Court File No.:_____

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 FIGR BRANDS, INC., FIGR NORFOLK INC. AND CANADA'S ISLAND GARDEN INC.

Applicants

FACTUM OF THE APPLICANTS
(CCAA Application)

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FACTUM OF THE APPLICANTS

PART I: INTRODUCTION

1. FIGR Brands, Inc. ("**FIGR Brands**"), FIGR Norfolk Inc. ("**FIGR Norfolk**"), and Canada's Island Garden Inc. ("**CIG**", and together with FIGR Brands and FIGR Norfolk, the "**Applicants**" or the "**FIGR Group**") seek urgent relief pursuant to an order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

2. The FIGR Group operates two (2) cannabis facilities – one in Simcoe, Ontario (the "**FIGR Norfolk Facility**") and the other in Charlottetown, Prince Edward Island ("**PEI**") (the "**CIG Facility**"). Since commencing operations, both facilities have been cash flow negative and are dependent on indirect subsidiaries of New Pyxus International (as defined below) for funding. Those indirect subsidiaries are no longer prepared to fund the FIGR Group without an exit strategy.

3. The Applicants believe that this CCAA proceeding is in the best interests of their stakeholders. A proceeding under the CCAA presents the only possible means of providing the Applicants with the breathing space required to develop and oversee an orderly sale process, while maintaining business operations in the ordinary course and in compliance with the cannabis regulatory regime, with a view to maximizing stakeholder value.

4. The relief sought in the Initial Order is limited to what is reasonably necessary to allow the Applicants to maintain the *status quo* and continue operations in the ordinary course during the initial 10-day Stay of Proceedings. The Applicants intend to return to the Court for additional relief necessary to advance the CCAA proceedings at a hearing to be scheduled prior to the expiration of the initial Stay of Proceedings (the "**Comeback Hearing**").

PART II: FACTS

5. The facts underlying this Application are more fully set out in the affidavit of Michael Devon, sworn January 21, 2021 (the "**Initial Affidavit**").[1] All capitalized terms used but not defined herein have the meanings ascribed to them in the Initial Affidavit.

B. The Applicants

6. FIGR Brands is a wholly-owned, indirect subsidiary of Pyxus International, Inc. ("**New Pyxus International**"), and is the majority shareholder of both FIGR Norfolk and CIG. [2]

7. Pyxus International Inc., as it then was ("**Original Pyxus International**"), and four (4) affiliated debtors (collectively, the "**US Debtors**") emerged from a financial restructuring under title 11 of the United States Code, 11 U.S.C. §§ 101-1532, as amended, in the United States Bankruptcy Court (the "**US Court**") for the District of Delaware. On September 11, 2020, the US Court entered a Final Decree closing each of the US Debtors' cases except Original Pyxus International, which is being administered under the name Old Holdco, Inc. [3]

8. FIGR Brands was incorporated under the *Business Corporations Act*, SBC 2002, c 57 (British Columbia) on October 28, 2019. On December 30, 2020, FIGR Brands amalgamated with its wholly-owned subsidiary, FIGR Canada Holdings ULC, formerly FIGR Inc., as part of an earlier-established global tax and structuring plan. FIGR Brands' principal place of business is located in Toronto, Ontario and its registered head office is located in Vancouver, British

[1] Affidavit of [Mike Devon] sworn on January 21, 2021 [Initial Affidavit], Applicants Application Record at Tab 2 [Application Record].
[2] *Ibid* at para 5, Application Record at Tab 2.
[3] *Ibid* at paras 10-11, Application Record at Tab 2.

Columbia.[4] It owns 80% of the common shares of FIGR Norfolk, and 94.25% of the common shares of CIG.[5]

9. FIGR Norfolk was originally incorporated as Goldleaf Pharm Inc. under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 on March 6, 2014, and changed its name to FIGR Norfolk Inc. pursuant to articles of amendment on February 28, 2019.[6] It holds a Standard Cultivation, Standard Processing, and Sale for Medical Purposes licence under the *Cannabis Act,* S.C. 2018, c. 16, as amended and its related regulations (together, the "**Cannabis Act**"). FIGR Norfolk operates the FIGR Norfolk Facility.[7]

10. CIG was incorporated under the PEI *Business Corporations Act*, R.S.P.E.I. 1988, c B-6.01 on August 8, 2013, and it currently carries on business under the trade name "FIGR East". CIG's principal place of business and registered head office are located in Charlottetown, PEI.[8] CIG holds a Standard Cultivation, Standard Processing and Sale for Medical Purposes licence (the "**CIG Licence**", and together with the FIGR Norfolk Licence, the "**Cannabis Licences**"), and operates the CIG Facility. [9]

C. Business and Operations

11. The cannabis industry is a highly regulated industry, with the Cannabis Act regulating the possession, cultivation, production, distribution, sale, research, testing, import, export and promotion of cannabis.[10]

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[4] *Ibid* at paras 13-14, Application Record at Tab 2.
[5] *Ibid* at paras 18, 20, Application Record at Tab 2.
[6] *Ibid* at para 15, Application Record at Tab 2.
[7] *Ibid* at paras 37, Application Record at Tab 2.
[8] *Ibid* at para 19, Application Record at Tab 2.
[9] *Ibid* at para 38, Application Record at Tab 2.
[10] *Ibid* at para 21, Application Record at Tab 2.

12. The FIGR Group currently employs approximately 189 employees (the "**Employees**").[11]

13. FIGR Norfolk and CIG operate advanced cannabis cultivation and cannabinoid extraction and processing facilities. Both are licenced to do so under the Cannabis Act. The FIGR Norfolk Licence allows FIGR Norfolk to conduct the following activities at the FIGR Norfolk Facility:

(i) possess cannabis;

(ii) obtain dried cannabis, fresh cannabis, cannabis plants or cannabis plant seeds by cultivating, propagating and harvesting cannabis;

(iii) for the purpose of testing, to obtain cannabis by altering its chemical or physical properties by any means;

(iv) produce cannabis, other than obtain it by cultivating, propagating or harvesting it; and

(v) sell recreational or medicinal dried cannabis, fresh cannabis, cannabis plants or cannabis plant seeds to authorized individuals under the Cannabis Act.

14. Pursuant to the CIG Licence, CIG is authorized to conduct the following activities at the licenced site:

(i) possess cannabis;

(ii) obtain dried cannabis, fresh cannabis, cannabis plants or cannabis plant seeds by cultivating, propagating and harvesting cannabis;

[11] *Ibid* at para 40, Application Record at Tab 2.

(iii) produce cannabis, other than obtain it by cultivating, propagating or harvesting it; and

(iv) sell recreational or medicinal dried cannabis, fresh cannabis, cannabis plants, cannabis plant seeds, edible cannabis, cannabis topicals or cannabis extract to authorized individuals under the Cannabis Act.

15. FIGR Norfolk and CIG are subject to a comprehensive and rigorous regulatory regime as set out in the Cannabis Act and enforced by Health Canada. This regime requires ongoing compliance, record keeping, and reporting. There are strict site, security and operational requirements, including that directors, officers, individuals in a position to exercise direct control, and key individuals on the ground at the licenced site must hold the requisite security clearances.[12]

16. The FIGR Group is currently a party to agreements with various provincial purchasing entities in Canada for the supply of cannabis product. The FIGR Group also has sale and supply agreements in place with a number of private third-party purchasers and retailers.[13]

D. Assets and Liabilities

17. As at November 30, 2020, the FIGR Group had total consolidated assets with a book value of approximately $153,166,418, and had in the aggregate approximately $1,774,333 cash on hand.

18. As at November 30, 2020, the unaudited book value of the FIGR Group's consolidated liabilities was approximately $203,362,540. The main liabilities of the Applicants are discussed below.[14]

[12] *Ibid* at paras 37-39, Application Record at Tab 2.
[13] *Ibid* at paras 27-28, Application Record at Tab 2.
[14] *Ibid* at paras 60-61, Application Record at Tab 2.

1. Secured Obligations

19. The Applicants do not have any secured funded debt, but there are certain financing statements registered against the Applicants.

20. There is a registered financing statement against CGI in PEI. The primary collateral secured is a 2x13 liter extraction unit. There are also a number of registered financing statements against FIGR Inc. (the former name of one of the amalgamated entities which now forms FIGR Brands) in respect of certain leased motor vehicles in Ontario.[15]

2. Unsecured Intercompany Obligations

21. FIGR Inc. is the borrower under a promissory note (the "**AOI Note**") issued by Alliance One International GmbH ("**AOI**"), an indirect subsidiary of New Pyxus International. The AOI Note bears interest at a rate equal to 0.5% plus the arithmetic average of: (a) LIBOR 1-month rate plus 0.025%; and (b) US prime rate plus 0.015%. On December 30, 2020 AOI assigned its rights under the AOI Note to its parent company and sole shareholder, Alliance One International Tabak B.V. ("**AOI Tabak**") (the "**AOI Assignment**"). As at November 30, 2020, approximately $189,729,870 was outstanding under the AOI Note. The AOI Note has no stated maturity and maybe prepaid at any time.[16]

22. CIG is the borrower under a promissory note (the "**CIG Note**") issued by FIGR Inc. The CIG Note bears interest at a rate equal to 1.0% plus the arithmetic average of: (a) LIBOR 1-month rate plus 0.025%; and (b) US prime rate plus 0.015%. As at November 30, 2020, approximately $93,910,479 was outstanding under the CIG Note.[17]

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[15] *Ibid* at paras 62-67, Application Record at Tab 2.
[16] *Ibid* at paras 68-71, Application Record at Tab 2.
[17] *Ibid* at paras 72-75, Application Record at Tab 2.

23. Lastly, FIGR Norfolk is the borrower under a promissory note issued by FIGR Inc. (the "**FIGR Norfolk Note**"). The FIGR Norfolk Note bears interest at a rate of 9% per annum, compounded quarterly and payable monthly commencing January 29, 2020 and thereafter on the first day of each month for the remainder of the term. The FIGR Norfolk Note matures on January 29, 2023. As at November 30, 2020, approximately $40,103,454 was outstanding under the FIGR Norfolk Note.[18]

24. All of these intercompany advances have been made on an unsecured basis.

3. Other Unsecured Obligations and Claims

25. Aside from intercompany borrowings, the Applicants have a number of other unsecured obligations.

26. CIG entered into a contribution agreement with the Atlantic Canada Opportunities Agency ("**ACOA**") on June 10, 2019 (the "**Contribution Agreement**"), pursuant to which ACOA agreed to contribute up to $800,000 (the "**Contribution Amount**") for the expansion of the CIG Expansion Facility. CIG is obligated to repay what is drawn in respect of the Contribution Amount in monthly installments between the period of March 1, 2021 and February 1, 2029. Approximately $776,044.02 remains outstanding under the Contribution Agreement.[19]

27. In addition, given the nature of its business, the FIGR Group relies on a number of vendors and third party service providers that provide services and products in connection with operating a business in the cannabis industry. The FIGR Group is currently indebted to certain third party suppliers.[20]

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[18] *Ibid* at paras 76-78, Application Record at Tab 2.
[19] *Ibid* at paras 80-81, Application Record at Tab 2.
[20] *Ibid* at para 82, Application Record at Tab 2.

28. The FIGR Group's aggregate payroll obligations are as follows: (i) FIGR Brands – approximately $170,000 semi-monthly; (ii) FIGR Norfolk – approximately $59,000 bi-weekly; and (iii) CIG – approximately $244,229 bi-weekly.

29. While the FIGR Group is current with respect to its payment of payroll and the remittance of employee source reductions, its ability to meet future payroll obligations, including payroll due in respect of FIGR Norfolk on January 23, CIG on January 30 and FIGR Brands on January 31 is contingent on the granting of the relief sought in the Initial Order.[21]

E. Issues Leading to the CCAA Filing

30. Since commencing operations, the Norfolk Facility and the CIG Facility have been cash flow negative. Both facilities are dependent on the indirect subsidiaries of New Pyxus International for direct and indirect funding. AOI Tabak, as a result of the AOI Assignment, is currently owed in excess of $189,729,870 by FIGR Brands as at November 30, 2020, which amount has increased since that date as a result of further advances and accrued interest.[22]

31. AOI Tabak is no longer prepared to fund the FIGR Group without an exit strategy.[23]

32. The urgency of this application stems from the need for the Applicants to prevent enforcement action by certain contractual counterparties and to access financing to allow the FIGR Group to continue to meet its future payroll obligations and maintain business operations in order to preserve and maximize value.

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[21] *Ibid* at paras 85-86, Application Record at Tab 2.
[22] *Ibid* at para 5, Application Record at Tab 2.
[23] *Ibid* at para 6, Application Record at Tab 2.

F. Proposed DIP Financing

33. Alliance One Tobacco Canada, Inc. (in such capacity, the "**DIP Lender**") has agreed to provide a super-priority, DIP interim, non-revolving credit facility up to a maximum principal amount of $8,000,000 (the "**DIP Loan**"), under which FIGR Brands is the Borrower and FIGR Norfolk and CIG are the Guarantors. The Applicants and the DIP Lender have entered into the DIP Term Sheet in respect of the DIP Loan. The interest rate applicable to advances under the DIP Loan is 8% per annum and shall be calculated on the daily outstanding balance owing under the DIP Loan, not in advance, and shall accrue and be paid on the Maturity Date (as defined in the DIP Term Sheet).[24]

34. Pursuant to the DIP Term Sheet, the proceeds of the DIP Loan will be used for, *inter alia*, the following purposes: (i) working capital needs in accordance with the Cash Flow Forecast; (ii) to pay fees and expenses associated with the DIP Loan (including without limitation certain expenses, fees of the Monitor, and legal fees of counsel to the DIP Lender, the Applicants and the Monitor); and (iii) to fund such other costs and expenses of the FIGR Group as agreed to by the DIP Lender. The DIP Loan is conditional, among other things, upon the granting of the DIP Lender's Charge, and is subject to customary conditions precedent, covenants and representations and warranties.[25]

35. The amount of the DIP Loan that is proposed to be funded during the initial Stay of Proceedings (up to $2.5 million) is only that portion that is necessary to ensure the continued operation of the Applicants' business in the ordinary course during the initial 10 days.

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[24] *Ibid* at paras 87-88, Application Record at Tab 2.
[25] *Ibid* at paras 89-90, Application Record at Tab 2.

G. Proposed Monitor

36. It is proposed that FTI Consulting Canada Inc. (in such capacity, the "**Proposed Monitor**") will act as Monitor in these CCAA Proceedings.

PART III: ISSUES

37. The issues to be considered on this application are whether:

(a) each of the Applicants is a "debtor company" to which the CCAA applies;

(b) the Stay of Proceedings should be granted;

(c) the Court should approve the proposed DIP Loan and grant the DIP Lender's Charge;

(d) the Administration Charge should be granted;

(e) the Directors' Charge should be granted;

(f) the Intercompany Charge should be granted; and

(g) the Applicants are entitled to make certain pre-filing payments.

B. The Applicants are "debtor companies"

38. The CCAA applies in respect of a "debtor company or affiliated debtor companies" whose liabilities exceed $5 million.[26] The term "debtor company" is defined as "any company that: (a) is bankrupt or insolvent […]" and the term "company" is defined as "any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province

[26] *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, s 3(1) [CCAA].

[…]".[27] Each of the Applicants is a "company" within the meaning of the CCAA as they are incorporated under the *Business Corporations Act*, SBC 2002, c 57 (British Columbia), the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 and the PEI *Business Corporation Act*, R.S.P.E.I. 1988, c B-6.01, as applicable.[28]

39. Each of the Applicants is a "debtor company" as defined in the CCAA because it is a company that is insolvent. The insolvency of a debtor company is assessed as of the time of filing the CCAA application.[29] Courts have taken guidance from the definition of "insolvent person" in subsection 2(1) of the *Bankruptcy and Insolvency Act*, which, in relevant part, provides that an "insolvent person" is a person:

> (a) who is for any reason unable to meet his obligations as they generally become due;
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due; or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.[30]

40. A company is also insolvent for purposes of the CCAA "if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring."[31]

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[27] *Ibid* s 2(1).
[28] Initial Affidavit, supra note 1 at para 13, 15 and 19, Application Record at Tab 2.
[29] *Re Stelco Inc* (2004), 48 C.B.R. (4th) 299 (Ont. Sup. Ct. J. [Commercial List]) at para 4 [*Stelco*].
[30] *Bankruptcy and Insolvency Act,* RSC 1985, c. B-3, s 2.
[31] *Stelco*, *supra* note 29 at paras 26, 40.

41. The Applicants are insolvent based upon the above definitions. As set out above, FIGR Brands, as at November 30, 2020, is indebted to AOI Tabak under the AOI Note in the amount of $189,729,870. Further, CIG and FIGR Norfolk are indebted to FIGR Brands in the amounts of $93,910,479 and $40,103,454, respectively**.** With limited cash on hand, the FIGR Group is unable to meet its obligations as they become due, including the payroll and related remittances due in respect of FIGR Norfolk on January 23, CIG on January 30 and FIGR Brands on January 31.

42. Each of the Applicants is insolvent based on the above definitions and the Applicants, as a whole and individually, have debts in excess of $5 million.[32]

C. The Stay of Proceedings Should be Granted

1. The Recent Amendments to the CCAA

43. The Applicants are seeking a stay of proceedings under section 11.02 of the CCAA. On November 1, 2019, the CCAA was amended to include section 11.001:

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

44. The stated purpose of the recent amendments to the CCAA is "enhancing retirement security by making the insolvency process fairer, more transparent and more accessible" by, among other things, limiting "the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players".[33]

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[32] Initial Affidavit, supra note 1 at para 5, Application Record at Tab 2.

[33] Canada, Innovation, Science and Economic Development Canada, *Insolvency reforms to come into force*, News Release, (Ottawa: Media Relations) 2019 at 2; Canada, Marketplace Framework Policy Branch, *Order Fixing November 1, 2019 as the Day on Which Certain Provisions of*

45. This amendment is consistent with existing jurisprudence which states that terms in initial orders should be kept to terms "as are reasonably necessary for the continued operation of the debtor company during a brief but realistic period of time".[34]

46. In cases considering this new amendment, the Court has adopted the above and stated the purpose of section 11.001 "is to make the insolvency process fairer, more transparent and more accessible by limiting the decisions made at the outset of the proceedings to measures that are reasonably necessary to avoid the immediate liquidation of an insolvent company and to allow for broader participation in the restructuring process."[35] Its intent is to ensure that, absent exceptional circumstances, the relief shall be limited to relief reasonably necessary for the ordinary course continued operations and, whenever possible, the *status quo* should be maintained during the initial 10-day period.[36] This 10-day period "allows for a stabilization of operations and a negotiating window."[37]

47. Consistent with the above, the Applicants have limited all relief sought on this application to that which is reasonably necessary in the circumstances for the continued operations of their business during the initial 10-day period. Relief outside of that scope, including approval of the proposed SISP, will not be sought until the Comeback Hearing.

2. The Requirements for the Stay of Proceedings are Satisfied

48. Section 11.02 of the CCAA provides the Court with the power to impose a stay of proceedings if it is satisfied that circumstances exist that make the order appropriate.[38] A stay of

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the two Acts Come into Force: SI/2019-90, Canada Gazette, Part II, Volume 153, Number 18 [*Order Fixing*]. See also *Re Lydian International Limited*, 2019 ONSC 7473 at para 31 [*Lydian*].

[34] *Royal Oak Mines Inc*, [1999] OJ No. 709 at paras 21-24; *Miniso International Hong Kong Limited v Migu Investments Inc*, 2019 BCSC 1234 at paras 77-80 [*Miniso*].

[35] *Re Clover Leaf Holdings Company*, 2019 ONSC 6966 at para 13 [*Clover Leaf*].

[36] *Lydian*, *supra* note 33 at para 26.

[37] *Ibid* at para 30.

[38] CCAA, *supra* note 26 s 11.02.

proceedings is appropriate to provide the debtor with breathing room while it seeks to restore solvency and emerge from the CCAA on a going concern basis.[39] Pursuant to the recent amendments to the CCAA, such relief can be granted for a period of not more than 10 days. The Initial Order is in accordance with this amendment.

49. The Applicants require the Stay of Proceedings to prevent potential enforcement action by certain contractual counterparties. It would be detrimental to the Applicants' business if proceedings were commenced or continued or rights and remedies were executed against them and, without the Stay of Proceedings, the Applicants are unable to continue operations in the ordinary course of business. The Stay of Proceedings will stabilize and preserve the value of the Applicants' business and ultimately provide the Applicants with breathing space to develop and oversee an orderly sale process, while maintaining business operations in the ordinary course and in compliance with the cannabis regulatory regime.[40]

50. The Applicants believe the granting of the Stay of Proceedings is in the best interests of the Applicants and their stakeholders, meets the statutory requirements, and is appropriate in the circumstances.

D. The Proposed DIP Financing Should be Approved

1. The Proposed DIP Financing Satisfies Subsection 11.2(5) of the CCAA

51. On November 1, 2019, a new subsection 11.2(5) was added to the CCAA regarding DIP financing sought at an initial application:

> 11.2(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the

[39] *Century Services Inc v Attorney General (Canada)*, 2010 SCC 60 at para 14; *Target Canada Co*, 2015 ONSC 303 at para 8.
[40] Initial Affidavit, supra note 1 at para 92-93, Application Record at Tab 2.

> period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.[41]

52. Consistent with section 11.001 discussed above, and the stated purposes of the amendments, this limits the approval of DIP financing today to what "is reasonably necessary for the continued operations of the debtor company in the ordinary course of business" to ensure that decisions taken at the outset of a CCAA proceeding are limited "to measures necessary to avoid the immediate liquidation of an insolvent company".[42]

53. In a recent case applying subsection 11.2(5), the Court held that the provision is consistent with the existing jurisprudence on interim financing that "DIP financing should be granted keep the lights on and should be limited to terms that are reasonably necessary for the continued operation of the company."[43] When considering this new amendment, a British Columbia Court endorsed the view that the amendment "is not inconsistent with the current approach of Canadian courts when exercising its discretion under s. 11.2 of the *CCAA*".[44]

54. Subsection 11.2(5) requires that this Court be satisfied, after considering all of the facts and circumstances in the case before it, that the interim financing sought to be approved is "reasonably necessary" for continued operations in such circumstances. What is "reasonably necessary" in each case is inevitably a question of fact based on the circumstances before the Court.[45]

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[41] CCAA, *supra* note 26 s 11.2(5).
[42] *Ibid* s 11.2(5); *Order Fixing*, *supra* note 33.
[43] *Clover Leaf*, *supra* note 35 at para 20.
[44] *Miniso*, *supra* note 34 at para 80.
[45] *8440522 Canada Inc, Re,* 2013 ONSC 6167 at para 30.

55. In line with the prior case law holding that DIP financing should be restricted to what is "reasonably necessary" to meet the debtor's needs, courts have approved DIP financing where it would provide stability to the debtor's business, ensure liquidity, prevent customers from going elsewhere, and ensure the day-to-day operations of the debtor's business.[46] In a recent decision from British Columbia considering the requirements of subsection 11.2(5) when approving DIP financing, the Court found the new provision was satisfied as the interim financing was "necessary to permit the [applicants] to maintain the value of the enterprise while they pursue a restructuring".[47]

56. In this case, without the proposed DIP Loan, the Applicants would be unable to maintain continued business operations in the ordinary course. Failure to operate in the ordinary course would be devastating to the Applicants' business as it may lead to, among other things, attrition of the Employees, many of whom are required to be employed under the Cannabis Licences. In addition to providing liquidity and preserving the Applicants' enterprise value, the proposed DIP Loan is critical to maintaining the *status quo.* The proposed DIP Loan will be used to honour its ordinary course commitments and the Applicants submit that the requirement in subsection 11.2(5) is satisfied.[48]

2. The Proposed DIP Financing Satisfies the Criteria in Subsections 11.2(1), (4)

57. Subsection 11.2(1) expressly provides the Court with the statutory jurisdiction to grant a DIP financing charge “on notice to the secured creditors who are likely to be affected by the security or charge – in an amount that the court considers appropriate…having regard to [the debtors’] cash-flow statement. The security or charge may not secure an obligation that exists

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[46] *Ibid* at paras 30-31.
[47] *Miniso*, *supra* note 34 at paras 86, 88.
[48] Initial Affidavit, supra note 1 at para 89, Application Record at Tab 2.

before the order is made." In the Initial Order, the Applicants are seeking a DIP Lender's Charge up to a maximum of $2.5 million that will rank subordinate to the Administration Charge and the Directors' Charge.[49]

58. The DIP Lender's Charge will not secure obligations incurred prior to the CCAA Proceedings, and the amount proposed to be funded is limited to the amount necessary to continue ordinary course operations prior to the Comeback Hearing. The DIP Lender's Charge, and all Charges, will not rank in priority to claims of secured creditors who did not receive notice of this application. The DIP Lender's Charge sought on this application is only for the amount to be accrued in the 10-day period preceding the Comeback Hearing.[50]

59. Subsection 11.2(4) sets out the following non-exhaustive factors to be considered by the Court in deciding whether to grant a DIP financing charge:

> 11.2(4) *Factors to be considered*. – In deciding whether to make an order, the court is to consider, among other things,
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> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
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> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
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> (g) the monitor's report referred to in paragraph 23(1)(b), if any.[51]

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[49] Initial Order, dated January 21, 2021 at para 36.
[50] Initial Affidavit, supra note 1 at paras 107-109, Application Record at Tab 2.
[51] *CCAA*, *supra* note 26 s 11.2(4); *Canwest Publishing Inc, Re,* 2010 ONSC 222 at para 42 [*Canwest Publishing*].

60. The following factors support approval of the proposed DIP Loan and the granting of the DIP Lender's Charge:

(a) the Applicants are facing a liquidity crisis in light of AOI Tabak's refusal to fund the FIGR Group any further without an exit strategy. The only way in which these obligations can be met is through the proposed DIP Loan. Any loss of important contracts or Employees would be devastating to the Applicants' business, including because certain of the Employees are required to be employed under the Cannabis Licences;

(b) the proposed DIP Loan is necessary to maintain the ongoing business and operations of the Applicants;

(c) the proposed DIP Loan will preserve the value and going concern operations of the Applicants' business, which is in the best interests of the Applicants and their stakeholders;

(d) the DIP Lender requires the DIP Lender's Charge as a condition of providing the proposed DIP Loan;

(e) the amount of the proposed DIP Loan is appropriate having regard to the Applicants' cash-flow statement and the amount that is proposed to be funded prior to the Comeback Hearing is only the portion necessary to keep the Applicants operating in the ordinary course of business;

(f) the cash flow projections demonstrate that debtor-in-possession financing is urgently required to provide the Applicants with the required liquidity for continued business operations in the ordinary course; and

(g) the Proposed Monitor is supportive of the proposed DIP Loan and does not believe that creditors will be prejudiced as a result of its approval.[52]

61. The Applicants submit that approval of the proposed DIP Loan and the DIP Lender's Charge is appropriate in the circumstances, consistent with the terms of the CCAA, reasonably necessary in order to enable the continued operation of the Applicants' business in the ordinary course, and in the best interests of the Applicants and their stakeholders - including the Employees of the Applicants who are intended to be paid in the ordinary course from the proposed DIP Loan.

E. The Administration Charge Should be Granted

62. The Applicants are seeking an Administration Charge in the amount of $600,000 to secure the professional fees and disbursements of the Proposed Monitor, along with its counsel and the Applicants' counsel, incurred prior to, on, or subsequent to the date of the Initial Order, incurred at their standard rates and charges.[53]

63. Section 11.52 of the CCAA expressly provides the Court with the jurisdiction to grant an administration charge. The following list of non-exhaustive factors are to be considered when granting an administration charge:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

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[52] Initial Affidavit, supra note 1 at para 5, 89-91 and 107, Application Record at Tab 2; Pre-Filing Report of the Proposed Monitor FTI Consulting Canada Inc. dated January 21, 2020 at paras 92-94 [Monitor's Report]
[53] Initial Affidavit, supra note 1 at para 99, Application Record at Tab 2.

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.[54]

64. The Applicants submit that it is appropriate for this Court to exercise its jurisdiction and grant the Administration Charge, given that:

(a) the Applicants' business is highly regulated and subject to numerous statutory and regulatory restrictions and requirements;

(b) the beneficiaries of the Administration Charge have, and will continue to, contribute to these CCAA Proceedings and assist the Applicants with their business, including continuing operations in the ordinary course;

(c) each proposed beneficiary of the Administration Charge is performing distinct functions and there is no duplication of roles;

(d) the quantum of the proposed charge is fair and reasonable;

(e) the proposed DIP Lender, supports the Administration Charge; and

(f) the Proposed Monitor is supportive of the Administration Charge.[55]

F. The Directors' Charge Should be Granted

65. The Applicants are seeking a Directors' Charge in the amount of $2 million to secure the indemnity of their directors and officers for liabilities they may incur during the CCAA Proceedings, which may include, among other things, unpaid accrued wages and unpaid accrued

[54] *Canwest Publishing*, *supra* note 51 at para 54.
[55] Initial Affidavit, supra note 1 at para 24 and 100-101, Application Record at Tab 2; Monitor's Report, supra note 52 at paras 95-97.

vacation pay, together with unremitted excise, sales, goods and services, and harmonized sales taxes.[56]

66. Section 11.51 of the CCAA affords the Court the jurisdiction to grant the Directors' Charge; the court may not make the order if "the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost" and the "court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct".[57]

67. "The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring".[58]

68. The Applicants submit it is appropriate in these circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge, given that:

(a) the directors and officers have indicated their continued service and involvement in these CCAA Proceedings is conditional upon the granting of the Directors' Charge;

(b) applicable insurance policies available to the Directors and Officers may provide insufficient coverage;

(c) the Directors' Charge applies only to the extent that the directors and officers do not have coverage under another directors and officers' insurance policy;

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[56] Initial Affidavit, supra note 1 at para 105, Application Record at Tab 2.
[57] CCAA, *supra* note 32 s 11.51(3)-(4).
[58] *Canwest Global Communications Corp* (2009), OJ No. 4286 at paras 46-48 [*Canwest Global*].

(d) the Directors' Charge would only cover obligations and liabilities that the directors and officers may incur after the commencement of the CCAA Proceedings and does not cover wilful misconduct or gross negligence;

(e) the Applicants will require the active and committed involvement of the directors and officers in order to continue business operations in the ordinary course, particularly due to the strict regulatory environment in which the Applicants operate and the security clearances required to be obtained by certain personnel;

(f) the amount of the Directors' Charge is reasonable in the circumstances and is limited to the potential exposure during the initial 10-day period; and

(g) the Proposed Monitor is supportive of the Directors' Charge.[59]

G. The Intercompany Charge Should be Granted

69. Where the operations and expenses of debtor companies are funded in the ordinary course through intercompany advances, it is appropriate for the CCAA court to approve the continuation of those arrangements during the CCAA Proceedings and to grant an intercompany change over the assets of the borrowers.[60]

70. To the extent that any member of the FIGR Group (each an "**Intercompany Lender**") makes any payment or incurs or discharges any obligation that is a payment or obligation of one or more of the other members of the FIGR Group (other than the Intercompany Lender) or otherwise transfers value to or for the benefit to one or more of the other members of the FIGR Group (other than the Intercompany Lender, as applicable), it is proposed that such Intercompany

[59] Initial Affidavit, supra note 1 at paras 102-106, Application Record at Tab 2; Monitor's Report, supra note 52 at paras 98-103.
[60] *Performance Sports Group Ltd., Re, 2016 ONSC 6800* at paras. 33-35 [*Performance Sports*]; *Walter Energy Canada Holdings, Inc., Re, 2016 BCSC 107* at paras. 62-67; *Arrangement Relatif a BioAmber Canada Inc., 2018 QCCS 3170* at paras. 20-22.

Lender be granted a charge on the Property in the amount of such payment or obligation or transfer (the "**Intercompany Charge**"). The Intercompany Charge will rank subordinate to Administration Charge, the Directors' Charge and the DIP Lender's Charge, but in priority to all other claims. The Proposed Monitor is supportive if the Intercompany Charge.[61]

71. The Intercompany Charge is necessary to protect members of the FIGR Group (and their respective creditors) for any obligation an Intercompany Lender incurs on behalf of another member of the FIGR Group and to secure such amounts. Intercompany charges to protect intercompany advances have been approved before in CCAA proceedings under the general powers in section 11 of the CCAA to make such orders as the court considers appropriate.[62]The Intercompany Charge will not secure any intercompany advances made before the date of the Initial Order.

H. The Court Should Allow the Applicants to Make Certain Pre-Filing Payments

72. To preserve normal course business operations, the FIGR Group, especially in light of the highly regulated nature of its business, is seeking authorization in the proposed Initial Order to make pre-filing payments, including payments for pre-filing goods or services supplied to the FIGR Group if, with the consent of the Monitor and the DIP Lender, such expenses were incurred in the ordinary course of business and consistent with existing policies and procedures.[63] This will ensure that the Applicant's business continues uninterrupted throughout these proceedings to preserve maximum value for the benefit of the Applicant's stakeholders.

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[61] Initial Affidavit, supra note 1 at para 110, Application Record at Tab 2; Monitor's Report, supra note 52 at para 106.
[62] *Performance Sports*, supra note 60 at para 34.
[63] Initial Affidavit, supra note 1 at paras 96-98, Application Record at Tab 2.

73. The Court has frequently authorized an applicant to pay pre-filing suppliers where continued supply is integral to the business of the applicants,[64] even in the case of non-critical suppliers.[65] The Court's jurisdiction is not impaired by section 11.4 of the CCAA, which codifies the Court's authority to declare a person to be a critical supplier and to grant a charge on the debtor's property in favor of such critical supplier.

74. In authorizing the payment of pre-filing obligations, courts have considered the following factors:

(a) whether the goods and services were integral to the business of the applicants;

(b) the debtors' need for the uninterrupted supply of the goods or services;

(c) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate; and

(d) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.[66]

75. The relief here is necessary to maintain ordinary course operations. The FIGR Group believes that the authority to make certain pre-filing payments pursuant to the proposed Initial Order is appropriate in the circumstances, as it requires the continued supply of goods and services from its key vendors and service providers during these CCAA proceedings.

76. The FIGR Group's ability to operate its business in the normal course is dependent on its ability to obtain an uninterrupted supply of goods and services on commercially reasonable

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[64] *Index Energy Mills Road Corporation (Re), 2017 ONSC 4944* at paras. 26-32; *Canwest Global*, supra note 58 at para. 41; *Cinram International Inc., Re, 2012 ONSC 3767* at para. 37 and at paras. 66-71 of Schedule C [*Cinram*].
[65] *Futura Loyalty Group Inc., Re., 2012 ONSC 6403*, at para. 10.
[66] *Cinram* supra note 64 at para. 68 of Schedule C.

terms.[67] As noted, the FIGR Group will require the consent of the Monitor and the DIP Lender in connection with any payments on account of pre-filing obligations. Both the Monitor and the DIP Lender are supportive of the relief.

PART IV: RELIEF REQUESTED

77. The Applicants submit that they meet all of the qualifications required to obtain the requested relief and request that this Court grant the proposed form of Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Bennett Jones

January 21, 2021

[67] Initial Affidavit, supra note 1 at para 97, Application Record at Tab 2.

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. *Arrangement Relatif a BioAmber Canada Inc.*, 2018 QCCS 3170
2. *Canwest Global Communications Corp, Re* (2009), OJ No. 4286
3. *Canwest Publishing Inc, Re*, 2010 ONSC 222
4. *Century Services Inc v Attorney General (Canada)*, 2010 SCC 60
5. *Cinram International Inc. (Re),* 2012 ONSC 3767
6. *Futura Loyalty Group Inc, Re,* 2012 ONSC 6403
7. *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944
8. *Miniso International Hong Kong Limited v Migu Investments Inc*, 2019 BCSC 1234
9. *Performance Sports Group Ltd.*, Re, 2016 ONSC 6800
10. *Re Clover Leaf,* 2019 ONSC 6966
11. *Re Lydian International Limited,* 2019 ONSC 7473
12. *Re Stelco Inc*, (2004) 48 CBR (4th) 299
13. *Royal Oak Mines Inc*, [1999] OJ No. 709
14. *Target Canada Co*, 2015 ONSC 303
15. *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107
16. *8440522 Canada Inc, Re*, 2013 ONSC 6167

Secondary Sources

Canada, Innovation, Science and Economic Development Canada, *Insolvency reforms to come into force*, News Release, (Ottawa: Media Relations) 2019.

Canada, Marketplace Framework Policy Branch, *Order Fixing November 1, 2019 as the Day on Which Certain Provisions of the two Acts Come into Force: SI/2019-90*, Canada Gazette, Part II, Volume 153, Number 18.

SCHEDULE B – STATUTES RELIED ON

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36**

Section 2(1), "Company"

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act,* whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent

Section 3

Application
(1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

Affiliated companies
(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

Company controlled
(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

Subsidiary
(4) For the purposes of this Act, a company is a subsidiary of another company if

(a) it is controlled by

(i) that other company,

(ii) that other company and one or more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

Section 11.001

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

Section 11.02

Stays, etc. – initial application
(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application
(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application
(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction
(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Section 11.2

Interim financing
(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders
(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application
(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Section 11.4

Critical supplier
(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply
(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier
(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority
(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Section 11.51

Security or charge relating to director's indemnification
(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance
(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault
(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Section 11.52

Court may order security or charge to cover certain costs
(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

***Bankruptcy and Insolvency Act*, RSC 1985, c. B-3**

Section 2, "Insolvent Person"

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

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due

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 FIGR BRANDS, INC., FIGR NORFOLK INC. AND CANADA'S ISLAND GARDEN INC.

Court File No.:_____

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