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

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

B E T W E E N:

**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

# RESPONDING FACTUM OF FINAL BELL HOLDINGS INTERNATIONAL INC.
## (Cortland Motion For Security for Costs)

May 22, 2024

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TO: **THE SERVICE LIST**

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## PART I - INTRODUCTION

1. The issue on this motion is whether the justness of the case supports an order that Final Bell pay security for Cortland's costs prior to the hearing of Final Bell's claim against BZAM for equitable damages and a constructive trust, in circumstances where Final Bell does not allege wrongdoing against Cortland and is seeking equitable relief to remedy unjust conduct by BZAM.

2. Cortland is not a "defendant" to an action. It is, at best, an intervenor on a motion. Final Bell does not seek any relief against Cortland: it does not seek damages or a declaration, or otherwise allege any wrongdoing against Cortland. Cortland is only participating in this proceeding because, if Final Bell is successful, the relief it seeks will likely lead to Cortland recovering less than the full amount of the secured debt owed to it by BZAM.

3. Cortland inserted itself into this proceeding, but its participation has been limited, as one would expect from an intervener. Its witness swore a 5-page affidavit with no exhibits in response to Final Bell's motion record. He was cross-examined for approximately 35 minutes. Cortland was not involved in the document request process that ultimately led to the adjournment of the hearing after BZAM disclosed relevant documents one business day before the hearing.

4. While Cortland has an interest in the outcome, its limited role does not support an award of security for costs against a co-respondent to this CCAA proceeding, let alone an award anywhere near the quantum it seeks. It seeks security for six timekeepers, including three non-litigator partners in its banking and/or restructuring groups. Without dockets, which Cortland refuses to produce, it is unclear how these lawyers' time is reasonably attributable to Final Bell's claim as opposed to other matters in the CCAA proceeding, such as the SISP and DIP loan.

5. The motion should be dismissed. It would be unjust to award Cortland security.

## PART II - SUMMARY OF FACTS

6. Cortland's motion, which was brought without notice to Final Bell and was initially proposed to be heard in writing, was brought on the same day as BZAM's motion. Its motion record, which was delivered a few hours after BZAM delivered its record, heavily overlaps with BZAM's record. Its moving factum contains four pages of facts.

7. Given the factual overlap with BZAM's motion, Final Bell repeats and relies on the facts summarized in its responding factum to BZAM's motion, which is best read prior to this factum. The facts below supplement the facts in Final Bell's other factum and attempt to avoid unnecessary repetition. Capitalized terms not defined in this factum are defined in the responding factum to BZAM's motion.

### A. Final Bell did not Bring a Claim against Cortland

8. Final Bell's claim in this proceeding seeks relief against BZAM, the CCAA applicant. It does not seek relief against Cortland. The claim concerns fraudulent misrepresentations that BZAM's officers made to Final Bell prior to closing on the SEA on January 5, 2024. Those misrepresentations are described in detail in the responding factum to BZAM's motion.

#### i. *Credit Facility Misrepresentation Concerns Cortland's Honesty, not Dishonesty*

9. The only misrepresentation that directly involves Cortland is the allegation that BZAM knowingly or recklessly misrepresented to Final Bell that it knew of "no reason" why it would not be able to extend the Cortland Facility beyond March 2024. But that misrepresentation does allege any wrongdoing by Cortland. In fact, Final Bell relies on Cortland's in-house counsel's

candid and honest communication to BZAM in December 2023 that Cortland would not grant an extension of the Cortland Facility in March 2024, contrary to BZAM's representation to Final Bell.

10. On December 13, 2023, following a review of a draft amended credit agreement, Bovingdon asked Cortland's outside counsel and in-house representatives whether the draft agreement contained a drafting error with respect to the maturity date, and whether the maturity date, which at the time was March 24, 2024, should be extended to 2025.[1]

11. The response from Rachel Andrew, Cortland's in-house counsel, sent that same day, clearly communicated Cortland's position: if BZAM is asking if the date in the amended agreement should be 2025, the answer is "no", because Cortland would not agree to an extension "at that time":

> […] 1. **Maturity Date: maturity date is March 24, 2024 – Cortland isn't granting TGOD an extension at that time.** The amort payments have been pushed out to the same date as the Maturity Date as we'd look to implement that in the future if TGOD requests an extension to the Maturity Date.[2]

12. The fact that BZAM did not forward Andrew's email to Final Bell, or otherwise update its representation that it saw "no reason" why the Cortland Facility would not be extended, is no fault of Cortland. No one is suggesting that Cortland was aware of BZAM's representations to Final Bell, or that BZAM had not updated them as it was obligated to do when the representation was no longer true. The fault lies entirely with BZAM.

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[1] Exhibit "4" to Bovingdon Cross; RMR, Tab 8-4. The draft amending agreement is Exhibit "1" to the Alappatt Cross; RMR, Tab 11-1.
[2] *Ibid*. [emphasis added].

ii. *The SARCA – Bovingdon Termination Triggers a Termination Event*

13. The agreement that was discussed in the email message quoted above was signed on January 8, 2024. It is entitled the "Second Amended and Restated Credit Agreement" (the "**SARCA**"). The SARCA defines "Change of Control" to include if Sean Bovingdon ceases to be the CFO of BZAM and Cortland is not satisfied, in its reasonable discretion, with the arrangements made with respect to his replacement. An "Event of Default" under the SARCA includes if a Change of Control occurs to which Cortland does not consent to in writing.[3]

14. It is undisputed that Milich terminated Bovingdon as BZAM's CFO without a replacement candidate in place, thus triggering a Change of Control. Moreover, Milich admits he did not have Cortland's written consent to Bovingdon's termination.[4] What's worse, this Event of Default was intentionally committed by BZAM at a time when it had not requested, let alone secured, an extension of the Cortland Facility.

15. Final Bell relies on BZAM's contractual obligations to Cortland, among other things, to support its claim that the Bovingdon termination was a misrepresentation by omission to Final Bell. In circumstances where the Cortland Facility was not yet extended beyond March 2024, an implied representation from BZAM to Final Bell was that it would not intentionally trigger an Event of Default three days after signing the SARCA.

16. But, as with the Cortland Facility extension misrepresentation, there is no allegation that Cortland knew that BZAM intended to terminate Bovingdon without cause on January 11, or that

[3] SARCA, Exhibit "1" to Alappatt Cross; RMR, Tab 11-1, pp. 1314-15.
[4] Milich Cross, pp. 33-34, qq. 125-29; RMR, Tab 10, pp. 1216-17.

this intention was not communicated to Final Bell before closing on the SEA. Cortland is not alleged to be in any way involved in the misrepresentation.

17. The other misrepresentations Final Bell relies on in its claim against BZAM do not involve Cortland at all, whether directly or indirectly.

**B. Cortland is a Quasi-Intervenor**

18. Cortland was not brought into the claim through Final Bell's allegations. It inserted itself in the proceeding out of concern for the consequences of the relief sought on its secured claim. Alappatt's brief affidavit concerns the alleged prejudice to Cortland if the SEA were rescinded, as originally sought by Final Bell.[5]

19. In effect, Cortland intervened in a dispute between a claimant and a respondent to protect an interest that is unique to it. Like an intervener, it has taken a "back seat" to BZAM at every stage of the litigation. Cortland's role has been limited to supplementing the evidentiary record with limited evidence to address its unique, and limited, role in the dispute.

**C. Cortland's Delay in Bringing Its Motion**

20. Like BZAM, Cortland knew, or could have discovered, all of the facts it relies on in support of its motion for security for costs before Final Bell delivered its motion record on March 18. Final Bell's status as a British Columbia corporation was known to the parties via the SEA, and the circumstances of the cease-trade order affecting its shares are publicly available on SEDAR.

[5] Alappatt Affidavit, ¶11-13; Cortland Reply Motion Record, Tab A-1, p. 9.

21. At no point prior to April 24, when it served its motion record and factum, did Cortland raise a concern about security for costs. Cortland's counsel was in attendance at the March 8 SISP approval motion where Final Bell communicated that it was in the process of investigating whether to bring a motion for relief that might affect the sales process. Cortland's counsel also attended the March 19 case conference where the Court confirmed that Final Bell's claim would be heard via a summary trial.[6] It did not address Final Bell's claim at either conference. In particular, at no point at or after those case conferences did Cortland raise the possibility of seeking security for its costs to participate in Final Bell's claim. Like BZAM, Cortland did not adduce any evidence on this motion to explain its delay in seeking security for costs.

**PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

22. The issue on this motion is whether the Court should order Final Bell to post security for Cortland's costs and, if so, the form and quantum of that security. Final Bell submits that no security should be ordered. In the alternative, the Court should only order Final Bell to pay security for Cortland's partial indemnity costs for two litigators to prepare for and attend the two-day hearing, in the amount of $30,000, payable within a reasonable period after this motion and/or before the hearing date.

23. To the extent the legal submissions in its factum responding to the BZAM motion are relevant, Final Bell repeats and relies on those arguments and seeks to avoid unnecessary duplication of submissions. For example, Final Bell repeats and relies on its submission that the

[6] Endorsements of Justice Osborne dated March 8 and 19, 2024.

accepted shifting of the onus under Rule 56 does not apply to this dispute, where Final Bell is not a plaintiff or applicant.

24. However, the general principles that apply to motions for security for costs are worthwhile repeating in brief.

**A. Test for Security for Costs – the Justness of the Case**

25. In *Yaiguaje v. Chevron Corporation*, the Ontario Court of Appeal confirmed that "an order for security for costs should only be made where the justness of the case demands it."[7] The factors to consider in determining the justness of the case include the merits of the claim and delay in bringing the motion. These factors can lead to a Court dismissing a motion for security for costs in circumstances where the moving party has met the traditional initial onus.[8]

26. With respect to delay in bringing the motion, it is accepted that a motion for security for costs must be brought promptly after the moving party discovers it has a reasonable basis for seeking security. The justness of the case requires that a plaintiff not be placed in the position of having to post security for costs after it incurred significant expense to advance its claim. Delay without explanation is fatal to a security for costs motion.[9]

27. Even where there may be an explanation for the delay, the Court should consider the timing of the motion to determine if the circumstances of the case weigh against granting security for costs. In *Solea International*, the Court held that it would be inappropriate to award

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[7] *Yaiguaje v Chevron Corporation* ("*Chevron*"), 2017 ONCA 827 at para. 23.
[8] *Chevron,* at para. 24.
[9] *Wilson Young & Associates Inc. v. Carleton University et al*, 2020 ONSC 4542, at paras. 59 and 62.

security for costs when all of the evidence was in the record, documentary and oral discovery had been completed, and the parties were ready for the final hearing on the merits.[10]

28. In the present case, Cortland claims it incurred over $330,000 in fees to date to participate in Final Bell's claim, which is approximately equal to Final Bell's fees to prosecute its claim. The fact that a party with a limited role could run up a sizable account without any indication of its intention to seek security for costs, and then take advantage of an adjournment necessitated by BZAM's conduct, militates against an award of security for costs.

29. In the alternative, the conduct justifies restricting Cortland to security for its costs of the hearing, which, as submitted below, would be reasonably be estimated at $30,000.

**B. Strong *Prima Facie* Case for a Constructive Trust**

30. Another factor to consider is the strength of Final Bell's claim for a constructive trust. In its factum responding to the BZAM motion, Final Bell explains how it has a strong *prima facie* case for equitable damages in lieu of rescission of the SEA. The remedy of equitable damages is warranted where rescission is unavailable or will not put the claimant in the position they would have been in but for the fraudulent misrepresentation.

31. However, In this case, equitable damages alone will amount to an empty remedy if a constructive trust is not imposed on BZAM's assets. It is undisputed that the Stalking Horse Bid, which is the only known means for BZAM to realize any value for its stakeholders, only intends to pay cash equal to the amount of Cortland's outstanding secured debt under the Cortland

[10] *Solea International BVBA v. Bassett & Walker International Inc.,* 2018 ONSC 3237, at para. 22.

Facility and the DIP Loan. This means that a restitutionary award in favour of Final Bell will be meaningless without a proprietary remedy.

i. *Equity Converts BZAM to a Trustee*

32. In insolvency proceedings, although the test for proving the existence of a constructive trust is admittedly high, a trust will ordinarily be imposed on property in the hands of a wrongdoer to remedy an injustice where the insolvent party obtained property through misconduct and it would be unjust to permit the bankrupt and its creditors to benefit from the misconduct.[11]

33. Just as equitable damages are awarded where rescission is justified but unavailable, equity converts a legal holder of property into a trustee if the property is acquired in circumstances where the Court finds the legal owner should not in good conscience retain the beneficial interest. "Good conscience" is the unifying concept underlying constructive trusts.[12]

34. While Cortland may not be a wrongdoer, it is undisputed that the successful assertion of a constructive trust means that the property in question would not form part of the property of the bankrupt. The trust property trumps the priority scheme in insolvency legislation. Where there is a limited pool of assets and conflicting claims to the insolvent party's estate, equity allows the Court to fashion a remedy in a manner responsive to the individualized circumstances of the case.[13]

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[11] *Credifinance Securities Limited v. DSLC Capital Corp.,* 2011 ONCA 160, ¶37.
[12] *Soulos v. Korkontzilas*, [1997] 2 SCR 217, ¶29.
[13] *Sirius Concrete Inc. (Re)*, 2022 ONCA 524 ¶14. *Garcha v. 690174 B.C. Ltd.*, 2023 BCCA 376, ¶87.

35. In this case, BZAM knowingly or recklessly misrepresented material facts to Final Bell to induce it to close on the SEA. The recently disclosed bank statements confirm that but for the SEA closing on January 5, 2024, BZAM would have been insolvent and unable to pay the $2.3 million excise tax arrears it paid on January 16. If that came to pass, Cortland would not have benefitted from the value of the sale of FBC assets to the Stalking Horse Bidder.

36. In these circumstances, it would be unjust to deprive Final Bell of its ability to be put back to the position it was in on January 4, 2024, before it closed on the SEA. Good conscience requires that the Court fashion a meaningful remedy for BZAM's misconduct, even if it means Cortland's recovery is affected.

ii. *Cortland's Security Interest Should not Trump Final Bell's Equitable Claim*

37. Cortland, a secured creditor, has not suggested that it has been defrauded by BZAM. Its claim is limited to a secured interest over the property that rightfully belongs to BZAM. That property does not include the FBC assets that would never have merged with BZAM if it had not misled Final Bell.

38. Depriving an insolvent party's creditors of the proceeds of wrongdoing that would normally be returned to the innocent party is not a novel remedy in insolvency proceedings. For example, in *Cummings v Peopledge HR Services*, Justice Newbould determined that it would be inequitable for creditors other than the claimants who provided certain funds to Peopledge to be paid their claims from those funds. Justice Newbould applied the "umbrella of good conscience" to avoid an outcome where innocent victims of misconduct are deprived of the return of their

funds in favour of creditors who would not have benefitted from the availability of funds but for the insolvent party's wrongdoing.[14]

39. In this case, it would be unconscionable to permit Cortland to make a full recovery of its secured credit if that means Final Bell recovers nothing after Court concludes that Final Bell would have been entitled to rescind the SEA. That would not be a just outcome and is not the way the Court is expected to apply insolvency legislation.

40. For the purposes of this motion, the Court need not, and should not, conclude definitively whether a constructive trust will be awarded after a trial in September (or sooner). Rather, it is enough to recognize that the Court could impose a constructive trust, and that Final Bell's sympathetic circumstances justify the seeking of a constructive trust, for the purposes of determining the justness of the case and whether Final Bell should post security for Cortland's costs.

### C. Cortland as Intervener Generally Not Entitled to Costs

41. Final Bell describes Cortland as an intervener because that title fits its role in this case. No party alleges that it committed any wrongdoing; it is only participating to seek to avoid an outcome that might affect its recovery in this CCAA proceeding.

42. The general rule concerning interveners and costs is that an intervener is neither liable for, nor entitled to, costs. This rule applies in both public and private contexts, even where the intervener has a commercial interest in the outcome.[15]

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[14] *Cummings v. Peopledge HR Services Inc.*, 2013 ONSC 2781, ¶18.
[15] *Ogichidaakwe (Grand Chief) v Ontario Minister of Energy*, 2015 ONSC 7582, ¶8.

43. It is acknowledged that there are exceptions to this general rule. But in circumstances where those exceptions are best determined at the conclusion of a proceeding, and not mid-stream, the general rule weights against granting Cortland security for its costs.

44. A related issue is the potential lack of reciprocity for costs. If Final Bell is successful on all aspects of its claim, it will have successfully overcome Cortland's opposition to its case. But in circumstances where Cortland is not responsible for Final Bell's loss, the Court may decide to hold BZAM solely liable for Final Bell's costs. One would expect Cortland would argue in favour of that outcome.

45. Or, if the Court determines that BZAM made fraudulent misrepresentations to Final Bell, but refuses to grant Final Bell a constructive trust, then Cortland would likely be considered a successful party, but Final Bell would also be a successful claimant in respect of its claim against BZAM. In those circumstances, the Court could fashion a Sanderson order remedy and find that the justness of the case requires Cortland's costs to be paid by BZAM.

46. Given the possibility of non-reciprocal costs liability, Cortland as quasi-intervener should not be entitled to security for costs.

**D. Quantum of Costs Sought Unsupported by Evidence**

47. As with BZAM, Cortland refused to provide redacted dockets to support the costs claimed in its Bill of Costs, notwithstanding that the form requires dockets or other similar evidence to be attached to the court form. This omission is particularly problematic where Cortland seeks security for six timekeepers, including three non-litigation partners whose actual

hourly rates range between $815 and $1005, which are all higher than the hourly rate of the senior litigator on the file (at $760).

48. For example, it is unclear how Cortland justifies seeking security for over 67 hours of Ms. Levine's time, comprised of over 40 hours of time already incurred and an estimated 27 hours to be incurred prior to the hearing. At $975 per hour, that amounts to over $65,000 in fees by one of three banking partners that Cortland claims relate solely to Final Bell's claim.[16]

49. The accepted principle for security for costs is that the quantum is not a simple matter of multiplying hours claimed times rates. Rather, the Court awards costs that are a fair and reasonable amount that the unsuccessful party should pay, rather than an exact measure of actual costs.[17] In this case, it is difficult to accept that, without dockets, Cortland will be able to claim indemnification for dozens of hours incurred by non-litigator partners in circumstances where its counsel are involved in other aspects of this CCAA proceeding.

50. The application of limited scrutiny to Cortland's Bill of Costs will reveal that, stripping away the costs attributed to non-litigators, its reasonable partial indemnity fees incurred to date and estimated to be incurred for the two-day hearing amount to approximately $30,000. In the event the Court determines that Cortland should be awarded some amount as security for costs, then as argued above, the amount should be limited to its costs of the hearing, but limited to a reasonable amount to claim for two litigators.

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[16] See Cortland's Bill of Costs; Cortland Motion Record, Tab B-11, p. 259. Ms. Levine's bio is at RMR Tab 6-O, p. 958.

[17] *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ON CA), ¶24.

**PART IV - ORDER REQUESTED**

51. Final Bell requests that Cortland's motion be dismissed, with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 22nd day of May, 2024.

Andrew Winton

May 22, 2024

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**SCHEDULE "A"**

**LIST OF AUTHORITIES**

1. *Yaiguaje v Chevron Corporation* ("*Chevron*"), 2017 ONCA 827.

2. *Wilson Young & Associates Inc. v. Carleton University et al*, 2020 ONSC 4542.

3. *Solea International BVBA v. Bassett & Walker International Inc.,* 2018 ONSC 3237.

4. *Credifinance Securities Limited v. DSLC Capital Corp.,* 2011 ONCA 160.

5. *Soulos v. Korkontzilas*, [1997] 2 SCR 217.

6. *Sirius Concrete Inc. (Re)*, 2022 ONCA 524.

7. *Garcha v. 690174 B.C. Ltd.*, 2023 BCCA 376.

8. *Cummings v. Peopledge HR Services Inc.*, 2013 ONSC 2781.

9. *Ogichidaakwe (Grand Chief) v Ontario Minister of Energy*, 2015 ONSC 7582.

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PROCEEDING COMMENCED AT TORONTO

**RESPONDING FACTUM OF FINAL BELL HOLDINGS INTERNATIONAL INC.**
**(CORTLAND MOTION FOR SECURITY FOR COSTS)**

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