

**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
(Claims Procedure Order and Ancillary Order)**

February 18, 2021

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FACTUM OF THE APPLICANT

PART I: OVERVIEW

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**") are seeking, under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"):

- (a) an order (the "**Claims Procedure Order**") *inter alia*, establishing a process for the solicitation, identification, determination and adjudication of claims against the FIGR Group and their present and former Directors and Officers (as defined below) (the "**Claims Procedure**"); and
- (b) an order (the "**Ancillary Order**"), *inter alia*:
 - (i) approving an extension of the Stay of Proceedings (as defined below) to and including April 30, 2021 (the "**Stay Extension**");
 - (ii) approving a key employee retention plan (the "**KERP**");
 - (iii) approving the Pre Filing Report of FTI Consulting Canada Inc. dated January 21, 2021, the First Report of FTI Consulting Canada Inc. dated January 27, 2021 and the Second Report (as defined below), and the activities referred to therein; and
 - (iv) approving the fees and disbursements of the Monitor (as defined below) and its counsel as set out in the fee affidavits attached thereto.

PART II: FACTS

2. The facts underlying this motion are more fully set out in the affidavit of Michael Devon sworn February 16, 2021 (the "**February 16 Affidavit**") and the Second Report of the Monitor dated February 18, 2021 (the "**Second Report**").¹ All capitalized terms used but not defined herein have the meanings ascribed to them in the February 16 Affidavit.

A. Background to the Need for CCAA Protection and the Granting of the Initial Order

3. 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. Those indirect subsidiaries advised the FIGR Group that they were no longer willing to provide funding without an exit strategy.

4. As a result, the Applicants urgently required the breathing space and stability afforded by the CCAA to run a 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. To that end, on January 21, 2021, the Applicants sought and obtained the initial order (the "**Initial Order**").

5. Among other things, the Initial Order:

- (a) granted a stay of proceedings until January 31, 2021 (the "**Stay of Proceedings**");
- (b) appointed FTI Consulting Canada Inc. as monitor of the Applicants (in such capacity, the "**Monitor**");

¹ Affidavit of Michael Devon sworn February 16, 2021 [February 16 Affidavit]; Second Report of the Monitor dated February 18, 2021 [Second Report].

- (c) approved the Applicants' ability to borrow under a debtor-in-possession credit facility (the "**DIP Loan**"); and
- (d) granted the following charges (collectively, the "**Charges**") over the Applicants' Property: (i) the Administration Charge up to a maximum amount of \$600,000; (ii) the Directors' Charge up to a maximum amount of \$2,000,000; (iii) the DIP Lender's Charge up to a maximum amount of \$2,500,000; and (iv) the Intercompany Charge.²

6. The relief sought in the Initial Order was limited to that which was reasonably necessary for the ordinary course business operations of the Applicants during the initial 10-day Stay of Proceedings.

7. On January 29, 2021, the Applicants obtained an amended and restated initial order (the "**Amended and Restated Initial Order**") which, among other things:

- (a) elevated the priority of the Charges ahead of all Encumbrances;
- (b) increased the Directors' Charge and the DIP Lender's Charge to the maximum amounts of \$2,700,000 and \$8,000,000 (plus interest and costs), respectively; and
- (c) extended to the Stay of Proceedings to and including March 31, 2021.

8. On January 29, 2021, the Applicants also sought and obtained an order (the "**SISP Approval Order**") approving a sale and investor solicitation process (the "**SISP**").³

² February 16 Affidavit, *ibid* at para 7; Second Report, *ibid* at para 2.

³ February 16 Affidavit, *ibid* at para 8; Second Report, *ibid* at para 3.

B. The Applicants' Activities Since the Granting of the Amended and Restated Initial Order and the SISP Approval Order

9. The Applicants, with the oversight of the Monitor, have continued to operate their business in the ordinary course since the granting of the Amended and Restated Initial Order and the SISP Approval Order. The Applicants have also focused their efforts on increasing efficiency and eliminating redundancies and unnecessary costs.

10. In that regard, the employment of four (4) employees of FIGR Brands was terminated and 17 employees of FIRG Norfolk were placed on temporary layoff. The Applicants have taken significant steps to preserve the jobs of employees where possible, and have chosen to temporarily lay off certain employees rather than terminating them until there is greater clarity regarding the outcome of the SISP and the future of the Applicants' operations.⁴

11. Further, disclaimer notices were issued in respect of motor vehicle leases for vehicles provided to sales employees that are no longer employed by the Applicants.⁵

12. On January 31, 2021, the FIGR Group's insurance policies with Royal & Sun Alliance Insurance Company of Canada and Wynward Insurance Group Next Wave Insurance Canada (collectively, the "**Insurers**") came up for renewal. In order to reduce the upfront costs of paying for the entire yearly premiums at the commencement of the policy period and after reviewing several proposed options, the FIGR Group entered into a premium financing arrangement (the "**CAFO Financing Arrangement**") with CAFO Insurance Premium Finance. The terms of the

⁴ February 16 Affidavit, *ibid* at para 13; Second Report, *ibid* at para 11.

⁵ February 16 Affidavit, *ibid* at para 14.

CAFO Financing Arrangement were considered and approved by the DIP Lender and the Monitor prior to being finalized.⁶

13. Since the granting of the SISP Approval Order, the Monitor, with the assistance of the Applicants, has commenced the Phase 1 of the SISP, and has taken steps to provide copies of the NDA and Teaser Letter to Known Potential Bidders, and upon execution of an NDA, provide Known Potential Bidders with a copy of the CIM and access to the Phase 1 data room for the SISP (all as defined in the SISP Approval Order).

C. The Claims Procedure Order

14. The Applicants are seeking approval of the Claims Procedure Order and authorization to undertake the Claims Procedure to solicit, identify, determine and adjudicate Claims against the FIGR Group and their present and former Directors and Officers. Given that the Applicants do not have any funded secured debt (with the exception of the DIP Loan), the Applicants currently expect that there will be distributions available to unsecured creditors following the SISP, through a plan of arrangement or otherwise. The Claims Procedure was developed in consultation with the Monitor and its counsel, and the FIGR Group believes that the Claims Procedure is an appropriate and effective process to solicit, identify, determine and adjudicate potential Claims.⁷

15. A detailed description of the Claims Procedure Order is provided in the February 16 Affidavit. The key features of the Claims Procedure are summarized below.

⁶ February 16 Affidavit, *ibid* at para 15; Second Report, *supra* note 1 at para 3.

⁷ February 16 Affidavit, *ibid* at paras 18-20; Second Report, *ibid* at paras 21 and 22.

Notice to Claimants

16. The Claims Procedure Order requires the Monitor to deliver to each Known Claimant a Claims Package that includes, among other things, an Instruction Letter, a Notice to Claimants and a Proof of Claim. The Claims Package is to be delivered within five (5) Business Days following receipt of the complete list of Known Claimants, which is itself to be delivered by the Applicants to the Monitor within two (2) Business Days following the issuance of the Claims Procedure Order.⁸

17. The Claims Procedure Order also requires the Monitor to:

- (a) cause the Notice to Claimants to be published as soon as practicable and without delay following the issuance of the Claims Procedure Order in *The Globe and Mail* (National Edition) for at least one (1) Business Day;
- (b) post a copy of the Notice to Claimants, the Claims Package and the Claims Procedure Order on the Monitor's Website as soon as reasonably possible;
- (c) deliver a Claims Package to any person claiming to be Claimant and requesting such material in writing; and
- (d) provide a Claims Package to any person upon becoming aware of any circumstance giving rise to a Restructuring Claim.⁹

Filing a Proof of Claim

18. Pursuant to the Claims Procedure Order, any Claimant who wishes to assert a Claim (including Pre-Filing Intercompany Claims) against the FIGR Group or the Directors or Officers

⁸ February 16 Affidavit, *ibid* at para 26; Second Report, *ibid* at para 29.

⁹ February 16 Affidavit, *ibid* at para 27; Second Report, *ibid* at para 29.

must deliver to the Monitor, on or before the applicable Bar Date (as defined below), a Proof of Claim, together with all supporting documentation in respect of such Claim. A D&O Indemnity Claim shall be deemed to have been timely filed in respect of each D&O Claim filed in accordance with the Claims Procedure, and Directors and Officers shall not be required to take any action or to file a Proof of Claim in respect of such D&O Indemnity Claim.¹⁰

Claims Bar Date

19. The Claims Procedure Order contemplates Bar Dates for various Claims. A Claimant who does not deliver a Proof of Claim (except in respect of an Excluded Claim (as defined below)) to the Monitor by the applicable Bar Date shall: (i) not be entitled to attend or vote at a meeting to vote on any CCAA plan in respect of such Claim; (ii) not be entitled to participate in any distribution in respect of such Claim pursuant to a plan or otherwise; (iii) not be entitled to any further notice in the CCAA Proceedings (unless such person is otherwise on the Service List); and (iv) be forever barred from making or enforcing such Claim against the FIGR Group or the Directors or Officers, and such Claim shall be extinguished.¹¹

20. The Claims Procedure Order specifies the following Bar Dates:

- (a) in respect of Pre-Filing Claims, D&O Pre-Filing Claims and Pre-Filing Intercompany Claims, 5:00 p.m. (Eastern Time) on April 6, 2021 (the "**Pre-Filing Claims Bar Date**"); and
- (b) in respect of Restructuring Claims and D&O Restructuring Claims, 5:00 p.m. (Eastern Time) on the later of: (i) the Pre-Filing Claims Bar Date, and (ii) the date

¹⁰ February 16 Affidavit, *ibid* at paras 23 – 25; Second Report, *ibid* at para 28.

¹¹ February 16 Affidavit, *ibid* at para 29.

that is thirty (30) Calendar Days after the date on which the Monitor sends such person a Claims Package (the later of such dates being the "**Restructuring Claims Bar Date**" and together with the Pre-Filing Claims Bar Date, the "**Bar Dates**").¹²

Excluded Claims

21. The Claims Procedure does not apply to: (a) any claim secured by any of the Charges granted pursuant to the Initial Order (as amended by the Amended and Restated Initial Order) or (b) any Employee Claim (collectively, the "**Excluded Claims**" and each an "**Excluded Claim**"). An Employee Claim includes the claim of any employee of the Applicants for vacation pay, termination pay, severance pay, wages, expenses, commissions, or other remuneration, arising as result of the termination of employment or a layoff of such employee by any Applicant prior to the commencement or during the CCAA Proceedings.¹³ Persons holding an Excluded Claim are not required to file a Proof of Claim in respect of such Excluded Claim.¹⁴

Review and Resolution of Disputed Claims

22. The Claims Procedure Order sets out the processes for: (i) reviewing Proofs of Claims filed in respect of Pre-Filing Claims, D&O Pre-Filing Claims, Restructuring Claims, D&O Restructuring Claims, and Pre-Filing Intercompany Claims and (ii) resolving Disputed Claims.¹⁵

23. All Proofs of Claim received by the applicable Bar Date shall be reviewed by the Monitor, with the assistance of the FIGR Group. The classification, nature, and/or amount of Claims may be accepted, revised, or disallowed by the Monitor and, in the case of D&O Claims, the consent

¹² February 16 Affidavit, *ibid* at para 28; Second Report, *supra* note 1 at para 26.

¹³ February 16 Affidavit, *ibid* at para 24; Second Report, *ibid* at paras 26 and 27.

¹⁴ February 16 Affidavit, *ibid* at para 30; Second Report, *ibid* at para 27.

¹⁵ February 16 Affidavit, *ibid* at para 31.

of the relevant Director or Officer. Where a Claimant's Claim is revised or disallowed in whole or in part, the Monitor will send a Notice of Revision or Disallowance describing the basis for the revision or disallowance.¹⁶

24. Any Claimant who wishes to dispute a Notice of Revision or Disallowance must deliver a Notice of Dispute of Revision or Disallowance by no later than 5:00 p.m. (Eastern Time) on the date that is fourteen (14) Calendar Days after the date the Monitor sends such notice.¹⁷ The Claims Procedure Order contemplates a consensual resolution process for any Notice of Dispute of Revision or Disallowance delivered to the Monitor.

25. Where such a Claim cannot be resolved consensually within a period or in a manner satisfactory to the Monitor, in consultation with the FIGR Group, and in the case of D&O claims, with the consent of the relevant Director or Officer, it will constitute a Disputed Claim. Each Disputed Claim will be referred to (i) the Court or (ii) a Claims Officer or such alternative dispute resolution as may be ordered by the Court or agreed to by the Monitor, the Applicants, the applicable Claimant and, in the case of D&O Claims, the relevant Director(s) and/or Officer(s).¹⁸

Pre-Filing Intercompany Claims

26. The Claims Procedure Order contemplates that the adjudication process in respect of Pre-Filing Claims and D&O Pre-Filing Claims shall not apply to Pre-Filing Intercompany Claims.¹⁹

27. Rather, the Claims Procedure Order contemplates that the Monitor, with the assistance of the FIGR Group, shall review all Proofs of Claims received by the Pre-Filing Claims Bar Date in

¹⁶ February 16 Affidavit, *ibid* at paras 32 and 35; Second Report, *supra* note 1 at paras 31 and 35.

¹⁷ February 16 Affidavit, *ibid* at paras 33 and 36; Second Report, *ibid* at paras 32 and 36.

¹⁸ February 16 Affidavit, *ibid* at paras 34 and 37; Second Report, *ibid* at paras 34 and 38.

¹⁹ February 16 Affidavit, *ibid* at para 38; Second Report, *ibid* at para 30.

respect of Pre-Filing Intercompany Claims and shall thereafter serve on the Service List and file with the Court the Pre-Filing Intercompany Claims Report, which will set out the Proposed Pre-Filing Intercompany Claims Resolution Process. Should any interested party wish to object to the Proposed Pre-Filing Intercompany Claims Resolution Process, it must serve on the Service List a notice of objection ("**Notice of Objection**") within seven (7) days of the date upon which the Pre-Filing Intercompany Claims Report is served by the Monitor. Any Notice of Objection may be consensually resolved between the Monitor and the objecting party, in consultation with the FIGR Group, or by further Order of the Court.²⁰

D. The Stay Extension

28. Under the Amended and Restated Initial Order, the Court extended the Stay of Proceedings until and including March 31, 2020. Pursuant to the Ancillary Order, the Applicants are seeking the Stay Extension to and including April 30, 2021.²¹

29. It is necessary and in the best interest of the Applicants and their stakeholders that the Stay Extension be granted as it will allow the Monitor, with the assistance of the Applicants, to advance the SISP and the Claims Procedure, which will ultimately preserve and maximize value of the Applicants' business for their stakeholders.²²

30. The Applicants are projected to have sufficient liquidity to fund their obligations and the costs of the CCAA Proceedings through the end of the Stay Extension.²³

²⁰ February 16 Affidavit, *ibid* at para 39; Second Report, *ibid* at para 39.

²¹ February 16 Affidavit, *ibid* at para 40; Second Report, *ibid* at paras 46 and 47.

²² February 16 Affidavit, *ibid* at para 40; Second Report, *ibid* at paras 47 and 48.

²³ February 16 Affidavit, *ibid* at para 42; Second Report, *ibid* at para 49.

E. The KERP

31. Pursuant to the Ancillary Order, the Applicants are seeking approval of the KERP, which was developed with the assistance of the Monitor and in consultation with the DIP Lender. The KERP provides for the Applicants to make retention payments to certain individuals employed by CIG (collectively, the "**Key Employees**") at various levels, including, among others, operations.²⁴

32. The Key Employees are entitled to two (2) payments under the proposed KERP, each of which is subject to the attainment of a milestone. The first milestone (the "**First Milestone**") is the earlier of: (i) April 30, 2021; (ii) the date upon which the Court grants an order terminating the CCAA proceedings (the "**CCAA Termination Date**"); and (iii) the date on which the relevant Key Employee is terminated without cause. The second milestone (the "**Second Milestone**") is the earlier of: (i) the date upon which any transaction or transactions that together result in the sale of all or substantially all of the business and/or assets of CIG closes; (ii) July 31, 2021; (iii) the date on which the relevant Key Employee is terminated without cause; and (iv) the CCAA Termination Date.²⁵

33. Other significant terms and conditions of the proposed KERP include that:

- (a) the maximum aggregate amount payable under the KERP is \$80,000; and
- (b) a Key Employee must remain an employee at the time of the relevant milestone in order to receive the payment unless terminated without cause.²⁶

²⁴ February 16 Affidavit, *ibid* at para 45; Second Report, *ibid* at para 12.

²⁵ February 16 Affidavit, *ibid* at para 46; Second Report, *ibid* at para 14.

²⁶ February 16 Affidavit, *ibid* at para 47; Second Report, *ibid* at para 15.

34. The Applicants view the retention of the Key Employees as essential to the successful restructuring efforts of the FIGR Group. The FIGR Group believes that the Key Employees are important to maintaining CIG's operations, and that they could not easily be replaced. Without the KERP, the FIGR Group believes the Key Employees would likely consider other options.²⁷ The purpose of the KERP is to provide the necessary incentive to the Key Employees to remain as committed key members of CIG's management and operational teams during the CCAA proceedings.²⁸

PART III: ISSUES

35. The issues to be considered on this motion are whether:

- (a) this Court should grant the Claims Procedure Order;
- (b) this Court should extend the Stay of Proceedings;
- (c) this Court should approve the KERP; and
- (d) this Court should seal the KERP Summary and KERP Letters.

A. The Claims Procedure Order Should be Granted

36. Section 11 of the CCAA authorizes this Court to make "any order it considers appropriate in the circumstances",²⁹ including an order approving a process for the solicitation and determination of claims against a debtor company and its directors and officers. As this Court recognized in *Re Toys "R" Us (Canada) Ltd.*, such orders are routinely granted.³⁰

²⁷ February 16 Affidavit, *ibid* at para 48; Second Report, *ibid* at para 18.

²⁸ February 16 Affidavit, *ibid* at para 49; Second Report, *ibid* at para 13.

²⁹ *Companies' Creditors Arrangement Act*, RSC 1985, c. C-35 s 11 [CCAA].

³⁰ *Re Toys "R" Us (Canada) Ltd.*, 2018 ONSC 609 at para 8.

37. Claims procedure orders permit insolvent debtors to establish processes "under which all of the creditors of an applicant and its directors and officers can submit their claims for recognition and valuation".³¹ Generally, such processes involve:

- (a) a method to communicate to potential creditors that there is a process by which they must prove their claims and the date by which they must do so;
- (b) an opportunity for the debtor or its representative to review and, if appropriate, contest claims made by creditors;
- (c) an adjudication mechanism for claims that cannot be agreed upon or settled through negotiation;
- (d) a "claims bar date" by which claims must be submitted; and
- (e) the barring of late claims to ensure that the Court-appointed monitor and the applicant can make accurate and informed determinations for voting and distribution purposes.³²

38. These processes have been regarded by courts as eminently practical means of streamlining and resolving the "multitude of claims against an insolvent debtor" in a timely and cost effective manner.³³

39. In the circumstances of this case, the factors that support this Court's exercise of discretion to approve the Claims Procedure set out in the proposed Claims Procedure Order are as follows:

³¹ *Ibid.*

³² *Ibid*; *Timminco Ltd, Re*, 2014 ONSC 3393 at para 43.

³³ *ScoZinc Ltd, Re*, 2009 NSSC 136 at para 31; *Canwest Global Communications Corp, Re*, 2011 ONSC 2215 at para 40.

- (a) the Claims Procedure is necessary to determine the universe of claims that exist against the Applicants, evaluate the impact of such claims and enable the Applicants to potentially make distributions to unsecured creditors following the SISP through a plan or otherwise;
- (b) it is necessary to understand the scope and nature of any potential claims against the Directors and Officers in order to be able to identify and address any indemnity claims the Director and Officers might have against the Applicants;
- (c) the Claims Procedure has been developed with the assistance and oversight of the Monitor and its counsel, and the Monitor will assist in the Claims Procedure, including in the determination of Claims;
- (d) the Claims Procedure has been designed to be a flexible, fair, expeditious, and comprehensive means of identifying, quantifying and resolving all claims against the Applicants and their Directors and Officers;
- (e) the Claims Procedure Order provides Claimants with sufficient opportunity to review the Claims Package and to submit a Proof of Claim or Notice of Dispute of Revision or Disallowance, as applicable;
- (f) the Bar Dates provide Claimants with sufficient time to file their Proofs of Claim, having regard to, among other things, claims bar dates in other CCAA proceedings;
- (g) there is a fair and streamlined process for resolving all Disputed Claims in a time-sensitive and cost-efficient manner, and in the event that the Monitor, with the assistance of the Applicants and the Directors and Officers, as applicable, is unable to resolve a dispute regarding any Disputed Claim, the Disputed Claim shall be

referred to the Court or Claims Officer for resolution or to an alternative dispute resolution as may be ordered by the Court as agreed to by the Monitor, the Applicants the applicable Claimant and, in the case of D&O Claims, the relevant Director(s) and/or Officer(s) ; and

- (h) the Monitor is supportive of the granting of the Claims Procedure Order and believes that the Claims Procedure is appropriate in the circumstances and in the best interests of the FIGR Group and all of its stakeholders.³⁴

40. For these reasons, the proposed Claims Procedure accords with the Court's discretion under the CCAA. It is flexible, expeditious and procedurally fair, ensuring an efficient solicitation, determination and resolution of claims against the Applicants. The Applicants submit that the Claims Procedure will streamline the resolution of claims against the Applicants in the most time-sensitive and cost-efficient manner and is appropriate in the circumstances.

B. The Stay of Proceedings Should be Extended

1. The Extension of the Stay of Proceedings is Appropriate in the Circumstances

41. The Stay of Proceedings currently expires on March 31, 2021. Section 11.02(2) of the CCAA gives this Court the authority to grant an extension of the Stay of Proceedings for any period it "considers necessary".³⁵ To do so, this Court must be satisfied that circumstances exist that make the order appropriate and that the Applicants have acted, and are acting, in good faith and with due diligence.³⁶

³⁴ February 16 Affidavit, *supra* note 1 at paras 18 -22, 25, 26 -29, and 31-39; Second Report, *supra* note 1 at paras 41-43.

³⁵ *CCAA*, *supra* note 30 s 11.02(2).

³⁶ *Ibid.*

42. A stay of proceedings is appropriate where it provides the debtors with breathing room while they seek to restore their solvency and emerge from their restructuring on a going concern basis.³⁷ Further, a stay of proceedings will be appropriate where it advances the purposes of the CCAA – including avoiding the social and economic effects of bankruptcy.³⁸

43. As detailed in the February 16 Affidavit and the Second Report, the Applicants require the Stay of Proceedings to, among other things, preserve the value of their business, maintain their ordinary course operations without disruption, continue to assist the Monitor with the SISP and administer the Claims Procedure.

44. Since the granting of the Amended and Restated Initial Order and the SISP Approval Order, the Applicants have acted and continue to act in good faith and with due diligence to advance their restructuring under the CCAA, while maintaining their ordinary course operations and assisting the Monitor with the SISP.³⁹ The Monitor supports the requested extension to the Stay of Proceedings, and the Applicants are forecast to have sufficient liquidity to fund their obligations and the costs of the CCAA Proceedings through the end of the proposed extension.⁴⁰

C. The KERP Should be Approved

45. The Ancillary Order seeks approval of the KERP and the Applicants' authorization to make payments in accordance with the terms thereof.

46. This Court has discretion to approve the KERP pursuant to its jurisdiction under section 11 of the CCAA to grant "any order it considers appropriate in the circumstances".⁴¹ Courts have

³⁷ [Century Services Inc v Attorney General \(Canada\), 2010 SCC 60](#) at para 14 [*Century Services*]; [Target Canada Co, 2015 ONSC 303](#) at para 8.

³⁸ [Century Services](#), *ibid* at para 70.

³⁹ February 16 Affidavit, *supra* note 1 at para 52; Second Report, *supra* note 1 at para 50.

⁴⁰ February 16 Affidavit, *ibid* at paras 42 and 43; Second Report, *ibid* at paras 49 and 57.

⁴¹ [CCAA](#), *supra* note 30 s 11.

frequently exercised their discretion to approve key employee retention plans where "the retention of certain employees has been deemed critical to a successful restructuring".⁴²

47. In *Cinram International Inc., Re*, Morawetz J. (as he then was) summarized the factors to be considered in determining whether to approve a key employee retention plan, including:

- (a) whether the Monitor supports the key employee retention plan;
- (b) whether the continued employment of the employees to which the key employee retention plan applies is important for the stability of the business and to enhance the effectiveness of a marketing process;
- (c) the employees' history and knowledge of the debtor;
- (d) the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the key employee retention plan applies;
- (e) whether the key employee retention plan was approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
- (f) whether the key employee retention plan is supported or consented to by the secured creditors of the debtor; and
- (g) whether the payments under the key employee retention plan are payable upon the completion of the restructuring process.⁴³

⁴² [Timminco Limited \(Re\)](#), 2012 ONSC 506 at para 72 [*Timminco*].

⁴³ [Cinram International Inc. \(Re\)](#), 2012 ONSC 3767 at para 37, Schedule "C" at para 91; [Aralez Pharmaceuticals Inc. \(Re\)](#), 2018 ONSC 6980 at para 29 [*Aralez*].

48. In considering these factors, courts have stated that the "business judgment of the board of directors of the debtor company and the monitor should rarely be ignored".⁴⁴

49. Having regard to the above factors, the following supports the granting of the KERP:

- (a) the KERP was developed with the assistance of the Monitor, and the Monitor is supportive of it;
- (b) absent the approval of the KERP, the Key Employees are likely to consider other employment options;
- (c) the Key Employees are critical to the execution and successful completion of the FIGR Group's restructuring and their continued employment is integral to the stability of its business during the CCAA Proceedings;
- (d) the total quantum of the KERP is relatively modest;
- (e) the KERP has been authorized by the applicable Applicants' boards;
- (f) the Key Employees have historical knowledge of, and familiarity with, the FIGR Group's business and operations, which is in a highly regulated industry, and their significant experience and expertise cannot be easily replaced, particularly during the CCAA Proceedings;
- (g) it will be disruptive and prohibitively costly to locate suitable replacements for the Key Employees during the CCAA Proceedings;
- (h) the KERP, and the timing of the First Milestone and the Second Milestone thereunder, are designed to encourage the continued participation of the Key

⁴⁴ *Aralez*, *ibid* at para 29; *Timminco*, *supra* note 43 at para 73.

Employees during the CCAA Proceedings through to the completion of the FIGR Group's restructuring;

- (i) the retention of certain of the Key Employees is essential to maintaining the FIGR Group's licenses with Health Canada; and
- (j) the KERP was developed in consultation with the DIP Lender, and the DIP Lender is supportive it.⁴⁵

50. In light of the foregoing, the Applicant submits that the KERP is reasonable and appropriate in the circumstances.

D. The KERP Summary and KERP Letters Should be Sealed

51. Pursuant to subsection 137(2) of the *Courts of Justice Act*, R.S.O. c. C.43, as amended, the Applicants are also requesting that this Court seal the KERP Summary and the KERP Letters attached as Confidential Appendices "A" and "B" respectively to the Second Report.⁴⁶

52. In *Sierra Club of Canada v Canada (Minister of Finance)*, the Supreme Court of Canada clarified that courts should exercise their discretion to grant sealing orders where the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and the salutary effects of the order outweigh its deleterious effects.⁴⁷

53. Orders sealing confidential appendices/exhibits relating to key employee retention plans containing sensitive personal and compensation information are routinely granted by this Court.⁴⁸

⁴⁵ February 16 Affidavit, *supra* note 1 at paras 44 - 48; Second Report, *supra* note 1 at paras 12, 18 and 19.

⁴⁶ *Courts of Justice Act*, RSO 1990, c. C. 43, s 137(2).

⁴⁷ *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53.

⁴⁸ *Re Essar Steel Algoma Inc et al*, 2015 ONSC 7656 at para 22 where Newbould J. stated that "[s]ealing orders are routinely granted in KERP cases".

54. In this case, the KERP Summary and the KERP Letters reveal individually identifiable information, including, among other things, compensation information. Disclosure of such sensitive personal and compensation information may cause harm to the Key Employees and to the Applicants, and the protection of such information is an important commercial and privacy interest that should be protected.⁴⁹

55. The Key Employees have a reasonable expectation that their personal information will be kept confidential. Further, given that the material terms of the KERP have been disclosed within the Second Report and the February 16 Affidavit, the salutary effects of the proposed sealing order outweigh any deleterious effects.⁵⁰

56. The Monitor is supportive of the sealing of the KERP Summary and the KERP Letters.⁵¹

PART IV: RELIEF REQUESTED

57. 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 Claims Procedure Order and Ancillary Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Bennett Jones LLP

February 18, 2021

⁴⁹ February 16 Affidavit, *supra* note 1 at para 50; Second Report, *supra* note 1 at para 16.

⁵⁰ February 16 Affidavit, *ibid* at paras 44-48.

⁵¹ Second Report, *supra* note 1 at para 57.

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [*Aralez Pharmaceuticals Inc, \(Re\)*, 2018 ONSC 6980](#)
2. [*Canwest Global Communications Corp, Re*, 2011 ONSC 2215](#)
3. [*Century Services Inc v Attorney General \(Canada\)*, 2010 SCC 60](#)
4. [*Cinram International Inc. \(Re\)*, 2012 ONSC 3767](#)
5. [*Re Essar Steel Algoma Inc et al*, 2015 ONSC 7656](#)
6. [*Re Toys “R” Us \(Canada\) Ltd*, 2018 ONSC 609](#)
7. [*ScoZinc Ltd, Re*, 2009 NSSC 136](#)
8. [*Sierra Club of Canada v Canada \(Minister of Finance\)*, 2002 SCC 41](#)
9. [*Target Canada Co*, 2015 ONSC 303](#)
10. [*Timminco Ltd, Re*, 2012 ONSC 506](#)
11. [*Timminco Ltd, Re*, 2014 ONSC 3393](#)

SCHEDULE B – STATUTES RELIED ON

Companies' Creditors Arrangement Act, R.S.C. 1985, c C-36

Section 11

General Power of Court

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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.

Courts of Justice Act, R.S.O. 1990, c. C.43

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see. R.S.O. 1990, c. C.43, s. 137.

**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.: CV-21-00655373-00CL

ONTARIO
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(COMMERCIAL LIST)

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