

Court File No.: CV-24-00712366-00CL

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 HUMBLE & FUME INC. (ONTARIO), HUMBLE &
FUME INC. (MANITOBA), BOB HEADQUARTERS INC., FUME LABS INC.,
HUMBLE CANNABIS SOLUTIONS INC., PWF HOLDCO INC., and
WINDSHIP TRADING LLC

Applicants

FACTUM OF THE APPLICANTS

(Returnable January 24, 2024)

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TO: SERVICE LIST

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INC., HUMBLE CANNABIS SOLUTIONS INC., PWF HOLDCO INC., and
WINDSHIP TRADING LLC

Applicants

FACTUM OF THE APPLICANTS
(returnable January 12, 2024)

PART I - INTRODUCTION

1. On January 5, 2024, the applicants Humble & Fume Inc. ("**Humble Parent**"), Humble & Fume Inc. (Manitoba) ("**Humble Manitoba**"), B.O.B. Headquarters Inc. ("**BOBHQ**"), Humble Cannabis Solutions Inc. ("**HCS**"), Fume Labs Inc. ("**Fume Labs**"), PWF Holdco Inc. ("**PWF**"), and Windship Trading LLC ("**Windship**", and, collectively, the "**Applicants**") brought an application to the Court for, among other things, protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**").
2. The Honourable Justice Cavanagh granted an order dated January 5, 2024 pursuant to the CCAA (the "**Initial Order**") in favour of the Applicants. Pursuant to the Initial Order, among other things, the Court:
 - (i) declared that the Applicants are companies to which the CCAA applies;

- (ii) provided a stay of proceedings in favour of the Applicants and their directors and officers up to and including January 15, 2024 (the “**Initial Stay Period**”);
 - (iii) appointed Deloitte Restructuring Inc. (“**Deloitte**”) as monitor of the Applicants in these proceedings (“**Monitor**”);
 - (iv) granted an administration charge in the amount of \$150,000 in favour of counsel for the Applicants, the Monitor, and the Monitor’s counsel (the “**Administration Charge**”) over the Applicants’ assets;
 - (v) authorized the Applicants to incur no further expenses in relation to the Securities Filings (as defined in the Initial Order);
 - (vi) authorized the Applicants to continue utilizing their cash management system (the “**Cash Management System**”); and
 - (vii) scheduled a comeback hearing returnable January 12, 2024 (the “**Comeback Hearing**”).
3. On January 12, 2024 Honourable Justice Cavanagh granted an order extending the stay of proceedings up to and including January 26, 2024 (the “**Stay Extension Order**”).
4. The Applicants now bring this motion in accordance with the Initial Order for the following relief:
- (a) an amended and restated initial order (“**ARIO**”) substantially in the form attached at Tab 3 of the Applicants’ motion record, among other things:

- i. abridging the time for and validating service of this notice of motion and the motion record and dispensing with service on any person other than those served;
 - ii. extending the stay of proceedings granted pursuant to the order, dated January 5, 2024 (the “**Initial Order**”), to and including April 5, 2024;
 - iii. approving an increase to the Administration Charge to the maximum amount of \$500,000;
 - iv. approving a second-ranking directors’ and officers’ charge in the maximum amount of \$475,000 (the “**Directors’ Charge**”)
 - v. approving the execution of the DIP Term Sheet (as defined below), the DIP Loan (as defined below), the authority to borrow up to USD\$2,500,000, and granting a third-ranking charge in favour of 1000760498 Ontario Inc. (the “**DIP Lender**”) in the maximum amount of USD\$2,500,000;
 - vi. approving a Key Employee Retention Plan (“**KERP**”) and authorizing the Applicants to make payments in accordance with the terms of the KERP;
 - vii. a sealing order in respect of the unredacted KERP; and
- (b) a sale process approval order (the “**SISP Approval Order**”), substantially in the form attached as Tab 4 to the Applicants’ Motion Record, among other things:
- i. approving Humble & Fume Inc.’s (the “**Vendor**”) execution of a stalking horse purchase agreement dated January 23, 2024 (the “**Stalking Horse SPA**”) between the Vendor and the DIP Lender;

- ii. approving the sale and investment solicitation process (“**SISP**”) and the Stalking Horse SPA; and
 - iii. confirming that the Stalking Horse SPA represents the “Stalking Horse Bid” as defined in and for purposes of the SISP Approval Order.
5. The Applicants distribute cannabis and cannabis accessories in Canada and the United States. The Applicants are insolvent, face a severe liquidity crisis, and are in urgent need of relief under the CCAA. Given its liquidity crisis, the Applicants require the breathing room afforded by the CCAA in order to stabilize their operations and prepare a SISP. The CCAA provides the most appropriate forum for the Applicants to restructure their affairs.
6. At this time, the Applicants believe that it is in the best interest of its stakeholders to pursue a SISP backstopped by the Stalking Horse SPA. Further details on each are discussed in the affidavit of Jakob Ripshtein, sworn January 23, 2024 (the “**Third Ripshtein Affidavit**”).¹

PART II - THE FACTS

7. The facts underlying this motion are more fully set out in the Third Ripshtein Affidavit and in the affidavit of Jakob Ripshtein sworn January 4, 2024 (the “**First Ripshtein Affidavit**”).² Capitalized terms not otherwise defined herein shall have the meaning prescribed to them in the Third Ripshtein Affidavit, unless otherwise indicated.

¹ Affidavit of Jakob Ripshtein, sworn January 23, 2024 (the “**Third Ripshtein Affidavit**”).

² Affidavit of Jakob Ripshtein, sworn January 4, 2024 (the “**First Ripshtein Affidavit**”).

A. Background

8. The Applicants operate cannabis distribution and cannabis accessory wholesale businesses in both Canada and the United States.³
9. The Applicants hold cannabis licenses issued by the governments of Alberta and British Columbia which allow the Applicants to operate in the cannabis industry (the “**Cannabis Licenses**”). The Applicants market cannabis products on behalf of third party licensed producers (“**LPs**”) who then pay the Applicants a percentage of all sales revenue within a designated sales territory.⁴
10. The Applicants also wholesale cannabis accessories. This includes pipes, vape pens, lighters, grinders, water pipes and other related accessories. The Applicants sell these products on a B2B basis in both Canada and the United States.⁵

B. Stalking Horse SPA

11. The Applicants and the DIP Lender, with the assistance of the Monitor, have negotiated the Stalking Horse SPA, pursuant to which the DIP Lender intends to (i) act as a stalking horse bidder in the SISP; and (ii) acquire 100% direct and indirect ownership of the Applicants within the CCAA proceedings by way of a reverse approval and vesting order that would result in the DIP Lender becoming the sole owner of 100% of the issued and outstanding shares of Humble Parent.⁶

³ First Ripshtein Affidavit at paragraph 16.

⁴ First Ripshtein Affidavit at paragraph 17.

⁵ First Ripshtein Affidavit at paragraph 18.

⁶ Third Ripshtein Affidavit at paragraph 43.

12. The DIP Lender is an affiliate of the Applicants' secured creditors.⁷
13. The Stalking Horse SPA will serve as a baseline for any bids received in the SISP to be measured against, and will signal to customers, employees and other stakeholders that the business will continue as a going concern following the conclusion of these CCAA proceedings.⁸

C. SISP

14. The Applicants seek approval of the SISP in which the Stalking Horse SPA will establish a baseline price and govern the solicitation of higher and more favourable offers. The SISP was developed in consultation with the Monitor and takes into account the current financial circumstances of the Applicants.⁹
15. The approval of the SISP will allow the Applicants to test the market for higher and better offers in order to maximize the value obtained for the Applicants' assets for the benefit of the various stakeholders.¹⁰
16. Subject to the approval of the Court, the SISP will be administered by the Monitor in consultation with the Applicants. In addition, the Monitor will have certain rights in connection with material decisions related to the process, including with respect to the extension of certain deadlines.¹¹

⁷ Third Ripshtein Affidavit at paragraph 43.

⁸ Third Ripshtein Affidavit at paragraph 45.

⁹ Third Ripshtein Affidavit at paragraph 51.

¹⁰ Third Ripshtein Affidavit at paragraph 52.

¹¹ Third Ripshtein Affidavit at paragraph 53.

17. The SISP will proceed in a one-phase process and is anticipated to run for a duration of thirty days. The Monitor will select the Successful Bid on the basis of a number of factors set out in the SISP, including the highest or otherwise best bid at an auction, if necessary.¹² Following the conclusion of the SISP the Applicants or the Monitor shall seek this Honourable Court's approval of the Successful Bid, as defined in the SISP.

D. DIP Loan and Charge

18. The Applicants, following consultation with the Monitor, have determined that they require interim financing to ensure that they have access to sufficient working capital to fund their ongoing operations and obligations during the SISP, including obligations related to the HCSHI Minority Interest and maintaining the possibility of executing the Cabo Option.¹³
19. As security for the DIP Loan the Applicants have agreed to provide the DIP Lender with a third-ranking charge in the maximum amount of USD\$2,500,000 over all present and future properties, assets, and undertakings of the Applicants, real and personal, tangible and intangible, whether now owned or hereafter acquired, and the proceeds thereof, subject only to the Administration Charge.¹⁴
20. The Monitor was involved in the negotiation of the DIP Loan and supports this Court's approval of the DIP Loan and the DIP Lender's Charge. The DIP Lender's Charge will not secure any pre-filing obligations of the Applicants.¹⁵

¹² Third Ripshtein Affidavit at paragraph 71.

¹³ Third Ripshtein Affidavit at paragraph 24.

¹⁴ Third Ripshtein Affidavit at paragraph 26(f).

¹⁵ Third Ripshtein Affidavit at paragraph 20.

E. Key Employee Retention Plan

21. The Applicants seek approval of a KERP to facilitate and encourage the continued participation of senior management and key employees of the Applicants who are required to guide the business through these CCAA proceedings and preserve value for stakeholders.¹⁶ The KERP will provide participants with additional payments as an incentive to continue their employment through the CCAA proceedings.¹⁷ The KERP will not be backstopped by a charge.
22. The KERP will provide payouts of between 6% and 25% of base salary to certain key employees upon certain events occurring.¹⁸ The KERP amounts are built into the Cash Flow Projection and have been approved by the Monitor and the DIP Lender.¹⁹
23. The Applicants are also seeking to seal the unredacted KERP, which will be attached as a confidential appendix to the First Report of the Monitor. The KERP contains sensitive personal and compensation information which I believe may cause harm to the Key Employees in the KERP and to the Applicants if such information became public.²⁰

F. Director's Charge

24. The Applicants are seeking a Directors' Charge on the Property, as defined in the Initial Order, in the amount of \$475,000. The Directors' Charge is intended to be a second-ranking

¹⁶ Third Ripshtein Affidavit at paragraph 36.

¹⁷ Third Ripshtein Affidavit at paragraph 37.

¹⁸ Third Ripshtein Affidavit at paragraph 40.

¹⁹ Third Ripshtein Affidavit at paragraph 42.

²⁰ Third Ripshtein Affidavit at paragraph 41.

Charge on the Property, ranking behind the Administration Charge and the DIP Lender's Charge.

25. To ensure the ongoing stability of the Applicants during the CCAA proceeding, the Applicants require the continued participation of their officers and directors. The quantum of the Directors' Charge was developed with the assistance and support of the Monitor.²¹

G. Increase to the Administration Charge

26. The Applicants seek an increase in the Administration Charge to \$500,000 to remain consistent with the projected fee and disbursements of the Monitor, counsel for the Monitor, and counsel for the Applicants during the Extended Stay Period.²²
27. The Applicants are of the view that the proposed increase to the Administration Charge is reasonable and necessary at this time.²³ The Monitor and the DIP Lender support the increase to the Administration Charge.²⁴

H. Stay of Proceedings

28. The Applicants have acted, and continue to act, in good faith and with due diligence to communicate with stakeholders and to develop the SISP. The Applicants seek a stay extension up to and including April 5, 2024 ("**Extended Stay Period**") to provide stability and to allow sufficient time to complete the SISP without having to incur additional costs during that process to return to Court to seek further extension.²⁵

²¹ Third Ripshtein Affidavit at paragraph 33.

²² Third Ripshtein Affidavit at paragraph 22.

²³ Third Ripshtein Affidavit at paragraph 23.

²⁴ Third Ripshtein Affidavit at paragraph 23.

²⁵ Third Ripshtein Affidavit at paragraph 18.

29. The Monitor has advised that it supports the extension of the stay for the Extended Stay Period.²⁶

PART III - ISSUES

30. The issues to be addressed before this Honourable Court are whether:
- (a) the Stalking Horse SPA should be approved;
 - (b) the SISP should be approved;
 - (c) the DIP Loan and DIP Lender's Charge should be approved;
 - (d) the KERP should be approved;
 - (e) the Directors' Charge should be granted;
 - (f) the Administration Charge should be increased; and
 - (g) the stay of proceedings should be extended.

PART IV - LAW AND ARGUMENT

A. Approval of the Stalking Horse SPA

31. Stalking horse agreements have been recognized by Canadian courts as a reasonable and useful component of a sales process.²⁷ They have been approved and utilized in many

²⁶ Third Ripshtein Affidavit at paragraph 21.

²⁷ *Cannapiece Group Inc, Re*, [2022 ONSC 6379](#) [*Cannapiece*]; *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#) at para 7.

insolvency proceedings to establish a baseline price and transactional structure for superior bids from interested parties.²⁸

32. The CCAA is flexible and is given a broad and liberal interpretation to achieve its objectives.²⁹ As such, a Court may approve a sale within the CCAA proceedings prior to or in the absence of a plan of compromise or arrangement.³⁰
33. The objective of the SISP is to implement a fair sale process to obtain the highest and best bids, thereby maximizing value for the benefit of the Applicants' stakeholders. The Court may approve the Stalking Horse SPA and the SISP concurrently.³¹
34. The Stalking Horse SPA provides some certainty that the Applicants' business will continue as a going concern. If the Stalking Horse SPA is not approved, the Applicants will not have sufficient funds to continue operating to the detriment of their stakeholders, will suffer a dilution of the HCSHI Minority Interest and the Cabo Option will expire without exercise.
35. The baseline price in the Stalking Horse SPA will assist in maximizing the value of the Applicants' business by fairly canvassing the market to obtain the best bids for the Applicants' business.

²⁸ *Danier Leather Inc, Re*, [2016 ONSC 1044](#) at para 20 [*Danier*]; *Nortel Networks Corp, Re*, [\[2009\] OJ No. 3169](#) at para 56 [*Nortel*].

²⁹ *Nortel* at para 47.

³⁰ *Nortel* at para 48.

³¹ *Nortel* at para 56; *Freshlocal Solutions Inc (Re)*, [2022 BCSC 1616](#) at para 30.

36. Despite efforts, the Applicants were unable to source alternative financing, prior to or within the filing. The terms of the Stalking Horse SPA were negotiated between the Applicants and the DIP Lender and are fair and reasonable in the circumstances.³²

37. The Monitor supports the approval of the Stalking Horse SPA solely for the purpose of approving the Stalking Horse SPA as the Stalking Horse Bid under the SISP.³³

B. Approval of the SISP

38. The timeline established for the SISP is structured to adequately expose the Applicants' business to the market. The Monitor is supportive of the length and structure of the SISP.³⁴

39. In exercising the broad powers to facilitate restructurings conferred by the remedial nature of the CCAA, the Court considers a number of factors in connection with the approval of a sales process:³⁵

- (a) is a sale transaction warranted at this time?
- (b) will the sale benefit the whole "economic community"?
- (c) will the creditors have a *bona fide* reason to object to the sale of the business?; and
- (d) is there a better viable alternative?

³² Third Ripshtein Affidavit at paragraph 43.

³³ Monitor's First Report, to be filed.

³⁴ Monitor's First Report, to be filed.

³⁵ *Nortel* at para 49; *Brainhunter Inc, Re*, [\(2009\), 183 ACWS \(3d\) 905](#) at para 13; *Danier* at para 23.

40. In this context, Courts have also considered the factors in section 36(3) of the CCAA³⁶, namely:
- (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 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 consideration their market value.
41. In light of the foregoing factors, the SISP should be approved for the following reasons:
- (a) *The sale transaction is warranted at this time:* The Applicants are insolvent and unable to continue operations without restructuring the Applicants' debt through a sale of the business.

³⁶ *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 36(3) [CCAA].

(b) *The sale transaction will benefit the whole economic community:* The Stalking Horse SPA sets a minimum price and the bidding procedures in the SISP is designed to test the market by soliciting the best bids, thereby maximizing value for the Applicants' stakeholders.

(c) *Senior Secured Creditor Support:* The Applicants' senior secured creditors, DGC Investments Inc. and a group of secured debentureholders, are supportive of the SISP.³⁷

(d) *There is no other, better, or viable alternative:* The Applicants, in consultation with their advisors, pursued a number of strategic initiatives to improve their operations and financial position. The DIP Lender was the only party who showed any interest in acquiring the Applicants' business.³⁸

(e) *The Monitor was consulted and will administer the SISP in consultation with the Applicants:* The SISP was developed in consultation with the Monitor and the Monitor is supportive of the Stalking Horse SPA acting as the minimum bid. The process will be administered by the Monitor in consultation with the Applicants and the Monitor will have certain consent rights in connection with material decisions, including extending timelines, dispensing with bid requirements, and terminating the SISP. The Monitor is not aware of any stakeholders who will be prejudiced by the SISP.³⁹

42. The SISP, with its attendant interim funding and bridge to a sale mechanics, is the best and only value maximizing option now available to the Applicants. It avoids the value

³⁷ Third Ripshtein Affidavit at paragraph 43.

³⁸ First Ripshtein Affidavit at paras 10-15 and 105-111.

³⁹ Third Ripshtein Affidavit at paragraphs 56-72.

destruction of a cessation of manufacturing operations and customer order fulfilment. The process provides interested parties with sufficient time to evaluate the opportunity and to submit a bid before the deadline.

43. The Monitor is of the view that the SISP is fair and reasonable in the circumstances.⁴⁰

C. Approval of the DIP Loan and the DIP Lender's Charge

44. Section 11.2 of the CCAA allows this Honourable Court to grant the DIP Loan, and to order a charge that ranks in priority to the Applicants' secured creditors, on notice to those secured creditors that would be affected and in an amount that the Court considers appropriate having regard to the Cash Flow Statement.⁴¹

45. The security or charge may not secure an obligation that exists before the order is made.⁴²

46. In determining whether the DIP Lender's Charge is appropriate, a court is required to consider the following factors under section 11.2(4) of the CCAA:⁴³

(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;

⁴⁰ Monitor's First Report, to be filed.

⁴¹ s. 11.2(1), CCAA.

⁴² s. 11.2(1), CCAA.

⁴³ s. 11.2(4), CCAA.

(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.

47. In accordance with the DIP Term Sheet, the Applicants are seeking a DIP Facility of USD\$2,500,000, to be made available upon the issuance of the ARIO. The DIP funds will be used to fund the Applicants' working capital needs, professional fees incurred in connection with these CCAA proceedings, a portion of the operating expenses of HCSHI and Cabo, and the exercise of the Cabo Option, at the DIP Lender's sole discretion.
48. The DIP Facility would be secured by a second-ranking court-ordered priority charge in the maximum amount of USD\$2,500,000 over all of the Applicants' property.
49. The DIP Loan is necessary for the Applicants to fund their ongoing operations through the SISP and to ensure that the HCSHI Minority Interest is not diluted, and to ensure that the Applicants retain the ability to exercise the Cabo Option.⁴⁴
50. It is submitted that the Court should approve the DIP Term Sheet and grant the DIP Lender's Charge. The DIP Loan is essential to the Applicants because it provides the Applicants with the interim financing needed to preserve enterprise value pending determination of a SISP. The benefits of such new financing to all stakeholders outweigh the potential prejudice to any particular creditors.

⁴⁴ Third Ripshtein Affidavit at paragraphs 16, 27.

51. The following additional factors support the approval of the DIP Term Sheet and the granting of the DIP Lender's Charge:

- (i) the availability of the DIP Loan is contingent on an order of this Court approving the DIP Term Sheet and the DIP Lender's Charge being granted to secure any advances made thereunder;⁴⁵
- (ii) the necessity of the DIP Loan is demonstrated and supported by the Cash Flow Forecast;⁴⁶
- (iii) the Applicants' business will be managed by its directors and senior management, in consultation with the proposed Monitor;
- (iv) in the absence of the DIP Loan, the Applicants will be unable to continue to carry on business or carry out the SISP, the HCSHI Minority Interest will be diluted, the Cabo Option will expire without exercise, and the Applicants will be forced to shut down its operations to the detriment of their stakeholders;⁴⁷
- (v) no creditor should be materially prejudiced as a result of the DIP Loan and the DIP Lender's Charge; and

⁴⁵ Third Ripshtein Affidavit at paragraph 26(f).

⁴⁶ Third Ripshtein Affidavit at paragraph 29.

⁴⁷ Third Ripshtein Affidavit at paragraph 27.

- (vi) the proposed Monitor and the Applicants' senior secured creditors are supportive of the DIP Loan, the DIP Term Sheet, and the DIP Lender's Charge.⁴⁸

D. Approval of the KERP

52. The purpose of a KERP is to retain employees that are important to the management or operations of the debtor company in order to keep their skills within the Applicants at a time when they are likely to look for other employment because of the Applicants' financial distress.⁴⁹ KERPs have been approved in numerous insolvency proceedings, particularly where the retention of certain employees was deemed critical to a successful restructuring.⁵⁰
53. This Court has jurisdiction to approve a KERP pursuant to its general power under section 11 of the CCAA to make any order it considers appropriate.⁵¹
54. The CCAA does not list specific factors to be considered by the court in determining whether to approve a KERP. Courts have held that the factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present, including:⁵²
- (a) *Is this employee important to the restructuring process?* The four key employees have either senior level roles and responsibilities that are essential to ensure the stability of the business, enhance effectiveness of the sale process, and facilitate an effective

⁴⁸ Third Ripshtein Affidavit at paragraph 25.

⁴⁹ *Re Grant Forest Products Inc.* [57 CBR \(5th\) 128](#), at para 8.

⁵⁰ *Walter Energy Canada Holdings, Inc, Re*, [2016 BCSC 107](#) at para 57.

⁵¹ CCAA, s. 11; *Re Cinram International*, [2012 ONSC 3767](#) at para 91.

⁵² *Walter Energy Canada Holdings, Inc, Re*, [2016 BCSC 107](#) at para 58.

restructuring or else provide necessary administrative functions and possess key institutional knowledge that would be difficult to replace in the context of a restructuring process.

(b) *Does the employee have specialized knowledge that cannot easily be replaced?* The key employees have specialized experience and unique knowledge about the operations of the Applicants. Their involvement in the sale process will be critical to the success of the Applicants' restructuring.

(c) *Will the employee consider other employment options if the KERP is not approved?* The potential KERP beneficiaries may seek other employment if the KERP is not authorized.

(d) *Was the KERP developed through a consultative process involving the monitor and other professionals?* The Applicants developed the KERP with input from the Monitor.⁵³

(e) *Does the monitor support the KERP and a charge?* The Monitor supports the KERP.⁵⁴ This Court has held that the views of the Monitor on the appropriateness of KERP provisions "deserve great weight".⁵⁵

E. Sealing the KERP

55. The Applicants request that this Court seal the Confidential Appendix to the First Report which contains a confidential summary of the proposed KERP. This Court has the

⁵³ Third Ripshtein Affidavit at paragraph 35.

⁵⁴ Third Ripshtein Affidavit at paragraph 42.

⁵⁵ *Re Grant Forest Products Inc*, [\[2009\] OJ No 3344](#), at para 19.

discretion pursuant to section 137(2) of the *Courts of Justice Act*⁵⁶ and its inherent jurisdiction to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

56. In *Sherman Estate v Donovan*, the Supreme Court of Canada held that an applicant asking a court to exercise its discretion in a manner that limits the open court presumption must establish that:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.⁵⁷

57. The Applicants respectfully submit that the foregoing test has been satisfied. The Confidential Appendix contains a confidential summary with respect to the KERP that contains individual salary information and the KERP payments for each eligible employee. Protecting the sensitive personal and compensation information of the employees is an important public interest that should be protected. Employees also have a reasonable expectation that their names and salary information will be kept confidential. Finally, as a matter of proportionality, the benefits of sealing the requested information outweigh its

⁵⁶ [RSO 1990 c C-43](#).

⁵⁷ *Sherman Estate v Donovan*, [2021 SCC 25 at paras 37-38](#).

negative effects, including because the overall potential cost of the KERP has been disclosed to stakeholders.

58. Courts have previously granted sealing orders in respect of individual compensation arrangements relating to key employee retention plans.⁵⁸
59. The Monitor is supportive of having the unredacted KERP sealed and not form part of the public record.⁵⁹

F. Approval of the Directors' Charge

60. The Applicants seek a Directors' Charge on the Applicants' assets and undertakings in favour of the Applicants' current officers and directors in the maximum amount of \$475,000 and ranking third to the Administration Charge and the DIP Lender's Charge.
61. Pursuant to section 11.51 of the CCAA, a court may grant a Directors' Charge on a super-priority basis.⁶⁰
62. The purpose of a Directors' Charge was described in *Canwest Global Communications Corp. (Re)*:⁶¹

The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they incur during the restructuring [...]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the

⁵⁸ *Fire & Flower (Re)*, [endorsement of the Honourable Osborne J, June 15, 2023](#) at para 21; *Ontario Securities Commission v Bridging Finance Inc.*, 2021 ONSC 4347 at [paras. 23-28](#); *Just Energy Group Inc., et al.* 2021 ONSC 7630, at [paras. 26-29](#); *GolfTown Canada Holdings Inc. (Re)*, Initial Order issued September 14, 2016 [Court File No. CV-16-11527-00CL] at para. 64; *Acerus Pharmaceuticals Corporation et. al (Re)*, [Amended and Restated Initial Order](#) issued February 3, 2023 [Court File No. CV-23-00693595-00CL].

⁵⁹ Third Ripshtein Affidavit at paragraph 42.

⁶⁰ s. 11.51, CCAA.

⁶¹ [Canwest Global Communications Corp. \(Re\), \[2009\] OJ No 4286](#) at para. 48.

applicants to keep the experienced board of directors supported by the experienced senior management.

63. In *Jaguar Mining Inc. (Re)*, the court set out the following factors to be considered with respect to the approval of a directors' charge:⁶²
- (a) whether notice has been given to the secured creditors likely to be affected by the charge;
 - (b) whether the amount is appropriate;
 - (c) whether the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and
 - (d) whether the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.
64. Notwithstanding the existence of the D&O Policy,⁶³ the Applicants' ordinary course operations may give rise to potential director or officer liability. The current policy contains certain exclusions and exceptions to coverage as provided.⁶⁴ The Applicants' ordinary course operations give rise to potential director or officer liability, including payroll and sales tax.⁶⁵ To address legitimate concerns expressed with respect to their potential exposure if they continue to act, the directors and officers have requested reasonable protection against personal liability that might arise during the post-filing period.⁶⁶
65. The quantum of the Directors' Charge was developed with the assistance and support of the Monitor. The Applicants are of the view that the charge is necessary at this time to

⁶² [*Jaguar Mining Inc. \(Re\)*, 2014 ONSC 494](#) at para. 45.

⁶³ Third Ripshtein Affidavit at paragraph 32.

⁶⁴ Third Ripshtein Affidavit at paragraph 32.

⁶⁵ Third Ripshtein Affidavit at paragraph 32.

⁶⁶ Third Ripshtein Affidavit at paragraph 32.

address circumstances that could lead to potential directors' liability prior to the termination of these CCAA proceedings.⁶⁷

G. Increase to the Administration Charge

66. The amount of the Administration Charge in the Initial Order was limited to the estimated professional fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Applicants ("**Professional Group**") during the Initial Stay Period. The Applicants seek to increase the Administration Charge from \$150,000 to \$500,000 in order to remain consistent with the projected fees and disbursements of the Professional Group during the Extended Stay Period.

67. Pursuant to section 11.52 of the CCAA, the Court may grant an administration charge. In deciding whether to grant an administration charge, Courts have considered a number of factors, including: (a) the size and complexity of the businesses being restructured; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge appears to be fair and reasonable; (e) the position of the secured creditors likely to be affected by the charge; and (f) the position of the Monitor.

68. The Applicants submit that it is appropriate for this Court to exercise its discretion to grant the Administration Charge for the following reasons:

⁶⁷ Third Ripshtein Affidavit at paragraph 33.

- (a) The cannabis industry is complex, highly regulated and subject to many statutory and regulatory restrictions and requirements, and successful restructuring will require the extensive input of the Professional Group;
- (b) the beneficiaries of the Administration Charge have and will continue to contribute to these CCAA proceedings and assist with Applicants with achieving their objectives in connection with the Stalking Horse SPA and the SISP, among other things;
- (c) Each of the proposed beneficiaries of the Administration Charge is performing unique functions without duplication of roles;
- (d) The quantum of the proposed increase to the Administration Charge is fair and reasonable, and is in line with the nature and size of the Applicants' business and the involvement required by the Professional Group;
- (e) The Monitor, the DIP Lender and the Applicants' senior secured lender are supportive of the increase in the Administration Charge.⁶⁸

H. Stay Extension

69. The Initial Order granted an initial 10-day stay of proceedings ending on January 15, 2024 (the “**Initial Stay Period**”). The stay of proceedings was extended by the Stay Extension Order up to and including January 26, 2024. The Applicants seek an order extending the stay of proceedings to and including April 5, 2024 (the “**Extended Stay Period**”).

⁶⁸ Third Ripshtein Affidavit at paragraph 23.

70. The Court may grant an extension of the stay of proceedings where the Court is satisfied that (a) circumstances exist that make the order appropriate; and (b) the Applicants have acted, and are acting, in good faith and with due diligence.⁶⁹ A stay of proceedings is appropriate to provide a debtor with breathing room while it seeks to restore solvency and emerge from the CCAA on a going concern basis.⁷⁰
71. It is respectfully submitted that the following factors weigh in favor of granting the extension of the stay for the Extended Stay Period:
- (a) since the granting of the Initial Order, the Applicants have acted and continue to act in good faith and with due diligence to communicate with stakeholders, to develop the SISP, and to negotiate the Stalking Horse SPA, while continuing to operate in the ordinary course of business to preserve the value of their business;⁷¹
 - (b) the Cash Flow Forecast appended to the Monitor's First Report, to be filed, shows sufficient liquidity during the Extended Stay Period to fund obligations and the costs of the CCAA proceedings;⁷²
 - (c) the extension of the stay is required to complete the SISP without having to incur additional costs during that process to return to Court to seek a further extension;
 - (d) the Monitor supports the requested extension of the stay of proceedings; and

⁶⁹ CCAA, s 11.02(2)-(3).

⁷⁰ *Target Canada Co, Re*, [2015 ONSC 303](#) at para 8.

⁷¹ Third Ripshtein Affidavit at paragraph s 10, 18, 43.

⁷² Third Ripshtein Affidavit at paragraph 20.

(e) the Applicants believe that no creditor will suffer material prejudice as a result of the extension of the stay for the Extended Stay Period.

PART V - RELIEF REQUESTED

72. The Applicants respectfully request that this Honourable Court grant the relief provided for in the proposed Amended and Restated Initial Order and in the SISP Approval Order, in accordance with the terms of the CCAA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of January, 2024.

MILLER THOMSON LLP
Lawyers for the Applicants

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Cannapiece Group Inc, Re*, 2022 ONSC 6379
2. *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750
3. *Danier Leather Inc, Re*, 2016 ONSC 1044
4. *Nortel Networks Corp, Re*, [2009] OJ No. 3169
5. *Freshlocal Solutions Inc (Re)*, 2022 BCSC 1616
6. *Brainhunter Inc, Re*, (2009), 183 ACWS (3d) 905
7. *Re Grant Forest Products Inc*. 57 CBR (5th) 128
8. *Fire & Flower (Re)*, [endorsement of the Honourable Osborne J, June 15, 2023](#)
9. *Ontario Securities Commission v Bridging Finance Inc.*, 2021 ONSC 4347
10. *Just Energy Group Inc., et al.* 2021 ONSC 7630
11. *Golf Town Canada Holdings Inc. (Re)*, Initial Order issued September 14, 2016, Court File No. CV-16-11527-00CL
12. *Acerus Pharmaceuticals Corporation et. al (Re)*, [Amended and Restated Initial Order](#) issued February 3, 2023 Court File No. CV-23-00693595-00CL
13. *Walter Energy Canada Holdings, Inc, Re*, 2016 BCSC 107
14. *Re Cinram International*, 2012 ONSC 3767
15. *Canwest Global Communications Corp. (Re)*, [2009] OJ No 4286
16. *Jaguar Mining Inc. (Re)*, 2014 ONSC 494
17. *Target Canada Co, Re*, 2015 ONSC 303

SCHEDULE “B” RELEVANT STATUTES

Companies’ Creditors Arrangement Act, RSC 1985, c C-36,

General power of court

11 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.

Stays, etc. — other than initial application

11.02(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

11.02(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.

Interim financing

11.2 (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.

Factors to be considered

11.2(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

Security or charge relating to director's indemnification

11.51 (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

11.51(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

11.51(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

11.51(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.

Factors to be considered

36(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.

Courts of Justice Act, RSO 1990, c C.43,

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

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

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 HUMBLE & FUME INC. ET
AL

Court File No.: CV-24-00712366-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at TORONTO

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(returnable January 24, 2024)**

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