



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-23-00697285-00CL **DATE:** March 21, 2024

NO. ON LIST: 3

TITLE OF PROCEEDING: PHOENA HOLDINGS INC. et al

BEFORE: Justice Cavanagh

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
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For Other, Self-Represented:

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Catherine Francis	Counsel for the Secured Creditor, Balfour Energy Corp.	cfrancis@foglers.com;

ENDORSEMENT

[1] On April 4, 2023, the Applicants obtained protection under the CCAA pursuant to an Initial Order granted on April 4, 2023, as amended and restated on April 14, 2024, for the purpose of liquidating and winding down the Applicants' business operations.

[2] On this motion, the Applicants seek approval of an Amended and Restated Subscription Agreement among the Company and T'IITSK'IN Spirit Ventures Ltd. as assigned to 1000832157 Ontario Inc. (the "Purchaser") for the purchase and sale of the purchased shares and the transaction pursuant to an Approval and Vesting Order (the "Approval and Reverse Vesting Order" or "RVO"). Under the requested RVO, the Purchaser will acquire Phoena Holdings Inc. (the "Company") and other purchased entities including Elmclyffe Investments Inc., the owner of the real property municipally known as 1396 Balfour Street, Pelham, Ontario (the "Facility"), free and clear of all liabilities which will be vested into the ResidualCos.

[3] In addition to the RVO, the Applicants seek a Distribution Order authorizing the Monitor, on behalf of ResidualCos, after closing of the transaction, to make distributions, subject to a reserve, to Cortland, the DIP lender and senior secured creditor, and other relief.

[4] The Applicants also seek an Order declaring that, pursuant to section 5 (5) of the *Wage Earner Protection Program Act (WEPPA)* Phoena meets the criteria established by section 3.2 of the *Wage Earner Protection Program Regulations*, and affirming that Phoena's employees are individuals who are eligible to receive payments under the *WEPPA*.

[5] The jurisdiction to approve a transaction by reverse vesting order is found in section 11 of the CCAA which allows the Court to "make any order that it considers appropriate in the circumstances." In considering whether to approve a sale transaction structured as a reverse vesting order, is appropriate to consider the following factors, as noted by Penny J. in *Harte Gold Corp. (Re)*, 2022 ONSC 653, at paragraph 23:

- a. The statutory basis for a reverse vesting order and whether a reverse vesting order is appropriate in the circumstances; and
- b. The factors outlined in section 36(3) of the CCAA, making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction.

[6] I am satisfied that the reverse vesting structure as contemplated is appropriate in the circumstances and meets the factors set out in *Harte Gold*. The proposed RVO structure is necessary to preserve tax attributes which include (1) Phoena's tax losses which, based on the corporate tax returns, are approximately \$309 million of non-capital losses and \$1.4 million of capital losses as of the 2022-year end, and (2) saving applicable land transfer taxes on the transfer of the Facility, which would otherwise result in a negative adjustment to the purchase price if not structured as an RVO. Further, the intention of the Purchaser is to obtain a license from Health Canada as a producer and distributor of cannabis at the Facility and the RVO allows the Phoena Group structure to remain in place, which may assist the Purchaser to expedite its relicensing efforts.

[7] The proposed transaction provides value for the tax losses, prevents a negative adjustment to the purchase price for land transfer taxes, and is the preferred outcome for the Applicants' senior secured creditor and DIP lender. I am satisfied that the proposed transaction represents the best economic result in the circumstances. The RVO structure has increased the economic effect of the transaction on the purchased entities' stakeholders, specifically, Cortland as the DIP lender and first secured creditor of the Applicants, over

that which would be achieved in an asset sale. The other stakeholders' interests are preserved in the ResidualCos with the same priority they held prior to the transaction.

[8] I am satisfied that the factors in section 36 (3) of the CCAA and the *Soundair* principles support the transaction. This Court approved the listing agreement between CBRE and Elmclyffe for the sale of the Facility on May 12, 2023. The Subscription Agreement represents the only viable option arising out of a ten-month extensive marketing process of the Facility by CBRE. The Subscription Agreement was the highest and best offer received. The consideration contemplated in the Subscription Agreement will allow for, among other things, the repayment of the DIP and a partial repayment of amounts outstanding under the credit agreement with Cortland. Cortland is the primary economic beneficiary of the transaction and supports it. The Purchaser plans to resume cannabis cultivation at the Facility, and this is expected to benefit other stakeholders such as former employees and suppliers.

[9] The Monitor recommends that the Court approve the transactions.

[10] The RVO contains third-party releases in favour of: (a) the directors, officers, legal counsel and advisors of the Applicants, ResidualCo 1 and ResidualCo 2 that were directors, officers, legal counsel and advisors of the Applicants as at the date of the commencement of the CCAA proceedings or the date of incorporation in the cases of ResidualCo 1 and ResidualCo 2, and (b) the Monitor and its legal counsel. The requested releases are limited in scope and are appropriately tailored to apply only to those who provided significant value to the Applicants' liquidation and wind-down. I am satisfied that the proposed released parties have made material contributions to the CCAA proceedings and have worked diligently toward, or otherwise facilitated, the winding down and liquidating of the Applicants' business and assets which efforts resulted in the Subscription Agreement. The requested releases do not release or discharge any claim that is not permitted to be released pursuant to section 5.1 (2) of the CCAA. The requested releases have the support of Cortland and the Monitor.

[11] I am satisfied that the discharge of the Directors' charge and the KERP charge, effective upon closing of the transaction, as contemplated by the requested RVO, is appropriate in the circumstances. The termination of these two charges will facilitate the Monitor making the distributions without the need to reserve for the amounts secured by the charges.

[12] I am satisfied that Ernst & Young ("EY"), in its capacity as Receiver over the Facility, should be discharged effective on closing. Upon closing of the transaction, the Purchaser will own the Facility and the purpose of the Receiver over the Facility will no longer exist. I am satisfied that the requested order discharging and releasing EY as the Receiver is appropriate and reasonable in the circumstances.

[13] The Applicants seek an Order to discharge and release Mr. Darin Karasiuk as the Chief Restructuring Advisor ("CRA") effective on the closing of the transaction. The Monitor supports this relief. I am satisfied that it is appropriate to grant the requested discharge and release of the CRA effective on the closing of the transaction.

[14] The Applicants seek an Order, supported by the Monitor, to seal Confidential Appendix "1" which contains an unredacted copy of the Subscription Agreement until the closing of the transaction. The public version of the Subscription Agreement has only been redacted to withhold the purchase price and the deposit, which are commercially sensitive. I am satisfied that the requested sealing order satisfies the tests set out in *Sierra Club* and *Sherman Estate*.

[15] I am satisfied that it is appropriate to authorize the Monitor, on behalf of the ResidualCos, following closing of the transaction and after payment of all outstanding professional fees, to make distributions, as soon as possible, from available funds, subject to the requested reserve, to Cortland first, to repay amounts owing under the DIP Term Sheet and second, to repay amounts owing under the Credit Agreement. The Monitor's counsel provided the Monitor with a legal opinion that, subject to the customary assumptions and qualifications, Cortland has a valid, enforceable and properly perfected security interest in the collateral of the Applicants. The net proceeds from the transaction are not sufficient to repay the amounts owing to Cortland. I am satisfied that it is fair, reasonable and appropriate for the distributions to be made to Cortland, as requested.

[16] I approve the Reports and conduct of the Monitor and the fees of the Monitor and the Receiver, and its legal counsel.

[17] I am satisfied that the stay period should be extended to April 30, 2025, in the circumstances. The proposed stay period is intended to provide the Monitor with the time necessary to make the distributions, to recover excluded tax assets and the D&O trust funds (as described in the Monitor's Fifth Report), and complete the *WEPPA* administration.

[18] The Applicants seek an order pursuant to section 5 (5) of the *WEPPA*. The *CCAA* proceedings were commenced with the intention of liquidating and winding down the Applicants' business operations which is what has occurred during the pendency of the *CCAA* proceedings. Phoena has terminated the employment of all but two full-time employees, five part-time employees and two independent contractors who remain employed specifically to assist with the ongoing liquidation and wind down. Phoena intends to terminate the employment of the remaining employees prior to the closing. I am satisfied that in the circumstances it is appropriate for this Court to declare that Phoena complies with the prescribed criteria and that former employees of Phoena are entitled to receive payments under the *WEPPA*.

[19] The Purchaser requests that this court remain seized of issues relating to the co-generational facility owned by Balfour Energy Corp. as described in the Monitor's Fifth Report at paras. 21-29. This Court will remain available to address any issues that may arise in this respect.

[20] Orders to issue in forms of Orders signed by me today.

Justice Cavanagh

Date: March 21, 2024