Court File No.: CV-20-00641220-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN GROWTH BRANDS INC., GGB CANADA INC., GREEN GROWTH BRANDS REALTY LTD. AND XANTHIC BIOPHARMA LIMITED

Applicants

FACTUM OF THE APPLICANTS
(Re: Stay Period Extension and Approval of the Second DIP Amendment)
(Returnable December 18, 2020)

December 17, 2020

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PART I - OVERVIEW

1. The Applicants are part of a corporate group that grows, processes and sells cannabis in multiple jurisdictions in the United States. The Applicants sought and were granted the initial order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), on May 20, 2020. Ernst & Young Inc. was appointed as the Monitor of the Applicants in these CCAA proceedings. The Initial Order authorized the Applicants to borrow funds pursuant to the DIP Agreement.

2. On June 2, 2020, this Court granted the Amended and Restated Initial Order that, among other things, increased the Applicants' borrowing capabilities under the DIP Agreement. Also on June 2, 2020, this Court granted an Order that, among other things, approved the SISP and the Stalking Horse APA. On August 13, 2020, this Court granted the Approval and Vesting Order that, among other things, approved the Transaction contemplated by the Amended and Restated Stalking Horse APA. Also on August 13, 2020, this Court granted an Order that approved the First DIP Amendment and extended the Stay Period to and including December 18, 2020.

3. This factum is filed in support of a motion by the Applicants seeking

(a) an order (the "**Stay Extension and DIP Amendment Order**") substantially in the form of the draft order attached as Tab 3 of the Motion Record, approving:

(i) the Second DIP Amendment;

(ii) a further extension of the Stay Period to March 26, 2021;

(b) an order (the "**Fee and Activity Approval Order**") substantially in the form of the draft order attached as Tab 4 of the Motion Record, approving:

(i) the First Report of the Monitor dated May 26, 2020, the Second Report of the Monitor dated May 31, 2020, the Third Report of the Monitor dated August 10, 2020, the Fourth Report of the Monitor (the "**Fourth Report**"), to be filed (collectively, the "**Monitor's Reports**"), and the activities of the Monitor as set out in the Monitor's Reports; and

(ii) the fees and disbursements of the Monitor and its counsel, as described in the Fourth Report.

PART II - THE FACTS

4. The facts with respect to this motion are more fully set out in the affidavit of Ken Kiffner sworn December 17, 2020 (the "**Kiffner Affidavit**"). Capitalized terms used in this factum but not otherwise defined have the meaning ascribed to them in the Kiffner Affidavit.

A. STATUS OF THE TRANSACTION AND SECOND AMENDED AND RESTATED STALKING HORSE APA

5. Since the Approval and Vesting Order approving the Transaction contemplated by the Amended and Restated Stalking Horse APA was granted on August 13, 2020, the

Company and the Monitor have been working diligently to satisfy the conditions to closing the Transaction as quickly as possible.

Kiffner Affidavit at para 20, Applicants' Motion Record, Tab 2.

6. The material remaining outstanding conditions to the closing of the Amended and Restated Stalking Horse APA relate to the regulatory approvals required for the transfer of the Cannabis Licenses in Nevada and Massachusetts. The Company is currently working with the relevant state authorities to complete the transfer of the Cannabis Licenses as quickly as possible. In early October 2020, the Company submitted the necessary applications in Nevada and Massachusetts to obtain approvals for the transfer of the Cannabis Licenses to Source Holding.

Kiffner Affidavit at paras 21-22, Applicants' Motion Record, Tab 2.

7. In Massachusetts, the Company submitted an application to the Cannabis Control Commission to approve the indirect transfer of ownership of Just Healthy from GGB Canada to Source Holding. The Company expects to obtain final approval for the transfer from the CCC in January or February 2021. No formal approvals are required at the local level.

Kiffner Affidavit at para 23, Applicants' Motion Record, Tab 2.

8. In Nevada, the Company submitted an application to the Cannabis Compliance Board to approve the indirect transfer of ownership of NOR, Wellness Orchards of Nevada LLC and Henderson Organic Remedies LLC to Source Holding. The CCB has confirmed that it will consider the Company's application at a meeting to be held on December 18, 2020. If the state-level approval is granted, then the Company will submit the required applications to certain local authorities. The timing of local approvals will vary, but the Company hopes that all local approvals can be obtained by mid-February 2021.

Kiffner Affidavit at para 24, Applicants' Motion Record, Tab 2.

9. It is also a condition to the closing of the Transaction that the Company acquire 100% of the equity of the Excluded Subsidiaries. The Company is working with its counsel to effect the necessary corporate reorganizations to satisfy this condition.

Kiffner Affidavit at para 25, Applicants' Motion Record, Tab 2.

B. THE SECOND AMENDED AND RESTATED STALKING HORSE APA

10. The Approval and Vesting Order provides that the Applicants and the Purchaser may, with the consent of the Monitor, make minor amendments to the Amended and Restated Stalking Horse APA. On December 16, 2020, the Company and the Purchaser entered into the Second Amended and Restated Stalking Horse APA. The Second Amended and Restated Stalking Horse APA incorporates certain minor revisions to the Amended and Restated Stalking Horse APA, which, in brief, include the following:

(a) authorizing the Company, until or concurrently with the Closing of the Transaction, at the Purchaser's reasonable request and subject to the consent of All Js, in its capacity as DIP Lender, to fund any associated costs, effect such transfers, or cause its direct or indirect subsidiaries (other than the Excluded Subsidiaries) to effect such internal reorganizations, tax elections, mergers, continuances or other corporate changes as may be reasonable necessary or desirable for the Purchaser's contemplated operation of the Company's business (the "**Pre-Closing Reorganization**"), subject to certain terms and conditions;

(b) requiring that the Company transfer, or cause to be transferred, to the Company, the Purchaser or the Purchaser's designee(s), such membership or other equity interests in the Company's direct and indirect subsidiaries (other than the Excluded Subsidiaries) or applicable debt (which forms part of the Purchased Assets), as may reasonably be requested by the Purchaser prior to Closing, subject to certain terms and conditions;

(c) confirming that the "Excess DIP Amount" may, at the Purchaser's sole discretion, form part of the Assumed Liabilities at Closing, subject to certain terms and conditions;

(d) providing that the Second Amended and Restated Stalking Horse APA may be terminated by the Purchaser prior to closing if the regulatory authorities in Nevada or Massachusetts issue a final written decision prohibiting the transfer of the Cannabis Licenses, and the Company and Purchaser agree, acting reasonably, that further efforts will not likely result in the requisite transfers being formally granted on or before the Outside Date; and

(e) extending the "Outside Date" by which the Second Amended and Restated Stalking Horse APA can be terminated to March 26, 2021.

Kiffner Affidavit at para 27, Applicants' Motion Record, Tab 2.

The Second Amended and Restated Stalking Horse APA, Applicants' Motion Record, Tab 2 – Exhibit E.

Blackline of the Second Amended and Restated Stalking Horse APA, Applicants' Motion Record, Tab 2 – Exhibit F.

11. The Second Amended and Restated Stalking Horse APA provides that the deadline for the Purchaser to file any registrations, declarations or other documents as may be necessary to obtain any required orders and authorizations for the Cannabis Licenses or other transactions contemplated by the Second Amended and Restated Stalking Horse APA

is 30 days after the entry of the Approval and Vesting Order or such later date as the parties may agree. The Company and the Purchaser have agreed to extend this deadline to March 26, 2021, to provide additional time for the regulators to complete their processes for approving the transfers of the Cannabis Licenses.

Kiffner Affidavit at para 29, Applicants' Motion Record, Tab 2.

12. Pursuant to the Second Amended and Restated Stalking Horse APA, the Closing Date of the Transaction is anticipated to be two business days following the day on which the last of the closing conditions in the Stalking Horse APA are satisfied or waived, other than those conditions which by their nature can only be satisfied as of the Closing Date.

Kiffner Affidavit at para 26, Applicants' Motion Record, Tab 2.

C. THE SECOND DIP AMENDMENT

13. In connection with the additional time required to implement the Transaction, the Applicants and their counsel, in consultation with the Monitor, negotiated the Second DIP Amendment. The Second DIP Amendment is expected to provide the Applicants with sufficient liquidity to pay for obligations incurred and scheduled to be paid through to the requested extension of the Stay Period.

Kiffner Affidavit at para 31, Applicants' Motion Record, Tab 2.

14. The Second DIP Amendment provides the Applicants with a DIP Facility comprised of (a) a maximum amount of US$7.9 million, being comprised of US$7.2 million advanced under the DIP Agreement, US$600,000 advanced under the First DIP Amendment and US$100,000 available under the Second DIP Amendment (such additional availability, the "**Excess DIP Amount**"); and (b) US$1.3 million, being the Capex Amount. The Excess DIP Amount is uncommitted and will be advanced by the DIP Lender in its sole discretion. The Capex Amount is to be made available at the DIP Lender's sole discretion, and is to be used

to pay certain capital expenditures expressly approved by the DIP Lender, in its sole discretion.

Kiffner Affidavit at paras 32 and 33, Applicants' Motion Record, Tab 2.

15. The Second DIP Amendment extends the maturity date of the DIP Facility to March 27, 2021, such that the DIP Agreement shall be repayable in full on the earlier of: (a) the date a demand for repayment in writing has been made by All Js, as lender, following the occurrence of any Event of Default (as defined in the Second DIP Amendment) which is continuing and has not been cured, (b) the completion of the Second Amended and Restated Stalking Horse APA, in which case the amounts owing under the DIP Agreement shall be satisfied in accordance with the terms of the Second Amended and Restated Stalking Horse APA, (c) the date on which the Amended and Restated Initial Order expires without being extended or on which the CCAA proceedings are dismissed or converted into a proceeding under the *Bankruptcy and Insolvency Act* (Canada), (d) the date of the sale of all or substantially all of the Collateral (as defined in the Second DIP Amendment), and (e) March 27, 2021.

Kiffner Affidavit at para 32, Applicants' Motion Record, Tab 2.

16. The Second DIP Amendment provides that it is an Event of Default if any application or authorization requested with respect to the Cannabis Licenses shall have been finally refused in writing and GGB and the Purchaser agree, acting reasonably, that further efforts will not likely result in the requisite transfers being formally granted, or the Second Amended and Restated Stalking Horse APA is terminated in accordance with its terms.

Kiffner Affidavit at para 32, Applicants' Motion Record, Tab 2.

17. The proposed Stay Extension and DIP Amendment Order provides that advances under the Second DIP Amendment will have the benefit of the DIP Lender's Charge, which the Applicants are seeking to increase to a maximum of US$10 million.

Kiffner Affidavit at para 32, Applicants' Motion Record, Tab 2.

PART III - ISSUES

18. The issues on this motion are whether this Court should:

(a) approve the Second DIP Amendment;

(b) approve the Monitor's Reports and Activities;

(c) approve the fees and disbursements of the Monitor and its counsel; and

(d) extend the Stay Period to and including March 26, 2021.

PART IV - THE LAW

A. THE SECOND DIP AMENDMENT SHOULD BE APPROVED

19. The Applicants are seeking approval of the Second DIP Amendment, which increases the DIP Facility to (a) a maximum amount of US$7.9 million by means of the Excess DIP Amount and (b) US$1.3 million by means of the Capex Amount. The proposed Stay Extension and DIP Amendment Order provides that advances made under the Second DIP Amendment will have the benefit of the DIP Lender's Charge, which the Stay Extension and DIP Amendment Order contemplates increasing to a maximum of US$10 million.

Kiffner Affidavit at paras 32, Applicants' Motion Record, Tab 2.

20. This Court previously approved a first amendment to the DIP Agreement on August 13, 2020. As was submitted in the Applicants' factum in connection with that First DIP Amendment, this Court has the jurisdiction to authorize funding in the context of a CCAA restructuring pursuant to s. 11.2(1) and 11.2(2) of the CCAA. In considering whether to

approve DIP financing, the Court is to consider the non-exhaustive list of factors set out in s. 11.2(4) of the CCAA. These same provisions of the CCAA provide this Court with the authority to approve amendments to a DIP agreement and secure all obligations arising from the amended DIP loans with a DIP charge.

> *Re Green Growth Brands Inc.* (13 August 2020), Toronto CV-20-00641220-00CL (Ont Sup Ct [Commercial List]) Order (Re Approving DIP Amendment and Extending Stay Period) at paras 2 to 4 (Monitor's Website).
>
> CCAA, s. 11.2(1), 11.2(2) and 11.2(4).
>
> *Lydian International Limited (Re)*, 2020 ONSC 4006 (CanLII) at paras 65 to 68 [***Lydian***].

21. In *Lydian*, Morawetz C.J. approved an amended DIP agreement that was intended to provide the debtors with adequate financing to implement their CCAA plan of arrangement. All obligations arising from the amended DIP facility were secured by the DIP charge. In approving that amended DIP agreement, Morawetz C.J. noted that:

(a) the DIP amendment was necessary to enable the debtors to implement their plan;

(b) the Monitor was supportive of the DIP amendment;

(c) the DIP amendment was not anticipated to give rise to any material financial prejudice; and

(d) the DIP lenders were the majority of the debtors' existing senior secured lenders.

> *Lydian*, *supra* (CanLII) at para 67.

22. The structure of the DIP Facility, being the Excess DIP Amount and the Capex Amount, is not unusual. This Court has previously approved new and additional DIP financing agreements that provide funding from the same or similar lending entities to a

debtor using a new lending structure, and this Court has used its s. 11.2 authority to grant charges for these additional funds.

> See e.g. *Re Peraso Technologies Inc*. (20 August 2020), Toronto CV-20-00642010-00CL (Ont Sup Ct [Commercial List] Order (Approval of Second DIP Agreement) at paras 5 to 8 (Monitor's Website).

23. Based on the following factors, the Second DIP Amendment and the increase to the DIP Lender's Charge should be approved by this Court:

(a) the Second DIP Amendment provides the Applicants with the liquidity necessary to close the Transaction;

(b) the Monitor is supportive of the Second DIP Amendment;

(c) the DIP lender is All Js, one of the Company's existing secured lenders and one of the parties to the Second Amended and Restated Stalking Horse APA; and

(d) All Js has agreed to provide the funding required by the Applicants to continue operations during the extended Stay Period, subject to an increase in the quantum of the DIP Lender's Charge.

> Kiffner Affidavit at paras 31-33, Applicants' Motion Record, Tab 2.
>
> Fourth Report at paras 34 and 55-57.

D. THE MONITOR'S REPORTS AND ACTIVITIES AND ITS FEES AND DISBURSEMENTS SHOULD BE APPROVED

24. The Applicants are seeking an order approving the Monitor's Reports and the activities detailed therein. This Court has not previously approved any of the Monitor's Reports or activities.

25. In *Re Target Canada Co.*, Morawetz R.S.J. (as he then was) wrote that a request to approve a monitor's report "is not unusual" and that "there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process."

> *Re Target Canada Co.*, 2015 ONSC 7574 at paras 2 and 22 (CanLII).

26. The form of the proposed order is consistent with the language used in *Re Target Canada Co.* and subsequent proceedings.

> Draft Fee and Activity Approval Order at para 2, Applicant's Motion Record, Tab 4.
>
> *Re Target Canada Co.*, 2015 ONSC 7574 at paras 7 and 26 (CanLII).

27. In the present case, the Monitor's Reports and the activities described therein should be approved. The Monitor has carried out its activities in a manner consistent with the provisions of the CCAA and in compliance with the Initial Order.

> Fourth Report at para 51.

28. The Applicants further seek approval of the fees and disbursements of (a) the Monitor for the period May 4, 2020 to November 27, 2020, inclusive; and (b) counsel to the Monitor for the period May 5, 2020 to November 23, 2020, inclusive. The breakdown of the fees and disbursements of the Monitor and its counsel are in the Fourth Report.

> Fourth Report at paras 52-54.

29. In approving the fees and disbursements of the Monitor and its counsel, the Court must consider whether those fees were "fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process."

> *Nortel Networks Corp., Re*, 2017 ONSC 673 (CanLII) at para 13, citing *Winalta Inc., Re*, 2011 ABQB 399 (CanLII) at para 30.

30. The Applicants have reviewed the fees of the Monitor and its counsel and supports the payment of the same. The fees and disbursements of the Monitor and its counsel are reasonable in the circumstances and have been validly incurred in accordance with the provisions of the Orders issued in these CCAA Proceedings. Accordingly, this Court should approve the fees and disbursements of the Monitor and its counsel.

> Kiffner Affidavit at paras 34-35, Applicant's Motion Record, Tab 2.
>
> Fourth Report at paras 52-54 and 59.

31. The draft Fee and Activity Approval Order provides that the Monitor shall be authorized and directed to submit the Fee and Activity Approval Order to the Court to be issued and entered if, by 12:00 p.m. EST on December 31, 2020, no person objects to the approval of the (a) Monitor's Reports and the Monitor's activities, as set out in the Monitor's Reports; (b) the fees and disbursements of the Monitor; and (c) the fees and disbursements of the Monitor's counsel.

> Draft Fee and Activity Approval Order at paras 2-6, Applicant's Motion Record, Tab 4.

32. If the Monitor receives an objection by 12:00 p.m. EST on December 31, 2020, the draft Fee and Activity Approval Order provides that the Monitor is authorized and directed to schedule a 9:30 a.m. EST appointment seeking the Court's advice and direction with regard to such objection.

> Draft Fee and Activity Approval Order at para 7, Applicant's Motion Record, Tab 4.

E. THE STAY PERIOD SHOULD BE EXTENDED

33. The Stay Period expires on December 18, 2020. Pursuant to s. 11.02 of the CCAA, the Court may grant an extension of a stay of proceedings where: (a) circumstances exist that

make the order appropriate; and (b) the debtor company satisfies the Court that it has acted, and is acting, in good faith and with due diligence.

CCAA, s. 11.02(2) and (3).

34. The Applicants are seeking to extend the Stay Period to and including March 26, 2021. This will provide the Applicants with stability and allow them to take any remaining steps necessary to obtain regulatory approvals required for the transfer of the Cannabis Licenses in Nevada and Massachusetts and, ultimately, close the Transaction

Kiffner Affidavit at para 37, Applicants' Motion Record, Tab 2.

35. No creditors are expected to suffer material prejudice as a result of the extension of the Stay Period. The Applicants are acting in good faith and with due diligence in pursuing their restructuring strategy and will continue to do so during the proposed extension of the Stay Period through to March 26, 2021.

Kiffner Affidavit at para 36, Applicants' Motion Record, Tab 2.

Fourth Report at para 56.

36. The Monitor has filed the Fourth Report confirming that, subject to this Court approving the Second DIP Amendment, the Applicants should have access to sufficient liquidity to continue current operations and close the Transaction during the extension of the Stay Period.

Fourth Report at para 55(c).

Kiffner Affidavit at para 38, Applicants' Motion Record, Tab 2.

37. The Monitor supports extending the Stay Period to and including March 26, 2021.

Fourth Report at para 57.

38. For the reasons described above, the Stay Period should be extended to and including March 26, 2021.

PART V - ORDER SOUGHT

39. For the foregoing reasons, the Applicants respectfully request that this Court grant the Stay Extension and DIP Amendment Order and the Fee and Activity Approval Order, substantially in the form of the draft Orders attached at Tab 3 and Tab 4, respectively, to the Applicants' motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of December, 2020.

Stikeman Elliott LLP

Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Lydian International Limited (Re)*, 2020 ONSC 4006 (CanLII)

2. *Nortel Networks Corp., Re*, 2017 ONSC 673 (CanLII)

3. *Re Green Growth Brands Inc*. (13 August 2020), Toronto CV-20-00641220-00CL (Ont Sup Ct [Commercial List]) Order (Re Approving DIP Amendment and Extending Stay Period) (Monitor's Website)

4. *Re Peraso Technologies Inc*. (20 August 2020), Toronto CV-20-00642010-00CL (Ont Sup Ct [Commercial List] Order (Approval of Second DIP Agreement) (Monitor's Website)

5. *Re Target Canada Co*., 2015 ONSC 7574 (CanLII)

SCHEDULE "B"
RELEVANT STATUTES

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

General power of court

11 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.

[…]

Stays, etc. — other than initial application

11.02 (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.

[...]

Interim financing

11.2 (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

11.2 (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

11.2 (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

11.2 (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

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 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.

[…]

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