

**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
FIGR BRANDS, INC., FIGR NORFOLK INC.
AND 1307849 B.C. LTD.**

Applicants

**FACTUM OF THE APPLICANTS
(Stay Extension, Distribution, WEPPA and Fee Approval Order)**

January 31, 2022

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FACTUM OF THE APPLICANTS

PART I: OVERVIEW

1. FIGR Brands, Inc. ("**FIGR Brands**"), FIGR Norfolk Inc. ("**FIGR Norfolk**"), and 1307849 B.C. Ltd. ("**Residual Co**", and together with FIGR Brands and FIGR Norfolk, the "**Applicants**" or the "**FIGR Group**") are seeking, under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), an order (the "**Stay Extension, Distribution, WEPPA and Fee Approval Order**"), *inter alia*:

- (a) approving an extension of the Stay Period (as defined below) to and including April 29, 2022 (the "**Stay Extension**");
- (b) authorizing and directing the Applicants to make one or more cash distributions (the "**Proposed Distributions**") to each Claimant with a Claim asserted and confirmed in accordance with the Claims Procedure Order, Employee Claims Procedure Order or the Pre-Filing Intercompany Claims Resolution Process which have been accepted as valid Claims (each a "**Proven Claim**") pursuant to the Proposed Distribution Methodology (as defined below), net of any withholding taxes based on applicable law;
- (c) approving the Proposed Distribution Methodology;
- (d) declaring that pursuant to section 5(5) of the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1 ("**WEPPA**"), FIGR Norfolk and FIGR Brands meet the criteria established by section 3.2 of the *Wage Earner Protection Program Regulations*, SOR/2008-222 (the "**WEPPA Regulations**");
- (e) approving the Eighth Report of FTI Consulting Canada Inc. ("**FTI**") in its capacity as court-appointed monitor (in such capacity, the "**Monitor**") dated January 27, 2022 (the "**Eighth Report**"), and the activities of the Monitor described therein; and
- (f) approving the fees and disbursements of the Monitor and its counsel as set out in the fee affidavits attached to the Eighth Report.

PART II: FACTS¹

2. The facts underlying this motion are more fully set out in the affidavit of Michael Devon sworn January 26, 2022 (the "**January 26 Affidavit**") and the Eighth Report.² All capitalized terms used but not defined herein have the meanings ascribed to them in the January 26 Affidavit or the Eighth Report, as applicable.

A. Background to the Need for CCAA Protection and the Granting of the Initial Order

3. The FIGR Group operated two (2) licensed cannabis facilities – one in Simcoe, Ontario and the other in Charlottetown, Prince Edward Island. Since commencing operations, both facilities were cash flow negative and were dependent on certain of the Applicants affiliate companies for funding. The cannabis facility in Charlottetown, Prince Edward Island was sold in these CCAA Proceedings as part of the CIG Transaction (as defined below).³

4. Facing significant liquidity issues, potential enforcement action from certain of its creditors and the cessation of its business, the Applicants sought protection under the CCAA. To that end, on January 21, 2021, the Applicants sought and obtained the initial order which, among other things:

- (a) granted a stay of proceedings until January 31, 2021 (as extended from time to time, the "**Stay Period**");
- (b) appointed FTI as Monitor;
- (c) approved the Applicants' ability to borrow under a debtor-in-possession credit facility (the "**DIP Loan**"); and
- (d) granted the following charges over the Applicants' Property: (i) the Administration Charge; (ii) the Directors' Charge; (iii) the DIP Lender's Charge; and (iv) the Intercompany Charge.⁴

¹ Note that any reference herein to the FIGR Group or the Applicants prior to June 28, 2021, being the closing of the CIG Transaction, includes CIG (each as defined below) and not Residual Co.

² Affidavit of Michael Devon sworn January 26, 2022 [January 26 Affidavit]; Eighth Report of the Monitor dated January 27, 2022 [Eighth Report].

³ January 26 Affidavit, *ibid* at para 5; Eighth Report, *ibid* at para 4.

⁴ January 26 Affidavit, *ibid* at paras 6 and 7; Eighth Report, *ibid* at para 5.

5. On January 29, 2021, the Applicants obtained an amended and restated Initial Order (as amended, the "**Initial Order**") which, among other things:

- (a) increased the Directors' Charge and the DIP Lender's Charge to \$2,700,000 and \$8,000,000 (plus interest and costs), respectively; and
- (b) extended the Stay Period to and including March 31, 2021.⁵

6. On January 29, 2021, the Applicants also sought and obtained an Order approving a sale and investment solicitation process.⁶

7. On February 22, 2021, the Court granted an Order (the "**Claims Procedure Order**") which, among other things, approved a process for the solicitation, identification, determination and adjudication of claims against the FIGR Group and their present and former Directors and Officers (each as defined in the Claims Procedure Order) (the "**Claims Procedure**"). The Claims Procedure excluded employee claims.⁷

8. On February 22, 2021, the Court also granted an Order which, among other things:

- (a) approved a key employee retention plan for certain management and operations staff of Canada's Island Garden Inc. ("**CIG**");
- (b) extended the Stay Period until April 30, 2021;
- (c) approved the Pre-Filing Report of the Monitor dated January 21, 2021, the First Report of the Monitor dated January 27, 2021 and the Second Report of the Monitor dated February 18, 2021 (the "**Second Report**") and the activities of the Monitor set out therein; and
- (d) approved the fees and expenses of the Monitor and its counsel, Cassels Brock & Blackwell LLP ("**Cassels**"), as set out in the Second Report.⁸

9. On March 31, 2021, the Court granted an Order which, among other things:

⁵ January 26 Affidavit, *ibid* at para 8; Eighth Report, *ibid* at para 6.

⁶ January 26 Affidavit, *ibid* at para 10; Eighth Report, *ibid* at para 6.

⁷ January 26 Affidavit, *ibid* at para 11; Eighth Report, *ibid* at para 7.

⁸ January 26 Affidavit, *ibid* at para 12; Eighth Report, *ibid* at para 7.

- (a) authorized the execution of the first amendment to the DIP Commitment Letter which increased the maximum borrowings available under the DIP Loan up to \$13,000,000 (which was an increase of \$5,000,000) and authorized a corresponding increase to the DIP Lender's Charge; and
 - (b) approved the Third Report of the Monitor dated March 26, 2021, the activities referred to therein and the fees and disbursements of the Monitor and its counsel, Cassels, as described therein.⁹
10. On April 30, 2021, the Court granted:
- (a) an Order (the "**Employee Claims Procedure Order**") which, among other things, established a procedure for the identification, determination and adjudication of Employee Claims (as defined in the Employee Claims Procedure Order) against the FIGR Group and their current and former Directors and Officers (each as defined in the Employee Claims Procedure Order) (the "**Employee Claims Procedure**"); and
 - (b) an Order which, among other things, extended the Stay Period until and including June 30, 2021, approved the Fourth Report of the Monitor dated April 27, 2021 (the "**Fourth Report**") and the activities set out therein and approved the fees and disbursements of the Monitor and its counsel, Cassels, as set out in the Fourth Report.¹⁰
11. On June 10, 2021, the Court granted an order (the "**CIG Approval and Vesting Order**") which, among other things:
- (a) approved the sale transaction (the "**CIG Transaction**") contemplated by a subscription and share purchase agreement (the "**CIG Subscription and Share Purchase Agreement**") between FIGR Brands, as vendor, CIG, as the purchased entity (in such capacity, the "**Purchased Entity**") and 102604 P.E.I. Inc., as the purchaser (the "**CIG Purchaser**"), and vesting in the CIG Purchaser all of FIGR

⁹ January 26 Affidavit, *ibid* at para 13; Eighth Report, *ibid* at para 8.

¹⁰ January 26 Affidavit, *ibid* at paras 14 and 15; Eighth Report, *ibid* at para 9.

Brands' right, title and interest in and to all issued and outstanding shares in the Purchased Entity;

- (b) added a subsidiary of FIGR Brands, namely Residual Co, incorporated under the laws of British Columbia, as an Applicant in these CCAA Proceedings in order to effectuate the CIG Transaction;
- (c) removed CIG as an Applicant in these CCAA Proceedings upon closing of the CIG Transaction and deemed CIG to be released from the purview of the Initial Order and all other orders of the Court granted in these CCAA Proceedings; and
- (d) transferred and vested the Excluded Liabilities, the Excluded Assets and Excluded Contracts (each as defined in the CIG Subscription and Share Purchase Agreement) to Residual Co on or before closing such that the Excluded Liabilities became liabilities of Residual Co and not liabilities of CIG or the Purchased Entity.¹¹

12. On June 10, 2021, the Court also granted an order (the "**Norfolk Approval and Vesting Order**") and together with the CIG Approval and Vesting Order, the "**Approval and Vesting Orders**") which, among other things, approved the sale transaction (the "**Norfolk Transaction**" and together with the CIG Transaction, the "**Transactions**") contemplated by the asset purchase agreement between FIGR Norfolk, as vendor, and 11897985 Canada Inc. (dba) BEROXFOOD North America, as purchaser (the "**Norfolk Purchaser**"), dated May 10, 2021 (the "**Norfolk Sale Agreement**"), which upon closing, would vest in the Norfolk Purchaser, or as it may direct in accordance with the Norfolk Sale Agreement, all of FIGR Norfolk's right, title and interest in and to the property described in the Norfolk Sale Agreement.¹²

13. On June 10, 2021, the Court granted a further order (the "**June Ancillary Order**") which, among other things:

- (a) extended the Stay Period until and including September 3, 2021;
- (b) authorized the execution by the Applicants of the Second Amendment to the DIP Commitment Letter, which, among other things, increased the maximum borrowing available under the DIP Loan up to \$16,000,000 (which was an increase of

¹¹ January 26 Affidavit, *ibid* at para 16; Eighth Report, *ibid* at para 10.

¹² January 26 Affidavit, *ibid* at para 17; Eighth Report, *ibid* at para 10.

\$3,000,000). The June Ancillary Order also authorized a corresponding increase to the DIP Lender's Charge;

- (c) authorized and empowered the Applicants to make, or cause to be made, distributions from time to time to the DIP Lender in repayment of the obligations secured by the DIP Lender's Charge;
- (d) approved the Fifth Report of the Monitor dated June 4, 2021 (the "**Fifth Report**") and the activities of the Monitor described therein;
- (e) approved the fees and disbursements of the Monitor and its counsel, Cassels, as set out in the Fifth Report; and
- (f) approved the Pre-filing Intercompany Claims Resolution Process (as defined in the Fifth Report).¹³

14. The CIG Transaction closed on June 28, 2021, and, as discussed in greater detail below, the Norfolk Transaction closed on January 28, 2022.¹⁴

15. On August 24, 2021, the Court granted an Order (the "**August Ancillary Order**") which, among other things:

- (a) extended the Stay Period until and including October 29, 2021;
- (b) approved a key employee retention plan for certain senior employees of FIGR Norfolk and sealed a summary of the Norfolk KERP (as defined in the August Ancillary Order);
- (c) approved the Sixth Report of the Monitor (the "**Sixth Report**") and the activities of the Monitor described therein; and
- (d) approved the fees and disbursements of the Monitor and its counsel, Cassels, as set out in the fee affidavits attached to the Sixth Report.¹⁵

¹³ January 26 Affidavit, *ibid* at para 18; Eighth Report, *ibid* at para 10.

¹⁴ January 26 Affidavit, *ibid* at para 19; Eighth Report, *ibid* at para 30.

¹⁵ January 26 Affidavit, *ibid* at para 20; Eighth Report, *ibid* at para 11.

16. On October 19, 2021, the Court granted an order (the "**October Stay Extension and Fee Approval Order**") which, among other things:

- (a) extended the Stay Period until and including February 4, 2022;
- (b) approved the Seventh Report of the Monitor (the "**Seventh Report**") and the activities of the Monitor described therein; and
- (c) approved the fees and disbursements of the Monitor and its counsel, Cassels, as set out in the fee affidavits attached to the Seventh Report.¹⁶

B. The Claims Procedure and Employee Claims Procedure¹⁷

(i) Claims Procedure and Employee Claims Procedure Update

17. The Monitor continues to carry out the Claims Procedure and the Employee Claims Procedure in accordance with the Claims Procedure Order and the Employee Claims Procedure Order, as applicable. The Monitor continues to engage with various Employee Claimants in an effort to resolve the few remaining Employee Claims.¹⁸

18. Thirty-nine (39) Employees of the Applicants have had their employment terminated since the commencement of the CCAA Proceedings, including twenty-two (22) Employees of FIGR Brands and seventeen (17) Employees of FIGR Norfolk.¹⁹ The most recent FIGR Norfolk termination occurred on January 28, 2022.

19. The Monitor continues to send Employee Claims Packages to the Applicants' former Employees in accordance with the Employee Claims Procedure Order.²⁰

(ii) Pre-Filing Intercompany Claims

20. The Claims Procedure Order contemplated that the adjudication process in respect of Pre-Filing Claims and D&O Pre-Filing Claims would not apply to Pre-Filing Intercompany Claims.²¹

¹⁶ January 26 Affidavit, *ibid* at para 21; Eighth Report, *ibid* at para 12.

¹⁷ Capitalized terms not otherwise defined in this section have the meaning ascribed to them in the Claims Procedure Order or the Employee Claims Procedure Order, as the case may be.

¹⁸ January 26 Affidavit, *supra* note 2 at para 23; Eighth Report, *supra* note 2 at paras 31 and 41-46.

¹⁹ January 26 Affidavit, *ibid* at para 25; Eighth Report, *ibid* at para 44.

²⁰ January 26 Affidavit, *ibid* at para 25; Eighth Report, *ibid* at para 43.

²¹ January 26 Affidavit, *ibid* at para 27; Eighth Report, *ibid* at para 39.

21. Pursuant to the terms of the Claims Procedure Order, the Monitor, with the assistance of the Applicants, was to review all Proofs of Claim received by the Pre-Filing Claims Bar Date in respect of Pre-Filing Intercompany Claims and was to thereafter serve on the Service List and file with the Court the Pre-Filing Intercompany Claims Report which was to set out the Proposed Pre-Filing Intercompany Claims Resolution Process.²²

22. On June 11, 2021, the Monitor proposed a Proposed Intercompany Claims Resolution Process in its Fifth Report. No Pre-Filing Intercompany Claims Objection was received by the Pre-Filing Intercompany Claims Bar Date and, in light of the foregoing, the Pre-Filing Intercompany Claims as set out in the Fifth Report were deemed to be accepted as valid claims.²³

C. The Transactions

23. As previously noted, on June 10, 2021, the Court granted the Approval and Vesting Orders approving the Transactions, and on June 28, 2021, the CIG Transaction closed.²⁴

24. Following the closing of the CIG Transaction, and in accordance with the June Ancillary Order, on July 8, 2021, the Applicants caused a distribution to be made to the DIP Lender in full satisfaction of their obligations owing under the DIP Loan including, but not limited to, outstanding principal, accrued interest, fees and expenses up and until July 8, 2021. As a result, there are no amounts currently owing by the Applicants to the DIP Lender.²⁵

1. The Norfolk Transaction²⁶

25. As previously noted, on May 10, 2021, FIGR Norfolk entered into the Norfolk Sale Agreement with the Norfolk Purchaser.²⁷

26. On June 29, 2021, FIGR Norfolk and the Norfolk Purchaser, with the consent of the DIP Lender and the Monitor, entered into the First Amendment to the Norfolk Sale Agreement which, among other things:

- (a) extended the Outside Date from June 30, 2021 to July 30, 2021; and

²² January 26 Affidavit, *ibid* at para 26; Eighth Report, *ibid* at paras 39 and 40.

²³ January 26 Affidavit, *ibid* at paras 29 and 30; Eighth Report, *ibid* at paras 39 and 40.

²⁴ January 26 Affidavit, *ibid* at para 31; Eighth Report, *ibid* at para 10.

²⁵ January 26 Affidavit, *ibid* at para 32; Eighth Report, *ibid* at para 52(c).

²⁶ Terms in this section not otherwise defined herein have the meanings scribed to them in the Norfolk Sale Agreement.

²⁷ January 26 Affidavit, *supra* note 2 at para 33.

- (b) amended Section 4.3 of the Norfolk Purchase Agreement to extend the date upon which the Financing Covenant needed to be satisfied to July 16, 2021.²⁸

27. On August 9, 2021, FIGR Norfolk and the Norfolk Purchaser, with the consent of the DIP Lender and the Monitor, entered into the Second Amendment to the Norfolk Sale Agreement which, among other things, extended the Outside Date from July 30, 2021 to August 31, 2021.²⁹

28. On October 13, 2021, FIGR Norfolk and the Norfolk Purchaser, with the consent of the DIP Lender and the Monitor, entered into the Third Amendment to the Norfolk Sale Agreement which, among other things:

- (a) extended the Outside Date from August 31, 2021 to October 29, 2021; and
- (b) modified section 9.6 of the Norfolk Sale Agreement to reflect the terms of the Norfolk Approval and Vesting Order.³⁰

29. On January 1, 2022, FIGR Norfolk and the Norfolk Purchaser, with the consent of the DIP Lender and the Monitor, entered into the Fourth Amendment to the Norfolk Sale Agreement (the **"Fourth Norfolk APA Amendment"**) which, among other things:

- (a) contained certain acknowledgments in respect of the Norfolk Sale Agreement and Norfolk Transaction;
- (b) authorized the Norfolk Purchaser, subject to the conditions outlined in the Fourth Norfolk APA Amendment, to carry out the Purchaser Work (as defined in the Fourth Norfolk APA Amendment);
- (c) extended the Outside Date from October 29, 2021 to January 14, 2022; and
- (d) deleted and replaced Schedule "F" of the Norfolk Sale Agreement, which summarized the Transferred Employees (as defined below).³¹

30. On January 8, 2022, following the execution of the Fourth Norfolk APA Amendment, FIGR Norfolk received correspondence from counsel to the Norfolk Purchaser which, in addition

²⁸ January 26 Affidavit, *ibid* at para 34; Eighth Report, *supra* note 2 at para 22.

²⁹ January 26 Affidavit, *ibid* at para 35; Eighth Report, *ibid* at para 22.

³⁰ January 26 Affidavit, *ibid* at para 36; Eighth Report, *ibid* at para 23.

³¹ January 26 Affidavit, *ibid* at para 37; Eighth Report, *ibid* at para 24.

to certain factual inaccuracies, suggested that certain conditions to which the Norfolk Purchaser agreed to pursuant to the Fourth Norfolk APA Amendment would not be met. In light of the foregoing, coupled with FIGR Norfolk's and the Monitor's ongoing concerns regarding the Norfolk Purchaser's ability to close the Norfolk Transaction, on January 10, 2022, FIGR Norfolk issued a letter to the Norfolk Purchaser (the "**APA Termination Letter**"). Among other things, the APA Termination Letter:

- (a) detailed certain defaults committed by the Norfolk Purchaser under the Norfolk Sale Agreement;
- (b) terminated the Norfolk Sale Agreement with immediate effect pursuant to Section 4.3 thereof (the "**APA Termination**"); and
- (c) advised the Norfolk Purchaser that FIGR Norfolk would retain the full amount of the Deposit, together with all interest accrued thereon, pursuant to the terms of the Norfolk Sale Agreement.³²

31. In response to the APA Termination Letter, the Norfolk Purchaser advised the Monitor that, notwithstanding the APA Termination, it still wished to close the Norfolk Transaction. In connection with the foregoing, counsel to the Norfolk Purchaser delivered a letter on January 11, 2022 to FIGR Norfolk which, among other things:

- (a) advised that the Norfolk Purchaser disagreed that the Norfolk Sale Agreement was terminated;
- (b) responded to certain items in the APA Termination Letter; and
- (c) advised that the Norfolk Purchaser remained ready, willing and able to close the Norfolk Transaction.³³

32. In an effort to mitigate its damages caused by the need to terminate the Norfolk Sale Agreement for the reasons outlined in the APA Termination Letter, FIGR Norfolk issued another letter to counsel to the Norfolk Purchaser on January 12, 2022 (the "**Reinstatement Letter**") which outlined the terms (collectively, the "**Reinstatement Conditions**") on which it was prepared to

³² January 26 Affidavit, *ibid* at para 38; Eighth Report, *ibid* at para 25.

³³ January 26 Affidavit, *ibid* at para 39; Eighth Report, *ibid* at para 26.

reinstate and further amend the Norfolk Sale Agreement with the ultimate goal of closing the Norfolk Transaction as soon as possible. The Reinstatement Letter also provided a deadline by which the Reinstatement Conditions were required to be met (the "**Reinstatement Deadline**").³⁴

33. Following delivery of the Reinstatement Letter, counsel to the Norfolk Purchaser advised that, although he believed the reinstatement was not necessary given the Norfolk Purchaser's view that the Norfolk Sale Agreement remained in force, the Reinstatement Conditions and the proposal advanced by FIGR Norfolk were acceptable.³⁵

34. On January 19, 2022, FIGR Norfolk and the Norfolk Purchaser, with the consent of the DIP Lender and the Monitor, entered into the Reinstatement Agreement and Fifth Amendment to the Norfolk Sale Agreement (the "**Reinstatement Agreement and Fifth Norfolk APA Amendment**") which, among other things:

- (a) extended the Outside Date from January 14, 2022 to January 29, 2022;
- (b) contained additional acknowledgements related to the Norfolk Sale Agreement and the Norfolk Transaction; and
- (c) provided that FIGR Norfolk would provide the Norfolk Purchaser with a reduction to the Purchase Price of up to \$20,000 to be applied on Closing in connection with interest costs incurred by the Norfolk Purchaser.³⁶

35. Additionally, the Reinstatement Agreement and Fifth Norfolk APA Amendment provided that FIGR Norfolk would instruct Hyde Advisory & Investments ("**Hyde**") to advise Health Canada that the Parties were ready and prepared to close the Norfolk Transaction on January 28, 2022 (the "**Hyde Communication**") on the condition that on or prior to the Reinstatement Deadline, the Norfolk Purchaser:

- (a) delivered an executed copy of the Reinstatement Agreement and Fifth Norfolk APA Amendment; and

³⁴ January 26 Affidavit, *ibid* at para 40; Eighth Report, *ibid* at para 27.

³⁵ January 26 Affidavit, *ibid* at para 41; Eighth Report, *ibid* at para 28.

³⁶ January 26 Affidavit, *ibid* at para 42; Eighth Report, *ibid* at para 29.

- (b) delivered certain deliverables to the Monitor in escrow, including \$4,470,000 (which amount was subject to mutually agreed adjustments on Closing and reflect the balance of the Purchaser Price due on Closing) (the "**Escrow Deliverables**").³⁷

36. The Reinstatement Agreement and Fifth Norfolk APA Amended also provided that:

- (a) the Escrow Deliverables would be released to FIGR Norfolk or returned to the Norfolk Purchaser in accordance with the escrow terms contained in Schedule "A" thereto (the "**Escrow Terms**"); and
- (b) should the Norfolk Purchaser fail to satisfy any or all of the Reinstatement Conditions, the proposal as outlined in the Reinstatement Letter and the Reinstatement Agreement and Fifth Norfolk APA Amendment would be null and void and of no force and effect, provided however that the Escrow Terms would survive and the APA Termination Letter would continue to be of full force and effect.³⁸

37. The Reinstatement Conditions were ultimately satisfied by the Norfolk Purchaser by the Reinstatement Deadline and the Parties instructed Hyde to issue the Hyde Communication.³⁹ The Norfolk Transaction subsequently closed on January 28, 2022.

D. The Stay Extension

38. Pursuant to the Stay Extension, Distribution, WEPPA and Fee Approval Order, the Applicants are seeking an extension of the Stay Period until and including April 29, 2022.⁴⁰

39. It is necessary and in the best interests of the Applicants and their stakeholders that the Stay Period be extended until and including April 29, 2022, as it is expected that, if the requested Stay Extension, Distribution, WEPPA and Fee Approval Order is granted, the additional time will allow the Applicants and/or the Monitor to:

- (a) complete the Claims Procedure in accordance with the Claims Procedure Order;

³⁷ January 26 Affidavit, *ibid* at para 43; Eighth Report, *ibid* at para 29.

³⁸ January 26 Affidavit, *ibid* at para 44; Eighth Report, *ibid* at para 30.

³⁹ January 26 Affidavit, *ibid* at para 45; Eighth Report, *ibid* at para 30.

⁴⁰ January 26 Affidavit, *ibid* at para 46; Eighth Report, *ibid* at para 68.

- (b) complete the Employee Claims Procedure in accordance with the Employee Claims Procedure Order;
- (c) administer WEPPA;
- (d) make the Proposed Distributions; and
- (e) move forward the steps necessary to complete CCAA Proceedings.⁴¹

40. The Applicants are projected to have sufficient liquidity to fund their obligations and the costs of the CCAA Proceedings through the end of the Stay Extension.⁴²

E. The WEPPA Relief

41. In light of recent amendments to WEPPA and the WEPPA Regulations, the Court now has the discretion, under section 5(5) and 3.2, respectively, to, in proceedings under the CCAA, order that a former employer meets the criteria prescribed by regulation where the former employer is the employer of all whose employees in Canada have been terminated, other than any retained to wind-down business operations.⁴³

42. At the outset of the CCAA Proceedings, FIGR Norfolk had approximately twenty-five (25) Employees. The employment of all FIGR Norfolk's Employees has since been terminated. Following closing of the Norfolk Transaction, the six (6) Transferred Employees ceased to be Employees of FIGR Norfolk.⁴⁴

43. At the outset of the CCAA Proceedings, FIGR Brands had approximately thirty (30) Employees. The employment of all FIGR Brands' Employees, with the exception of two (2) Employees (the "**FIGR Brands Executives**"), has since been terminated. The FIGR Brands Executives are being retained to assist and facilitate, among other things, the general wind-down of the Applicants.⁴⁵

⁴¹ January 26 Affidavit, *ibid* at para 47; Eighth Report, *ibid* at para 68.

⁴² January 26 Affidavit, *ibid* at para 48; Eighth Report, *ibid* at para 69.

⁴³ January 26 Affidavit, *ibid* at para 51; Eighth Report, *ibid* at para 60.

⁴⁴ January 26 Affidavit, *ibid* at para 52; Eighth Report, *ibid* at para 62.

⁴⁵ January 26 Affidavit, *ibid* at para 53; Eighth Report, *ibid* at para 63.

44. All Employees of FIGR Norfolk and FIGR Brands, other than those necessary to wind-down the Applicants' remaining business operations, have either been terminated or assumed by the Norfolk Purchaser.⁴⁶

45. Representatives from Labour Program Employment and Social Development Canada ("LPESDC"), the Government of Canada agency responsible for administering programs under WEPPA, were contacted by counsel for the Applicants and the Monitor in connection with the foregoing relief. The LPESDC, following a description of the CCAA Proceedings and the Employee terminations to date, advised that it did not object to the application of WEPPA in the circumstances. The LPESDC has been served with the Motion Record of the Applicants and the Eighth Report.⁴⁷

F. The Proposed Distributions and the Proposed Distribution Methodology

(i) The Proposed Distributions and the Net Cash Balance

46. The Applicants have realized on substantially all of their assets and collected all amounts owing to them, including accounts receivable. The Applicants and the Monitor have also reviewed and determined substantially all of the Claims and Employee Claims filed against the Applicants and the Directors and Officers pursuant to the Claims Procedure Order and the Employee Claims Procedure Order, as the case may be. The Applicants are holding certain cash balances that, at this time, should be distributed to holders of Proven Claims, subject to a reserve for administrative and other costs in the amount of approximately \$2.1 million (the "**Administrative Reserve**"). The Administrative Reserve will be used to secure, among other things:

- (a) all remaining fees and expenses of counsel to the Applicants, the Monitor, and counsel to the Monitor in respect of the CCAA Proceedings;
- (b) wages and fees of certain directors and officers of the Applicants incurred or to be incurred following Filing Date;
- (c) any remaining costs to wind down the Applicants; and

⁴⁶ January 26 Affidavit, *ibid* at para 54; Eighth Report, *ibid* at para 64.

⁴⁷ Eighth Report, *ibid* at para 65.

- (d) the indemnity provided for in paragraph 20 of the Initial Order in favour of the Directors and Officers of the Applicants.⁴⁸

47. The Monitor and the Applicants have received funds totaling approximately \$27.7 million. The estimated net cash available for distribution by the Applicants is approximately \$10.3 million (the "**Net Cash Balance**").⁴⁹

48. The deductions from, and adjustments to, the funds received from the CIG Transaction and the Norfolk Transaction to arrive at the Net Cash Balance were based on: (i) the funds received; (ii) the payment of priority payments; (iii) repayment of the DIP Loan; and (iv) Intercompany Charge amounts.⁵⁰

(ii) *The Proposed Distribution Methodology*

49. The process to facilitate the Proposed Distributions of the Net Cash Balance (the "**Proposed Distribution Methodology**") can be summarized as follows:

- (a) each Claimant holding a Proven Claim will receive a *pro rata* distribution from each Applicant entity up to the maximum amount of their Proven Claim;
- (b) all distributions will be made in Canadian dollars. Any Proven Claim denominated in a foreign currency shall be converted to Canadian Dollars at the Bank of Canada daily average exchange rate on the Filing Date (USD 1: CAD 1.2627);
- (c) for greater certainty, Proven Claims include all Claims (including Pre-Filing Intercompany Claims) and Employee Claims having been finally determined in accordance with the Claims Procedure Order, Employee Claims Procedure Order or the Pre-Filing Claims Resolutions Process, as the case may be;
- (d) subject to the Administrative Reserve, no secured claims or priority claims remain;
- (e) the Pre-Filing Intercompany Claims include Claims by one Applicant against another Applicant. Distributions made by one Applicant with respect to Pre-Filing

⁴⁸ January 26 Affidavit, *supra* note 2 at para 56; Eighth Report, *ibid* at para 50.

⁴⁹ January 26 Affidavit, *ibid* at para 57; Eighth Report, *ibid* at para 51.

⁵⁰ January 26 Affidavit, *ibid* at para 58; Eighth Report, *ibid* at para 52.

Intercompany Claims of another Applicant will ultimately form cash available for distribution to third party Claimants of another Applicant;

- (f) following the reallocation of proceeds to determine the Net Cash Balance, each Intercompany Charge is no longer required to secure the Pre-Filing Intercompany Claims; and
- (g) certain Pre-Filing Intercompany Claims held by Alliance One International Tabak B.V. ("**Pyxus**"), a party related to the Applicants, form the most significant (by value) of the unsecured Claims against the Applicants (the "**Pyxus Claims**"). For the purposes of the Proposed Distributions, the Pyxus Claims are to be treated as third party claims.⁵¹

50. Canada Revenue Agency, who originally filed placeholder Claims, has voluntarily withdrawn its claim against each of the Applicants. In light of the size of the Pyxus Claims, it is proposed that the Administrative Reserve be held back entirely from those claims, which will in turn facilitate distributions and significantly reduce administrative costs.⁵²

PART III: ISSUES

51. The issues to be considered on this motion are whether:

- (a) this Court should approve the Proposed Distribution Methodology and authorize and direct the Applicants to make the Proposed Distributions;
- (b) this Court should declare that, pursuant to section 5(5) of the WEPPA, FIGR Norfolk and FIGR Brands meet the criteria established by section 3.2 of the WEPPA Regulations; and
- (c) this Court should extend the Stay Period.

⁵¹ January 26 Affidavit, *ibid* at para 59; Eighth Report, *ibid* at paras 58 and 59.

⁵² January 26 Affidavit, *ibid* at para 60; Eighth Report, *ibid* at para 58.

A. The Proposed Distribution Methodology Should be Approved and the Proposed Distributions Should be Authorized

52. The Stay Extension, Distribution, WEPPA and Fee Approval Order seeks approval of the Proposed Distribution Methodology and the authorization and direction to make the Proposed Distributions in accordance with the terms thereof.

53. This Court has broad power in a CCAA proceeding to do what is just in the circumstances.⁵³ Section 11 of the CCAA provides that a court may make any order it considers appropriate in the circumstances.⁵⁴

54. The Court has the authority to approve distributions to creditors during a CCAA proceedings, including outside of a Plan of Compromise or Arrangement.⁵⁵ This concept applies regardless of whether the creditors receiving a distribution are secured or unsecured.⁵⁶

55. There is nothing in the CCAA that precludes a distribution of cash to creditors of the debtor during the pendency of CCAA proceedings.⁵⁷ In *Nortel*, Justice Newbould stated the following:

"I see no difference between an interim distribution, as in the case of *AbitibiBowater*, or a final distribution, as in the case of *Timminco*, or a distribution to an unsecured or secured creditor, so far as a jurisdiction to make the order is concerned without any plan of arrangement".⁵⁸

56. This Court has the jurisdiction to grant an order authorizing the Proposed Distributions in respect of each Claimant with a Proven Claim pursuant to the Proposed Distribution Methodology, net of any withholding taxes based on applicable law. To that end, similar relief has been granted by this Court in recent proceedings, where a distribution was made to unsecured creditors without a plan of compromise or arrangement.⁵⁹

57. In connection, with the Stay Extension, Distribution, WEPPA and Fee Approval Order, the Applicants are seeking approval of the Administrative Reserve which will be used to secure, among other things:

⁵³ [U.S. Steel Canada Inc. \(Re\)](#), 2016 ONCA 662 at paras. 53 and 78.

⁵⁴ [Companies Creditors' Arrangement Act](#), RSC 1985, c. C-36, at s. 11 [CCAA].

⁵⁵ [Nortel Networks Corp., Re](#), 2014 ONSC 4777 at paras 53-55 [*Nortel*].

⁵⁶ [Re Mobilicity](#), Distribution Order granted August 14, 2015, Court File No. CV-13-10274-00CL.

⁵⁷ [AbitibiBowater Inc.](#), 2009 OCCC 6461 (Que. S.C.) at para 71.

⁵⁸ *Nortel*, *supra* note 55 at para 58.

⁵⁹ [Carillion Canada Holdings Inc., et al.](#), Distribution Order granted August 4, 2021, Court File No. CV-18-590812-00CL.

- (a) all remaining fees and expenses of counsel to the Applicants, the Monitor, and counsel to the Monitor in respect of the CCAA Proceedings;
- (b) wages and fees of certain directors and officers of the Applicants incurred or to be incurred following the Filing Date;
- (c) any remaining costs to wind down the Applicants; and
- (d) the indemnity provided for in paragraph 20 of the Initial Order in favor of the Directors and Officers of the Applicants.⁶⁰

58. The Applicants have realized on substantially all of their assets and collected all amounts owing to them, including accounts receivable. The Applicants and the Monitor have also reviewed and determined substantially all of the Claims and Employee Claims filed against the Applicants and the Directors and Officers pursuant to the Claims Procedure Order and the Employee Claims Procedure Order, as the case may be. In light of the foregoing, the Applicants believe the Proposed Distributions of the Net Cash Balance to the holders of Proven Claims, subject to the Administrative Reserve, is appropriate at this time.⁶¹

59. The Monitor is of the view that the Proposed Distribution Methodology is fair and allows for distributions in the quickest and most cost-efficient manner. This is of particular importance for the Applicants and the Monitor given the significant shortfall creditors of the Applicants are expected to suffer.⁶²

60. Accordingly, the Applicants respectfully submit that the Court should approve the Proposed Distribution Methodology and authorize the Proposed Distributions.

B. WEPPA Declaration

61. The Stay Extension, Distribution, WEPPA and Fee Approval Order seeks a declaration that, pursuant to section 5(5) of WEPPA, that FIGR Norfolk and FIGR Brands meet the criteria established by section 3.2 of the WEPPA Regulations.⁶³

⁶⁰ January 26 Affidavit, *supra* note 2 at para 56; Eighth Report, *supra* note 2 at para 50.

⁶¹ January 26 Affidavit, *ibid* at para 56; Eighth Report, *ibid* at para 50.

⁶² January 26 Affidavit, *ibid* at para 60; Eighth Report, *ibid* at para 59.

⁶³ January 26 Affidavit, *ibid* at para 2(a)(iii); Eighth Report, *ibid* at para 3(a)(iv).

62. Section 5(1) of WEPPA provides as follows:

5 (1) An individual is eligible to receive a payment if

(a) the individual's employment ended for a reason prescribed by regulation;

(b) one of the following applies:

(i) the former employer is bankrupt,

(ii) the former employer is subject to a receivership,

(iii) the former employer is the subject of a foreign proceeding that is recognized by a court under subsection 270(1) of the *Bankruptcy and Insolvency Act* and

(A) the court determines under subsection (2) that the foreign proceeding meets the criteria prescribed by regulation, and

(B) a trustee is appointed, or

(iv) the former employer is the subject of proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act* and a court determines under subsection (5) that the criteria prescribed by regulation are met; and

(c) the individual is owed eligible wages by the former employer [Emphasis Added].⁶⁴

63. Section 5(5) of WEPPA provides that "[o]n application by any person, a court may, in proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act*, determine that the former employer meets the criteria prescribed by regulation".⁶⁵ Section 3.2 of the WEPPA Regulations provides that "[f]or the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer *all of whose employees in Canada have been terminated other than any retained to wind down its business operations [emphasis added]*".⁶⁶

64. The date FIGR Norfolk, FIGR Brands and their former Employees would become eligible under WEPPA would be the date of the Stay Extension, Distribution, WEPPA and Fee Approval Order, if granted.⁶⁷

⁶⁴ [Wage Earner Protection Program Act](#) (S.C. 2005, c.47, s. 1), s. 5(1)[*WEPPA*].

⁶⁵ *ibid.*, s. 5(5).

⁶⁶ [Wage Earner Protection Program Regulation](#) (SOR/2008-222), s. 3.2.

⁶⁷ *WEPPA*, *supra* note 64 "eligible wages" (a)(iii).

65. Section 5(5) of WEPPA and section 3.2 of the WEPPA Regulation only recently came into force on November 20, 2021. Counsel is not aware of an order made under these provisions yet and LPESDC also advised counsel of the same.

66. At the commencement of the CCAA Proceedings, FIGR Norfolk had approximately 25 employees. The employment of substantially all of FIGR Norfolk's Employees other than the six (6) Transferred Employees (as defined in the Norfolk Sale Agreement) (the "**Transferred Employees**") have been terminated. Upon the Closing of the Norfolk Transaction, the Transferred Employees were assumed by the Norfolk Purchaser and ceased to be Employees of FIGR Norfolk.⁶⁸

67. At the commencement of the CCAA Proceedings, FIGR Brands had approximately thirty (30) Employees. The employment of substantially all of FIGR Brands' Employees has been terminated, with the exception of the FIGR Brands Executives. The FIGR Brands Executives were, and will continue to be, retained to facilitate certain post-closing matters in respect of the Norfolk Transaction and the general wind-down of the Applicants.⁶⁹

68. Accordingly, all of the FIGR Norfolk and FIGR Brands' Employees, with the exception of those absolutely necessary to wind down the Applicants' estates, have either been terminated or assumed by the Norfolk Purchaser.⁷⁰

69. As described above, LPESDC advised that it did not object to the application of WEPPA in the circumstances and has been served with the Motion Record of the Applicants and the Eighth Report.⁷¹

C. The Stay Period Should be Extended

70. The Stay Period currently expires on February 4, 2022. Section 11.02(2) of the CCAA gives this Court the authority to grant an extension of the Stay Period for any period it "considers necessary".⁷² To do so, this Court must be satisfied that circumstances exist that make the order

⁶⁸ January 26 Affidavit, *supra* note 2 at paras 52 and 54; Eighth Report, *supra* note 2 at para 62.

⁶⁹ January 26 Affidavit, *ibid* at para 53; Eighth Report, *ibid* at para 63.

⁷⁰ January 26 Affidavit, *ibid* at para 54; Eighth Report, *ibid* at para 64.

⁷¹ Eighth Report, *ibid* at para 66.

⁷² [CCAA](#), *supra* note 54, s 11.02(2).

appropriate and that the Applicants have acted, and are acting, in good faith and with due diligence.⁷³

71. A stay of proceedings is appropriate where it provides the debtors with breathing room while they seek to restore their solvency and emerge from their restructuring on a going concern basis.⁷⁴ Further, a stay of proceedings will be appropriate where it advances the purposes of the CCAA – including avoiding the social and economic effects of bankruptcy.⁷⁵

72. As detailed in the January 26 Affidavit and the Eighth Report, the Applicants, with the assistance of the Monitor, require the Stay Extension to allow for additional time to, among other things:

- (a) complete the Claims Procedure in accordance with the Claims Procedure Order;
- (b) complete the Employee Claims Procedure in accordance with the Employee Claims Procedure Order;
- (c) administer WEPPA;
- (d) make the Proposed Distributions; and
- (e) move forward the necessary steps to complete the CCAA Proceedings.⁷⁶

73. Since the granting of the October Stay Extension and Fee Approval Order, the Applicants have acted and continue to act in good faith and with due diligence to, among other things, stabilize their business, communicate, with the assistance of the Monitor, with Health Canada, employees, customers (including the provincial cannabis boards), suppliers and other key stakeholders in the CCAA Proceedings, wind down head office operations, terminate certain FIGR Norfolk Employees, settle outstanding Claims, work to close the Norfolk Transaction and assist the Monitor with the Claims Procedure and the Employee Claims Procedure.⁷⁷ The Monitor supports the requested extension to the Stay Period, and the Applicants are forecast to have sufficient

⁷³ *Ibid.*

⁷⁴ *Century Services Inc v Attorney General (Canada)*, 2010 SCC 60 at para 14 [*Century Services*]; *Target Canada Co.*, 2015 ONSC 303 at para 8.

⁷⁵ *Century Services*, *ibid* at para 70.

⁷⁶ January 26 Affidavit, *supra* note 2 at para 47; Eighth Report, *supra* note 2 at para 68.

⁷⁷ January 26 Affidavit, *ibid* at para 22; Eighth Report, *ibid* at para 70.

liquidity to fund their obligations and the costs of the CCAA Proceedings through the end of the proposed extension.⁷⁸

PART IV: RELIEF REQUESTED

74. The Applicants submit that they meet all of the qualifications required to obtain the requested relief and request that this Court grant the proposed form of Stay Extension, Distribution, WEPPA and Fee Approval Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Bennett Jones LLP

January 31, 2022

⁷⁸ January 26 Affidavit, *ibid* at paras 48 and 49; Eighth Report, *ibid* at paras 69 and 78.

SCHEDULE "A"
LIST OF AUTHORITIES

Cases Cited

1. [*AbitibiBowater Inc.*, 2009 QCCS 6461](#)
2. [*Century Services Inc v Attorney General \(Canada\)*, 2010 SCC 60](#)
3. [*Nortel Networks Corp., Re*, 2014 ONSC 4777](#)
4. [*Target Canada Co*, 2015 ONSC 303](#)
5. [*U.S. Steel Canada Inc. \(Re\)*, 2016 ONCA 662](#)

Other Sources

1. [*Carillion Canada Holdings Inc., et al.*](#), Distribution Order granted August 4, 2021, Court File No. CV-18-590812-00CL.
2. [*Re Mobilicity*](#), Distribution Order granted August 14, 2015, Court File No. CV-13-10274-00CL.

SCHEDULE "B"
STATUTES RELIED ON

Companies' Creditors Arrangement Act, R.S.C. 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.

Wage Earner Protection Program Act (S.C. 2005, c.47, s. 1)

eligible wages means

(a) wages other than termination pay and severance pay that were earned during the longer of the following periods:

[...]

(iii) the period beginning on the day that is six months before one of the following days and ending on the day on which a court makes a determination under subsection 5(5):

- (A) the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the *Bankruptcy and Insolvency Act* or, if a notice of intention to make a proposal is filed by or in respect of the employer under that Division, the day on which the notice of intention is filed,
- (B) the day on which the most recent proceedings under the *Companies' Creditors Arrangement Act* are commenced; and

[...]

Conditions of eligibility

5 (1) An individual is eligible to receive a payment if

- (a) the individual's employment ended for a reason prescribed by regulation;
- (b) one of the following applies:
 - (i) the former employer is bankrupt,
 - (ii) the former employer is subject to a receivership,
 - (iii) the former employer is the subject of a foreign proceeding that is recognized by a court under subsection 270(1) of the *Bankruptcy and Insolvency Act* and
 - (A) the court determines under subsection (2) that the foreign proceeding meets the criteria prescribed by regulation, and
 - (B) a trustee is appointed, or
 - (iv) the former employer is the subject of proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act* and a court determines under subsection (5) that the criteria prescribed by regulation are met; and
- (c) the individual is owed eligible wages by the former employer.

Prescribed criteria — other proceedings

5(5) On application by any person, a court may, in proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act*, determine that the former employer meets the criteria prescribed by regulation.

Wage Earner Protection Program Regulation (SOR/2008-222), s. 3.2.

Proceedings Under Bankruptcy and Insolvency Act or Companies' Creditors Arrangement Act

3.2 For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.

**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 FIGR BRANDS, INC., FIGR NORFOLK
INC. AND 1307849 B.C. LTD.**

Court File No.: CV-21-00655373-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings Commenced in Toronto

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