Court File No. CV-24-00715773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BZAM LTD., BZAM HOLDINGS INC., BZAM MANAGEMENT INC., BZAM CANNABIS CORP., FOLIUM LIFE SCIENCE INC., 102172093 SASKATCHEWAN LTD., THE GREEN ORGANIC DUTCHMAN LTD., MEDICAN ORGANIC INC., HIGH ROAD HOLDING CORP. and FINAL BELL CORP.

Applicants

AIDE MEMOIRE OF
CORTLAND CREDIT LENDING CORPORATION

August 6, 2024

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TO: **THE SERVICE LIST**

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RE: SCHEDULING THRESHOLD MOTION RE CORTLAND PRIORITY

1. At this case conference Cortland Credit Lending Corporation ("**Cortland**") asks that the Court schedule a threshold motion for the determination of the priority of its claims over those of Final Bell Holdings Limited ("**Final Bell**") assuming Final Bell were to obtain the relief it seeks (which Cortland denies) and in advance of the trial of Final Bell's claims. This step fairly balances procedural fairness to all parties, judicial economy and the need for cost-effective and timely insolvency proceedings.

2. This CCAA proceeding should already have been long completed. Instead, it has been delayed and made significantly more expensive by the equity claims asserted by a shareholder of BZAM Holdings Ltd ("**BZAM**"), Final Bell.

3. This court already gave Final Bell its opportunity to try its rescission claim over its shares in BZAM. On the eve of that summary trial, Final Bell was granted a contested

adjournment. It then strategically amended its claim to seek a constructive trust instead of rescission. Final Bell now asserts a blanket priority for its claims, notwithstanding that:

(a) It was on notice of the DIP financing and DIP charge that secure all of Cortland's lending; and

(b) Cortland is a bona fide third-party purchaser for value without notice, having advanced all of its pre-filing security for good consideration and without knowledge of Final Bell's claims.

4. Final Bell's allegations of misrepresentation giving rise to its acquisition of BZAM shares are – perhaps deliberately – factually complex.

5. The evidentiary and legal basis for Cortland's priority is not. The evidentiary basis for Cortland's priority rests in uncontested – or uncontestable facts. The legal basis for Cortland's priority rests in the well-delineated doctrines of collateral attack, DIP super-priority and secured lender priorities.

6. As a result, the issues on the threshold motion lend themselves well to the exercise of the court's CCAA case management function: to schedule and determine issues affecting the outcome of an insolvency proceeding in the most efficient and effective manner for <u>all</u> stakeholders – not just one single contingent litigation creditor (with an equity claim). As recently noted by Madam Justice Kimmel in highly contested proceedings – including bitter disputes over the manner, timing and process of adjudicating litigious issues:

> [42] The court's May 24, 2024 case management direction was made with a view to a just expeditious, streamlined and orderly process for an eventual sale approval motion that will need to be heard on a single day shortly after the conclusion of the Sale Process if there is a successful bid coming out of that process. **In these multi-issue proceedings, issues need to be sequenced and determined in an orderly manner. That is part of the court's case management function**.[1] [emphasis added]

7. If Cortland is correct that its security cannot be subordinated to Final Bell, then the continuation of the summary trial of Final Bell's claims will be moot. There will be no proceeds from which Final Bell can recover.

8. At every turn in this application Final Bell has asserted the primacy of its rights to procedural fairness, invoking inapposite reliance on rules such as the "plain and obvious" test. It will no doubt continue with such tactics and invocations at this case conference.

9. Procedural fairness is important. In context. It becomes a tactical trap where it is relied upon to deprive stakeholders of substantive relief without underlying justification. That is why CCAA courts routinely dispose of contested issues of fact, including on paper records and upon legal grounds. This is one such circumstance.

10. To continue with its claim, Final Bell must surmount very high legal hurdles that rest on limited facts. By way of illustration, this Court's Amended and Restated Initial Order (the "**ARIO**") approved Cortland's DIP financing and granted Cortland a DIP charge with super priority over all claims, expressly including super priority over all trusts.[2] The ARIO was granted on notice to Final Bell, was unopposed by Final Bell and was not

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[1] *In the Matter of a Plan of Comprise or Arrangement of Tacora Resources Inc.* CV-23-00707394-CL, June 5, 2024 at 42.

[2] The super-priority of the DIP charge was only subject to two express exclusions: the Administration Charge and a pre-existing third party mortgage on one piece of real property.

appealed. These facts are uncontestable. Final Bell's current position is therefore an impermissible collateral attack on the ARIO.

11. Equally, granting Final Bell a constructive trust, contrary to the priorities ordered in the ARIO (another uncontested fact), would be contrary to the established Supreme Court of Canada jurisprudence on DIP charges, and would undermine and upend the insolvency process in Canada. As explained by Justice Côté, writing for the majority in *Canada v. Canada North Group Inc,* 2021 SCC 30:

> [30] Super-priority charges in favour of the monitor, financiers and other professionals are required to derive the most value for the stakeholders. They are beneficial to all creditors, including those whose claims are protected by a deemed trust. The fact that they require super priority is just a part of "[t]he harsh reality . . . that lending is governed by the commercial imperatives of the lenders" (*Indalex,* at para. 59). It does not make commercial sense to act when there is a high level of risk involved. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness […]

12. Finally, as detailed in Cortland's Reply Factum on the security for costs motion heard on June 4, 2024, the well-established caselaw is clear that the Court will not impose a constructive trust, particularly in the CCAA context, where doing so would trump a secured creditor generally. This is especially so where, as here, the wished-for constructive trust emanates from "equity" claims within the meaning of the CCAA.[3]

[3] Final Bell has suggested that, in addition to the claims related to the Share Exchange Agreement, it is also an unsecured creditor pursuant to a promissory note relating to previous trade payable. However, the promissory note was issued to one of its affiliates, Final Bell Holdings, Inc. Therefore, Final Bell is not actually a creditor of BZAM.

13. The threshold motion requires only limited motion materials, facta and a short hearing date. Indeed, Cortland has already served its motion materials. If successful, the threshold motion will be dispositive, and eliminate the more complex procedure contemplated for Final Bell's underlying misrepresentation allegations.

14. Cortland therefore proposes that the motion be scheduled at the earliest possible date, in advance of the summary trial. Notably, Final Bell has already seen Cortland's position and the substance of its arguments in Cortland's Reply Factum on the security for costs motion delivered on May 29, 2024 and which were the subject of extensive submissions during the hearing of that motion on June 4, 2024.

15. It would be highly prejudicial to further strain the resources of the parties or the Court when the entire litigation may be dealt with much more surgically. As this Court noted in its endorsement dated June 30, 2024, the Final Bell claim "is delaying the progress in the restructuring, including but not limited to the SISP. DIP financing costs and other professional fees that may otherwise have been avoided or reduced continue to accrue, all of which reduces the overall recovery available to creditors and other stakeholders."[4]

16. Cortland asks this court to bring that waste to an end.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of August, 2024.

[4] *In the Matter of BZAM LTD. et al*, CV-24-00715773-00CL, June 30, 2024 at 41.

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ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-23-00707394-00CL **HEARING DATE:** June 5, 2024

NO. ON LIST: 1

TITLE OF PROCEEDING: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TACORA RESOURCES INC**

BEFORE JUSTICE: **KIMMEL**

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ENDORSEMENT OF JUSTICE KIMMEL:

1. Tacora seeks approval of:
    a. a Sale Process Order; and
    b. a Stay Extension Order, that, among other things: (i) extends the Stay Period to July 29, 2024; (ii) authorizes Tacora to reallocate KERP Funds that were earmarked for Key Employees who have resigned from Tacora to certain other Key Employees; and (iii) seals the confidential appendix 1 (the "Confidential Appendix") to the Ninth Report of the Monitor dated June 3, 2024 (the "Ninth Report"), which contains details of the reallocated KERP.
2. Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the Company's factum filed in support of this motion.

The Stay Extension Order

3. The Stay Extension Order is supported by the Monitor and not opposed.
4. The court may grant an extension of the Stay Period pursuant to s. 11.02(2) and (3) of the CCAA "for any period that the court considers necessary" where the applicant satisfies the court that: (a) circumstances exist that make the order appropriate; and (b) it has acted, and is acting, in good faith and with due diligence.
5. Tacora has acted, and continues to act, in good faith and with due diligence to advance its restructuring within these CCAA Proceedings. The proposed extension of the Stay Period is necessary for Tacora, together with its advisors and the Monitor, to continue to review and advance its potential alternatives and pursue a value-maximizing transaction. Tacora's Updated Cash Flow Forecast reflects that, subject to the indicated assumptions, Tacora is forecast to have sufficient liquidity to fund its obligations and the costs of the CCAA Proceedings through to the end of the proposed extension of the Stay Period. The Monitor's supports the requested extension to the Stay Period and no creditor or other stakeholder is objecting to it.
6. The same justifications apply as when the court approved the last extension of the Stay Period to June 24, 2024. See *Tacora Resources Inc. (Re)*, 2024 ONSC 2454, at paras. 52-54.
7. Tacora is also seeking the court's approval to reallocate the KERP amounts under the existing KERP Funds (that were allocated to the Key Employees who have resigned) to certain other Key Employees. Key Employees are critical to the Company's operations and restructuring activities. The additional Key

Mine Employee is similarly critical to the Company's operations and restructuring activities. There is a risk that the Key Employees may pursue other employment opportunities if the KERP amounts under the existing KERP Funds are not reallocated to the remaining Key Employees. Finding alternative, qualified individuals to replace the Key Employees will be challenging, disruptive, costly, and time consuming for the Company.

8. To date, none of the KERP Funds that were designated under the original order approving the KERP have been paid out. Orders of this nature, amending the list of eligible employees under a KERP and reallocating KERP funds, have been made in other cases. See for example, *Arrangement relatif à FormerXBC Inc. (Xebec Adsorption Inc.)*, 2023 QCCS 834, 82 *PCAS Patient Care Automation Services Inc (Re)*, 2012 ONSC 2423 at para. 10.
9. The reallocation of the KERP Funds is appropriate, reasonable and justified in the circumstances, and the terms, conditions and amounts of such reallocation are in line with KERP previously approved by this court and employee retention plans approved in other CCAA proceedings. The same justifications exist for the proposed amendments to KERP as existed when it was originally approved. See *Tacora Resources Inc. (Re)*, 2023 ONSC 6126, at para. 158 (d).
10. Similarly, the same justifications apply to the sealing of the Confidential Appendix to the Monitor's Ninth Report containing the amounts to be reallocated to eligible employees under the KERP as applied to the sealing of the confidential exhibits in respect of the KERP when it was originally approved. See *Tacora Resources Inc. (Re)*, 2023 ONSC 6126, at paras. 159-162.
11. I have signed the Stay Extension Order, dated and effective June 5, 2024.

Sale Process Order

12. Without attracting sufficient capital to make the capital improvements that Tacora needs to increase production, Tacora will continue to generate losses. It has been reiterated many times in the course of this proceeding that the only way in which Tacora can become a long-term sustainable operation is for it to attract investors and/or purchaser to make the necessary investments in the Scully Mine.
13. As of the week ending June 23, 2024, Tacora is forecasted to add at least another $125 million of secured debt to its balance sheet through the DIP Facility on top of its already overleveraged capital structure that existed at the time that it commenced these CCAA Proceedings. The increasing amount of debt will make the restructuring more difficult to complete as third-party investors will need to invest incremental further amounts to address the DIP financing prior to investing the required amounts into the Company.
14. Tacora is fielding questions from trade creditors and employees. It has already lost three of its Key Employees since the CCAA filing. As the second largest employer in the Labrador West region, delaying emergence from these CCAA Proceedings will result in uncertainty for a significant number of employees. This delay also introduces uncertainty and the potential for distractions in Tacora's dealings with frustrated trade creditors that are needed for its continued operations. The concerns of these and other stakeholder groups continue to loom large while Tacora seeks an alternative going-concern solution.
15. Tacora continues to pursue a consensual restructuring with its two most significant stakeholders: Cargill and the Ad Hoc Group of noteholders. As has been said before, however, Tacora cannot do so without also advancing a sale process in parallel to identify one or more investors and/or purchasers and a transaction to allow Tacora to exit these CCAA Proceedings. Tacora has worked with its financial and other advisors and the Monitor, in consultation with its noteholders and Cargill, to come up with the proposed Sale Process.
16. The proposed Sale Process builds upon Tacora's pre-CCAA efforts to sell or restructure and the post-CCAA filing court approved Solicitation Process that resulted in a successful bid that was not completed. As the Monitor explains in its Ninth Report, the timeline of the Sales Process was designed to identify an actionable transaction within the time frame of its projected remaining availability under

the DIP Facility. The Monitor has reiterated in its Ninth Report that completing the restructuring so that Tacora can emerge from this CCAA proceeding as soon as possible is of critical importance to the Company and its stakeholders.

17. The Monitor is of the view that the Sale Process, including the possibility of an Auction, can be achieved within that time frame and provides for an open, fair and transparent process with an appropriate level of independent oversight. The Monitor also believes that the proposed Sale Process will encourage and facilitate bidding by interested parties and that it is reasonable in the circumstances.
18. Tacora's proposed Sale Process is designed to be efficient and focused. If a successful transaction emerges from it, Tacora will be seeking court approval on July 26, 2024, before the now extended Stay Period expires. Tacora is focused on running an efficient Sale Process that strikes a balance between the much needed certainty of an executable transaction and the need for flexibility to try to secure the best available transaction.
19. Cargill is the only party that is objecting to the Proposed Sale Process. Cargill has suggested changes, with explanations, which Tacora has responded to.
20. Some of Cargill's requested changes were accepted by the Company in advance of the June 5, 2024 hearing. Some further suggested changes from Cargill were accepted at the urging of the court during the hearing. Importantly, Tacora has agreed that it will not dictate what type of transaction the bids should be for, a share deal (RVO) or an asset deal (APA). Tacora has agreed to remove the fourth recital that Cargill was objecting to and to amend section 2 and make conforming changes elsewhere, as needed, to reflect this further change that will allow bidders to choose their transaction structure (for example in section 7 so as to provide for templates to be given to bidders for both types of transactions).
21. Some of the concerns raised by Cargill about the proposed Sale Process that it seeks to have addressed through its remaining suggested changes require the court's input and direction as they have not been accepted by Tacora.
22. As a general matter, the specific terms of the Sale Process are a matter of business judgment for Tacora. It has proposed the Sale Process with the benefit of the advice of its legal and other advisors, and input from the Monitor and both the Ad Hoc Group and Cargill. The court will not lightly interfere with the mechanics of the proposed Sale Process that the Company has proposed based on these inputs, absent some demonstration of unfairness or concerns that could undermine the eventual approval of any transaction that comes out of the Sale Process.
23. Subsection 36(3) of the CCAA sets out certain factors for the Court to consider in approving a sale. Section 36 does not directly address the factors a court should consider when determining whether to approve a sale process, however, such criteria can be evaluated in light of the considerations that will ultimately apply when seeking approval of a sale transaction, including whether the process is reasonable in the circumstances, whether the Monitor approved the process, and the extent to which the creditors were consulted. See *Brainhunter Inc. (Re)*, 2009 CanLII 72333, at para. 16.
24. The remaining disputed suggested changes to Tacora's proposed Sale Process are discussed below, with reference corresponding section numbers in the Procedures for Sale Process.
25. <u>Changes to section 2:</u> Cargill requests that section 2 expressly allow for a CCAA plan as a transaction option in the Sale Process. While Tacora is not specifying a CCAA plan as a transaction option in the Sale Process, its counsel stated in court that if a viable plan is submitted by any party, whether in conjunction with a bid submitted in the Sale Process or outside of it, the Company will consider the option of pursing a plan. To that end, the Company has retained the ability to adjust the Sale Process or terminate it if there is an option presented that is not strictly within the Sale Process requirements that the Company, in consultation with the Monitor, deems to be viable and worth pursuing. I agree with Tacora that expressly providing for a CCAA plan option overly complicates the Sale Process and the suggested changes to this end need not be included Sale Process. There is sufficient flexibility in the process to allow for a CCAA plan to be put forward and for any viable plan that is presented to be considered and pursued if deemed appropriate.

26. Changes to section 5: Cargill would like the date of the sale approval motion in section 5 to be stated to be subject to change to a later date (such "other" date rather than such "earlier" date) set by the court. The court remains concerned about timing. The July 26, 2024 approval date is within the current Stay Period extension. I agree with Tacora that this date should be presented and considered to be a firm date. If contingencies arise, they can be addressed but they need not be expressly provided for now.
27. Changes to section 10 (e)(vii): Cargill would like the conditions of qualified bids in section 10 (e) (vii) to include repayment of the DIP in full. The Company is concerned that introducing the repayment of the DIP as a condition of a Qualifying Bid could have a chilling effect on other prospective bidders and give Cargill an advantage in the bidding process, which could compromise the fairness of the Sale Process. This is not dissimilar to the Ad Hoc Group's attempt to introduce a topping credit bid into the first Solicitation Process, which the court rejected (see *Tacora Resources Inc (Re)*, 2023 ONSC 6126 at paras. 121 – 123). Cargill does not need this condition to protect its position, nor is it entitled to this level of protection as a DIP lender (see *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 226, at paras. 30-32). It can make a back-stop credit bid if it is concerned that a bid might be accepted that is below the value of the DIP. Tacora's counsel confirmed in court that it remains open to Cargill to make a credit bid within the Sale Process, in conjunction with or in addition to any other bid that Cargill may wish to make in the Sale Process. What Cargill will not be entitled to do is decline to participate at all in the Sale Process and then come forward afterwards and try to make a credit bid.
28. Changes to section 10 (g): Cargill argues, regarding section 10 (g), that a bid should not be excluded from being considered a Qualified Bid simply because a potential bidder adds in different or additional required conditions to their transaction documents beyond those included in the transaction templates. The company retains the ability to accept non-compliant Bids, but does not want to invite bidders to submit bids with additional or new conditions. Added conditions will make the comparisons of the Bids more difficult. Further, the last accepted bid was lost because of a condition; having been burned once, Tacora would like to discourage conditions beyond those that it will include in its templates that it considers to be achievable. Since the goal is an executable transaction and Tacora is best situated to identify the conditions it can tolerate, bidders should be incentivized to structure their bids accordingly. Cargill's proposed change to s. 10 (g) is not necessary or appropriate.
29. Changes to section 12: Nor are Cargill's proposed changes to section 12 necessary or appropriate, particularly since in that same section, Tacora has expressly retained the ability to waive strict compliance with any one or more of the specified Bid requirements and deem such non-compliant Bid to be a Qualified Bid. This already qualifies the earlier language indicating that a bid that is not a Qualified bid "shall" be rejected. The existing language strikes the appropriate balance and "shall" need not be changed to "may" in section 12.
30. Changes to section 16: With respect to section 16, Cargill believes that the DIP Lender, as a significant stakeholder, should be permitted to attend the auction. Tacora plans to restrict attendance at the auction to participating bidders, and it will not be open to stakeholders unless they are also bidders. Cargill will be permitted to attend the auction if it is participating as a bidder in the auction but otherwise does not have an automatic right to participate in it. If it wants to be present at the auction it will need to be a participating bidder. The company and the Monitor will communicate with stakeholders who are not part of the auction as needed. The auction process needs to be fair and focused on the objective of maximizing value for the Company and its stakeholders from the participating bidders. No justification was offered for Cargill to be there in any other capacity. If issues arise in the auction process that require input from Cargill in some other capacity (for example, as Dip Lender, or as contractual counterparty or as creditor), or input from any other stakeholder not otherwise participating in the auction process, the Company has said it will reach out to them.
31. Changes to sections 18-22: Cargill has asked that the auction procedures at sections 18-22 should be deleted and left to be settled at a later time rather than pre-determined before any bids have been received. Cargill has not raised any specific objections to the proposed auction procedures in these sections. The timelines for the Sale Process and auction procedures are such that it is better to have as

much determined in advance as possible. Flexibility has been retained in section 17 for Tacora to revise the auction procedures later if need be.

32. In summary, none of the remaining changes to the Sale Process that Cargill requested that have not already been agreed to by Tacora need to be made.
33. The Sale Procedures within the proposed Sale Process, with the amendments that have now been agreed to, are fair and reasonable:
    a. They will best serve the interests of the Company's stakeholders as a whole by enhancing the prospects of a successful restructuring;
    b. They have been approved by the Monitor;
    c. The significant creditors and stakeholders, including the Ad Hoc Group and Cargill, were consulted.

    See *Brainhunter,* at para. 16. The factors that support the approval of the proposed Sale Process are set out in detail in the Company's factum for this motion and in the Monitor's Ninth Report.

34. The Sale Process is approved. Once Tacora has made the changes that it agreed to make to the Sale Process, the revised Sale Process Order may be submitted to me to be signed.

Cargill's Global Process Motion

35. Cargill advised the other parties before the June 5, 2024 hearing that it no longer intended to proceed with its Global Process Motion on June 26, 2024 (and as a result, Cargill did not file a notice of motion by the May 31 date fixed by this Court). Tacora and the Monitor advised that the motion could only be withdrawn with prejudice. Cargill has responded that "[w]e reserve our rights to contest a RVO application and file materials to oppose such matter depending on the facts."
36. Tacora and the Monitor are concerned that Cargill may seek to advance the same arguments about the legal availability of an RVO that it had indicated it would raise in the Global Process Motion in its opposition to any RVO transaction that may emerge as the successful transaction in the Sale Process. Tacora and the Monitor seek the court's direction on this issue, and specifically for a direction that the decision not to proceed with the Global Process Motion is with prejudice to Cargill.
37. Cargill says that it reconsidered its position on this motion after the court ruled on May 24, 2024 that its Disclaimer Motion would be heard on June 26, 2024, rather than it being deferred as Cargill had suggested it be. Cargill's position is that Tacora and the Monitor have presented the court with no authority for the imposition of a term of "with prejudice" on its decision not to proceed with a motion that was never brought, and says that it cannot be prevented from raising the intended arguments on its Global Process Motion in the future. Cargill says that it has been transparent about what its arguments would be on the Global Process Motion and the parties will thus not be surprised by them if they are raised in response to future motions (including a sale approval motion) that have not yet been brought based on future facts that are not currently known.
38. The court shares the practical concerns that the Company and the Monitor have raised. The Global Process Motion, like the RVO Preliminary Motion, were presented at the May 24, 2024 case conference to be the flip side of the same hypothetical coin. They were framed as legal issues that the court could determine in advance, namely:
    a. Whether an RVO is legally impermissible if the Cargill Offtake Agreement has not been disclaimed (to be decided by the RVO Preliminary Motion: does the Offtake Agreement have to have been disclaimed for it to be assigned to ResidualCo under an RVO?); OR
    b. Whether an RVO is legally impermissible if the Cargill Offtake Agreement has been disclaimed (to be decided by the Global Process Motion: If the Offtake Agreement is disclaimed, does that preclude any assignment of liability associated with that agreement to ResidualCo?).

39. In its Aide Memoire for the May 24, 2024 case conference, Cargill described its Global Process Motion as follows:

> Cargill will bring a motion seeking a declaration that, as a point of law, an RVO transaction structure is not available to a debtor where (i) there is a large unsecured creditor in a position to vote against a CCAA plan; (ii) that unsecured creditor opposes the RVO; and (iii) there is an unsecured CCAA plan alternative which provides for consideration to all affected unsecured creditors in the form of restructured shares or other consideration. If granted, Cargill believes this declaration eliminates an RVO transaction structure which vests out the Offtake Agreement over its objection. This motion should be heard and determined prior to expending the time and resources on a disclaimer dispute that may never be necessary. The Global Process Motion should be heard on June 26, 2024, unless matters are resolved in the interim.

40. It was proposed that the proposed Global Process Motion would proceed on the basis of assumed facts (including that the disclaimer is allowed thereby creating a large unsecured liability in favour of Cargill and that there is an unsecured CCAA plan alternative; the latter assumption of a CCAA plan alternative remains a possibility based on the earlier discussion in this endorsement that allows for the presentation of a CCAA plan even though it is not expressly invited as one of the transaction options in the Sale Process).
41. The court did not accept Cargill's submission on May 24, 2024 that its Disclaimer Motion should be deferred. But it did accept that the issues raised by the Global Process Motion, if successful, could eliminate the possibility of any RVO transaction structure. The court's objective in timetabling these motions (the Global Process Motion, the Disclaimer Motion and the RVO Preliminary Motion) all together was to clear away any uncertainty about the legal impermissibility of an RVO transaction tied to the existence or non-existence of the Cargill Offtake Agreement so as not to waste the time of bidders in the Sale Process on an RVO transaction structure if it is determined to be legally impermissible for either of the reasons postulated by Cargill.
42. The court's May 24, 2024 case management direction was made with a view to a just, expeditious, streamlined and orderly process for an eventual sale approval motion that will need to be heard on a single day shortly after the conclusion of the Sale Process if there is a successful bid coming out of that process. In these multi-issue proceedings, issues need to be sequenced and determined in an orderly manner. That is part of the court's case management function.
43. If Cargill wishes to raise the issues that it identified for its Global Process Motion then it may deliver its Global Process Motion Record on June 11, 2024 when the next round of materials are due for the June 26, 2024 motions. If it elects not to bring that motion, it will be foreclosed from raising the intended arguments on that motion at the sale approval motion if the successful transaction in the Sale Process is a share (RVO) deal.
44. Following the court's decision on the June 26, 2024 motions, if an RVO transaction structure is determined to be legally permissible, any RVO transaction that is brought to the court for approval following the Sale Process will remain subject to the court's discretion and all of the *Harte Gold Corp. (Re)*, 2022 ONSC 653 factors that must be considered in that context. That is a given. No one is suggesting otherwise. Conversely, if an RVO transaction structure is determined to be legally impermissible for any of the grounds raised, the court understands that Tacora does not intend to include an RVO transaction option in the Sale Process and, thus, there will be no RVO transaction for the court to consider at the July 26, 2024 sale approval hearing.
45. What will not be permitted in the context of these proceedings and having regard to the lengthy and complex procedural history and the particular timing and liquidity constraints that Tacora is operating

under, is for an issue that was flagged as a question of legal impermissibility to be deferred and raised by Cargill after an RVO transaction has been negotiated with a successful bidder.

46. This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of a formal order being taken out.

KIMMEL J.
June 7, 2024

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-24-00715773-00CL **DATE:** June 30, 2024

NO. ON LIST: 2

TITLE OF PROCEEDING: In the Matter of BZAM LTD. et al

BEFORE JUSTICE: Justice OSBORNE

PARTICIPANT INFORMATION

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ENDORSEMENT of OSBORNE, J:

1. These motions engage two issues that arise relatively infrequently:

   a. when and in what circumstances are security for costs appropriate within an ongoing *CCAA* proceeding; and

   b. whether a party against whom no relief is directly sought can be entitled to security for costs.

2. BZAM Ltd. ("BZAM") and Cortland Credit Lending Corporation ("Cortland") each seek an order requiring Final Bell Holdings International Ltd. ("Final Bell") to immediately post security for the costs of its claim originally for rescission of a Share Exchange Agreement dated December 5, 2023, and now damages and equitable relief, including the imposition of a constructive trust.

3. BZAM seeks security in respect of costs on a full indemnity scale in the amount of $636,000, or in the alternative on a substantial indemnity scale in the amount of $575,000, and Cortland seeks security on a partial indemnity scale in the amount of $243,595.34.

4. Final Bell opposes the relief sought.

5. BZAM relies upon the affidavits of Wenbo Sun affirmed April 23, 2024 and May 13, 2024, and the affidavit of Matthew Milich sworn May 28, 2024. Cortland relies on the affidavit of Jonathan Shepherd sworn April 24, 2024. Final Bell relies on the affidavit of Keith Adams dated March 18, 2024.

6. Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated.

Background

7. The overarching background to, and context of, this motion is set out in earlier Endorsements I have issued in this CCAA proceeding.

8. BZAM is a Canadian cannabis company that owns cannabis cultivation facilities in Ontario and Alberta, leases production facilities in Ontario, British Columbia and Québec, leases a retail store in Saskatchewan, and has corporate offices in Ontario and British Columbia. It filed for and was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c C-36 (the "*CCAA*") pursuant to the terms of the Initial Order granted on February 28, 2024.

9. Approximately three months before BZAM's *CCAA* filing, BZAM had entered into a Share Exchange Agreement with Final Bell dated December 5, 2023, pursuant to which Final Bell sold its wholly-owned subsidiary, Final Bell Canada Inc. ("FBC") to BZAM. The consideration paid for the shares of FBC consisted of equity in BZAM and unsecured debt. As a result, Final Bell became a shareholder of BZAM.

10. Cortland is the pre-filing senior secured lender of BZAM, and the provider of debtor-in-possession ("DIP") financing (the "DIP Lender") pursuant to the Initial Order.

11. Final Bell did not appear on the first day hearing in this proceeding on February 28, 2024 to oppose the Initial Order that was granted. It did not seek to avail itself of the come-back clause in that Initial Order or seek relief amending or vacating the Initial Order. Even at the come-back hearing required under the *CCAA* to be conducted within 10 days of the Initial Order, Final Bell did not oppose the continuation of relief, including but not limited to the stay of proceedings.

12. However, on March 18, 2024, Final Bell brought a claim seeking to rescind the Share Exchange Agreement, alleging fraudulent misrepresentation on the part of BZAM. With the agreement of the parties, that claim has proceeded, and has been case managed, as a trial of an issue within this *CCAA* proceeding. It originally came before the Court on an urgent basis, given that Final Bell's claim for rescission needed to be

resolved in order that the pending Sale and Investment Solicitation Process ("SISP") for BZAM could proceed. Potential bidders needed to know what they were bidding on (i.e., whether the assets and business of BZAM included FBC or not). The parties requested, and the Court accommodated, an extremely expedited case management timetable leading to the summary trial of Final Bell's claim for rescission.

13. Subsequent to the scheduling of the summary trial by which the Final Bell claim was to be adjudicated, Final Bell advised the Court that it was abandoning its claim for rescission. However, it now seeks in its claim damages and equitable relief in the form of an order imposing a constructive trust over any proceeds of the sale of the business of the Applicants. I pause to observe that, subject to the Final Bell claim, those proceeds would be entirely payable to Cortland, which is anticipated to suffer a loss even if it receives the entirety of those net proceeds.

14. That case management timetable contemplated the very steps that in fact occurred: the claimant and the respondents filed extensive affidavit evidence, made extensive documentary production, conducted cross examinations on the affidavits, conducted a Rule 39.03 examination, and responded to undertakings and further document requests.

15. The summary trial was intended to proceed in hybrid format, with evidence of all parties being led by way of affidavit, with cross examinations and other *viva voce* evidence limited to certain fundamental issues. Trial was scheduled for two days on April 22 and 23, 2024, dates which were scheduled by the Court on the consent of all parties, each of whom confirmed their availability for those dates.

16. The trial did not proceed as scheduled. On April 19, 2024, a few days before it was set to commence, Final Bell sought an urgent case conference at which it requested an adjournment of the trial on the basis that it had just received supplementary productions from BZAM that, in the submission of Final Bell, fundamentally changed the landscape and required Final Bell to re-evaluate its position and anticipated evidence. BZAM and Cortland opposed the adjournment. Having heard submissions from all parties, I granted the adjournment requested by Final Bell. The hearing is now anticipated to occur sometime this summer.

17. BZAM and Cortland now seek security for their respective costs of the Final Bell claim, based both on non-residency and good reason to believe that Final Bell lacks sufficient assets in Ontario or elsewhere to pay a costs award if ordered to do so.

Rule 56 and Security for Costs

18. This Court has jurisdiction to make an order respecting security for costs pursuant to Rule 56.01(1):

> The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
>
> a) the plaintiff or applicant is ordinarily resident outside Ontario;
>
> b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
>
> c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding, that remain unpaid, in whole or in part;
>
> d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario;
>
> e) there is good reason to believe that the action or application is frivolous and vexatious, and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or

f) a statute entitles the defendant or respondent to security for costs.

19. The jurisdiction is discretionary. The analysis to be undertaken by the Court in determining whether that discretion should be exercised has two stages:

a. first, the moving party must show that any one of the six factors set out in Rule 56.01(1) applies; and

b. if the first stage is met, the onus shifts to the responding party to establish that it would be unjust in all of the circumstances to order security for costs.

See: *Brown v. Hudson's Bay Company*, 2014 ONSC 1065 at paras. 33-34.

20. The threshold to meet the first stage of the test is "light", given that "unfairness would result were the defendant required to prove something that is within the knowledge of the plaintiff": *JoBro Film Finance Ltd., v. National Bank of Canada*, 2020 ONSC 975 ("*JoBro*") at para. 6.

21. The second stage involves an inquiry into other factors which may assist in determining the justice of the case:

> [E]ach case must be considered on its own facts are helpful nor just to compose a static list of factors to be used in all cases. In determining the justness of the security for costs order. There is no utility in imposing rigid criteria on top of the criteria already provided for in the Rules. The correct approach is for the court to consider the justness of the order holistically, examining all the circumstances of the case and guided by the overriding interests of justice to determine whether it is just that the order be made.
>
> See *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827 ("*Yaiguaje*") at para. 25.

22. Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits, even in circumstances where the other provisions of Rule 56 have been met: *Yaiguaje* at para. 23.

23. As recognized by the Court of Appeal in *Yaiguaje* at para. 24, courts in Ontario have identified various factors to be considered, including the merits of the claim, any delay in bringing the motion for security, the impact of a defendant's conduct on the available assets of the plaintiff, access to justice concerns, and the public importance of the litigation.

24. However, none of those factors is exclusive, mandatory or static, and each case must be considered on its own facts. The overarching objective is, as stated by the Court of Appeal, to consider the justness of the order holistically, examining all the circumstances of the case and being guided by the overriding interests of justice.

Does Rule 56 Apply to Claims in a CCAA Proceeding?

25. Final Bell submits that, as a preliminary issue, Rule 56.01 does not apply at all because BZAM is not a "defendant" or a "respondent" as referred to in Rule 56.01 (1) and is in fact, the Applicant in this CCAA proceeding, and also because Final Bell, as the claimant here, is not a "plaintiff" or "applicant" but is a respondent in this CCAA proceeding.

26. I cannot accept the submission. While Final Bell is indeed a Respondent in this insolvency proceeding, and BZAM is indeed the Applicant, the dispute in respect of which security for costs is sought is the claim of Final Bell described above. Final Bell is the claimant, and it alleges fraud and seeks substantive relief against BZAM. The relationship of those parties in the context of the Final Bell claim is analogous in all respects to that of plaintiff and defendant or applicant and respondent.

27. If necessary, I would place reliance on Rule 1.04(1) which requires that the Rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits, and also on Rule 1.04(2), which provides that where matters are not provided for in the rules, the practice shall be determined by analogy to them.

28. I draw additional comfort for my analogous approach from Rule 56.01(2) itself, which provides that subrule (1) applies with necessary modifications to a party to a garnishment, interpleader or other issue who is an active claimant and would, if a plaintiff, be liable to give security for costs. In my view, the legislative intent is clearly that security for costs should be available in circumstances of an active claim.

29. Finally, if necessary, in my view, the broad discretion given to this Court in s.11 of the *CCAA* to make any order that it considers appropriate in the circumstances "on the application of any person interested in the matter" would also be a basis for my jurisdiction to order security for costs. The power given to the supervising court is vast, and this broad discretionary power is the feature of the *CCAA* that enables it to be adapted so readily to each reorganization: *Canada v. Canada North Group Inc*., 2021 SCC 30 (CanLII), [2021] 2 SCR 571 ("*Canada North* ") at para. 121, quoting *9354-9186 Québec Inc. v. Callidus Capital Corp*., 2020 SCC 10, [2020] 1 S.C.R. 521 at para. 67.

30. In my view, the baseline requirements of appropriateness, good faith and due diligence, and the requirement that the supervising judge must be satisfied that the order sought would advance the policy and remedial objectives of the *CCAA* (i.e., the survival of going concerns, and the objective of providing the conditions under which the debtor can attempt to reorganize) are all such that there is no good policy reason to hold that the security for costs regime established by the Rules cannot apply in a *CCAA* proceeding: see *Canada North*, at para. 21.

31. In this case, the successful party or parties in respect of Final Bell's claim would presumptively be entitled to costs in respect of that claim, just as would a party successful on a motion within any application or action. There is nothing special about a claim advanced in a *CCAA* proceeding, and particularly a significant claim with material costs incurred to prosecute and defend, that disentitles a successful party to costs when the claim is determined. Sometimes costs are sought and sometimes they are not, just as with any proceeding. Claims within a *CCAA* proceeding are routinely the subject of claims for costs, and where the determination of claims is delegated by order to a claims officer (which is very common in complex and large restructurings), those claims officers are regularly given the jurisdiction and discretion to determine and award costs.

32. In my view, it follows that if the successful party or parties on the Final Bell claim would presumptively be entitled to costs following a determination of that claim (as they would be), there is no just rationale for the conclusion that the security for costs regime established by the Rules cannot apply at all.

33. For all of these reasons, I find that Rule 56.01 is not inapplicable to a claim brought within a *CCAA* proceeding.

Is Security for Costs available to Cortland?

34. Final Bell submits that it ought not to be required to post security in favour of Cortland, even if security is otherwise appropriate, since it alleges no wrongdoing against Cortland and seeks no relief against that party.

35. In my view, additional considerations can apply in the somewhat unusual circumstances as are present here, in that the Final Bell Claim is being litigated within this *CCAA* proceeding. It is to be expected, and indeed it is the case here, that other stakeholders are directly affected by this claim.

36. Cortland, in its capacity as senior secured lender and DIP Lender, is such an example. That party is clearly affected by the disruption to the restructuring proceeding (with attendant costs) brought about by the final bow claim, whatever the result. In addition, it is also very directly affected by the result of the claim in

that if Final Bell is successful, the ability of Cortland to recover on its DIP financing and/or on its pre-filing indebtedness owing by BZAM will almost certainly be negatively affected.

37. This Court previously approved the DIP Facility pursuant to which the DIP financing was advanced. It allows BZAM to continue operating during this restructuring. Pursuant to the DIP facility, Cortland was granted a super priority charge over all existing and after-acquired real and personal property of the Applicants. That includes all existing and after-acquired real and personal property of FBC and Final Bell. I pause to observe that Final Bell did not oppose that super priority charge, and nor has it sought subsequently to amend, vary or vacate that charge, although the constructive trust remedy it now seeks would have precisely that effect.

38. As noted above, and subject to the Final Bell claim, Cortland would be entitled to the entirety of the net proceeds from the sale of BZAM's business, and it is anticipated that Cortland would still suffer a shortfall on its indebtedness. It is those very net proceeds over which Final Bell (notwithstanding its late-in-the-day abandonment of its rescission claim), now seeks to assert a constructive trust. If that constructive trust claim is successful, it would "prime" or rank in priority to the claim of Cortland, which would therefore suffer the corresponding loss as a direct result. Accordingly, it is difficult to conclude that Cortland is unaffected by the Final Bell claim.

39. Moreover, it is perhaps ironic that Final Bell takes the position that Cortland ought not to be entitled to security for costs when one of the key allegedly fraudulent misrepresentations on which Final Bell bases its claim is that, as noted above, BZAM was anticipated to have sufficient financing available pursuant to the revolving credit facility issued by none other than Cortland.

40. Indeed, Final Bell essentially concedes this point itself in its factum, where it describes Cortland as "the only party with a legitimate interest in seeking security" (para. 2(e)).

41. Had the Final Bell claim been outstanding earlier, Cortland may well have elected not to provide DIP financing at all. Other stakeholders (such as other creditors) could also be directly affected by the Final Bell claim here notwithstanding that they are not directly involved in its determination. The pendency of that claim is delaying the progress in the restructuring, including but not limited to the SISP. DIP financing costs and other professional fees that may otherwise have been avoided or reduced continue to accrue, all of which reduces the overall recovery available to creditors and other stakeholders.

42. The conclusion that Cortland is an affected party entitled to respond to the motion and entitled to security for the costs thereof is reinforced by Rule 37.07(1) which requires that a notice of motion be served on any party "or other person who will be affected by the order sought, unless these rules provide otherwise", and is consistent with the approach taken by this Court in *Re U.S. Steel Canada Inc*., [2022] 5 C.B.R. (7th) 95, 2022 ONSC 6993 at paras. 51 and 52. Here, as in that case, the proprietary and economic interests of the party [seeking security] depend on the outcome of the claim.

43. Finally, I accept the submission of Cortland that equity and fairness militate in favour of it being entitled to security in the circumstances where the consideration that Final Bell received under the Share Exchange Agreement of shares and unsecured debt means that, at its highest, Final Bell is an unsecured creditor and an equity holder of BZAM. Cortland, on the other hand, was and is a secured creditor. It held secured debt pursuant to the revolving credit facility pre-filing, and has a priority charge in respect of the post-filing DIP Facility. To conclude that Cortland ought not to be entitled to security would amount to elevating the position of Final Bell above Cortland and leave Cortland, as the admittedly innocent party against which no allegations are advanced, bearing most of the risk.

44. For all of these reasons, it seems just and equitable that security for costs be available in appropriate circumstances to a party in the position of Cortland. If necessary, I find that the broad discretionary jurisdiction given to a *CCAA* court in s. 11 of the *CCAA* and discussed above is broad enough to direct a party to post

security for costs in favour of another stakeholder in appropriate circumstances, such as I have found to be present in this particular case.

Application of Rule 56 to this Case

45. In this case, there is no dispute that Final Bell ordinarily resides outside Ontario (Rule 56.01(1)(1)(a)).

46. The jurisdiction where the corporate party carries on business is decisive in satisfying the rule in this regard: *Fruitticola SNC v. Rite-Pak Produce Co. Limited,* 2009 CanLII 60089 (ONSC) at para. 7. In any event, however the requirement of being "ordinarily resident" is to be construed, there is no interpretation that allows for the conclusion that Final Bell is "ordinarily resident" in Ontario.

47. Final Bell is a US-based cannabis company, incorporated under the laws of British Columbia. It is therefore ordinarily resident outside of Ontario, specifically in Van Nuys, California, United States. It has no connection to Ontario. While technically or formally a Canadian company in that its registered mailing office is in British Columbia, it is functionally a U.S. operation. Its directors are also all located outside Ontario: one is in the United States, one is in Singapore, one is in Australia and two are in British Columbia. Its Chief Financial Officer is located in California.

48. I am satisfied that the factors set out in Rule 56.01(1)(a) apply.

49. I am equally satisfied that there is good reason to believe that Final Bell has insufficient assets in Ontario to pay the costs of either BZAM or Cortland or both. As a starting point, there is no evidence that it has any assets in Ontario at all.

50. Jurisdiction aside, each of its financial statements since at least December 31, 2021 reflect that Final Bell has recorded net losses from operations and that liabilities exceed assets by a material amount. Moreover, things are trending in the wrong direction: the margin by which its liabilities exceed assets has exceeded over time.

51. The moving parties submit that Final Bell has at all times been, and remains, balance-sheet insolvent. Its condensed consolidated financial statements as of and for the three and nine months ended December 31, 2022 and 2021, which constitute its most recent publicly-disclosed financial statements, reveal total assets of USD $72,575,890 as against total liabilities of USD $86,015,166, therefore yielding negative equity of USD $13,439,276 as at December 31, 2022.

52. The moving parties submit that over time, between the date of those financial statements and during the nine months thereafter ending September 30, 2023, the financial situation of Final Bell deteriorated even further, such that by March 31, 2023, its total liabilities exceeded its total assets by USD $29,030,384.

53. Moreover, Final Bell's condensed consolidated statement of cash flows as at March 31, 2022 and March 31, 2023 reflect losses from operations in the amounts of USD $13,137,736 and USD $17,710,102, respectively, and that it suffered net losses of USD $22,521,933 and $52,201,853, respectively.

54. The audit of Final Bell's condensed consolidated financial statements was never completed for the year ended March 31, 2022 or the year ended March 31, 2023. In fact, its auditor resigned on November 3, 2023, citing professional standards and issues of "concern" regarding Final Bell's valuation of FBC, the company it sold to BZAM (less than one month after its auditor resigned).

55. As a result of its failure to file financial statements, Final Bell was placed under a Cease Trade Order by the British Columbia Securities Commission on August 14, 2023. That CTO remains active, although partially revoked by the BCSC on September 30, 2023 and January 9, 2024 at the request of Final Bell to avoid materially prejudicial events occurring.

56. As a result of all of the above, BZAM and Cortland submit that while Final Bell may not be impecunious, there is good reason to believe that it does not have sufficient assets in Ontario to pay the costs of BZAM and/or Cortland if ordered to do so.

57. There has been much jurisprudence about whether and in what circumstances the fact that a corporation's liabilities exceed its assets is enough to meet the first part of the test, or whether a corporation's operational insolvency is similarly enough to meet the test. (See, for example, *JoBro,* at para. 39; *Capital Sports Management Inc. v. Trinity Development Group Inc., et al*, 2020 ONSC 7309 at para. 17; *Legendary Log Homes, Inc. v. Courtice Auto Wreckers Limited*, [2008] O.J. No. 4028 [ONSC] at para. 2; and *American Axle & Manufacturing Inc. v. Durable Release Coasters Ltd.*, [2006] O.J. No. 5283 [ONSC] at para. 33.

58. However, the application of the test as articulated in *JoBro* requiring that the issue be approached holistically and in a common sense manner, allows for no conclusion here other than that Final Bell lacks sufficient assets to satisfy a costs award, in or even outside Ontario, with the result that Rule 56.01(1)(d) also applies.

59. Accordingly, I am satisfied that the moving parties have established that the first stage of the test has been met, such that the onus shifts to Final Bell to establish that requiring it to post security for costs in the circumstances would be unjust.

60. I am reinforced in this conclusion by the position of Final Bell itself, which submits in paragraph one of its factum that "the issue on this motion is whether the justness of the case supports an order that Final Bell pay security for costs".

61. A consideration of what is just in any one case is clearly dependent on the particular circumstances of that case. The objective is to ensure equality between litigants and avoid, for example, creating a circumstance where the effect of an order requiring a party to post security would almost automatically mean, in a practical sense, that that party was deprived of the opportunity to bring its claim. Against this, however, the court must balance the right of the party or parties seeking security to avoid a circumstance where those parties would be compelled to defend a claim in respect of which it is virtually certain that they could never recover any costs, whatever the result.

62. This balancing is particularly relevant in a matter like this one where the allegations are serious (fraud), the costs will likely be significant and they will be incurred in relatively short order given the accelerated timetable for this claim and summary trial.

63. The respective positions of the parties with respect to the merits of the Final Bell claim are wholly at odds with one another.

64. Final Bell submits that the strength of its claim is a factor in its favour, since it has a strong *prima facie* case that it was defrauded.

65. Final Bell alleges that it is entitled to damages and equitable relief essentially on the basis that it sold its subsidiary, FBC, to BZAM in exchange for shares and unsecured debt, only to have BZAM file for insolvency protection three months later. It alleges four broad fraudulent misrepresentations:

a. BZAM misled Final Bell about its ability to extend a revolving credit facility granted by Cortland, which Final Bell understood was going to be extended in March, 2024 for another 15 months;

b. BZAM misled Final Bell about its future cash flows as a standalone entity;

c. BZAM misled Final Bell about its outstanding excise tax liabilities other than those disclosed; and

d. BZAM did not inform Final Bell of its intention to terminate it CFO without any succession plans and very shortly after the closing of the FBC acquisition.

66. BZAM denies all of the fraudulent misrepresentation allegations, a position in which it is fully supported by Cortland, who has been involved prior to filing as BZAM's pre-filing senior secured lender, and thereafter as the DIP Lender. BZAM and Cortland submit that the Final Bell claim is without merit and that BZAM made no misrepresentations, fraudulent or otherwise.

67. In my view, and while recognizing that the merits of the underlying claim can be a factor taken into account, the merits of the Final Bell claim here are a neutral factor. As noted above, the allegations are serious, and the claim has serious consequences for all parties involved. The nature of the fraudulent misrepresentations alleged engage credibility issues of a number of individuals involved, including but not limited to the credibility of the CEO and former CFO of BZAM. That is in large part why the summary trial contemplates *viva voce* evidence, albeit from a limited number of witnesses and on a limited number of issues.

68. The Final Bell claim engages vigourously contested allegations of discrepancies between documents said to have been produced during the due diligence period, and records subsequently disclosed following the Final Bell transaction, including but not limited to Canada Revenue Agency filings in respect of cannabis excise tax obligations.

69. In my view, I am not in a position on this motion to resolve these fundamental issues or make any significant preliminary findings in respect thereof, with the result that the merits of the case are a neutral factor.

70. Moreover, the moving parties submit that Final Bell is advancing its claim purely for tactical reasons and delay in order to gain leverage, and that this is illustrated by the fact that, notwithstanding its threats to do so, Final Bell did not avail itself of the come-back right in the Initial Order to seek to set aside that Initial Order (including the stay of proceedings) within the 10 day period, or at any time subsequently. Nor has it sought, as noted above, to amend or vacate the super priority charge in favour of Cortland as DIP Lender.

71. They submit that Final Bell was late in asserting its claim and did not advance the claim for many weeks while this CCAA proceeding was ongoing. When it did bring its claim, it sought the remedy of rescission, which was wholly disruptive to the proceeding generally, and to that then-ongoing SISP process in particular. Only once the summary trial of the Final Bell claim was scheduled on an urgent basis did Final Bell then abandon its claim for rescission, although that has only a partially calming effect since it continues to seek a constructive trust over the proceeds of sale of the assets and business of BZAM.

72. In response, Final Bell submits that the moving parties, and particularly BZAM, were late in bringing these motions for security and such motions must be bought promptly after the defendant discovers it has a reasonable basis for doing so. Final Bell submits that the justness of the case requires that it not be placed in the position of having to post security for costs after it has incurred significant expense to advance its claim.

73. While I accept that delay can be a factor (both ways), in my view, it does not operate in the particular circumstances of this case to favour Final Bell. The claim would already have been heard on the merits at the originally proposed summary trial but for the adjournment request of Final Bell. While I do not fault Final Bell for bringing that request (indeed, I granted it), I do not think that in the circumstances the fact that the summary process has expanded and now continues and it is in that context in which the moving parties bring these motions, amounts to delay such as to disentitle the moving parties to relief.

74. In the same way, I cannot accept the submission of Final Bell that granting security to BZAM in the circumstances is "tantamount to rewarding it for its faulty documentary disclosure". While BZAM could have moved for security earlier, there is no question but that this entire claim has proceeded on a very expedited timetable and the parties (all of them) have been busy responding to issues in real-time and preparing for trial on an accelerated basis.

75. In my view, and having considered all of the relevant factors in the circumstances of this case holistically, I am satisfied that it would be fair and just to require Final Bell to post security in favour of both

BZAM and Cortland. The Final Bell claim is significant and wholly disruptive to this restructuring proceeding. That is not to say that it is without merit, and the disruption may ultimately be determined to have been justified, but at present, the disruption is real and the merits of the claim are undetermined.

76. Moreover, the claim is complex, proceeding as noted above, on an extremely expedited timetable, and requires the expenditure of very significant resources by all affected parties, as is reflected in all of the Bills of Costs discussed below.

77. There is no evidence before me to the effect that an order requiring security to be posted would force an end to the Final Bell claim. On the contrary, Final Bell submits that, notwithstanding its balance sheet insolvency, it would be in a position to pay an award of costs following the determination of its claim, if ordered to do so.

78. For all of the above reasons, I am satisfied that Final Bell has not met its onus of establishing that it would be unjust to compel it to post security for costs.

Quantum of Security to be Posted

79. The next issue, then, is what quantum should be required.

80. The court has wide discretion as to the quantum of security to be posted, and that discretion must be exercised in a manner that is just in all the circumstances. As is clear from the jurisprudence cited above, it is the role of the court to do its best by balancing the entitlement of the responding parties to the claim to a reasonable measure of protection for their costs, as against the impact of any order requiring security to be posted on the claimant.

81. The principles and factors that apply to a determination of the appropriate quantum are substantially similar to the factors that apply to the exercise of discretion in fixing costs. The amount ordered must fall within the reasonable contemplation of the parties, and the court must be guided by what is reasonable and fair: *Canadian Metal Buildings Inc. v. 1467344 Ontario Limited*, 2019 ONSC 566 at para. 27; and *2018218 Ontario Limited v. Realty Specialists Inc.,* 2019 ONSC 150 at para. 23.

82. In this particular case, that involves a consideration of three points, among others.

83. First, BZAM submits that security in respect of costs on an elevated scale (full indemnity or substantial indemnity, as opposed to partial indemnity) could be appropriate given that the allegation by Final Bell in the underlying claim is fraud, such that it would presumptively be entitled to costs on an elevated scale at the end of the day if successful.

84. Cortland seeks security on a partial indemnity scale.

85. Final Bell acknowledges that costs may be awarded on an elevated scale where dishonest conduct is alleged as in this case, but it submits that the strength of its case is such that security should be ordered, if at all, only on a lower scale given its *prima facie* case that misrepresentations were knowingly or recklessly made by officers of BZAM.

86. In my view, and balancing all of the factors, I am not persuaded that security should be ordered in respect of costs on an elevated scale. Whether costs will ultimately be awarded in respect of the Final Bell claim at all, let alone on an elevated scale, remain to be seen. It is not automatic that unsuccessful allegations of fraud inevitably entitle a successful party to elevated costs: see *Hamilton v. Open Window Bakery Ltd*., 2004 SCC 9 at para. 26. In my view, the equities in this case justify an order requiring that security be posted, but not on an elevated scale.

87. Second, it is important to ensure that the quantum reflects only the potential costs of this particular claim. Here, Final Bell submits that the costs claimed by BZAM include costs of this restructuring proceeding beyond the four corners of this claim, and should therefore be reduced.

88. It is elementary that the quantum reflects only the costs incurred or to be incurred with respect to this claim.

89. Final Bell contests the quantum sought to be posted by BZAM in part, on the basis that BZAM has not submitted actual dockets reflecting solicitors' time already incurred. In my view, this is not fatal to BZAM's position. Dockets are often not required, and I previously gave case management directions to the effect that dockets were not required in connection with this motion (see Endorsement made in this proceeding dated May 6, 2024).

90. Further, I accept the statement from counsel to the effect that the Bill of Costs does not include any time for matters unrelated to the Final Bell claim, consistent with the Bill of Costs itself in the description of services in respect of which costs are sought to be secured. Obviously, actual entitlement to an award of costs, and the quantum of such costs, are for another day, and the costs claimed will have to be justified.

91. Third, Final Bell submits that the quantum of costs sought to be posted is simply unfairly high and that even if this Court were persuaded that security was appropriate, the quantum should be reduced so as not to prevent Final Bell from asserting its claim.

92. Where the requirement for security for costs has been established, and the majority of litigation steps have been completed, a plaintiff must generally pay security for those costs already incurred and for anticipated costs of upcoming steps in the litigation: *Shuter v. Toronto Dominion Bank*, [2007] O.J. 3435 [ONSC] at para. 193; *Demessey Limited v. Cassels Brock and Blackwell LLP*, 2011 ONSC 4122 at para. 33.

93. BZAM seeks security to be posted in accordance with its draft Bill of Costs. It breaks down costs already incurred and costs estimated to be incurred going forward, and summarizes total fees and disbursements as follows: $635,712.96 (full indemnity scale), $574,986.81 (substantial indemnity scale), and $392,808.38 (partial indemnity scale).

94. Cortland has also filed a Bill of Costs. That reflects total fees, inclusive of disbursements and HST, in the amount of $243,595.34 (partial indemnity scale), $363,001.43 (substantial indemnity scale), and $402,723.53 (actual fees). As noted above, Cortland seeks security to be posted in the partial indemnity amount.

95. Final Bell has filed its own Costs Outline in respect of its claim to support its submission that the quantum sought by each of BZAM and Cortland is excessive. The Costs Outline of Final Bell reflects costs incurred to date, and it projects costs going forward, all-inclusive of fees, disbursements and HST, as follows: $293,230.27 (partial indemnity scale), $430,601.55 (substantial indemnity scale), and $476,391.97 (actual amounts).

96. In my view, and having considered all of the relevant factors, including the work undertaken to date in respect of the Final Bell claim and the projected work to be undertaken through to and including the completion of the summary trial, an appropriate order is one that requires Final Bell to post security for costs in favour of BZAM in the amount of $350,000 and in favour of Cortland in the amount of $147,000, for a total of $497,000. All amounts are inclusive of fees, disbursements and HST.

97. I observe that this aggregate amount is, in my view, well within the range that Final Bell could expect to pay if unsuccessful in its claim. I pause to observe that the Purchase Price in the Share Exchange Agreement included Consideration Shares (as defined in the Agreement) with a value of $13,500,000 (90 million Purchaser Shares at a deemed price per Purchaser Share of $0.15). Moreover, the proportion of the amount I

have ordered to be posted in favour of Cortland relative to BZAM is equal to the proportion of partial indemnity costs claimed by those parties relative to one another.

Result and Disposition

98. The motion of each of BZAM and Cortland is granted. Final Bell is ordered to post security for costs in the following amounts:

a. in respect of the costs of BZAM: $350,000; and

b. in respect of the costs of Cortland: $147,000.

99. Given the expedited timetable pursuant to which the Final Bell claim is being tried, that security is to be posted within 15 days, failing which the parties may seek a case conference before me to determine next steps, including whether the Final Bell claim should be dismissed.

100. BZAM and Cortland seek their costs of this motion, if successful. So too does Final Bell. Having been successful, BZAM and Cortland are presumptively entitled to their costs.

101. Pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, costs are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

102. Rule 57.01 provides that in exercising its discretion under s. 131, the court may consider, in addition to the result in the proceeding (and any offer to settle or contribute), the factors set out in that Rule.

103. The overarching objective is to fix an amount that is fair, reasonable, proportionate and within the reasonable expectations of the parties in the circumstances: *Boucher v. Public Accountants Council for the Province of Ontario*, (2004) 71 O.R. (3d) 291 (C.A.), 2004 CanLII 14579 (Ont. C.A.).

104. Rule 57.03 provides that, on the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall fix the costs of the motion and order them to be paid within 30 days.

105. BZAM has filed a Costs Outline pursuant to which it seeks costs on a partial indemnity scale inclusive of disbursements in the amount of $30,747.87. (The Costs Outline also reflects substantial indemnity costs of over $46,000 and actual costs in excess of $51,000).

106. All parties filed extensive motion records, facta, authorities, briefs and aides memoire. In my view, and having considered all of the Rule 57 factors in the circumstances of this motion, Final Bell should pay to BZAM its costs in the amount of $20,000 and Cortland its costs in the amount of $8500. Those costs are inclusive of fees, disbursements and HST. They are payable by Final Bell to BZAM and Cortland respectively, at the same time as the security is to be posted: within 15 days.

107. Order to go to give effect to these reasons.

Osborne J.

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 BZAM LTD., BZAM HOLDINGS INC., BZAM MANAGEMENT INC., BZAM CANNABIS CORP., FOLIUM LIFE SCIENCE INC., 102172093 SASKATCHEWAN LTD., THE GREEN ORGANIC DUTCHMAN LTD., MEDICAN ORGANIC INC., HIGH ROAD HOLDING CORP. and FINAL BELL CORP

Applicants

Court File No. CV-24-00715773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding Commenced at **TORONTO**

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