

**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 January 9, 2023)**

January 5, 2023

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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 and these CCAA proceedings were intended to enable the Applicants to address their liquidity crisis and restructure and maximize the value of the Canadian Business (as defined below) for the benefit of their stakeholders. In furtherance of these purposes, the Applicants now seek an order (the "**Stalking Horse and SISP Approval Order**") pursuant to the CCAA, among other things:
  - (a) approving a sale and investment solicitation process, including corresponding Bidding Procedures and Auction Procedures (each as defined below) (the "**SISP**");
  - (b) approving the letter agreement dated November 7, 2022 (the "**SISP Advisor Engagement Agreement**"), among the Applicants and Stoic Advisory Inc. (the "**SISP Advisor**"), and authorizing the Applicants, *nunc pro tunc*, to pay all amounts due pursuant to the SISP Advisor Engagement Agreement in accordance with its terms;
  - (c) authorizing the SISP Advisor and the Applicants to implement the SISP, with the oversight of KSV Restructuring Inc., in its capacity as the Court-appointed Monitor of the Applicants (in such capacity, the "**Monitor**");

- (d) authorizing and approving the Applicants' execution of the share purchase agreement dated December 12, 2022 (the "**Stalking Horse SPA**"), among the Applicants and L5 Capital Inc. (the "**Stalking Horse Bidder**"), *nunc pro tunc*, and approving the Stalking Horse SPA, including the Expense Reimbursement (as defined below) set out therein, solely for the purposes of acting as the stalking horse bid in the SISP (the "**Stalking Horse Bid**");
  - (e) approving the Applicants' execution of the first amending agreement among the Applicants and the DIP Lender (as defined below) dated December 14, 2022 (the "**DIP Amendment**") to the DIP Agreement (as defined below), *nunc pro tunc*; and
  - (f) granting an extension of the Stay of Proceedings (as defined below) to and including March 10, 2023.
3. The proposed Stalking Horse and SISP Approval Order is the next logical step in these CCAA proceedings and is in the best interests of the Applicants and their stakeholders.
4. If granted, the relief proposed under the Stalking Horse and SISP Approval Order will maintain the *status quo* and ensure the Canadian Business' preservation while a flexible, efficient and competitive process for canvassing the market for potential buyers of the Vendors' Assets (as defined below) or investors in the Canadian Business is conducted. In each case, the relief proposed is supported by the Monitor, and Cortland Credit Lending Corporation, in its capacities as the DIP Lender and as agent for and on behalf of the Applicants' senior secured lenders (in such capacity, the "**Agent**").

## 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 January 1, 2023 (together, the "**Ruscetta Affidavits**").<sup>1</sup> All capitalized terms used but not defined herein have the meanings ascribed to them in the Ruscetta Affidavits.

### A. Background to and Developments in these CCAA Proceedings

6. 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 their financial position, conserve costs and restructure the Canadian Business, the Applicants recently faced a dire liquidity crisis.<sup>2</sup>

7. 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.<sup>3</sup>

8. Among other things, the Initial Order:

- (a) appointed KSV Restructuring Inc. as the Monitor;

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<sup>1</sup> Affidavit of Michael Ruscetta sworn on November 7, 2022, Applicant's Motion Record dated January 1, 2023 at Tab 2A [Motion Record]; Affidavit of Michael Ruscetta sworn on January 1, 2023 [Third Ruscetta Affidavit], Motion Record at Tab 2.

<sup>2</sup> *Ibid* at para 5, Motion Record at Tab 2.

<sup>3</sup> *Ibid* at para 6, Motion Record at Tab 2.

- (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, or affecting the Canadian Business or the Property (as defined in the Initial Order), 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, and Cortland Credit Lending Corporation, as agent for and on behalf of the lenders party thereto (the "**DIP Lender**"); and
- (d) granted the Administration Charge, the Directors' Charge and the DIP Lender's Charge (each as defined in the Initial Order) over the Property.<sup>4</sup>

9. On November 17, 2022, the Applicants sought and obtained an amended and restated Initial Order pursuant to the CCAA (the "**Amended and Restated Initial Order**"), which, *inter alia*:

- (a) granted an extension of the Stay of Proceedings to and including February 3, 2023; and
- (b) approved increases to the Directors' Charge and the DIP Lender's Charge up to the maximum amounts of \$2,922,000 and \$4,875,000, respectively.<sup>5</sup>

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<sup>4</sup> *Ibid* at para 7, Motion Record at Tab 2.

<sup>5</sup> *Ibid* at para 8, Motion Record at Tab 2.

10. 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' operations, and advance their restructuring objectives. Among other things, this has included preparing the proposed SISP and negotiating the SISP Advisor Engagement Agreement and the Stalking Horse SPA, each with the assistance and oversight of the Monitor.<sup>6</sup>

**B. The SISP Advisor and the SISP Advisor Engagement Agreement**

11. To facilitate the SISP, the Applicants have engaged the SISP Advisor pursuant to the SISP Advisor Engagement Agreement. The SISP Advisor is a boutique corporate finance advisory firm focused on the global cannabis industry with extensive mergers and acquisitions, financial advisory and capital markets experience. Moreover, the SISP Advisor was a previous informal advisor to Trichome, and the Court-approved mergers and acquisitions advisor in the JWC CCAA Proceedings in respect of the JWC SISP.<sup>7</sup>

12. Pursuant to the SISP Advisor Engagement Agreement, the SISP Advisor will provide several financial advisory services to the Applicants in connection with the SISP (collectively, the "**Services**"). In consideration for providing the Services to the Applicants, the SISP Advisor is entitled to a fixed cash fee (the "**Transaction Fee**") in an amount equal to \$50,000 per month, payable monthly from the execution of the SISP Advisor Engagement Agreement up to a maximum of \$300,000 (or 6 months) (the "**Maximum Fee**"). If a stalking horse transaction, including the Stalking Horse Bid, closes prior to the full amount of the Maximum Fee having been

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<sup>6</sup> *Ibid* at para 10, Motion Record at Tab 2.

<sup>7</sup> *Ibid* at paras 12, 16, Motion Record at Tab 2; Second Report of KSV Restructuring Inc. dated January 4, 2023 s 4.1 at paras 2-3, 8 [Monitor's Report].



paid by the Applicants to the SISP Advisor, no further Transaction Fee payment will be due and payable.<sup>8</sup>

13. Notably, the SISP Advisor Engagement Agreement does not entitle the SISP Advisor to a success fee or any other form of consideration beyond the Transaction Fee.<sup>9</sup>

### C. The SISP

14. The Applicants developed the SISP, in consultation with the Monitor and the SISP Advisor, to solicit interest in all of their right, title and interest in and to all of their assets or all of the shares in the capital of the Applicants (collectively, the "**Vendors' Assets**"). To maximize flexibility in the SISP, the Applicants will also consider a bid (i) for all of the Vendors' Assets, (ii) separate bids to acquire some but not all of the Vendors' Assets, and (iii) a bid that contemplates a plan of reorganization, recapitalization or other form of reorganization of the business and affairs of the Applicants.<sup>10</sup>

15. Pursuant to the proposed Stalking Horse and SISP Approval Order, the SISP Advisor, under the supervision of the Applicants and the Monitor, will be responsible for the marketing and sale of the Vendors' Assets (the "**Bidding Process**") in accordance with the SISP and the bidding procedures to be employed in the SISP (the "**Bidding Procedures**"). The Monitor will be responsible for conducting an auction (the "**Auction**"), if required in accordance with the terms of the Bidding Procedures, on behalf of the Applicants.<sup>11</sup>

16. In accordance with the timeline governing the SISP (the "**SISP Timeline**"), the SISP Advisor commenced certain preliminary steps in the SISP on January 3, 2023. A Potential Bidder

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<sup>8</sup> Third Ruscetta Affidavit, *ibid* at paras 14-15, Motion Record at Tab 2.

<sup>9</sup> *Ibid* at para 14, Motion Record at Tab 2.

<sup>10</sup> *Ibid* at paras 18-19, Motion Record at Tab 2.

<sup>11</sup> *Ibid* at para 20, Motion Record at Tab 2.

that wishes to make a bid in the SISP must deliver a written copy of its bid by no later than 5:00 p.m. (Eastern Time) on February 6, 2023 (the "**Bid Deadline**"), with such bid including or conforming to the requirements prescribed under the Bidding Procedures (collectively, the "**Required Bid Terms and Materials**").<sup>12</sup> Among other things, the Required Bid Terms and Materials include the following:

- (a) bids must provide aggregate consideration of \$6,600,000, which shall include cash consideration in an amount of at least \$5,300,000, being (x) the amount payable under the Stalking Horse Bid (\$5,000,000), plus (y) the Expense Reimbursement (\$200,000) and (z) a \$100,000 minimum bid increment;
- (b) bids must provide a description of the Vendors' Assets to be included in the transaction, and an allocation of the purchase price to such Vendors' Assets;
- (c) bids must not include a provision making the Potential Bidder's offer conditional on obtaining financing or any internal approval or on the outcome of unperformed due diligence or any other contingencies more burdensome than those set forth in the Stalking Horse Bid;
- (d) bids must include an assumption of liabilities and other economic terms that are at least as favorable in the aggregate as those in the Stalking Horse Bid; and
- (e) bids must provide a cash deposit in the amount of not less than five percent (5%) of the amount of the purchase price, in immediately available funds in the form of

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<sup>12</sup> *Ibid* at paras 21, 25, Motion Record at Tab 2; Monitor's Report, *supra* note 7 s 5.1 at para 5.

a wire transfer, bank draft or such other form acceptable to the Monitor, acting reasonably, which shall be held by the Monitor in trust.<sup>13</sup>

17. A bid from a Potential Bidder that includes all of the Required Bid Terms and Materials (a "**Qualified Bidder**") and is received by the Bid Deadline is a "**Qualified Bid**".<sup>14</sup> In consultation with the Applicants, the Monitor may waive compliance with any one or more of the Required Bid Terms and Materials and deem such non-compliant bid to be a Qualified Bid.

18. The Applicants and the Monitor will review all Qualified Bids to determine which Qualified Bid is the best offer (the "**Lead Bid**"). A copy of the Lead Bid will be provided by the Monitor to all Qualified Bidders after the Bid Deadline and no later than 5:00 p.m. (Eastern Time) three (3) days before the date scheduled for the Auction. If no Qualified Bids are submitted by the Bid Deadline other than the Stalking Horse Bid, the Stalking Horse Bid will be deemed to be the Successful Bid (as defined below). In such case, the SISP will not proceed to an Auction.<sup>15</sup>

19. The Auction, if any, will be conducted in accordance with the auction procedures attached as Schedule "A" to the SISP (the "**Auction Procedures**") at 10:00 a.m. (Eastern Time) on February 17, 2023.<sup>16</sup>

20. As indicated in the Bidding Procedures, the sale of the Vendors' Assets to any Qualified Bidder is conditional upon this Court's approval of such bid (the "**Successful Bid**") at a motion to be brought by the Applicants in these CCAA proceedings on or before March 3, 2023 (the "**Approval and Vesting Order Motion**"). At the Approval and Vesting Order Motion, the Applicants intend to seek an order (the "**Approval and Vesting Order**") authorizing the

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<sup>13</sup> Third Ruscetta Affidavit, *ibid* at para 25, Motion Record at Tab 2.

<sup>14</sup> *Ibid* at para 26, Motion Record at Tab 2.

<sup>15</sup> *Ibid* at para 27, Motion Record at Tab 2.

<sup>16</sup> *Ibid* at para 28, Motion Record at Tab 2.

Applicants to proceed with the sale of the Vendors' Assets to the Qualified Bidder making the Successful Bid.<sup>17</sup>

**D. The Stalking Horse SPA**

21. To enhance the efficacy of the SISP and establish an appropriate, valuable and competitive floor for bids submitted in accordance therewith, the Applicants, in consultation with the Monitor, entered into the Stalking Horse SPA with the Stalking Horse Bidder. The Stalking Horse Bidder is a related party.<sup>18</sup>

22. The Stalking Horse SPA contemplates a reverse vesting transaction, pursuant to which the Stalking Horse Bidder will acquire all of the issued and outstanding shares in the capital of TJAC and MYM (together with MYMB, Highland and TRC, the "**Purchased Entities**") owned by Trichome (collectively, the "**Purchased Shares**"). As a result, the Stalking Horse SPA, if consummated, is expected to ensure the preservation of the Canadian Business as a going concern and the continued employment of a significant number of the Applicants' employees.<sup>19</sup>

23. The consideration payable under the Stalking Horse SPA includes a base cash purchase price of \$5,000,000 (the "**Purchase Price**") and certain deferred consideration (the "**Deferred Consideration**") payable pursuant to secured limited recourse promissory notes. The Deferred Consideration includes an amount equal to 100% of:

- (a) all actual receipts obtained by the Purchased Entities after the closing date on account of any receivables due and owing to the Purchased Entities on the closing date (the "**Closing Date Purchased Entity Receivables**");

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<sup>17</sup> *Ibid* at para 30, Motion Record at Tab 2.

<sup>18</sup> *Ibid* at para 33, Motion Record at Tab 2.

<sup>19</sup> *Ibid* at para 34, Motion Record at Tab 2.

- (b) the costs of the cannabis inventory expected to be held by the Purchased Entities at closing as set out in the Stalking Horse SPA, provided that in no circumstances will the aggregate cost of such inventory exceed \$1,300,000 (the "**30-Day Inventory**"); and
- (c) all actual receipts obtained by the Purchased Entities after the closing date on account of the sale of any inventory owned by the Purchased Entities on the closing date other than 30-Day Inventory (the "**Closing Date Purchased Entity Inventory**").<sup>20</sup>

24. To compensate the Stalking Horse Bidder for performing the due diligence and incurring the expenses necessary to negotiate and execute the Stalking Horse SPA, the Applicants have agreed to pay the Stalking Horse Bidder an expense reimbursement on account of its reasonable and documented out of pocket fees and expenses, up to a maximum of \$200,000 inclusive of HST (the "**Expense Reimbursement**"). The Expense Reimbursement will become payable if the Stalking Horse Bid is not the Successful Bid or upon certain events of termination of the Stalking Horse SPA.<sup>21</sup>

25. The Expense Reimbursement, if payable, in addition to the return of the Deposit to the Stalking Horse Bidder in accordance with the Stalking Horse SPA, is the sole remedy of the Stalking Horse Bidder for any breach of the Stalking Horse SPA by any of the Applicants. There is no "break fee" in addition to the Expense Reimbursement.<sup>22</sup>

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<sup>20</sup> *Ibid*, Motion Record at Tab 2.

<sup>21</sup> *Ibid* at para 37, Motion Record at Tab 2.

<sup>22</sup> *Ibid* at paras 38-39, Motion Record at Tab 2.

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

26. As noted above, the Initial Order authorized the Applicants to borrow under a DIP Facility in accordance with the terms of the DIP Agreement. Since the granting of the Initial Order, the Applicants, with the oversight of the Monitor, have entered into the DIP Amendment to, among other things, ensure that the Applicants have sufficient liquidity to meet their working capital requirements in these CCAA proceedings.<sup>23</sup>

27. Principally, the DIP Amendment modifies the manner in which the Over-Advance Amount (as defined in the DIP Agreement) is calculated under the DIP Agreement for the period between the week ended December 9, 2022 to the week ended March 3, 2023 (the "**Borrowing Period**"). The DIP Amendment does not alter the maximum principal amount of borrowings permitted under the DIP Facility and the Amended and Restated Initial Order nor does it necessitate a change to the quantum of the DIP Lender's Charge.<sup>24</sup>

28. It is a condition subsequent to the DIP Amendment that the Applicants seek approval of the DIP Amendment by no later than January 13, 2023.<sup>25</sup>

### **F. The Stay of Proceedings**

29. The Stay of Proceedings under the Amended and Restated Initial Order will expire on February 3, 2023. Pursuant to the proposed Stalking Horse and SISP Approval Order, the Applicants are seeking to extend the Stay of Proceedings to and including March 10, 2023 (the "**Stay Period**").<sup>26</sup>

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<sup>23</sup> *Ibid* at para 42, Motion Record at Tab 2.

<sup>24</sup> *Ibid* at para 43, Motion Record at Tab 2.

<sup>25</sup> *Ibid* at para 45, Motion Record at Tab 2.

<sup>26</sup> *Ibid* at para 46, Motion Record at Tab 2.

30. The Applicants' revised cash flow analysis demonstrates that the Applicants will have sufficient liquidity to fund their obligations and the costs of these CCAA proceedings throughout the Stay Period, provided the DIP Amendment is approved and the term of the DIP Agreement is extended pursuant to a further amending agreement.<sup>27</sup>

### **PART III: ISSUES**

31. The issues to be considered on this motion are whether this Court should:

- (a) approve the SISP Advisor Engagement Agreement;
- (b) approve the SISP;
- (c) approve the Stalking Horse SPA, including the Expense Reimbursement, for the purposes of serving as the Stalking Horse Bid in the SISP;
- (d) approve the DIP Amendment; and
- (e) extend the Stay of Proceedings granted under the Amended and Restated Initial Order through the Stay Period.

### **PART IV: LAW AND ANALYSIS**

#### **A. The SISP Advisor Engagement Agreement Should be Approved**

32. Section 11 of the CCAA vests this Court with broad discretion to make "any order that it considers appropriate in the circumstances."<sup>28</sup> In this case, it is appropriate for this Court to exercise its discretion to approve the SISP Advisor Engagement Agreement.

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<sup>27</sup> *Ibid* at para 48, Motion Record at Tab 2; Monitor's Report, *supra* note 7 s 8.0 at para 2.

<sup>28</sup> [Companies' Creditors Arrangement Act, RSC 1985, c. C-36 s 11.02\(2\)](#) [CCAA].

33. The exercise of this Court's discretion under section 11 of the CCAA must "further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence."<sup>29</sup> The CCAA's objectives include "providing for timely, efficient and impartial resolution of a debtor's insolvency" and "preserving and maximizing the value of a debtor's assets".<sup>30</sup>

34. Relying on section 11 of the CCAA, Courts have previously approved the engagement of financial advisors where such engagements facilitated the debtors' restructuring, including the debtors' Court-approved sale process.<sup>31</sup> Courts have likewise provided such approval in the context of other insolvency proceedings.<sup>32</sup>

35. When determining whether to approve the engagement of a financial advisor in an insolvency proceeding, Courts have considered the following factors, among others:

- (a) whether the debtors and the Court-officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;
- (b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and
- (c) whether a success fee is necessary to incentivize the financial advisor.<sup>33</sup>

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<sup>29</sup> [9354-9186 Québec inc v Callidus Capital Corp, 2020 SCC 10](#) at para 70 [*Callidus*].

<sup>30</sup> *Ibid* at para 40.

<sup>31</sup> [Re Tamerlane Ventures Inc, 2013 ONSC 5461](#) at para 22; [Re Walter Energy Canada Holdings, Inc, 2016 BCSC 107](#) at paras 19, 27, 31-32 [*Walter Energy*]; [Re Target Canada Co, 2015 ONSC 303](#) at para 72 [*Target*]; [Re Sino-Forest Corp, 2012 ONSC 2063](#) at paras 46-47 [*Sino-Forest*]; [In the Matter of a Plan of Compromise or Arrangement of PharmHouse Inc \(October 29, 2020\), Toronto, CV-20-00647704-00CL](#) (Order) (ONSC) at para 3 [PharmHouse SISP Approval Order]; [In the Matter of a Plan of Compromise or Arrangement of James E. Wagner Cultivation Corporation et al. \(April 9, 2020\), Toronto, CV-20-00639000-00CL](#) (Order) (ONSC) at para 7 [JWC Bidding Procedures and Stalking Horse APA Approval Order].

<sup>32</sup> [Re Danier Leather Inc, 2016 ONSC 1044](#) at paras 47-48 [*Danier*]; [Re Colossus Minerals Inc, 2014 ONSC 514](#) at paras 28, 30-31 [*Colossus*].

<sup>33</sup> [Danier](#), *ibid* at para 47; [Colossus](#), *ibid* at paras 30, 31-36; [Sino-Forest](#), *supra* note 31 at para 47; [Walter Energy](#), *supra* note 31 at paras 31-32, 35; [Target](#), *supra* note 31 at para 72.



36. Here, it is appropriate for this Court to exercise its discretion to approve the SISP Advisor Engagement Agreement and authorize the Applicants, *nunc pro tunc*, to pay all amounts due pursuant to the SISP Advisor Engagement Agreement in accordance with its terms as:

- (a) the SISP Advisor's engagement is expected to enhance the prospect of value maximizing transactions, beyond the Stalking Horse Bid, materializing in the SISP and thus, is in the best interests of the Applicants and their stakeholders;
- (b) the SISP Advisor has extensive mergers and acquisitions, financial advisory and capital markets experience, with particular expertise in the cannabis sector;
- (c) as a previous informal advisor to Trichome, and the Court-approved mergers and acquisitions advisor in the JWC CCAA Proceedings in respect of the JWC SISP, the SISP Advisor is familiar with, and well-positioned to solicit interest in, the Canadian Business and the Vendors' Assets;
- (d) the SISP Advisor Engagement Agreement does not entitle the SISP Advisor to a success fee or any other form of consideration beyond the Transaction Fee;
- (e) the Applicants, exercising their business judgement, are of the view that the SISP Advisor's remuneration is appropriate given the SISP Advisor's experience, the breadth of the Services to be provided and the benefit expected to accrue to the Applicants and their stakeholders by virtue of the SISP Advisor's involvement in the SISP;
- (f) the Monitor is supportive of the SISP Advisor's engagement and the approval of the SISP Advisor Engagement Agreement and believes that the Maximum Fee is reasonable in the circumstances; and

- (g) the DIP Lender and the Agent are supportive of the SISP Advisor's engagement and the approval of the SISP Advisor Engagement Agreement.<sup>34</sup>

## **B. The SISP Should be Approved**

37. It is well established that the CCAA confers jurisdiction on Courts to approve a sale process, including a "stalking horse" sale process, in respect of the business or assets of debtor companies prior to or in the absence of a plan of compromise and arrangement.<sup>35</sup>

38. As Morawetz J. (as he then was) held in *Re Nortel Networks Corp.* ("**Nortel**"), and affirmed in *Re Brainhunter Inc.*, when determining whether to approve a "stalking horse" sale process, Courts should consider the following factors:

- (a) is a sale transaction warranted at this time;
- (b) will the sale benefit the whole "economic community";
- (c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business; and
- (d) is there a better viable alternative.<sup>36</sup>

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<sup>34</sup> Third Ruscetta Affidavit, *supra* note 1 at paras 12, 14-17, Motion Record at Tab 2; Monitor's Report, *supra* note 7 s 4.1 at para 8.

<sup>35</sup> *Re Nortel Networks Corp* (2009), OJ No. 3169 at paras 47-48 [*Nortel*]; *Re Brainhunter Inc* (2009), OJ No. 5578 at para 13 [*Brainhunter*]; *Sino-Forest*, *supra* note 31 at paras 40-41; *In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands*, 2020 ONSC 3565 at para 61 [*Green Growth*]; *CCAA*, *supra* note 28 s 11.

<sup>36</sup> *Nortel*, *ibid* at para 49; *Brainhunter*, *ibid*; *Sino-Forest*, *ibid* at para 41. See also, *Walter Energy*, *supra* note 31 at paras 20-21 citing *CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd*, 2012 ONSC 1750 at para 6 [*CCM*], where the British Columbia Supreme Court considered the following factors drawn from the approval of sale processes in receivership proceedings: (i) the fairness, transparency and integrity of the proposed process; (ii) the commercial efficacy of the proposed process in light of the specific circumstances; 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. In the CCAA context, these factors were similarly applied by this Court in *Re PCAS Patient Care Automation Services Inc*, 2012 ONSC 2840 at para 17 [*PCAS*].

39. Although the approval a *sale process* is distinct from the approval of a *sale*, Courts have nevertheless employed the considerations enumerated under section 36 of the CCAA to inform the application of the *Nortel* factors.<sup>37</sup> These considerations include:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the Court a report stating that in its opinion the sale or disposition would be more beneficial to creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

40. Having regard to the foregoing, the Applicants submit that the SISP should be approved given that:

- (a) the SISP was developed, in consultation with both the Monitor and the SISP Advisor, to provide a flexible, efficient, fair and equitable process for canvassing

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<sup>37</sup> [Brainhunter](#), *ibid* at paras [16-17](#); [Green Growth](#), *supra* note 35 at para [61](#); [CCAA](#), *supra* note 28 s [36](#).

the market for potential buyers of the Vendors' Assets or investors in the Canadian Business and maximizing recovery for the Applicants' stakeholders;

- (b) both the SISP Advisor and the Monitor are of the view that the SISP Timeline is appropriate in the circumstances and will provide sufficient opportunity to solicit interest for a sale of the Vendors' Assets or the reorganization or recapitalization of the Canadian Business;
- (c) as the best option for maximizing recovery available to the Applicants at this time, the SISP is in the best interests of both the Applicants and their stakeholders;
- (d) in addition to assisting in the development of the SISP, the Monitor has several consent, consultation and other rights under the SISP, including with respect to the adoption of other rules for the Bidding Process and the waiver of one or more of the Required Bid Terms and Materials, and is responsible for the Auction;
- (e) to date, no objections to the proposed SISP, the sale of the Vendors' Assets or potential investment in the Canadian Business have been raised;
- (f) each of the DIP Lender and the Agent is supportive of the proposed SISP; and
- (g) the Monitor is supportive of the proposed SISP and believes that the SISP is the best option available to the Applicants at this time.<sup>38</sup>

### **C. The Stalking Horse SPA Should be Approved**

41. Pursuant to the proposed Stalking Horse and SISP Approval Order, the Applicants are seeking approval of the Stalking Horse SPA, including the Expense Reimbursement, solely for the

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<sup>38</sup> Third Ruscetta Affidavit, *supra* note 1 at paras 18, 20, 22, 26-29, 31-32, Motion Record at Tab 2; Monitor's Report, *supra* note 7 s 5.8 at para 1.

purposes of approving it as the Stalking Horse Bid in the SISP. If the Stalking Horse Bid is the Successful Bid in the SISP, the Applicants will seek approval of the transaction contemplated by the Stalking Horse SPA at the Approval and Vesting Order Motion.

42. Stalking horse agreements are frequently employed in "insolvency proceedings to facilitate sales of businesses and assets and [...] establish a baseline price and transactional structure for any superior bids".<sup>39</sup> As this Court has previously held, 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."<sup>40</sup>

43. Given their benefits, stalking horse agreements, including those involving a related party, break fees and/or expense reimbursements, have been approved by Courts concurrently with a sale process in numerous CCAA proceedings.<sup>41</sup> When assessing bid protections such as break fees and expense reimbursements – which "are frequently approved in insolvency proceedings"<sup>42</sup> – Courts have recognized that:

- (a) in addition to compensating a stalking horse bidder for the time and resources expended and the risks taken in developing a stalking horse agreement, bid protections also reflect the price of stability; and

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<sup>39</sup> [Danier](#), *supra* note 32 at para 20; [Cannapiece Group Inc v Carmela Marzili, 2022 ONSC 6379](#) at paras 4, 8 [Cannapiece]; [CCM](#), *supra* note 36 at para 7; [Brainhunter](#), *supra* note 35 at para 13.

<sup>40</sup> [Danier](#), *ibid*.

<sup>41</sup> [Brainhunter](#), *supra* note 35 at paras 11-12, 20-21; [Green Growth](#), *supra* note 35 at paras 5, 51-53, 62; [Cannapiece](#), *supra* note 39 at paras 2, 5, 13; [Nortel](#), *supra* note 35 at paras 2, 56; [PCAS](#), *supra* note 36 at paras 7, 11, 21; [JWC Bidding Procedures and Stalking Horse APA Approval Order](#), *supra* note 31 at paras 3-6; [In the Matter of a Plan of Compromise or Arrangement of Harte Gold Corp \(December 20, 2021\)](#), Toronto, CV-21-00673304-00CL (Order) (ONSC) at paras 3-5 [Harte Gold SISP Approval Order]; [In the Matter of a Plan of Compromise or Arrangement of Superette Inc et al. \(September 9, 2022\)](#), Toronto, CV-22-00686245-00CL (Order) (ONSC) at paras 3-4, 6-7 [Superette SISP Approval Order]; [In the Matter of a Plan of Compromise or Arrangement of Just Energy Group et al. \(August 18, 2022\)](#), Toronto, CV-21-00658423-00CL (Order) (ONSC) at paras 3-4, 7, 9-10 [Just Energy SISP Approval Order].

<sup>42</sup> [Danier](#), *supra* note 32 at para 41; [Green Growth](#), *ibid* at paras 51-52.

- (b) bid protections are subject to the debtors' business judgement, provided that they lie within a range of reasonable alternatives – often between 1.8% to 5% of the value of the stalking horse bid.<sup>43</sup>

44. Here, approval of the Stalking Horse SPA, including the Expense Reimbursement, is appropriate in the circumstances given that:

- (a) the Stalking Horse SPA will serve as an appropriate backstop and valuable floor for bids in the proposed SISP while ensuring the preservation of the Canadian Business as a going concern and the continued employment of a significant number of the Applicants' employees;
- (b) the baseline Purchase Price, the Deferred Consideration and the transaction structure proposed under the Stalking Horse SPA is expected to promote the submission of competitive bids in the SISP, and thereby maximize value for the Applicants and their stakeholders;
- (c) the Applicants, exercising their business judgement, believe that (i) the consideration provided under the Stalking Horse SPA, including the Purchase Price and the Deferred Consideration, is fair and reasonable, and (ii) the Expense Reimbursement is fair and reasonable in view of the benefits of having a Stalking Horse Bid capable of assuring a going concern result, the expenses incurred and to be incurred by the Stalking Horse Bidder, and the risks attending the Stalking Horse Bidder's participation in the SISP;

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<sup>43</sup> [Green Growth](#), *ibid* at para 52; [Danier](#), *ibid* at paras 41-42; [Cannapiece](#), *supra* note 39 at para 5; [CCM](#), *supra* note 36 at para 13; [Brainhunter](#), *supra* note 35 at para 20. See also, [Re Parlay Entertainment Inc.](#), 2011 ONSC 3492 at paras 12, 20 where the break fee and expense reimbursement represented approximately 4.8% of the sale price.

- (d) there is no break fee and the maximum amount of the Expense Reimbursement represents approximately 3.2% of the aggregate consideration provided under the Stalking Horse SPA, being \$6,300,000 (exclusive of any amounts payable for the Closing Date Purchased Entity Receivables and the Closing Date Purchased Entity Inventory) – well within a range of reasonableness;
- (e) the Monitor is supportive of the Stalking Horse SPA for the purposes of acting as the Stalking Horse Bid in the SISP and believes that (i) the Expense Reimbursement is reasonable and (ii) the Stalking Horse SPA's approval is in the best interests of the Applicants' stakeholders as it will protect downside risk while facilitating the submission of potentially superior bids in the SISP; and
- (f) each of the DIP Lender and the Agent has advised that it is supportive of the approval of the Stalking Horse SPA for the purposes of acting as the Stalking Horse Bid in the SISP and the Expense Reimbursement.<sup>44</sup>

#### **D. The DIP Amendment Should be Approved**

45. The Applicants entered into the DIP Amendment to ensure that they would have sufficient liquidity to meet their working capital requirements during these CCAA proceedings. Pursuant to the proposed Stalking Horse and SISP Approval Order, the Applicants now seek approval of the DIP Amendment.

46. 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 DIP Amendment.<sup>45</sup> In addition to the

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<sup>44</sup> Third Ruscetta Affidavit, *supra* note 1 at paras 33-37, 39-41; Monitor's Report, *supra* note 7 s 5.6 at paras 1-4, s 5.7 at para 1 and s 5.8 at para 1.

<sup>45</sup> [CCAA](#), *supra* note 28 s [11.2](#); [Re Lydian International Limited, 2020 ONSC 4006](#) at para [66](#) [*Lydian International*].

considerations relied upon by this Court when approving the DIP Facility and granting the DIP Lender's Charge under the Initial Order and the Amended and Restated Initial Order,<sup>46</sup> the following factors, among others, support the approval of the DIP Amendment:

- (a) the DIP Amendment ensures that the Applicants will have sufficient borrowing availability under the DIP Facility to meet their working capital requirements during the Borrowing Period without increasing the maximum principal amount of borrowings permitted under the DIP Facility and the Amended and Restated Initial Order or increasing the quantum of the DIP Lender's Charge;
- (b) a liquidity shortfall would be detrimental to the Canadian Business' operations, the proposed SISP and the Applicants' stakeholders, and would likely precipitate an event of default under the DIP Agreement;
- (c) it is a condition subsequent to the DIP Amendment that the Applicants seek approval of the DIP Amendment; and
- (d) the Monitor is supportive of the DIP Amendment and believes that (i) its terms are reasonable and appropriate in the circumstances and (ii) none of the Applicants' stakeholders will be prejudiced by the DIP Amendment's approval *nunc pro tunc*.<sup>47</sup>

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<sup>46</sup> [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); [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 \(November 17, 2022\), Toronto, CV-22-00689857-00CL](#) (Endorsement) (ONSC). See also, [CCAA](#), *ibid* s [11.2\(1\)](#), [11.2\(4\)](#); [Lydian International](#), *ibid*.

<sup>47</sup> Third Ruscetta Affidavit, *supra* note 1 at paras 42-45, Motion Record at Tab 2; Monitor's Report, *supra* note 7 s 6.0 at paras 3-4, 7.



## E. The Stay of Proceedings Should be Extended

47. The Stay of Proceedings is currently set to expire on February 3, 2023.<sup>48</sup> Subsection 11.02(2) of the CCAA expressly authorizes this Court to grant an extension of the Stay of Proceedings for "any period that the court considers necessary".<sup>49</sup> 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.<sup>50</sup>

48. The jurisdiction vested in Courts to stay proceedings under section 11.02 "should be construed broadly to accomplish the legislative purposes of the CCAA".<sup>51</sup> These purposes include, among others, enabling the continuation of the debtors' business, avoiding the social and economic costs of a liquidation, preserving the value of the debtors' business and facilitating a value-maximizing restructuring.<sup>52</sup> Accordingly, a stay of proceedings will be appropriate where it maintains the *status quo* and provides debtors with breathing room while they seek to restore solvency and arrange a "sale of assets in order to maximize recovery for stakeholders."<sup>53</sup>

49. In this case, the proposed extension of the Stay of Proceedings is appropriate 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' operations, and advance their restructuring objectives, including by, among other things,

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<sup>48</sup> Third Ruscetta Affidavit, *ibid* at para 46, Motion Record at Tab 2.

<sup>49</sup> CCAA, *supra* note 28 s 11.02(2); [Laurentian University of Sudbury, 2021 ONSC 1098](#) at para 56.

<sup>50</sup> CCAA, *ibid*.

<sup>51</sup> [Canwest Global Communications Corp, 2011 ONSC 2215](#) at para 24 [*Canwest*].

<sup>52</sup> *ibid*; [Callidus](#), *supra* note 29 at para 40; [Century Services Inc v Attorney General \(Canada\), 2010 SCC 60](#) at para 15 [*Century Services*]; [Target](#), *supra* note 31 at para 8; [Re Timminco Limited, 2012 ONSC 2515](#) at para 15 [*Timminco*].

<sup>53</sup> [Timminco](#), *ibid*; [Century Services](#), *ibid* at para 14; [Target](#), *ibid*; [Canwest](#), *supra* note 51 at paras 24-25.

developing the SISP and negotiating the SISP Advisor Engagement Agreement and the Stalking Horse SPA;

- (b) the Stay of Proceedings is necessary to prevent disruption to the Canadian Business and enforcement action by the Applicants' contractual counterparties;
- (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 maintain the Canadian Business, preserving value for the Applicants' stakeholders, including the Applicants' employees and suppliers;
- (d) the proposed extension of the Stay of Proceedings will (i) allow the SISP Advisor, under the supervision of the Applicants and the Monitor, to conduct the SISP, and (ii) enable the Applicants to seek approval of the transaction contemplated under the Stalking Horse SPA or one or more other value-maximizing transactions that may materialize in the SISP at the Approval and Vesting Order Motion;
- (e) provided that the DIP Amendment is approved and the term of the DIP Agreement is extended pursuant to a further amending agreement, the Applicants are forecast to have sufficient liquidity to fund their obligations and the costs of these CCAA proceedings throughout the Stay Period;
- (f) the proposed extension of the Stay of Proceedings will obviate the need to expend additional time and costs in seeking an extension of the Stay of Proceedings prior to the proposed Approval and Vesting Order Motion;
- (g) 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; and

(h) the Agent and the DIP Lender are supportive of the proposed extension of the Stay of Proceedings.<sup>54</sup>

50. 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.

**PART V: RELIEF REQUESTED**

51. The Applicants submit that the relief sought on the within motion is appropriate in the circumstances and consistent with prior orders of this Court,<sup>55</sup> and respectfully request that the proposed form of Stalking Horse and SISP Approval Order be granted.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5<sup>TH</sup> DAY OF JANUARY 2023**

*Bennett Jones LLP*  
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BENNETT JONES LLP

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<sup>54</sup> Third Ruscetta Affidavit, *supra* note 1 at paras 47-50, Motion Record at Tab 2; Monitor's Report, *supra* note 7 s 8.0 at paras 1-2.

<sup>55</sup> See generally, [JWC Bidding Procedures and Stalking Horse APA Approval Order](#), *supra* note 31; [PharmHouse SISP Approval Order](#), *supra* note 31; [Harte Gold SISP Approval Order](#), *supra* note 41; [Superette SISP Approval Order](#), *supra* note 41; [Just Energy SISP Approval Order](#), *supra* note 41.

## SCHEDULE A – LIST OF AUTHORITIES

### *Cases Cited*

1. [9354-9186 Québec inc v Callidus Capital Corp, 2020 SCC 10](#)
2. [Cannapiece Group Inc v Carmela Marzili, 2022 ONSC 6379](#)
3. [Canwest Global Communications Corp, 2011 ONSC 2215](#)
4. [CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd, 2012 ONSC 1750](#)
5. [Century Services Inc v Attorney General \(Canada\), 2010 SCC 60](#)
6. [In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands, 2020 ONSC 3565](#)
7. [In the Matter of a Plan of Compromise or Arrangement of Harte Gold Corp \(December 20, 2021\), Toronto, CV-21-00673304-00CL \(Order\) \(ONSC\)](#)
8. [In the Matter of a Plan of Compromise or Arrangement of James E. Wagner Cultivation Corporation et al. \(April 9, 2020\), Toronto, CV-20-00639000-00CL \(Order\) \(ONSC\)](#)
9. [In the Matter of a Plan of Compromise or Arrangement of Just Energy Group et al. \(August 18, 2022\), Toronto, CV-21-00658423-00CL \(Order\) \(ONSC\)](#)
10. [In the Matter of a Plan of Compromise or Arrangement of PharmHouse Inc \(October 29, 2020\), Toronto, CV-20-00647704-00CL \(Order\) \(ONSC\)](#)
11. [In the Matter of a Plan of Compromise or Arrangement of Superette Inc et al. \(September 9, 2022\), Toronto, CV-22-00686245-00CL](#)
12. [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 \(Endorsement\) \(ONSC\)](#)
13. [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 \(November 17, 2022\), Toronto, CV-22-00689857-00CL \(Endorsement\) \(ONSC\)](#)
14. [Laurentian University of Sudbury, 2021 ONSC 1098](#)
15. [Re Brainhunter Inc \(2009\), OJ No. 5578](#)
16. [Re Colossus Minerals Inc, 2014 ONSC 514](#)
17. [Re Danier Leather Inc, 2016 ONSC 1044](#)
18. [Re Lydian International Limited, 2020 ONSC 4006](#)
19. [Re Nortel Networks Corp \(2009\), OJ No. 3169](#)
20. [Re Parlay Entertainment Inc, 2011 ONSC 3492](#)
21. [Re PCAS Patient Care Automation Services Inc, 2012 ONSC 2840](#)
22. [Re Sino-Forest Corp, 2012 ONSC 2063](#)
23. [Re Tamerlane Ventures Inc, 2013 ONSC 5461](#)
24. [Re Target Canada Co, 2015 ONSC 303](#)
25. [Re Timminco Limited, 2012 ONSC 2515](#)

26. [Re Walter Energy Canada Holdings, Inc, 2016 BCSC 107](#)

## SCHEDULE B – STATUTES AND REGULATIONS RELIED ON

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

#### Section 11

##### **General power of court**

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 111992, c. 27, s. 901996, c. 6, s. 1671997, c. 12, s. 1242005, c. 47, s. 128

#### 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 36**

**Restriction on disposition of business assets**

(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

**Notice to creditors**

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

**Factors to be considered**

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.



**Additional factors — related persons**

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

**Related persons**

(5) For the purpose of subsection (4), a person who is related to the company includes

- (a) a director or officer of the company;
- (b) a person who has or has had, directly or indirectly, control in fact of the company; and
- (c) a person who is related to a person described in paragraph (a) or (b).

**Assets may be disposed of free and clear**

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

**Restriction — employers**

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

**Restriction — intellectual property**

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

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

Proceeding commenced at Toronto

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**FACTUM OF THE APPLICANTS**  
**(Returnable January 9, 2023)**

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