



SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

COUNSEL SLIP / ENDORSEMENT

COURT FILE
NO.:

CV-23-00700581-00CL

DATE: 30 August 2023

NO. ON LIST: 3

TITLE OF PROCEEDING: **FIRE & FLOWER HOLDINGS CORP. et al**

BEFORE JUSTICE: **OSBORNE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Maria Konyukhova Philip Yang	Fire & Flower Holdings Corp. Fire & Flower Inc. 13318184 Canada Inc. 11180703 Canada Inc. 10926671 Canada Ltd. Friendly Stranger Holdings Corp. Pineapple Express Delivery Inc. Hifyre Inc	mkonyukhova@stikeman.com pyang@stikeman.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Jeffery Rosenberg Jodi Porepa	FTI Consulting Canada Inc Court- Appointment Monitor	Jeffrey.rosenberg@fticonsulting.com jodi.porepa@fticonsulting.com
Leanne Williams Rebecca Kennedy	counsel for the Monitor	williams@tgf.ca rkennedy@tgf.ca
Natalie Renner Christian Lachance	2707031 Ontario Inc (the DIP Lender)	nrenner@dwpv.com clachance@dwpv.com
Haddon Murray Linda Galessiere	Turning Point Brands RioCan, SmartREIT, Centrecorp and Northfield Equities Inc.	Haddon.murray@gowlingwlq.com lgalessiere@clegal.ca

Maya Poliak	Ontario Securities Commission	maya@chaitons.com
Gavin Finlayson Patrick Corney	Green Acre Capital LP	gfinlayson@millerthomson.com pcorney@millerthomson.com

ENDORSEMENT OF JUSTICE OSBORNE:

1. The Applicants move for:
 - a. approval of a subscription agreement dated August 17, 2023 between FFHC (as company) and 2759054 Ontario Inc. operating as FIKA Cannabis (as purchaser) (the “Subscription Agreement”), the contemplated Transactions and authorization to FFHC to complete the Transactions;
 - b. approval of the amended and restated subscription agreement to be entered into between FFHC and 2707031 Ontario Inc. (“ACT Investor”) as purchaser (the “Back-up Subscription Agreement), the contemplated Back-up Transactions and authorization to FFHC complete the Back-up Transactions only if, and to the extent necessary, that the Subscription Agreement and the Transactions contemplated therein do not close for any reason;
 - c. the granting of Releases as defined and described in the motion materials;
 - d. an extension of the Stay Period until October 15, 2023;
 - e. a sealing order in respect of the Confidential Appendix to the Third Report of the Monitor; and
 - f. approval of the proposed claims procedure.
2. Defined terms in this Endorsement have the meaning given to them in the motion materials, the Third Report of the Monitor dated August 26, 2023 or my Earlier endorsements made in this proceeding, unless otherwise stated.
3. The Service List has been properly served. The relief sought today by the Applicants is fully supported and recommended by the Monitor. It is not opposed by any party.
4. For the reasons that follow, the requested relief is granted.
5. The Applicants rely upon the Affidavit of Stephane Trudel sworn August 23, 2023 together with Exhibits thereto, and the Supplementary Affidavit of Mr. Trudel sworn August 28, 2023, the latter of which relates primarily to the particulars of the executed Back-up Subscription Agreement. They also rely on the Third Report of the Monitor dated August 26, 2023.
6. It is not necessary to set out all of the background to, and context for, the motions before me today. On June 19, 2023, I approved a SISP, including a stalking horse agreement.
7. The Monitor conducted the SISP, in consultation with the Applicants, to solicit interest in sales for all or portions of the Property and/or Business. I emphasize, as I did in an earlier Endorsement and given the history of this matter, that the SISP was specifically and intentionally designed to be sufficiently broad so as to contemplate the possibility of an investment in, restructuring, recapitalization, refinancing or other

form of reorganization of the Applicants and/or their Business. Accordingly, the possibility of asset and share transactions (including through a reverse vesting structure) were capable of being fully explored through the SISP.

8. The Monitor contacted 138 Known Potential Bidders. 33 Potential Bidders executed agreements to access the virtual data room. At the conclusion of Phase 1, there were 12 Phase 1 Qualified Bidders. Eight Binding Offers were received by the Phase 2 Bid Deadline, consisting of three Sale Proposals and five Partial Sales Proposals.
9. The Special Committee, in consultation with, and on the recommendation of, the Monitor and counsel to the Applicant, determined that the best interests of the Applicants and their stakeholders were to designate the FIKA Bid and one other Bid to be Phase 2 Qualified Bids, with the result that those two Bidders, together with the Stocking Horse Bidder, participated in the Auction.
10. The Auction was held virtually on August 15, 2023. The FIKA Bid was declared to be the Successful Bid with ACT Investors' Bid declared as the Back-up Bid.
11. The Subscription Agreement was executed by FFHC and FIKA, subject to Court approval, on August 17, 2023. It contemplates a reverse vesting transaction, pursuant to which FIKA will purchase new shares of FFHC for a purchase price of \$36 million. FFHC will, in turn, cancel and terminate all of its existing equity securities with the result that FIKA will be the sole shareholder of FFHC and ultimately each of its subsidiaries.
12. Excluded Contracts, Excluded Assets and Excluded Liabilities of the Applicants will be transferred to Residual Co.
13. The proposed reverse vesting structure will permit the Applicants to maintain their licences and permits which, in the highly regulated cannabis environment in which they operate, will avoid very significant additional delays, costs and uncertainty associated with the potential transfer of such licences and permits to a third party. In addition, maintaining contracts with provincially operated cannabis distributors, licenced cannabis producers, suppliers of strategic data sources and others whose services are required to maintain those licences and permits, will avoid the uncertainty, time and expense of obtaining the necessary consents to assign those rights or entered into new arrangements.
14. Finally, the reverse vesting structure permits the maintenance of the tax attributes of the Applicants, including operating losses.
15. The proposed Transactions will satisfy all of the secured liabilities of the Applicants and leave a surplus of some millions of dollars for recovery available to unsecured creditors. Certain unsecured and contingent liabilities are assumed, intellectual property licences and government entity contracts are maintained, and the Applicants will continue operations as a going concern.
16. The going concern result in turn provides the potential for many of the approximately 594 employees of the Applicants to continue, and it results in the ability to maintain business relationships with landlords and suppliers.
17. For all of the same reasons, the Back-up Subscription Agreement and contemplated Back-up Transactions are also appropriate but necessary only in the event that the Subscription Agreement and the Transactions contemplated therein do not close for any reason.
18. In the result, I am satisfied for all of these reasons that the Transaction and the Back-up Transaction (together with the respective corollary relief) should be approved. The evidence establishes that the Transaction, and if it fails to close the Back-up Transaction, provide the best and next best respectively outcomes for stakeholders. At the same time, the Transaction, and particularly the reverse vesting structure

contemplated thereby, does not result in stakeholders being worse off than they would be under any other viable alternative.

19. In my view, this is reflected, at least in part, by the fact that the relief sought today is unopposed.
20. In the particular circumstances of this case, the reverse vesting structure is also appropriate. It is well-established that this Court has the jurisdiction to approve a reverse vesting transaction pursuant to ss. 11 and 36 of the CCAA. The bigger issue is whether it ought to do so, since they ought not to be the “norm” and the evidence must establish that such a structure is necessary in the particular circumstances of each case: *Just Energy Group Inc. et. al. v Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354; *Arrangement relatif à Black Rock Metals Inc.*, 2022 QCCS 282, leave to appeal to QCCA denied, August 5, 2022; and *Harte Gold (Re)*, 2022 ONSC 653.
21. I am satisfied for the reasons set out above that the reverse vesting transaction is appropriate and necessary in this case. The value of the business as a going concern, which is in turn dependent upon the transfer on an efficient basis of the appropriate licences, permits and critical agreements and arrangements, depends upon this structure. In short, the factors set out by the Court in *Harte Gold (Re)* are satisfied here. In addition, I have concurrently considered the non-exhaustive list of factors as set out under s. 36(3) of the CCAA which align with the principles established in *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ONCA).
22. The consideration being paid pursuant to the Subscription is fair, reasonable, and also reflects a value of the assets being preserved under the reverse vesting structure.
23. Vesting relief will be required in the event, if it comes to pass, that the Back-up Transaction is implemented because the Transaction did not close. Approval of the Back-up Transaction now, however, reduces the required Court appearances and attendant costs, thereby preserving additional value for stakeholders.
24. Finally, with respect to the Transaction aspect of the relief sought today, I am satisfied that the Releases as contemplated by para. 28 of the draft order, and the more limited scope releases as contemplated by para. 29 of the draft order, are appropriate in the circumstances. They, too, are supported by all parties and I am satisfied that the Released Claims do not release claims not permitted to be released pursuant to s. 5.1(2) of the CCAA.
25. The parties to benefit from the releases have all contributed materially to the outcome achieved here and the value preserved thereby. The claims to be released are rationally connected to the purpose of the restructuring; the releases are fair, reasonable not overly broad; the restructuring may be jeopardized without them; they benefit the Applicants as well as the creditors generally; and contract counterparties and creditors have knowledge of the nature and effect of the proposed releases.
26. In short, the proposed Releases are consistent with those that have been previously approved by this Court and importantly, align with the factors set out by Chief Justice Morawetz in *Lydian*.
27. In sum, the Transaction, the Back-up Transaction, including in each case the reverse vesting structure and the releases, are appropriate and are approved.
28. The proposed Claims Process establishes an appropriate process for the identification, quantification and resolution or determination of unsecured claims against the Applicants. Those will be transferred to Residual Co.
29. I am satisfied that the notification process will provide Claimants with adequate notice and an opportunity to prove their Claims prior to either the Pre-Filing Claims Bar Date or the Restructuring Claims Bar Date, as applicable.

30. As necessary, the proposed adjudication procedure will facilitate the expeditious and fair resolution or determination of any disputes regarding the status and/or quantum of any Claim. Mr. Neils Ortved has agreed to serve as Claims Officer and he is amply qualified to do so.
31. A claims process may be approved pursuant to s. 11 of the CCAA, and is appropriate where it will streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost-efficient manner: See *CanWest Global Communications Corp, Re*, 2011 ONSC 2215.
32. The particular claims process proposed here has been tailored to the specific context of this proceeding, and I am satisfied that it provides for the efficient, cost-effective and streamlined adjudication of Claims against the Applicants and their directors and officers.
33. The extension of the existing stay until and including October 15, 2023 is also necessary and appropriate. It will provide the necessary time for the Applicants to attempt to maximize value for all stakeholders through the CCAA Proceedings and the Claims Process. I observe that the Subscription Agreement contemplates an Outside Date of September 15, 2023 to close either the Transactions or the Back-up Transactions.
34. The Applicants continue to act in good faith and with due diligence. The Updated Cash Flow Forecast (Appendix “G”) to the Third Report reflects that the Applicants are expected to maintain liquidity and fund operations up to October 15, 2023.
35. I am satisfied that the proposed stay extension will not materially prejudice any stakeholders and observe that the Monitor supports the proposed extension. It is granted.
36. The Monitor seeks a sealing order in respect of the Confidential Appendix to the Third Report which includes in summary form the economics of the competing Bids described above. Until the Transaction or Back-up Transaction is closed, it is critical, in order that the integrity of the process and the ability to remarket the Business and/or assets if need be, that the confidentiality of that economic analysis and the previous Bids, be maintained.
37. I am satisfied that the sealing relief, to be effective not permanently but only until further order of the Court which may be sought by motion on notice at any time, is appropriate and meets the test as articulated by the Supreme Court of Canada in *Sherman Estate*, refining the test as set out in *Sierra Club*.
38. Finally, I add the following at the request of the Ontario Securities Commission (“OSC”), and with the consent of all other parties. Nothing in the approval and reverse vesting order granted today shall affect the OSC’s rights and ability to pursue any investigation, take any action, exercise any discretion or commence any proceeding in respect of the Applicants under the *Securities Act (Ontario)*, R.S.O. 1990, c. S.5 (the “*Securities Act*”) or *Commodity Futures Act*, R.S.O. 1990, c. C.20 (the “*CFA*”) other than in connection with the enforcement of a payment ordered by the OSC prior to the date of the Initial Order dated June 5, 2023 (the “Filing Date”). In addition, nothing in the order shall release any claims by the OSC which may be advanced pursuant to the *Securities Act* or *CFA* against the Released Parties (as defined in paragraph 28 of the order) other than the Monitor and its Counsel, who shall continue to benefit fully from the releases provided for in paragraph 28 of the Order. For greater certainty nothing in the Order is intended to or shall: (i) encroach on the jurisdiction of the OSC in the matter of regulating the conduct of market participants other than in connection with the enforcement of a payment ordered by the OSC prior to the Filing Date; or (ii) vary or amend paragraphs 53 and 54 of the Amended and Restated Initial Order dated June 15, 2023 pertaining to Relief from Reporting Obligations. Further, nothing in this order shall constitute or be construed as an admission by the OSC that the Court has jurisdiction over matters that are within the exclusive jurisdiction of the OSC under the *Securities Act* and *CFA*.
39. For all of the above reasons, the relief sought is approved. I am satisfied as to both the proposed claims procedure order and the proposed approval and reverse vesting order.

40. Both orders to go in the form signed by me today, and which are effective immediately and without the necessity of issuing and entering.

Note: This Endorsement was originally released on August 29, 2023. Counsel brought to my attention the inadvertent admission of paragraph 38 above, included at the request of counsel for the OSC. Accordingly, this Endorsement was revised to include that paragraph on August 30, 2023. No other changes made.

Oleary, J.