

**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 BZAM LTD.
(Case Conference on August 7, 2024)**

1. BZAM (on behalf of the Applicants) comes to this case conference supporting the position of Cortland Credit Lending Corporation that its threshold motion (to determine the discrete legal issue of the priority of its court-ordered DIP charge to the constructive trust Final Bell seeks—the “Threshold Motion”) should be scheduled for the first available half-day hearing that the Court can accommodate, in advance of the intended two-day trial of Final Bell's claims. Should Cortland’s motion be successful, the relief Final Bell seeks would be moot, disposing of the entire litigation.¹

2. As this court has observed, Final Bell’s claim has caused real disruption to this restructuring proceeding.² In particular, the ability of the Applicants to seek approval of the

¹ Where a matter is moot—that is, “[i]f the decision of the court will have no practical effect on [the parties’] rights, the court will decline to decide the case.”: *Borowski v Canada (Attorney General)*, [1989] 1 S.C.R. 342 [SCC], at p. 353.

² Endorsement of Justice Osborne regarding Security for Costs, June 30, 2024, at para. 75.

Stalking Horse Purchase Agreement has been stalled due to the uncertainty arising from the Final Bell litigation.³

3. Further delays to approval of the Stalking Horse Purchase Agreement can be avoided by a timely adjudication of Cortland’s Threshold Motion. If Cortland is successful, the motion would resolve the entire litigation summarily and likely avoid the need for a trial (and the associated expense to the Applicants). This court’s determination of the Threshold Motion as soon as possible will provide much-needed clarity for the Applicants and allow them to complete their restructuring efforts in a timely manner.

4. Cortland’s Threshold Motion has substantial merit. Courts have almost invariably refused to grant a constructive trust where doing so would upset the established priority scheme as amongst creditors, particularly where a constructive trust would unfairly compromise the legitimate interests of a secured creditor such as Cortland.⁴ Further, this court has recognized—including as recently as this month—the super-priority of a DIP charge even over statutory trusts, and even in circumstances where the ARIO did not include provision for trusts.⁵ In this case, however, Section 41 of the ARIO expressly provides that the DIP charge “shall rank in priority to all other security interests [and] trusts...”⁶

5. In determining that both BZAM and Cortland were entitled to security for costs, this Court observed that the proceeds of the sale of the business to the Stalking Horse Bidder would go entirely to Cortland as DIP lender.⁷ If the Court determines on the Threshold Motion that

³ Fourth Affidavit of Matthew Milich (sworn July 8, 2024), at paras. 31-32.

⁴ See, e.g., *Kingsett Mortgage Corp et al v. Stateview Homes et al.*, [2023 ONSC 2636](#) (and the cases cited therein), including at paragraphs 71-72, 75 and 80; *Pacific Shores Resort & Spa Ltd., Re*, [2013 BCSC 480](#), at para 73; etc.

⁵ *Waygar Capital Inc. v. Quality Rugs of Canada Limited*, 2024 ONSC 2486, at paras. 26-30.

⁶ ARIO, s. 41.

⁷ Security for Costs Endorsement, at para. 13.

Cortland's DIP charge sits in priority to the constructive trust Final Bell now alleges, there will be no recovery for Final Bell and its claims will be undoubtedly moot.⁸

6. As this court directed at the hearing of the security for costs motion, however, the matter of scheduling the Threshold Motion would need to wait until after the security for costs motion was decided.

7. Accordingly, now that Final Bell has been ordered to post security for costs, and has done so, the Threshold Motion is ripe for adjudication. Cortland has largely already briefed the issue on the motion in its security for costs materials,⁹ and the motion concerns nothing more than the narrow and discrete legal issue of whether its DIP charge stands in priority to a constructive trust as claimed by Final Bell. The Applicants agree with Cortland that the hearing of this motion should take less than two hours and, as noted above, agree that a finding in favor of Cortland will render the remedy Final Bell seeks unavailable, and would therefore moot its claim.¹⁰

8. In the interest of the efficient use of judicial resources, and the most expeditious resolution of this litigation possible, the Applicants submit that the Threshold Motion should be scheduled for the earliest available half-day hearing date.

⁸ See *Borowski*, above.

⁹ Aide Memoire of Cortland, June 3, 2024, at para. 8.

¹⁰ As Final Bell submitted on the security for costs motion, a constructive trust is a necessary part of the relief it now seeks: equitable damages alone, without a constructive trust, would in its telling be a “meaningless” and “empty” remedy: Responding Factum of Final Bell to Cortland Credit Lending Corporation (Motion for Security for Costs), at para. 31.

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**AIDE MEMOIRE OF THE APPLICANTS
(Case Conference on 7, 2024)**

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