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 Third DIP Amendment)
(Returnable March 23, 2021)

March 21, 2021

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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. On December 17, 2020, GGB and the Purchaser entered into the Second Amended and Restated Stalking Horse APA. On December 18, 2020, this Court granted an order that, among other things, approved the Second DIP Amendment and extended the Stay Period to and including March 26, 2021.

4. This factum is filed in support of a motion by the Applicants seeking an order (the "**Third DIP Amendment Order**"), substantially in the form of the draft order attached as Tab 3 of the Motion Record, approving:

(a) a further extension of the Stay Period to May 28, 2021; and

(b) the Third DIP Amendment.

PART II - THE FACTS

5. The facts with respect to this motion are more fully set out in the affidavit of Ken Kiffner sworn March 19, 2021 (the "**Second Kiffner Affidavit**"). Capitalized terms used in this factum but not otherwise defined have the meaning ascribed to them in the Second Kiffner Affidavit.

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

6. The Company and the Monitor have been working to satisfy the conditions to closing the Transaction contemplated by the Second Amended and Restated Stalking Horse APA. The material remaining outstanding conditions to the closing of the Transaction relate to the regulatory approvals required for the transfer of the Cannabis Licenses in Nevada.

> Second Kiffner Affidavit at paras 14 and 17, Applicants' Motion Record, Tab 2.

7. In Nevada, the CCB approved the Company's application for approval of the indirect transfer of ownership of NOR, Wellness Orchards of Nevada LLC and Henderson Organic

Remedies LLC, which hold the GGB Group's cannabis licenses in Nevada, to Source Holding on December 18, 2020. The approval was conditioned upon GGB executing a settlement agreement and remitting a payment of $25,000 in satisfaction of what the CCB alleged was an unapproved insertion of certain intermediary entities between the public entity and the license-holding entities in Nevada. The CCB approved the settlement agreement during its January 2021 meeting, GGB has remitted the payment as required, and the CCB has issued its letter approving the transfer to Source Holding.

Second Kiffner Affidavit at para 17, Applicants' Motion Record, Tab 2.

8. The Company has also submitted the required applications to local authorities in the cities of Las Vegas, North Las Vegas, Henderson and Reno, as well as Clark County and Nye County in Nevada. All local approvals other than for the City of Las Vegas have been obtained. The Company hopes that the approval for the City of Las Vegas will be obtained by March 26, 2021.

Second Kiffner Affidavit at para 17, Applicants' Motion Record, Tab 2.

9. The Second Amended and Restated Stalking Horse APA provides that if the transfer of the Cannabis Licenses is not completed before the Outside Date (being March 26, 2021), then the Outside Date and any termination right available to any party in connection therewith will be extended by a period of 60 days, and may be further extended by mutual written consent of the Company and the Purchaser.

Second Kiffner Affidavit at para 18, Applicants' Motion Record, Tab 2.

10. 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 and anticipates that this process will be completed within the coming days.

Second Kiffner Affidavit at para 19, Applicants' Motion Record, Tab 2.

11. The parties will close the transaction contemplated by the Second Amended and Restated Stalking Horse APA as promptly as practicable after regulatory approvals are obtained and the other closing conditions contained therein are satisfied or waived.

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

B. THE THIRD DIP AMENDMENT

12. In connection with the additional time required to implement the Transaction, the Applicants and their counsel, in consultation with the Monitor, negotiated the Third DIP Amendment. The Third 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.

Second Kiffner Affidavit at para 21, Applicants' Motion Record, Tab 2.

13. The Third DIP Amendment increases the DIP Facility to a maximum amount of (a) US$8,162,078 million, comprised of US$7.2 million advanced under the DIP Agreement, US$600,000 advanced under the First DIP Amendment and US$362,078 available under the Third DIP Amendment; and (b) US$5,940,652 million (the "**Capex Amount**"). The proceeds of the Capex Amount are to be used by the Company solely to pay certain capital expenditures expressly approved by the DIP Lender, in its sole discretion.

Second Kiffner Affidavit at para 22, Applicants' Motion Record, Tab 2.

14. The Third DIP Amendment also extends the maturity date of the DIP Facility to May 28, 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 Third 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 Third DIP Amendment), and (e) May 28, 2021.

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

15. The Third 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 the Company and the Purchaser agree, acting reasonably, that further efforts will not likely result in the requisite transfers being formally granted on or before the Outside Date, or the Second Amended and Restated Stalking Horse APA is terminated in accordance with its terms.

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

16. The proposed Third DIP Amendment Order provides that advances under the Third DIP Amendment will have the benefit of the DIP Lender's Charge, which the Applicants are seeking to increase to a maximum of US$14.2 million.

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

PART III - ISSUES

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

(a) approve the Third DIP Amendment; and

(b) extend the Stay Period to and including May 28, 2021.

PART IV - THE LAW

A. THE THIRD DIP AMENDMENT SHOULD BE APPROVED

18. The Applicants are seeking approval of the Third DIP Amendment, which increases the DIP Facility to a maximum amount of (a) US$8,162,078 million; and (b) US$5,940,652 million. The proposed Third DIP Amendment Order provides that advances made under the Third DIP Amendment will have the benefit of the DIP Lender's Charge, which the Third DIP Amendment Order contemplates increasing to a maximum of US$14.2 million.

> Second Kiffner Affidavit at paras 22 and 24, Applicants' Motion Record, Tab 2.

19. This Court previously approved a first amendment to the DIP Agreement on August 13, 2020 and a second amendment to the DIP Agreement on December 18, 2020. As was submitted in the Applicants' factum in connection with that First DIP Amendment and Second 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).

Re Green Growth Brands Inc. (18 December 2020), Toronto CV-20-00641220-00CL (Ont Sup Ct [Commercial List]) Order (Re: Stay Period Extension and Approval of the Second DIP Amendment) at paras 3 to 7 (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***].

20. 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.

21. The structure of the DIP Facility, being the US$8,162,078 portion and the US$5,940,652 Capex Amount, is not unusual and is similar to the structure of the Second DIP Amendment. 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.

Re Green Growth Brands Inc. (18 December 2020), Toronto CV-20-00641220-00CL (Ont Sup Ct [Commercial List]) Order (Re: Stay Period Extension and Approval of the Second DIP Amendment) at paras 3 to 7 (Monitor's Website).

See also *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).

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

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

(b) the Monitor is supportive of the Third 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.

Second Kiffner Affidavit at paras 8, 21 and 24, Applicants' Motion Record, Tab 2.

Fifth Report at paras 33, 46 and 48.

C. THE STAY PERIOD SHOULD BE EXTENDED

23. The Stay Period expires on March 26, 2021. 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).

24. The Applicants are seeking to extend the Stay Period to and including May 28, 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 and, ultimately, close the Transaction

> Second Kiffner Affidavit at paras 25 and 26, Applicants' Motion Record, Tab 2.

25. 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 May 28, 2021.

> Second Kiffner Affidavit at paras 25 and 28, Applicants' Motion Record, Tab 2.
>
> Fifth Report at para 47.

26. The Monitor has filed the Fifth Report confirming that, subject to this Court approving the Third 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.

> Fifth Report at paras 33 and 46(c).
>
> Second Kiffner Affidavit at para 27, Applicants' Motion Record, Tab 2.

27. The Monitor supports extending the Stay Period to and including May 28, 2021.

> Fifth Report at paras 46(a) and 48.

28. For the reasons described above, the Stay Period should be extended to and including May 28, 2021.

PART V - ORDER SOUGHT

29. For the foregoing reasons, the Applicants respectfully request that this Court grant the Third DIP Amendment Order substantially in the form attached at Tab 3 of the Applicants' motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of March 2021.

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. *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)

3. *Re Green Growth Brands Inc*. (18 December 2020), Toronto CV-20-00641220-00CL (Ont Sup Ct [Commercial List]) Order (Re: Stay Period Extension and Approval of the Second DIP Amendment) (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)

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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