activities Since the Granting of the Initial Order

11. Since the granting of the Initial Order, the Applicants have acted in good faith and with due diligence to stabilize and continue the Canadian Business' ordinary course operations, and advance their restructuring objectives.⁷ In this regard, the Applicants have, with the assistance and oversight of the Monitor, among other things:

- (a) implemented a communication plan to advise key stakeholders of these CCAA proceedings and the granting of the Initial Order;
- (b) conducted two virtual town halls with the Applicants' employees regarding these CCAA proceedings and their impact on the Canadian Business;

⁵ *Ibid* at para 8, Motion Record at Tab 2.

⁶ *Ibid* at para 12, Motion Record at Tab 2.

⁷ *Ibid* at para 10, Motion Record at Tab 2.

- (c) coordinated an advance under the DIP Facility with the DIP Lender in accordance with the DIP Agreement; and
- (d) assisted the Monitor in preparing notices to creditors and other stakeholders as required under the Initial Order.⁸

12. In addition to the foregoing, the Applicants have also negotiated and executed a letter agreement with a financial advisor to conduct a sale and investor solicitation process ("**SISP**"), approval for which will be sought on a subsequent motion in these CCAA proceedings.⁹ Contemporaneously with the development of a SISP, the Applicants are attempting to negotiate an asset purchase agreement with a potential purchaser to serve as a stalking horse bid in the SISP.¹⁰

13. The Applicants are not seeking any relief in connection with a SISP or the potential stalking horse bid at this time.

C. The Stay of Proceedings

14. The Stay of Proceedings under the Initial Order will expire at the end of the Initial Stay Period, being November 17, 2022. Pursuant to the proposed Amended and Restated Initial Order, the Applicants are seeking to extend the Initial Stay Period to and including February 3, 2023 (the "**Stay Period**").¹¹

15. The Applicants' 13-week cash flow forecast (the "**Cash Flow Forecast**") demonstrates that the Applicants will have sufficient cash to support the Canadian Business' ordinary course

⁸ *Ibid*, Motion Record at Tab 2.

⁹ *Ibid*, Motion Record at Tab 2.

¹⁰ First Report of KSV Restructuring Inc dated November 14, 2022 s 5.0 at paras 1-2 [Monitor's Report].

¹¹ Second Ruscetta Affidavit, *supra* note 1 at para 14, Motion Record at Tab 2.

operations and the costs of these CCAA proceedings throughout the Stay Period, provided the proposed Amended and Restated Initial Order is granted.¹²

D. The Directors' Charge

16. The Initial Order granted a charge in favour of the Directors and Officers in the maximum amount of \$967,000 as security for the obligations and liabilities that the Directors and Officers may incur during the Initial Stay Period (the "**Directors' Charge**"). Pursuant to the proposed Amended and Restated Initial Order, the Applicants seek to increase the Directors' Charge to the maximum amount of \$2,922,000.¹³

17. The increased quantum of the Directors' Charge was determined by the Applicants, in collaboration with the Monitor, and is limited to the liabilities that the Directors and Officers may face during the Stay Period.¹⁴

E. The DIP Lender's Charge

18. In connection with the commencement of these CCAA proceedings, the Credit Parties entered into the DIP Agreement with the DIP Lender to address their severe liquidity crisis.¹⁵ As referenced above, the Initial Order:

- (a) approved the Applicants' ability to borrow under the DIP Agreement up to the maximum amount of \$4,875,000; and
- (b) granted the DIP Lender a charge on the Property in the maximum amount of \$1,825,000 to secure all amounts advanced under the DIP Facility, together with

¹² *Ibid* at para 16, Motion Record at Tab 2; Monitor's Report, *supra* note 10 s 6.0 at para 3 and s 7.0 at paras 1-2.

¹³ Second Ruscetta Affidavit, *ibid* at para 19, Motion Record at Tab 2.

¹⁴ *Ibid*, Motion Record at Tab 2; Monitor's Report, *supra* note 10 s 8.2 at para 2.

¹⁵ Second Ruscetta Affidavit, *ibid* at para 24, Motion Record at Tab 2.

all obligations, indebtedness, fees, costs and expenses of the Borrower under the DIP Agreement and the DIP Facility (the "**DIP Lender's Charge**").¹⁶

19. The amount of the DIP Facility to be funded during the Initial Stay Period was limited to that which was necessary to ensure the continued operation of the Canadian Business prior to the return of the within motion. The quantum of the DIP Lender's Charge sought pursuant to the Initial Order was correspondingly limited to the amount to be funded during the Initial Stay Period.¹⁷

20. Pursuant to the DIP Agreement, all advances under the DIP Facility are to be secured by the DIP Lender's Charge. Having regard to the Cash Flow Forecast and the Applicants' funding requirements during the Stay Period, the Applicants now seek to increase the quantum of the DIP Lender's Charge pursuant to the Amended and Restated Initial Order, from \$1,825,000 to \$4,875,000 – the maximum borrowings available under the DIP Facility.¹⁸

F. The Priority of the Charges

21. Pursuant to the Initial Order, the Charges rank in priority to all Encumbrances (as defined in the Initial Order), save for Encumbrances in favour of any persons that were not served with the Applicants' notice of application for the Initial Order. The Initial Order preserved the entitlement of the Applicants and the beneficiaries of the Charges to seek priority of the Charges ahead of such Encumbrances on a subsequent motion, including the within motion.¹⁹

22. Under the proposed Amended and Restated Initial Order, the Applicants now seek to have the Charges rank in priority to all Encumbrances. The persons benefiting from the Encumbrances

¹⁶ *Ibid*, Motion Record at Tab 2.

¹⁷ *Ibid* at para 25, Motion Record at Tab 2.

¹⁸ *Ibid* at para 26, Motion Record at Tab 2.

¹⁹ *Ibid* at para 29, Motion Record at Tab 2.

have been given notice of the within motion and the proposed form of Amended and Restated Initial Order.²⁰

PART III: ISSUES

23. The issues to be considered on this motion are whether this Court should:
- (a) extend the Stay of Proceedings granted under the Initial Order through the Stay Period;
 - (b) increase the amount of the Directors' Charge granted under the Initial Order; and
 - (c) increase the amount of the DIP Lender's Charge granted under the Initial Order.

PART IV: LAW AND ANALYSIS

A. The Stay of Proceedings Should be Extended

24. The Stay of Proceedings is currently set to expire on November 17, 2022.²¹ Subsection 11.02(2) of the CCAA expressly authorizes this Court to grant an extension of the Stay of Proceedings for "any period the court considers necessary".²² To grant such an extension, 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.²³

25. The jurisdiction vested in Courts to stay proceedings under section 11.02 "should be construed broadly to accomplish the legislative purposes of the CCAA".²⁴ These purposes include,

²⁰ *Ibid* at paras 29-30, Motion Record at Tab 2. See generally, Affidavit of Service of Joshua Foster sworn November 7, 2022; Affidavit of Service of Joshua Foster sworn November 11, 2022.

²¹ Second Ruscetta Affidavit, *ibid* at para 14, Motion Record at Tab 2.

²² [Companies' Creditors Arrangement Act, RSC 1985, c. C-36](#) s 11.02(2) [CCAA]; [Laurentian University of Sudbury, 2021 ONSC 1098](#) at para 56 [*Laurentian*].

²³ CCAA, *ibid*.

²⁴ [Canwest Global Communications Corp, 2011 ONSC 2215](#) at para 24 [*Canwest*].

among others, enabling the continuation of the applicants' business, avoiding the social and economic costs of a liquidation and facilitating a value-maximizing restructuring.²⁵ Accordingly, a stay of proceedings will be appropriate where it maintains the *status quo* and provides applicants with breathing room while they seek to restore solvency and arrange a "sale of assets in order to maximize recovery for stakeholders."²⁶

26. Here, the proposed extension of the Stay of Proceedings is appropriate in the circumstances given that:

- (a) since the granting of the Initial Order, the Applicants have acted in good faith and with due diligence to stabilize and continue the Canadian Business' ordinary course operations, and advance their restructuring objectives, including by, among other things, liaising with their stakeholders and continuing to develop a SISP;
- (b) the Stay of Proceedings is necessary to prevent (i) enforcement action by the Applicants' contractual counterparties and (ii) disruption to the Canadian Business;
- (c) the proposed extension of the Stay of Proceedings will preserve the *status quo* and afford the Applicants the breathing space and stability required to continue the Canadian Business' ordinary course operations, preserving value for the Applicants' stakeholders, including the Applicants' employees, suppliers and regulators;
- (d) the proposed extension of the Stay of Proceedings will enable the Applicants to develop and seek this Court's approval of a SISP, and attempt to negotiate an asset purchase agreement for the purposes of acting as the stalking horse bid therein;

²⁵ [Ibid](#); [Century Services Inc v Attorney General \(Canada\), 2010 SCC 60](#) at para 15 [[Century Services](#)]; [Target Canada Co, 2015 ONSC 303](#) at para 8 [[Target](#)]; [Re Timminco Limited, 2012 ONSC 2515](#) at para 15 [[Timminco](#)].

²⁶ [Century Services](#), *ibid* at para 14; [Target](#), *ibid*; [Canwest](#), *ibid* at paras 24-25; [Timminco](#), *ibid*; [Re Clover Leaf Holdings Company, 2019 ONSC 6966](#) at para 19.

- (e) provided that the proposed Amended and Restated Initial Order is granted, the Applicants are forecast to have sufficient liquidity to support the Canadian Business' ordinary course operations and the costs of these CCAA proceedings throughout the Stay Period;
- (f) the Monitor is supportive of the proposed extension of the Stay of Proceedings and does not believe that any creditor will be prejudiced by such extension;
- (g) the Agent and the DIP Lender are supportive of the proposed extension of the Stay of Proceedings; and
- (h) neither the Applicants nor the Monitor are aware of any party opposed to the requested extension of the Stay of Proceedings.²⁷

27. Taken together, the Applicants submit that the proposed extension of the Stay of Proceedings is in the best interests of the Applicants and their stakeholders, is consistent with the purposes of the CCAA, and is appropriate in the circumstances.

B. The Directors' Charge Should be Increased

28. Having regard to section 11.001 of the CCAA, the quantum of the Directors' Charge granted under the Initial Order was limited to the Directors' and Officers' potential exposure during the Initial Stay Period.²⁸ Pursuant to the proposed Amended and Restated Initial Order, the Applicants now seek to increase the Directors' Charge from the maximum amount of \$967,000 to

²⁷ Second Ruscetta Affidavit, *supra* note 1 at paras 15-18, Motion Record at Tab 2; Monitor's Report, *supra* note 10 s 3.0 at para 1 and s 7.0 at paras 1-2. See also, Initial Order Affidavit, *supra* note 1 at paras 119-121, Motion Record at Tab 2A.

²⁸ [CCAA](#), *supra* note 22 s 11.001; [In the Matter of a Plan of Compromise or Arrangement of Trichome Financial Corp, Trichome JWC Acquisition Corp, MYM Nutraceuticals Inc., Trichome Retail Corp, MYM International Brands Inc, and Highland Grow Inc \(November 7, 2022\), Toronto, CV-22-00689857-00CL](#) (Endorsement) (ONSC) at 2 [November 7 Endorsement].

\$2,922,000, being the Directors' and Officers' estimated maximum potential liability during the Stay Period.²⁹

29. Section 11.51 of the CCAA authorizes this Court to grant a charge and increases thereto, in favour of a debtor company's directors and officers in an amount it considers appropriate where the secured creditors likely to be affected by the charge are given notice thereof.³⁰ Such a charge may rank in priority to the claim of any secured creditor but may not be granted if the Court is of the opinion that "adequate indemnification insurance for the director or officer" could be obtained by the debtor company at a reasonable cost.³¹

30. A charge securing the indemnity of a debtor company's directors and officers is both "common place and essential to [...] the success of any possible restructuring" as it is not otherwise reasonable to expect a debtor company's directors and officers to continue.³² The objective of such charges is to "keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring".³³

31. In granting charges securing the indemnity of a debtor company's directors and officers, Courts have considered, among other things, whether:

- (a) notice has been given to the secured creditors likely to be affected by the charge;
- (b) the amount of the proposed charge is appropriate given the directors' and officers' estimated exposure;

²⁹ Second Ruscetta Affidavit, *supra* note 1 at para 19, Motion Record at Tab 2.

³⁰ *CCAA*, *supra* note 22 s 11.51(1)-(4); *Laurentian*, *supra* note 22 at paras 80-81; *Re Canwest Global Communications Corp.*, [2009] OJ No 4286 (Ont Sup Ct) at para 45 [*Canwest Global*]; *Re US Steel Canada Inc.*, 2014 ONSC 6145 at para 20 [*US Steel*]; *Re Lydian International Limited*, 2019 ONSC 7473 at para 52 [*Lydian*].

³¹ *CCAA*, *ibid* s 11.51(2), 11.51(3); *Canwest Global*, *ibid*.

³² *US Steel*, *supra* note 30 at paras 20-22.

³³ *Canwest Global*, *supra* note 30 at paras 45-48; *Re Timminco Ltd.*, 2012 ONSC 506 at para 66; *MPX International Corporation*, 2022 ONSC 4348 at para 66 [*MPX*].

- (c) the charge applies in respect of any obligation incurred by a director or officer as a result of the directors' or officers' gross negligence or willful misconduct; and
- (d) the debtor company could obtain adequate indemnification insurance for the director at a reasonable cost.³⁴

32. When granting the Initial Order, this Court was satisfied that the requirements of section 11.51 of the CCAA had been satisfied such that the Directors' Charge was appropriate.³⁵ The Applicants submit that the requirements of section 11.51 of the CCAA continue to be satisfied and that it is appropriate for this Court to exercise its jurisdiction to grant the proposed increase to the Directors' Charge, given that:

- (a) the Applicants' existing claims-made insurance policies under which the directors and officers are beneficiaries (the "**Insurance Policies**") are subject to a relatively small annual limit and a number of exclusions, exceptions and carve-outs, and are intended for the benefit of the entire International Company;
- (b) the Applicants are unable to acquire alternative or additional directors' and officers' liability insurance capable of adequately supplementing the Insurance Policies;
- (c) the Applicants require the continued involvement of their directors and officers in order to continue operating the Canadian Business, especially given the strict regulatory environment in which the Applicants operate and the security clearances required of certain directors and officers;

³⁴ [Lydian](#), *supra* note 30 at paras 52-54; [MPX](#), *ibid* at paras 66-68; [Canwest Global](#), *ibid* at paras 47-48.

³⁵ [November 7 Endorsement](#), *supra* note 28 at 2.

- (d) the directors and officers have indicated that their continued service during the Stay Period is conditional upon the granting of the Directors' Charge;
- (e) the Directors' Charge only covers obligations and liabilities that the Directors and Officers incur after the commencement of the CCAA proceedings and does not indemnify the Directors and Officers in the event of willful misconduct or gross negligence;
- (f) the amount of the Directors' Charge is reasonable in the circumstances and, in consultation with the Monitor, has been limited to the potential exposure of the Directors and Officers during the Stay Period;
- (g) the Applicants' secured creditors have been given notice of the within motion and the proposed Amended and Restated Initial Order; and
- (h) each of the Monitor, the Agent and the DIP Lender is supportive of the proposed Directors' Charge.³⁶

A. The DIP Lender's Charge Should be Increased

33. In accordance with section 11.001 and subsection 11.2(5) of the CCAA, the Initial Order limited the quantum of the DIP Lender's Charge to that which was reasonably necessary for the Applicants' continued operations in the ordinary course of business during the Initial Stay Period.³⁷ Pursuant to the proposed Amended and Restated Initial Order, the Applicants now seek to increase

³⁶ Initial Order Affidavit, *supra* note 1 at paras 128-135, Motion Record at Tab 2A; Second Ruscetta Affidavit, *supra* note 1 at paras 19-22, 30, Motion Record at Tab 2; Monitor's Report, *supra* note 10 s 8.2 at paras 1-7; Draft Amended and Restated Initial Order at para 20, Motion Record at Tab 3. See generally, Affidavit of Service of Joshua Foster sworn November 7, 2022; Affidavit of Service of Joshua Foster sworn November 11, 2022.

³⁷ [November 7 Endorsement](#), *supra* note 28 at 2.

the quantum of the DIP Lender's Charge from \$1,825,000 to \$4,875,000, reflecting the maximum borrowings available under the DIP Facility.³⁸

34. This Court's jurisdiction to approve DIP financing and grant a corresponding charge under section 11.2 of the CCAA also authorizes it to approve the proposed increase to the DIP Lender's Charge.³⁹ To do so, this Court must be satisfied that the requirements of subsection 11.2(1) have been met and that the considerations enumerated in subsection 11.2(4) of the CCAA support the relief sought.⁴⁰ These requirements were satisfied when this Court issued the Initial Order approving the DIP Facility and granting the DIP Lender's Charge. They continue to be satisfied here.

2. Subsection 11.2(1) of the CCAA is Satisfied

35. Subsection 11.2(1) of the CCAA authorizes this Court to approve DIP financing and grant a corresponding charge in an amount it considers appropriate – having regard to the debtor company's cash flow statement – where the secured creditors likely to be affected by the charge are given notice thereof.⁴¹ A charge granted pursuant to subsection 11.2(1) of the CCAA may rank in priority to the claim of any secured creditor but may not secure an obligation that exists before the proposed order is made.⁴²

36. In accordance with the requirements of subsection 11.2(1) of the CCAA:

- (a) notice of the within motion has been given to the Applicants' secured creditors;

³⁸ Second Ruscetta Affidavit, *supra* note 1 at paras 24-25, Motion Record at Tab 2.

³⁹ [CCAA](#), *supra* note 22 s 11.2; [Re Lydian International Limited, 2020 ONSC 4006](#) at para 66 [*Lydian International*].

⁴⁰ [CCAA](#), *ibid* s 11.2(1), 11.2(4); [Lydian International](#), *ibid*.

⁴¹ [CCAA](#), *ibid* s 11.2(1); [Re Boreal Capital Partners Ltd et al, 2021 ONSC 7802](#) at para 23 [*Boreal*]; [Re Just Energy Corp, 2021 ONSC 1793](#) at para 52 [*Just Energy*]; [Re MJardin Group Inc, 2022 ONSC 3338](#) at para 29.

⁴² [CCAA](#), *ibid* s 11.2(1), s 11.2(2); [Boreal](#), *ibid*.

- (b) the DIP Lender's Charge does not secure any obligations arising prior to the Initial Order; and
- (c) the Cash Flow Forecast substantiates the Applicants' need for additional borrowings under the DIP Facility up to the aggregate amount of approximately \$4,875,000 during the Stay Period.⁴³

3. Subsection 11.2(4) of the CCAA is Satisfied

37. When determining whether to grant a charge securing DIP financing, subsection 11.2(4) of the CCAA directs Courts to consider the following non-exhaustive factors:

- (a) the period during which the applicants are expected to be subject to the CCAA proceedings;
- (b) how the applicants' business and financial affairs are to be managed during the CCAA proceedings;
- (c) whether the applicants' management has the confidence of their major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the applicants;
- (e) the nature and value of the applicants' property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and

⁴³ Second Ruscetta Affidavit at paras 26, 30, Motion Record at Tab 2; Monitor's Report, *supra* note 10 s 6.0 at para 3 and s 8.3 at para 2; Draft Amended and Restated Initial Order at para 35, Motion Record at Tab 3. See generally, Affidavit of Service of Joshua Foster sworn November 7, 2022; Affidavit of Service of Joshua Foster sworn November 11, 2022.

- (g) the proposed monitor's report, if any.⁴⁴

38. In view of the non-exhaustive factors enumerated under subsection 11.2(4) of the CCAA, the following supports the approval of the proposed increase to the DIP Lender's Charge:

- (a) pursuant to the DIP Agreement, all advances under the DIP Facility are to be secured by the DIP Lender's Charge;
- (b) as noted above, the Cash Flow Forecast substantiates the Applicants' need for additional borrowings under the DIP Facility up to the aggregate amount of approximately \$4,875,000 during the Stay Period;
- (c) absent an increase to the DIP Lender's Charge, the Applicants will not be permitted to request the additional advances required under the DIP Facility to maintain the Canadian Business' ordinary course operations or to fund these CCAA proceedings during the Stay Period;
- (d) if the Applicants are unable to request additional advances under the DIP Facility, they will be forced to cease the Canadian Business' ongoing operations to the detriment of their stakeholders; and
- (e) the Monitor is of the view that the proposed increase to the DIP Lender's Charge is both required and appropriate, given the Applicants' need for additional liquidity, the Cash Flow Forecast and the terms of the DIP Agreement.⁴⁵

⁴⁴ [CCAA](#), *supra* note 22 s 11.2(4); [Just Energy](#), *supra* note 41 at para 61.

⁴⁵ Second Ruscetta Affidavit, *supra* note 1 at paras 26-28; Monitor's Report, *supra* note 10 s 6.0 at para 3 and s 8.3 at paras 1-2. See also, Initial Order Affidavit, *supra* note 1 at paras 9, 65-66, 80, 84-85, 114-117, 136, 141-142, 148, Motion Record at Tab 2A.

PART V: RELIEF REQUESTED

39. The Applicants submit that the relief sought on the within motion is appropriate in the circumstances and consistent with prior orders of this Court,⁴⁶ and respectfully request that the proposed form of Amended and Restated Initial Order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14TH DAY OF NOVEMBER 2022

Bennett Jones LLP

BENNETT JONES LLP

⁴⁶ [*In the Matter of a Plan of Compromise or Arrangement of FIGR Brands, Inc., FIGR Norfolk Inc. and Canada's Island Garden Inc.*](#) (January 29, 2021), Toronto, CV-21-00655373-00CL (Order) (ONSC); [*In the Matter of a Plan of Compromise or Arrangement of Superette Inc., Superette Ontario Inc., 2659198 Ontario Inc., 2662133 Ontario Inc., 2662134 Ontario Inc. and 2662135 Ontario Inc.*](#) (September 9, 2022), Toronto, CV-22-00686245-00CL (Order) (ONSC); [*In the Matter of a Plan of Compromise or Arrangement of MPX International Corporation, BioCannabis Products Ltd., Canveda Inc., The CinG-X Corporation, Spartan Wellness Corporation, MPXI Alberta Corporation, MCLN Inc., and Salus BioPharma Corporation*](#) (August 4, 2022), Toronto, CV-22-00684542-00CL (Order) (ONSC); [*In the Matter of a Plan of Compromise or Arrangement of McEwan Enterprises Inc.*](#) (October 7, 2021), Toronto, CV-21-00669445-00CL (Order) (ONSC).

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [Canwest Global Communications Corp, 2011 ONSC 2215](#)
2. [Century Services Inc v Attorney General \(Canada\), 2010 SCC 60](#)
3. [In the Matter of a Plan of Compromise or Arrangement of FIGR Brands, Inc., FIGR Norfolk Inc. and Canada's Island Garden Inc. \(January 29, 2021\), Toronto, CV-21-00655373-00CL \(Order\) \(ONSC\)](#)
4. [In the Matter of a Plan of Compromise or Arrangement of McEwan Enterprises Inc. \(October 7, 2021\), Toronto, CV-21-00669445-00CL \(Order\) \(ONSC\)](#)
5. [In the Matter of a Plan of Compromise or Arrangement of MPX International Corporation, BioCannabis Products Ltd., Canveda Inc., The CinG-X Corporation, Spartan Wellness Corporation, MPXI Alberta Corporation, MCLN Inc., and Salus BioPharma Corporation \(August 4, 2022\), Toronto, CV-22-00684542-00CL \(Order\) \(ONSC\)](#)
6. [In the Matter of a Plan of Compromise or Arrangement of Superette Inc., Superette Ontario Inc., 2659198 Ontario Inc., 2662133 Ontario Inc., 2662134 Ontario Inc. and 2662135 Ontario Inc. \(September 9, 2022\), Toronto, CV-22-00686245-00CL \(Order\) \(ONSC\)](#)
7. [In the Matter of a Plan of Compromise or Arrangement of Trichome Financial Corp, Trichome JWC Acquisition Corp, MYM Nutraceuticals Inc., Trichome Retail Corp, MYM International Brands Inc, and Highland Grow Inc \(November 7, 2022\), Toronto, CV-22-00689857-00CL \(Endorsement\) \(ONSC\)](#)
8. [Laurentian University of Sudbury, 2021 ONSC 1098](#)
9. [MPX International Corporation, 2022 ONSC 4348](#)
10. [Re Boreal Capital Partners Ltd et al, 2021 ONSC 7802](#)
11. [Re Canwest Global Communications Corp, \[2009\] OJ No 4286 \(Ont Sup Ct\)](#)
12. [Re Clover Leaf, 2019 ONSC 6966](#)
13. [Re Just Energy Corp, 2021 ONSC 1793](#)
14. [Re Lydian International Limited, 2019 ONSC 7473](#)
15. [Re Lydian International Limited, 2020 ONSC 4006](#)
16. [Re MJardin Group Inc, 2022 ONSC 3338](#)
17. [Re Timminco Limited, 2012 ONSC 2515](#)
18. [Re Timminco Ltd, 2012 ONSC 506](#)
19. [Re US Steel Canada Inc, 2014 ONSC 6145](#)
20. [Target Canada Co, 2015 ONSC 303](#)

SCHEDULE B – STATUTES AND REGULATIONS RELIED ON

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

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.

2019, c. 29, s. 136

Section 11.02

Stays, etc. – initial application

(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F)2019, c. 29, s. 137.

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.

1997, c. 12, s. 1242005, c. 47, s. 1282007, c. 36, s. 652019, c. 29, s. 138.

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.

2005, c. 47, s. 1282007, c. 36, s. 66.

**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 TRICHOME FINANCIAL CORP., TRICHOME JWC ACQUISITION CORP.,
MYM NUTRACEUTICALS INC., TRICHOME RETAIL CORP., MYM
INTERNATIONAL BRANDS INC., AND HIGHLAND GROW INC.**

Court File No.: CV-22-00689857-00CL

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