

**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
TREES CORPORATION, ONTARIO CANNABIS HOLDINGS CORP., MIRACULO
INC., 2707461 ONTARIO INC., OCH ONTARIO CONSULTING CORP., AND 11819496
CANADA INC.**

Applicants

**FACTUM OF THE APPLICANTS
(Returnable on April 5, 2024)**

April 2, 2024

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TO: THE SERVICE LIST

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PART I - OVERVIEW¹

1. On December 22, 2023, the Applicants commenced proceedings under the *Companies' Creditors Arrangement Act*² (the "**CCAA Proceedings**") pursuant to the Initial Order granted by Chief Justice Morawetz (as amended and restated, the "**Initial Order**"). On January 29, 2024, the Court granted the SISP Approval Order that, among other things, approved the Stalking Horse Bid and authorized the Applicants and the Monitor to commence the SISP.

2. At this hearing, the Applicants seek two orders:
 - (a) **Approval and Reverse Vesting Order:** Among other things, approving the Share Purchase Agreement that provides for a going-concern sale transaction for the business of the Applicants, and channeling and vesting all Excluded Assets and Excluded Liabilities to ResidualCo; and

 - (b) **Stay Extension and Termination Order:** Among other things: (i) extending the stay of proceedings up to and including May 31, 2024, (ii) approving the Monitor's reports filed in the CCAA Proceedings, (iii) approving the fees and disbursements of the Monitor and its legal counsel, (iv) upon the filing of the Termination Certificate, providing for the termination of these CCAA Proceedings, and the

¹ Capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the affidavit of Jeffrey Holmgren sworn March 25, 2024 (the "**Holmgren Affidavit**"); Motion Record dated March 25, 2024 at Tab 2.

² R.S.C. 1985, c. C-36, as amended [[CCAA](#)].

Court-ordered charges, and discharging the Monitor, and (v) permitting ResidualCo to assign itself into bankruptcy.

3. The Court should grant the proposed relief for the following reasons:

- (a) **Approval and Reverse Vesting Order:** When taking into consideration all of the factors, the Share Purchase Agreement provides the best path forward for the Applicants and a going concern exit from the CCAA Proceedings, including the employment of at least 95% of all store-level employees. The Monitor extensively canvassed the market for potential bidders pursuant to the Court-approved SISF, which culminated in several competing bids submitted in respect of the Applicants' business. As a result of this competitive process, the original Stalking Horse Bid was increased by the Purchaser – maximizing value for the Applicants' secured creditors. The reverse vesting structure is necessary in this case because the Applicants operate in a highly regulated and licensed industry. Since cannabis retail licenses cannot be transferred, a traditional asset sale would cause significant delay, expense and uncertainty in closing the Transaction. In addition, since the proposed Transaction is a credit bid, the reverse vesting structure does not make any creditor worse off than under any other alternative.
- (b) **Stay Extension and Termination Order:** The Applicants require an extension to May 31, 2024 to close the Transaction. Once the Transaction is closed, it is not expected that ResidualCo will have any valuable assets, and it will be assigned into bankruptcy shortly thereafter. Seeking the Stay Extension and Termination Order

at this time avoids the costs of another motion and will permit the CCAA Proceedings to conclude in an orderly fashion.

4. For the reasons set out herein, the Applicants submit that the relief sought is fair, reasonable, and will advance these CCAA Proceedings for the benefit of the Applicants' stakeholders.

PART II - FACTS

A. Background

5. The facts with respect to this motion are briefly summarized below and are more fully set out in the Holmgren Affidavit.
6. The Applicants commenced the CCAA Proceedings on December 22, 2023, due to an ongoing liquidity crisis. The comeback hearing was held on January 2, 2024, in which the Court granted an Amended and Restated Initial Order, that among other things, approved the execution of a debtor in possession term sheet dated December 21, 2023 (as amended, the "**DIP Term Sheet**"), between One Plant (Retail) Corp. ("**One Plant**" and, in such capacity, the "**DIP Lender**") and the Applicants.³ On January 29, 2024, the Applicants obtained the Second Amended and Restated Initial Order that, among other things, approved additional DIP financing, and extended the stay period up to and including April 12, 2024.⁴

³ Holmgren Affidavit at para 6.

⁴ Holmgren Affidavit at para 7.

7. On January 29, 2024, the Applicants sought and obtained the SISP Approval Order, which, among other things: (a) approved the SISP and authorized the Applicants and the Monitor to immediately commence the SISP; and (b) approved the Stalking Horse Agreement between Trees and One Plant (in such capacity, the “**Stalking Horse Bidder**”) for the purpose of serving as the Stalking Horse Bid under the SISP.⁵

8. The Stalking Horse Bid provided for the acquisition of the Applicants as a going concern through the purchase of the shares of Trees in exchange for a purchase price comprised of: (a) the Credit Bid Consideration, (b) the Pre-Filing GST/HST Obligations, and (c) the Cash Consideration (each as defined in the Stalking Horse Agreement). As of January 29, 2024, consideration provided by the Stalking Horse Bid was estimated to be approximately \$3.6 million.⁶

B. The SISP

9. The SISP solicited interest in and opportunities for: (a) one or more sales or partial sales of all or a portion of the Business or Assets of the Applicants; and/or (b) an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Applicants or their Business. The SISP provided the Applicants with the latitude to pursue both asset and share transactions (including through a reverse vesting structure).⁷

⁵ Holmgren Affidavit at para 8.

⁶ Second Report of FTI Consulting Canada Inc. dated March 27, 2024 [the “**Second Report**”], Appendix E: First Report of the Monitor at para 26(c).

⁷ Holmgren Affidavit at para 11.

10. The Monitor sent a Teaser Letter to 144 Known Potential Bidders. The Monitor received executed confidentiality and non-disclosure agreements from 19 potential bidders and provided each of these parties with access to the virtual data room facilitated by the Monitor for purposes of the SISP.⁸
11. Following the Phase I Bid Deadline, the Monitor, in consultation with the Applicants, determined that three bidders were deemed Qualified Phase I Bidders and were invited to participate in Phase II of the SISP.⁹
12. Prior to the Phase II Bid Deadline, the Monitor received binding offers from two bidders (together, the “**Portion Bidders**”). Both offers were Portion Bids, which, when combined, constituted an offer for the entirety of the Applicants’ British Columbia and Ontario businesses and exceeded the Minimum Bid Amount (such combined bid, the “**Aggregate Bid**”).¹⁰ The Monitor recognized the Aggregate Bid as a Superior Offer in accordance with the SISP and declared an Auction.¹¹
13. By March 20, 2024, the Stalking Horse Bidder had substantially completed its purchase of certain secured convertible promissory notes issued by Trees to various noteholders in the aggregate principal amount of \$1,005,000 (the “**Secured Convertible Notes**”). The Stalking Horse Bidder advised the Monitor that if an Auction was necessary, it intended to

⁸ Holmgren Affidavit at paras 13 & 14.

⁹ Holmgren Affidavit at para 15.

¹⁰ Holmgren Affidavit at para 17.

¹¹ Holmgren Affidavit at para 21.

increase the value of its credit bid by the total indebtedness outstanding under the Secured Convertible Notes.¹²

14. Accordingly, on March 20, 2024, the Monitor also advised the Portion Bidders that the Stalking Horse Bidder intended to credit bid the Secured Convertible Notes at the Auction, which would increase its bid by approximately \$1.1 million.¹³
15. On March 20, 2024, both of the Portion Bidders separately advised the Monitor that they were unwilling to increase their bids during the Auction in an amount that exceeded the Stalking Horse Bidder's anticipated bid increase of approximately \$1.1 million, and that they were withdrawing their respective bids from the SISP.¹⁴ As a result, the Stalking Horse Bidder was declared the Successful Bidder under the SISP.¹⁵

C. The Share Purchase Agreement and Transaction

16. On March 25, 2024, Trees and One Plant (in such capacity, the "**Purchaser**") entered into an amended Share Purchase Agreement.¹⁶ The amendments, among other things, provided for an increase to the Purchase Price represented by the Purchaser's credit bid of the Secured Convertible Notes.
17. The salient terms of the Share Purchase Agreement are summarized as follows:¹⁷

¹² Holmgren Affidavit at para 18.

¹³ Holmgren Affidavit at para 21.

¹⁴ Second Report at para 35.

¹⁵ Holmgren Affidavit at para 22.

¹⁶ Holmgren Affidavit at para 3.

¹⁷ Holmgren Affidavit at para 24.

- (a) One Plant will acquire 100% of the existing and outstanding shares of Trees;
- (b) the Purchase Price is estimated to be \$4,887,144.48, calculated as of April 5, 2024, and includes: (i) the Credit Bid Consideration (estimated to be approximately \$4.5 million as of April 5, 2024), (ii) the Cash Consideration (which is estimated to require a cash payment of approximately \$500,000, and (iii) satisfaction of the Pre-Filing GST/HST Obligations;¹⁸
- (c) all Excluded Contracts, Excluded Assets and Excluded Liabilities will be channelled to and vest in ResidualCo;
- (d) One Plant shall continue to employ at least 95% of store-level employees; and
- (e) closing is subject to customary conditions precedent, subject to approval of the change in control of the Applicants by the applicable Governmental Authority.

D. Approval of Monitor's Activities and Fees

- 18. The Applicants seek approval of the First and Second Report of the Monitor and the fees and disbursements of the Monitor and its legal counsel, Torys LLP ("**Torys**") for the period from January 3, 2024, to the date of the Monitor's discharge.
- 19. As set out in the Affidavit of Jeffrey Rosenberg sworn March 27, 2024 (the "**Rosenberg Affidavit**"), the total fees and disbursements (inclusive of HST) of the Monitor during the period from January 3, 2024, to March 24, 2024, are \$471,866.55.¹⁹ As set out in the

¹⁸ Second Report at para 42(c).

¹⁹ Second Report, Appendix C: Rosenberg Affidavit at para 2.

Affidavit of David Bish sworn March 26, 2024 (the “**Bish Affidavit**”, together with the Rosenberg Affidavit, the “**Fee Affidavits**”), the total fees and disbursements (inclusive of HST) of Torys during the period from January 3, 2024, to March 24, 2024, are \$239,582.90.²⁰

20. The Monitor estimates that the total fees and disbursements of the Monitor and Torys that will be incurred in connection with completing the remaining tasks prior to the Monitor’s discharge should not exceed \$225,000.²¹ The DIP Lender has indicated its support for the approval of the Monitor’s and Torys’ fees and disbursements.²²

E. CCAA Termination

21. The Applicants also seek the proposed Stay Extension and Termination Order to bring a conclusion to these CCAA Proceedings. Following closing of the Transaction, ResidualCo is not expected to have any material assets.²³
22. The proposed Stay Extension and Termination Order provides that these CCAA Proceedings will be terminated once the Monitor has determined that all administrative matters in connection with the CCAA Proceedings have been completed, and the Monitor serves the Termination Certificate on the Service List.²⁴ At that time, FTI will be released and discharged as the Monitor, and each of the Court-ordered charges will be discharged.²⁵

²⁰ Second Report, Appendix D: Bish Affidavit at para 4.

²¹ Second Report at para 70.

²² Second Report at para 69.

²³ Holmgren Affidavit at para 55.

²⁴ Holmgren Affidavit at para 56.

²⁵ Holmgren Affidavit at para 57.

23. To facilitate the orderly wind-up of ResidualCo, the proposed Stay Extension and Termination Order authorizes ResidualCo to make an assignment in bankruptcy pursuant to the *Bankruptcy and Insolvency Act*²⁶ prior to the CCAA Termination Time.²⁷

PART III - ISSUES

24. The Court must determine the following issues on this motion:
- (a) Should the Court approve the Share Purchase Agreement and the Transaction?
 - (b) Should the Court grant the Approval and Reverse Vesting Order?
 - (c) Should the Court grant the requested releases?
 - (d) Should the Court grant the Stay Extension and Termination Order?

PART IV - LAW & ARGUMENT

ISSUE 1: The Court Should Approve the Share Purchase Agreement and the Transaction

Jurisdiction to Approve the Transaction

25. When exercising its jurisdiction under section 11 of the CCAA to approve a reverse vesting transaction, this Court has concurrently considered the non-exhaustive factors enumerated under subsection 36(3) of the CCAA and those articulated in *Royal Bank v Soundair*.²⁸

Together, these factors include:

²⁶ R.S.C. 1985, c. B-3 [BIA].

²⁷ Holmgren Affidavit at para 60.

²⁸ CCAA, *supra* s. 36(3); *Harte Gold (Re)*, 2022 ONSC 653 [*Harte Gold*] at [paras 20-21](#); *Royal Bank v Soundair Corp.*, 1991 CanLII 2727, 4 OR (3d) 1(ONCA).

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the monitor approved the process leading to the proposed sale or disposition;
 - (c) whether the monitor filed with the Court a report stating that in its opinion the sale or disposition would be more beneficial to creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties;
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value; and
 - (g) whether sufficient effort has been made to obtain the best price and that the debtors have not acted improvidently.
26. These factors support the approval of the Share Purchase Agreement and the Transaction:
- (a) **The process leading to the Share Purchase Agreement and the Transaction was reasonable:** During the CCAA Proceedings, the Monitor broadly canvassed the market under the SISP by sending a Teaser Letter to 144 Known Potential Bidders. The SISP was developed in consultation with the Monitor and the Monitor administered the SISP in accordance with its terms and the SISP Approval Order.²⁹
 - (b) **The Second Report opines that the Transaction is more favourable than a liquidation:** The Second Report concludes that the only viable alternative to the Transaction is a liquidation of the Applicants' assets, which would produce a worse

²⁹ Holmgren Affidavit at para 38; Second Report at para 21.

result, or no more favourable a result as the reverse vesting structure would produce, for all stakeholders.³⁰

- (c) **Stakeholders were consulted during the sale process:** The Purchaser, being the Applicants' principal and senior secured creditor, was consulted in the development and negotiating of the SISP and supports the relief sought by the Applicants.³¹ In addition, the Applicants' counsel offered a meeting with the remaining secured creditor of Ontario Cannabis Holdings Corp. that is not the Purchaser, to discuss the proposed Transaction.
- (d) **The Share Purchase Agreement and the Transaction allows various stakeholders to maintain their rights:** As referenced below, the Applicants' stakeholders are no worse off than they would have been under any other viable alternative.³²
- (e) **Sufficient effort has been made to obtain the best price and the Applicants have not acted improvidently:** The Monitor and the Applicants undertook extensive solicitation efforts during the SISP, and it resulted in a competitive process for the Applicants' business. The SISP resulted in the Share Purchase Agreement's purchase price being increased by approximately \$1.1 million, along with recoveries for the former holders of the Secured Convertible Notes—the most senior secured creditor group of Trees, other than the Purchaser. Further, prior to the commencement of the CCAA Proceedings, the Applicants pursued various debt or equity opportunities as part of the Applicants' comprehensive review of options to address its liquidity issues, all of which were unsuccessful.³³

27. The Monitor supports the approval of the Share Purchase Agreement and the Transaction.³⁴

³⁰ Second Report at para 44(c).

³¹ Holmgren Affidavit at para 41; Second Report at para 43(d).

³² Holmgren Affidavit at paras 37-39; Second Report at para 44(c).

³³ Holmgren Affidavit at paras 10-22 and 26; Second Report at para 14.

³⁴ Second Report at para 45.

ISSUE 2: The Court should Grant the Approval and Reverse Vesting Order

28. While reverse vesting transactions have been described as a relatively new structure to achieve the remedial objectives of the CCAA and are not considered the “norm”, reverse vesting transactions have been recognized on a number of occasions as an appropriate way for a debtor to sell its business as a going-concern where the circumstances justify such a structure.³⁵
29. The jurisdiction to approve a transaction that is to be implemented through a reverse vesting order is found in section 11 of the CCAA, which gives the Court broad powers to make any order it thinks fit.³⁶
30. In this case, compelling circumstances exist to justify a reverse vesting structure. The reverse vesting structure is necessary in this case to give effect to the best possible outcome and a going-concern restructuring of the Applicants’ business.³⁷
31. In *Harte Gold* and *Acerus*, Justice Penny held that the following factors should inform the Court’s consideration of a proposed reverse vesting transaction:
- (a) whether the reverse vesting order is necessary;
 - (b) whether the reverse vesting transaction structures produces an economic result at least as favourable as any other viable alternative;

³⁵ *Harte Gold*, *supra* at [para 38](#).

³⁶ *Harte Gold*, *supra* at [paras 36-37](#).

³⁷ *Harte Gold*, *supra* at [para 38](#).

- (c) whether any stakeholder is worse off under the reverse vesting transaction structure than they would have been under any other viable alternative; and
 - (d) whether the consideration being paid for the debtors' business reflects the importance and value of the licences and permits (or other intangible assets) being preserved under the reverse vesting transaction structure.³⁸
32. Courts have held that reverse vesting orders are generally appropriate in at least three circumstances:
- (a) where the debtor operates in a highly-regulated environment in which its existing permits, licences or other rights are difficult or impossible to assign to a purchaser;
 - (b) where the debtor is party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser; and
 - (c) where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.³⁹
33. The foregoing considerations and factors support the granting of the Approval and Reverse Vesting Order:
- (a) **The reverse vesting structure is necessary in the circumstances:** The Applicants operate in the cannabis industry which is heavily regulated. In order for the Applicants to carry on their business, they are required to maintain various licenses and permits. The Applicants operate nine cannabis retail stores across British Columbia and Ontario pursuant to cannabis retail and operator licenses that would

³⁸ *Harte Gold*, supra at [para 38](#); *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314, at para [12](#) [*Acerus*].

³⁹ *Arrangement relatif à Blackrock Metals Inc*, 2022 QCCS 2828 at [paras. 114-116](#); *Harte Gold*, supra at [para. 71](#); *Quest University*, supra at [para. 136](#), referring to the RVO granted in *Re Comark Holdings Inc et al*, (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. SCJ [Commercial List]) proceeding to preserve tax attributes, and [para. 142](#), referring to the RVO granted in *JMB Crushing Systems Inc. (Re)*, 2020 ABQB 763 to preserve both licenses and tax attributes.

be at considerable risk of being lost if an asset transfer were to be implemented. As noted by the Monitor, a reverse vesting structure typically takes significantly less time to obtain regulatory approvals associated with a change in management. The Applicants do not have sufficient liquidity to remain in a CCAA process for the extended amount of time transferring the licenses would entail.⁴⁰

- (b) **The Transaction produces an economic result more favourable than any other alternative:** The Transaction represents the best possible outcome for the Applicants and their stakeholders in the circumstances. Without the Approval and Reverse Vesting Order, which is a condition to the Share Purchase Agreement, there would be substantial delay in transferring the permits and licenses, and the ability to transfer some or all of them at all would be at risk. There is no other viable alternative to the Transaction – no bids ultimately materialized under the SISP that provided for better collective recoveries to the Applicants’ stakeholders than those provided by the Share Purchase Agreement.⁴¹
- (c) **Stakeholders are not worse off under the reverse vesting structure:** As discussed above, there is no viable alternative to the Approval and Reverse Vesting Order. The only realistic alternative is a liquidation scenario, which would produce a worse result for all stakeholders. The Applicants do not own a significant amount of “hard” assets that can be liquidated. The value is the Applicants’ brand and the going concern continuation of the business. In a liquidation, after the payment of the professional fees and the DIP Lender, it is unlikely that there would be funds available for distribution to any creditors. Employees would also lose the ongoing employment provided by the Transaction. Further, the Purchaser’s assumption of various liabilities provides a benefit for stakeholders that would not have otherwise had this benefit.⁴² The Assumed Liabilities under the Share Purchase Agreement include: (a) all Post-Filing Claims; (b) all liabilities of the Applicants arising from

⁴⁰ Holmgren Affidavit at para 31; Second Report at para 44(a).

⁴¹ Holmgren Affidavit at paras 32-35, 37 and 38; Second Report at para 44(b).

⁴² Second Report at para 44(c).

and after Closing; (c) Intercompany Claims; (d) the Pre-Filing GST/HST Obligations; and (e) the Administration Expense Amount.⁴³

- (d) **The consideration paid is fair, reasonable and reflects the importance of the assets being preserved under the reserve vesting structure:** The purchase price for the shares is approximately \$4.9 million. This purchase price is fair and reasonable, as confirmed by the Court-approved SISP. The consideration being paid by the Purchaser is directly attributable to the value and importance of the Applicants' permits and licenses.⁴⁴

34. As this Court recognized in *Harte Gold*, where shareholders “have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders.”⁴⁵ In this case, certain secured creditors are not expected to recover amounts owed to them. It is clear that there is no value for the current shareholders of the Applicants.

35. The Monitor supports granting the proposed Approval and Reverse Vesting Order.⁴⁶

ISSUE 3: The Court Should Grant the Releases in the Approval and Reverse Vesting Order

36. The proposed Approval and Reverse Vesting Order includes releases in favour of the Released Parties from the Released Claims. The Released Parties include: (a) the Applicants and its representatives, (b) the first director of ResidualCo, and its legal counsel, and (c) One Plant, in its various capacities, and its representatives.⁴⁷

⁴³ Holmgren Affidavit at para 24.

⁴⁴ Holmgren Affidavit at paras 33-36; Second Report at para 44(d)

⁴⁵ *Harte Gold*, *supra* at [para 64](#).

⁴⁶ Second Report at para 45.

⁴⁷ Holmgren Affidavit at para 4(a)(x).

37. The Released Claims covers any and all present and future claims against the Released Parties based upon any fact or matter of occurrence in respect of the CCAA Proceedings, the Share Purchase Agreement and the completion of the Transaction. The Released Claims do not release claims which are not permitted to be released pursuant to section 5.1(2) of the CCAA.⁴⁸
38. Releases for directors and officers and other advisors to debtor companies are a common feature of CCAA plans. The absence of a CCAA plan, however, does not deprive the court of the jurisdiction to approve releases for these parties. It does not limit the jurisdiction of the Court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.⁴⁹
39. The CCAA Court has approved releases in the absence of a CCAA plan, including when granting a vesting order. These releases have been in favour of, among other parties, directors, officers, counsel, employees, shareholders, and advisors.⁵⁰
40. Chief Justice Morawetz's decision in *Lydian* sets out a list of non-exhaustive factors that the Court should consider when considering if a release is appropriate in the circumstances:
- (a) whether the claims to be released are rationally connected to the purpose of the plan;
 - (b) whether the plan can succeed without the releases;

⁴⁸ Holmgren Affidavit at para 43.

⁴⁹ *Green Relief Inc. (Re)*, 2020 ONSC 6837 [*Green Relief*] at [paras 23 and 25](#).

⁵⁰ *Green Relief*, *ibid* at [para 76](#); In the Matter of the CCAA Proceeding of Fire & Flower Holdings Corp. *et al*, Court File No. CV-23-00700581-00CL, Endorsement of Justice Osborne dated August 30, 2023 at paras [24-26](#).

- (c) whether the parties being released contributed to the plan;
- (d) whether the releases benefit the debtors as well as the creditors generally;
- (e) whether the creditors voting on the plan have knowledge of the nature and effect of the releases; and
- (f) whether the releases are fair, reasonable and not overly-broad.⁵¹

41. The CCAA Court has held that it is not necessary for each of the above factors to apply in order for the Court to find it appropriate to grant a release.⁵²

42. The releases are reasonable and appropriate in the circumstances and should be granted for the following reasons:

- (i) **The Released Claims are rationally connected to the purpose of the restructuring:** The Released Claims are rationally connected to the Applicants' restructuring because they are limited to claims arising during the CCAA Proceedings, or in connection with the Share Purchase Agreement and the Transaction.⁵³
- (ii) **The Released Parties contributed to the restructuring:** In the preceding stages of these CCAA Proceedings, it was highly litigious. The Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of the Applicants were instrumental to the conduct of the SISP and the continued operations of the Applicants during the CCAA Proceedings. One Plant provided the DIP Facility necessary to support the Applicants through the restructuring and

⁵¹ *Lydian International Limited (Re)*, 2020 ONSC 4006 [*Lydian*] at [para 54](#).

⁵² *Green Relief*, *supra* at [para 28](#).

⁵³ Holmgren Affidavit at paras 43 and 44.

agreed to the Stalking Horse Bid to provide certainty that a going-concern solution for the Applicants had already been identified. Each of the Released Parties have materially contributed time, energy and resources to achieve this outcome and accordingly, it is appropriate to grant the releases to these parties.⁵⁴

- (iii) **The releases are fair, reasonable and not overly broad:** The releases are fair and reasonable because they are sufficiently narrow in the circumstances and carves out claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA in respect of the Applicants' directors.⁵⁵
- (iv) **Creditors have knowledge of the nature and effect of the releases:** Stakeholders on the Service List were served with materials relating to this motion. To date, no creditor has objected to the releases sought in the Approval and Reverse Vesting Order.

- 43. As part of the Stay Extension and Termination Order, the Applicants also seek to discharge FTI from its role as Monitor upon the filing of the Termination Certificate. The discharge of the Monitor is common as part of the orderly termination of a CCAA proceeding.⁵⁶
- 44. The Applicants also seek releases in favour of the Monitor and its representatives as part of the proposed Approval and Reverse Vesting Order.
- 45. The *Lydian* factors support the approval of the releases for the Monitor and its representatives. The Monitor and its counsel have made material and essential contributions to this restructuring. The Monitor conducted the SISP, which process ultimately led to recoveries for the former holders of the Secured Convertible Notes and

⁵⁴ Holmgren Affidavit at para 45; See *Allen-Vanguard Corporation (Re)*, 2011 ONSC 5017 at para [61](#).

⁵⁵ Holmgren Affidavit at para 43.

⁵⁶ *Re Peraso Technologies Inc.* (28 October 2020), Toronto CV-20-00642010-00CL (Ont. Sup. Ct. [Comm. List] Order (Termination of CCAA Proceedings)) [*Peraso*].

the increase of approximately \$1.1 million to the consideration paid for the Applicants' business. As reflected in the Monitor's First and Second Reports, the Monitor and its counsel have worked diligently to ensure that these proceedings resulted in a going concern solution for the Applicants' business that treats all stakeholders fairly and reasonably. As stated by Justice Koehnen in the CCAA proceeding of *Green Relief*, a CCAA proceeding cannot proceed without a Monitor, Monitor's counsel or company counsel.⁵⁷

46. Looking forward, the Monitor and its counsel will: (i) assist in closing the Transaction; (ii) distribute the Administrative Expense Amount on account of Administrative Expense Costs and other amounts, if any, secured by the CCAA Charges; (iii) oversee an orderly wind down of these CCAA Proceedings; and (iv) ensure the completion of all other remaining administrative tasks. Once the Termination Certificate has been filed, the Monitor will have completed its mandate.⁵⁸
47. Accordingly, it is appropriate for the Monitor Released Parties to be released from all Claims as provided for by the proposed Approval and Reverse Vesting Order.

ISSUE 4: The Court Should Grant the Stay Extension and Termination Order

Extension of the Stay Period

48. The Stay Period currently expires on April 12, 2024. The Applicants request an extension of the Stay Period to May 31, 2024. The extension of the Stay Period is necessary and appropriate in the circumstances to provide the Applicants the time necessary to close the

⁵⁷ *Green Relief*, *ibid* at [para 50](#).

⁵⁸ Second Report at paras 59-60.

Transaction and allow the Applicants and ResidualCo to complete the winding down of its outstanding liabilities.⁵⁹

49. The Share Purchase Agreement contemplates an Outside Date of April 30, 2024 to close the Transaction. However, it is unclear when the requisite regulatory authorities will provide the approvals required to satisfy the closing conditions in the Share Purchase Agreement.⁶⁰
50. 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. The Court must be satisfied that circumstances exist that make the order appropriate, and that the Applicants have acted, and are acting, in good faith and with due diligence.
51. The Applicants have acted and are continuing to act in good faith and with due diligence in these CCAA Proceedings to stabilize the Applicants' business and operations.⁶¹
52. The extension of the Stay Period would minimize the costs associated with an additional hearing. Further, extending the Stay Period to May 31, 2024, should provide ample time for the Applicants and the Purchaser, with the assistance of the Monitor, to close the Transaction.⁶²

⁵⁹ Holmgren Affidavit at para 47.

⁶⁰ Holmgren Affidavit at para 48.

⁶¹ Holmgren Affidavit at para 51; Second Report of the Monitor at para 56.

⁶² Holmgren Affidavit at para 49.

53. An extension of the Stay Period to and including May 31, 2024, is necessary and appropriate in the circumstances to provide the Applicants with the time necessary to close the Transaction, for the Monitor to complete any remaining administrative tasks, and to assign ResidualCo into bankruptcy.⁶³
54. The Applicants are projected to have sufficient cash to continue their operations during the requested Stay Period.⁶⁴ The Monitor and the DIP Lender are both supportive of the proposed extension of the Stay Period.⁶⁵

The Monitor's Reports and Fees Should be Approved

55. Courts have recognized the policy and practical reasons to approve the Monitor's activities and provide a level of protection for the Monitor during CCAA proceedings. In the present case, the Monitor's Reports and the conduct and activities of the Monitor referred to therein should be approved.⁶⁶ The Monitor has acted responsibly and carried out its activities in a manner consistent with the provisions of the CCAA and in compliance with the Initial Order. No party has put forward evidence to the contrary.
56. Pursuant to the Initial Order, the Monitor and its counsel are entitled to be paid their reasonable fees and disbursements, each at their standard rates and charges.⁶⁷ The Initial Order also requires the Monitor and its counsel to pass their accounts.⁶⁸ A summary of the

⁶³ Holmgren Affidavit at para 55.

⁶⁴ Second Report at para 69.

⁶⁵ Second Report at para 74.

⁶⁶ *Target Canada Inc. (Re)*, 2015 ONSC 7574 at [para 2](#).

⁶⁷ *Trees et al*, Initial Order dated December 22, 2023 [Court File No. CV-23-00711935-00CL] at para 28.

⁶⁸ *Ibid* at para 29.

fees for FTI and Torys for the period of January 3, 2024, through March 24, 2024, are set out in the Fee Affidavits.⁶⁹ The Applicants also seek approval of FTI and Torys' fees to be incurred in completing the remaining administrative tasks of the Monitor.

57. The overarching test on a motion to pass accounts is to consider the “overriding principle of reasonableness”, with the predominant consideration in such assessment being the overall value contributed by the monitor and its counsel. As stated by Chief Justice Morawetz in the CCAA proceedings of *Laurentian University*, the Court does not engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of a professional services may not be instructive when looked at in isolation.⁷⁰
58. The Court has articulated the following non-exhaustive list of factors when evaluating the fairness and reasonableness of a court-appointed officer's fees:
- (a) the nature, extent and value of the assets being handled;
 - (b) the complications and difficulties encountered;
 - (c) the degree of assistance provided by the company, its officers or its employees;
 - (d) the time spent;
 - (e) the Monitor's knowledge, experience and skill;
 - (f) the diligence and thoroughness displayed;
 - (g) the responsibilities assumed;

⁶⁹ Second Report, Appendix C: Rosenberg Affidavit at Exhibit B and Appendix D: Bish Affidavit at Exhibit B.

⁷⁰ *Laurentian University of Sudbury*, 2022 ONSC 2927 at [para 9](#) [*Laurentian*]; *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 at [para 45](#).

- (h) the results achieved; and
- (i) the cost of comparable services when performed in a prudent and economical manner.⁷¹

59. Applying these factors, it is respectively submitted that the accounts of FTI and Torys are fair and reasonable. As discussed above, FTI and Torys have provided essential services to the Applicants' restructuring efforts. The Monitor implemented and conducted the SISP, which has resulted in a successful outcome that will allow the Applicants to continue their business as a going concern for the benefit of their stakeholders. Additionally, the economic costs of FTI's and Torys' fees and disbursements are effectively borne by the DIP Lender through the DIP Facility. The DIP Lender supports the Applicants' motion for the Stay Extension and Termination Order, including the approval of these fees and disbursements.

60. The Monitor's estimated subsequent fees and disbursements to be incurred until these CCAA Proceedings are terminated should also be approved to avoid the costs and inefficient use of judicial resources by requiring a separate hearing.

The CCAA Should be Terminated upon the Filing of the Termination Certificate

61. The Court should grant the proposed Stay Extension and CCAA Termination Order, which provides for the termination of the CCAA Proceedings and the Monitor's discharge upon the filing of the Termination Certificate.

⁷¹ *Laurentian* at [para 10](#).

62. The Court has the jurisdiction to terminate the CCAA Proceedings pursuant to its broad jurisdiction under section 11 of the CCAA.
63. It is anticipated that the CCAA Proceedings will be terminated once the Transaction has closed and the remaining administrative activities of the Monitor have been completed. At that time, ResidualCo will be the sole debtor company in this proceeding, will not have any material assets and there will be no further reason for the CCAA Proceedings.
64. The Court has previously granted similar orders when there are no material steps left in the CCAA proceedings and allowed for termination of a CCAA proceeding upon the filing of the Termination Certificate at a future date.⁷² The CCAA Proceedings have served their purpose by providing the Applicants with the stability to restructure their operations and achieve a successful outcome in the SISF. The Court's authority to terminate these CCAA Proceedings upon the filing of the Termination Certificate also avoids the costs of a future motion.
65. The Monitor supports the termination of these CCAA Proceedings on the terms set forth in the Stay Extension and Termination Order.⁷³

⁷² *Peraso, supra*; [Re Chalice Brands Ltd.](#) (28 September 2023), Toronto CV-23-00699872-00CL (Ont. Sup. Ct. [Comm. List] CCAA Termination Order).

⁷³ Holmgren Affidavit at para 62; Second Report at para 50.

PART V - ORDER SOUGHT

66. For all of the foregoing reasons, the Applicants respectfully submit that this Court grant the Approval and Reverse Vesting Order and the Stay Extension and Termination Order in the forms requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of April, 2024.

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**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [*Acerus Pharmaceuticals Corporation \(Re\)*](#), 2023 ONSC 3314.
2. [*Allen-Vanguard Corporation \(Re\)*](#), 2011 ONSC 5017
3. [*Arrangement relatif à Blackrock Metals Inc*](#), 2022 QCCS 2828.
4. [*Bank of Nova Scotia v Diemer*](#), 2014 ONCA 851.
5. [*Fire & Flower Holdings Corp*](#), Court File No. CV-23-00700581-00CL, Endorsement of Justice Osborne dated August 30, 2023.
6. [*Green Relief Inc \(Re\)*](#), 2020 ONSC 6837.
7. [*Harte Gold \(Re\)*](#), 2022 ONSC 653.
8. [*Laurentian University of Sudbury*](#), 2022 ONSC 2927.
9. [*Lydian International Limited \(Re\)*](#), 2020 ONSC 4006.
10. [*Quest University Canada \(Re\)*](#), 2020 BCSC 1883.
11. [*Re Chalice Brands Ltd.*](#) (28 September 2023), Toronto CV-23-00699872-00CL (Ont. Sup. Ct. [Comm. List] CCAA Termination Order).
12. [*Re Peraso Technologies Inc.*](#) (28 October 2020), Toronto CV-20-00642010-00CL (Ont. Sup. Ct. [Comm. List] CCAA Termination Order).
13. [*Royal Bank v Soundair Corp*](#), 1991 CanLII 2727, 4 OR (3d) 1(ONCA).
14. [*Target Canada Inc \(Re\)*](#), 2015 ONSC 7574.

SCHEDULE “B” RELEVANT STATUTES

[*Bankruptcy and Insolvency Act, RSC 1985, c B-3.*](#)

Interpretation

Definitions

2 In this Act,

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

Assignments

Assignment for general benefit of creditors

49 (1) An insolvent person or, if deceased, the executor or administrator of their estate or the liquidator of the succession, with the leave of the court, may make an assignment of all the insolvent person’s property for the general benefit of the insolvent person’s creditors.

[*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.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Stays, etc. — other than initial application

11.01 (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.

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Restriction on disposition of business assets

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

Notice to creditors

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

Factors to be considered

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

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;

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

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

Additional factors — related persons

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

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

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

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

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

Restriction — employers

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

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is

included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TREES CORPORATION, ONTARIO CANNABIS HOLDINGS CORP., MIRACULO INC., 2707461 ONTARIO INC., OCH ONTARIO CONSULTING CORP., AND 11819496 CANADA INC.

Court File No. CV-23-00711935-00CL

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

Proceedings commenced at Toronto, Ontario

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