

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED**

**BETWEEN:**

**KW CAPITAL PARTNERS LIMITED**

**Applicant**

**- AND -**

**VERT INFRASTRUCTURE LTD.**

**Respondent**

**FACTUM OF THE RECEIVER  
(EMPRISE TRANSACTION APPROVAL)**

June 1, 2021

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**TO: The Service List**

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**PART I - OVERVIEW**

1. On this motion, KSV Restructuring Inc. (formerly KSV Kofman Inc.) in its capacity as the receiver and manager (the “**Receiver**”) of Vert Infrastructure Ltd. (“**Vert**”) pursuant to an order of this Court dated June 16, 2020 (the “**Receivership Order**”) seeks, *inter alia*, an order (the “**Approval and Vesting Order**”) approving the letter agreement between the Receiver, in its capacity as the court-appointed receiver of Vert, and Emprise Capital Corp. (“**Emprise**”) dated March 22, 2021 (the “**Agreement**”), and the transaction terms and steps provided for therein (the “**Emprise Transaction**”).

2. The Emprise Transaction is a means of obtaining an additional \$200,000 for creditors in consideration for delivering Vert as a public shell company to Emprise.

3. The Emprise Transaction is predicated on the issuance of the Approval and Vesting Order which will, among other things, vest all of the Property (as defined in the Receivership Order), subject to existing encumbrances, to the Receiver, in trust (the “**Trustee**”), for the purposes of continuing to administer the Property for the benefit of the existing creditors of Vert in the same manner and with the same powers, obligations and protections as the Receiver has pursuant to the Receivership Order (the “**Trust**”).

4. In order to effect the related shareholder and governance reorganization of Vert as contemplated in the Agreement, the Receiver is also seeking this Court’s authorization and direction to bring a separate application in the Supreme Court of British Columbia seeking an order (the “**BC Order**”) under the *Business Corporations Act* (British Columbia) (the “**BCBCA**”) as more fully set out in the second report of the Receiver dated May 31, 2021 (the “**Report**”).

5. Lastly, the Receiver is seeking an order authorizing the Trustee to make distributions from the Trust to KW Capital Partners Limited (“**KW Capital**”), as agent on behalf of KW Capital, Plazacorp Investments Limited and Jesse Kaplan (together, the “**Secured Lenders**”) as the Trustee considers appropriate from time to time, as the first Secured Lenders of Vert (the “**Distribution Order**”). The Secured Lenders are the only creditors with an economic interest in Vert as aggregate realizations on the Property will be significantly less than the amount of secured debt owed to the Secured Lenders.

6. KW Capital, as agent for the Secured Lenders, has consented to the relief being sought herein. The Emprise Transaction will permit the Receiver to monetize Vert’s public shell to the benefit of the Secured Lenders without incurring additional expenses as

Emprise has agreed to fund the costs of the Emprise Transaction, as more fully described below.

7. Vert's public shell on its own is of no value to the Receiver, nor would it be to the Trustee in effecting realizations on the remaining Property. Following the issuance of the order sought herein, the administration of the Property will continue in exactly the same fashion, with the added benefit of the Emprise Transaction proceeds. Accordingly, no creditor will be prejudiced by the relief being sought herein.

## **PART II - FACTS**

8. The facts on this motion are set out in the Report filed in support of this motion. Capitalized terms used herein but otherwise undefined have the respective meanings given to them in the Report. The following is a high level summary of the facts relevant to this motion.

### **Overview of Vert and the Guarantor Group**

9. Vert was incorporated under the BCBCA. Vert's main purpose was to raise capital to incorporate and fund subsidiaries in the United States with the corporate purpose of operating licenced cannabis and hemp businesses.

Report, s. 2.0(1), (3).

10. Vert established limited liability companies in the United States, including Elite Ventures Group LLC ("**Elite**") (83% owned directly or indirectly by the Company), Wheeler Park Properties LLC ("**Wheeler**") (70%), DVG LLC (50%), Ocean Green Management

LLC (30%) (collectively, the “**Guarantor Group**”) and Oklahoma Ventures Group LLC (49%) (together with the Guarantor Group, the “**LLCs**”).

Report, s. 2.0(4).

11. Vert also owns 5,000,000 common shares in RoccaVerde Wellness Corporation, formerly known as World Farms Corp., a private company.

Report, s. 2.0(5).

12. Vert is a reporting issuer in Ontario, Alberta and British Columbia. The common shares of Vert are listed for trading on the Canadian Securities Exchange under the symbol “VVV”, on the OTC in the United States under the symbol “CRXPF”, and on the Frankfurt exchange under the symbol “2FR.”

Report, s. 2.0(2).

13. On August 18, 2020, the securities of Vert were cease traded by order of the British Columbia Securities Commission for Vert’s failure to file financial statements and management’s discussion and analysis for the year ended February 29, 2020 (the “**Cease Trade Order**”). The securities of Vert remain subject to the Cease Trade Order to the date of this motion.

Report, s. 2.0(2).

## **The Receivership**

14. On the application of KW Capital as agent of the Secured Lenders, this Court issued the Receivership Order to enable the Receiver to take steps to protect the business and preserve the value of the assets of Vert and the Guarantor Group.

15. As at the date of the Receivership Order, none of the LLCs were operating and none have commenced operations since the receivership commenced. The Receiver is of the view that the Secured Lenders will suffer a material shortfall on their advances to Vert.

Report, s. 2.0(7).

16. The Receiver continues to be actively engaged in the management of Vert and the administration of Vert's estate. Additional details of the Receiver's activities since the date of the Receivership Order can be found on the Receiver's website.

Report, s. 2.0(8).

## **The Emprise Transaction**

17. Emprise, a private merchant bank, approached the Receiver in late November 2020 to acquire Vert's public listing. Discussions between the Receiver and Emprise led to the Agreement. The Emprise Transaction contemplates the following, if approved by this court and the BC Court:

- (a) Emprise will pay the costs of the Emprise Transaction pursuant to the Initial Loan provided to Vert;

- (b) Vert will be restructured such that its assets and liabilities (other than the obligations to repay the Initial Loan and Funding Loan) will be transferred to the Trust;
- (c) The Receiver will receive \$200,000 as consideration pursuant to the Emprise Transaction, in the form of the Funding Loan, the proceeds of which will vest in the Trust;
- (d) Emprise will restructure the share capital of Vert to take advantage of Vert's public listing; and
- (e) Upon the closing of the Emprise Transaction, Vert will have no assets and no liabilities other than the Initial Loan and the Funding Loan owed to Emprise which are to be repaid from any new capital raised by Vert.

Report, s. 3.0(1).

18. The Receiver agreed to work exclusively with Emprise. In the event this exclusivity is breached, Emprise is entitled to repayment of the Initial Loan and a fee in the amount of \$50,000 (the "**Break Fee**"), which Break Fee shall be secured by a Receiver's certificate subordinate only to the security of the Receiver.

Report, s. 3.0(2)(g).

19. Additional details of the Emprise Transaction can be found in the Report and in the Agreement.

### **Proposed Distribution**

20. The Receiver recommends that this Court issue the Distribution Order authorizing and directing the Receiver, on behalf of Vert, to make one or more distributions to the Secured Lenders up to the amount of Vert's indebtedness owing to them. If the Approval and Vesting Order is issued and the Emprise Transaction is completed, such distributions would be made from the Trust.

Report, s. 4.0(4).

### **PART III - ISSUES**

21. There are four issues on this Motion:
- (i) Does this Court have the jurisdiction to create the Trust?
  - (ii) Does this Court have the jurisdiction to vest the Property in the Trust and channel all claims against Vert and the Property thereto?
  - (ii) Should this Court approve the Emprise Transaction and grant the Approval and Vesting Order?
  - (iii) Should this Court issue the Distribution Order?

### **PART IV - LAW AND ARGUMENT**

#### ***(i) This Court has the jurisdiction to create the Trust***

22. There are few examples in which Canadian courts have created trusts by order in insolvency proceedings. However, there is Common Law support for this Court's jurisdiction to so order.

23. In *Otter Bay* the court created certain trust funds which it deemed be held in lieu of the subject lands and premises as security for the amounts claimed by certain lien claimants. Such order created a trust in order to facilitate the sales of certain real property by an interim receiver. The creation of the Trust by order of this Court will similarly permit an asset of the debtor to be monetized.

*269893 Alberta Ltd v Otter Bay Developments Ltd*, 2010 CarswellBC 3883 (SC) at para 23, Book of Authorities, Tab 1 [*Otter Bay*], affirmed in 2011 BCCA 90, Book of Authorities, Tab 2.

24. In *Re Woodward's Ltd.*, the court found that preservation of the status quo was one justification for the creation of a trust for supplier claims (which was absent in such case). Here, the creation of the Trust is designed specifically to maintain the status quo while monetizing an asset of the debtor to the benefit of its creditors.



*Re Woodward's Ltd.*, 1993 CarswellBC 75 (SC) at para 18, Book of Authorities, Tab 3 – leave to appeal dismissed in *Re Woodward's Ltd.*, 1993 CarswellBC 564 (CA), Book of Authorities, Tab 4.

25. Additionally, Canadian courts have approved of documented trust arrangements, either through trust documents or plan provisions in order to facilitate a restructuring or compromise.

*Re Sino-Forest Corp.*, 2012 ONSC 7050 at para 65, Book of Authorities, Tab 5.

*Re Target Canada Co.*, 2015 ONSC 303 at paras 54-55, Book of Authorities, Tab 6.

26. Courts have approved of such trust arrangements to ensure a path of recovery for parties with claims against the debtor. In this case a documentary trust would be superfluous as it would require an agreement between the Receiver and itself, but the Trust will still effectively provide a path of recovery for the creditors of Vert. The requirement to create the Trust by trust document would be form over substance, incurring unnecessary expense for little purpose.

27. Further, as the Property in question consists exclusively of cash, shares in a private company, sales tax refunds and shareholder interests in the LLCs there is very little complexity, and thus little administrative cost, involved in vesting such Property in the Trust.

***(ii) This Court has the jurisdiction to vest the Property in the Trust and channel all claims against the Property thereto***

**I. Statutory Jurisdiction**

28. The statutory jurisdiction to vest the Property in the Trust can be found under both section 100 of the *Courts of Justice Act* and section 243(1)(c) of the *Bankruptcy and Insolvency Act*.

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, s. 243(1)(c) [BIA].

*Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 100 [CJA].

29. Section 100 of the CJA allows a court to “vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.”

CJA, s. 100.

30. In *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, the Ontario Court of Appeal illustrated that the jurisdiction to issue orders approving asset transfers in receiverships might be founded on section 100 of the CJA alone where such assets were not being transferred on a free and clear basis.

*Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at paras 39-40, 76 [*Third Eye*], Book of Authorities, Tab 7.

31. The Approval and Vesting Order does not purport to vest the Property in the Trust free and clear, and in fact, will leave the Property subject to all current claims and encumbrances (excluding the Initial Loan and Funding Loan, which are merely funding aspects of the Emprise Transaction). Accordingly, the court’s discussion on section 100

in *Third Eye* militates in favour of a finding that this Court has the express jurisdiction to vest the Property in the Trust pursuant to the CJA.

32. This Court also has the jurisdiction to vest the Property in the Trust pursuant to section 243(1)(c) of the BIA which provides this Court with the jurisdiction to appoint a receiver to “take any other action that the court considers advisable” if just or convenient to do so.

BIA, section 243(1)(c).

33. Section 243(1)(c) has been interpreted broadly and found to grant Canadian courts jurisdiction to do what “justice dictates” and “practicality demands”.

*Third Eye, supra*, at paras 52 and 57.

34. A liberal and purposive interpretation of section 243(1)(c) leads to the conclusion that this Court has the jurisdiction not only to create the Trust but to vest the Property with the Receiver in trust. Such a finding would also adequately respect Parliament’s desire for the receivership regime to be flexible and responsive to evolving commercial practice.

*Third Eye, supra*, at para 86.

35. The purpose of receiverships is to “enhance and facilitate the preservation and realization of the assets [of a debtor] for the benefits of creditors.” Such purpose is generally achieved through the liquidation of a debtor’s assets – sometimes referred to as the essence of a receiver’s powers.

*Third Eye, supra*, at para 73.

36. The Approval and Vesting Order will allow the Receiver to realize the value of Vert's public listing to the benefit of Vert's creditors. Vesting Vert's assets with the Trust is just one step in the liquidation process. Absent the Approval and Vesting Order, the public listing will be of no value to Vert's estate or Vert's creditors.

Report, s. 3.1(1).

37. A parallel can also be drawn to cases in which Canadian courts have held they possess the jurisdiction to issue reverse vesting orders in proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"), further supporting this Court's jurisdiction to issue the Approval and Vesting Order.

## II. Reverse Vesting Orders

38. The Approval and Vesting Order is structurally similar to a reverse vesting order which Canadian courts have found the jurisdiction to issue under section 36 of the CCAA. That same jurisdiction can be found under section 243(1)(c) of the BIA.

*Arrangement relatif a Nemaska Lithium inc.*, 2020 QCCS 3218 at para 8, Book of Authorities, Tab 8 [*Nemaska*].

39. Canadian courts' jurisdiction to issue reverse vesting orders was canvassed extensively in *Nemaska*, in which the court held that "contemporary economic problems demand that innovative solutions be considered and, if they achieve the fundamental objectives of the CCAA, then they must be endorsed."

*Nemaska*, *supra*, at para 53 [unofficial translation].

40. As discussed above, the purpose of receiverships is to "enhance and facilitate the preservation and realization of the assets [of a debtor] for the benefit of creditors." The

transaction contemplated by the Approval and Vesting Order is likely the only method by which the public shell of Vert may be monetized – thereby enhancing the realization of Vert’s assets for the benefits of its creditors.

Report, s. 3.1(1).

41. No creditors have objected, nor will any creditors be prejudiced by the Approval and Vesting Order as all creditors will continue to have the same claims against the Trust they currently hold against Vert and no Property will be removed from the estate. The Approval and Vesting Order thus creates a solution which is better for all and which is in line with the purpose of receiverships under the BIA.

***(iii) This Court should approve the Emprise Transaction***

42. Receivers have the powers set out in the orders appointing them. Receivers are consistently granted the power to sell the property of a debtor, which was indeed the case under the Receivership Order pursuant to which the Receiver has the power:

to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business ... with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause [\$150,000].

Receivership Order para 3(k).

43. It is settled law that where a court is asked to approve a transaction in a receivership context, the court is to consider the following principles (collectively, the "**Soundair Principles**"):

- (a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- (b) the interests of all parties;

- (c) the efficacy and integrity of the process by which the party obtained offers;  
and
- (d) whether the working out of the process was unfair.

*Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (CA), at para. 16 [*Soundair*].

44. Absent clear evidence that a proposed sale is improvident or that there was an abuse of process, a court is to grant deference to the recommendation of a receiver to sell a debtor's assets. Only in such exceptional circumstances will a court intervene and proceed contrary to the recommendation of its officer, in this case, the Receiver.

*Soundair, supra*, at para. 21.

45. In the present case, evidence has been presented in the Report to demonstrate that each of the Soundair Principles has been satisfied, militating in favour of approval of the Emprise Transaction sought on this motion.

#### **I. Efforts to Obtain the Best Price**

46. The Emprise Transaction, if successful, will provide for recoveries of up to \$200,000 to Vert's creditors, at no cost to Vert's stakeholders, as the Emprise Transaction costs are being funded by Emprise.

47. While Vert's public listing was not actively marketed by the Receiver, given (i) its value, (ii) the relatively significant cost to implement any transaction involving its sale, and (iii) the uncertainty surrounding its saleability, the consideration in the Emprise Transaction is the best price in the circumstances.

## **II. The Interests of All Parties**

48. The Secured Lenders, Vert's largest stakeholder, support the Emprise Transaction. No party is objecting and no creditors will be prejudiced as they all maintain their claims against the Property vested in the Trust.

Report, s. 3.1(1).

49. Vert's public listing likely has no value absent the Emprise Transaction and the Receiver is not aware of any other method to monetize such asset.

Report, s. 3.1(1).

50. The transfer of all of the Property will see the receivership continued under the Trust, without any prejudice to Vert's stakeholders.

## **III. The Efficacy and Integrity of the Process**

51. The Secured Lenders support the Emprise Transaction and the Receiver recommends this Court issue the Approval and Vesting Order as the structure contemplated by the Emprise Transaction is a practical and cost-effective mechanism to convey Vert's public company listing, while providing an economic benefit to Vert's stakeholders.

Report, s. 3.1(1).

#### **IV. Whether the Process was Unfair**

52. There is no indication that the process leading to the Agreement was unfair, and no creditors have objected to it. The Receiver has and continues to act in good faith with respect to all of Vert's stakeholders.

53. While a Break Fee is contemplated, the Receiver is of the view that it is reasonable given the complexity of the Emprise Transaction and the resources being allocated by Emprise to complete it.

Report, s. 3.1(1).

54. As this Court has the jurisdiction to issue the Approval and Vesting Order and the Soundair Principles have been satisfied, the Receiver respectfully requests this Court grant the Approval and Vesting Order.

#### ***(iv) This Court should issue the Distribution Order***

55. Proposed distributions by receivers are regularly approved by Canadian courts following the receiver's evaluation of priority, quantum and quality of the claims of secured creditors.

*Royal Bank of Canada v Casselman PHBC Ltd.*, 2017 ONSC 4107 at para 35, Book of Authorities, Tab 9.

56. Lawson Lundell LLP (BC counsel to the Receiver) ("**Lawson**") has provided the Receiver with an opinion on the Secured Lenders' security over Vert (the "**Security**"). Subject to the standard qualifications and assumptions contained therein, Lawson is of



the opinion that the Security constitutes a valid and enforceable charge against the Property.

Report, s. 4.0(2).

57. The Secured Lenders have funded the professional costs of the Receiver and its Canadian and US counsel. Due to the state of Vert's business, there have been no recoveries to-date. While recoveries are expected, the Secured Lenders will likely incur a shortfall on their advances to Vert.

Report, s. 4.0(1).

58. The Receiver is not aware of any claim that ranks in priority to the Secured Lenders other than the Receiver's Charge (as defined in the Receivership Order), and recommends that this Court issue the Distribution Order.

Report, ss. 4.0 (3)-(4).

59. As the Property consists essentially of shareholdings and cash that is not being altered or sold and will remain in Trust following the issuance of the Approval and Vesting Order and the Distribution Order, no stakeholder of Vert will be prejudiced by the Distribution Order, nor is any creditor objecting to the relief sought by the Receiver herein.

## **PART V - ORDER REQUESTED**

60. For the reasons set forth herein and in the Report, the Receiver respectfully requests the granting of the orders contained in the form of the draft order included at Tab three of the Receiver's Motion Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 1st day of June 2021.

A handwritten signature in black ink, appearing to read 'RS', written over a horizontal line.

Robin B. Schwill

Lawyers for the Receiver,  
KSV Restructuring Inc.

## SCHEDULE "A" – AUTHORITIES

<b>TAB</b>	<b>AUTHORITY</b>
1.	<i>269893 Alberta Ltd v Otter Bay Developments Ltd</i> , 2010 CarswellBC 3883 (SC).
2.	<i>269893 Alberta Ltd v Otter Bay Developments Ltd</i> , 2011 BCCA 90.
3.	<i>Re Woodward's Ltd.</i> , 1993 CarswellBC 75 (SC).
4.	<i>Re Woodward's Ltd.</i> , 1993 CarswellBC 564 (CA).
5.	<i>Re Sino-Forest Corp.</i> , 2012 ONSC 7050.
6.	<i>Re Target Canada Co.</i> , 2015 ONSC 303.
7.	<i>Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.</i> , 2019 ONCA 508.
8.	<i>Arrangement relatif a Nemaska Lithium inc.</i> , 2020 QCCS 3218 [unofficial translation].
9.	<i>Royal Bank of Canada v Casselman PHBC Ltd.</i> , 2017 ONSC 4107.

## **SCHEDULE "B"**

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

#### **Trustee to be receiver**

**16.** (4) The trustee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the bankrupt, be in the same position as if he were a receiver of the property appointed by the court, and the court may on his application enforce the acquisition or retention accordingly.

#### **Restriction on disposition of assets**

**65.13.** (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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.

#### **Court may appoint receiver**

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

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

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

(c) take any other action that the court considers advisable

#### **Trustee to be appointed**

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

### ***Courts of Justice Act, R.S.O. 1990, c. C.43***

#### **Vesting orders**

**100.** A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

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

#### **Restriction on disposition of business assets**

**36.** (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

**KW CAPITAL PARTNERS LIMITED** and **VERT INFRASTRUCTURE LTD.**

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Proceeding commenced at Toronto

**FACTUM OF THE RECEIVER**

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