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COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

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



AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.

APPLICANT DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC., and DELTA 9 CANNABIS STORE INC.

DOCUMENT: **BENCH BRIEF OF THE APPLICANT (COMEBACK APPLICATION)**

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**APPLICATION BEFORE THE HONOURABLE JUSTICE D.R. MAH
TO BE HELD ON NOVEMBER 15, 2024 at 2:00 P.M. ON THE COMMERCIAL LIST**

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I. OVERVIEW

1. This Brief is submitted on behalf of Delta 9 Cannabis Inc. (“**D9 Parent**”), Delta 9 Logistics Inc. (“**Logistics**”), Delta 9 Bio-Tech Inc. (“**Bio-Tech**”), Delta 9 Lifestyle Cannabis Inc. (“**Lifestyle**”), and Delta 9 Cannabis Store Inc. (“**Store**”, and together with D9 Parent, Logistics, Bio-Tech, and Lifestyle, the “**Delta 9 Group**” or the “**Applicants**”), in support of its application for:
 - a. approval of the sale transaction (the “**Proposed Transaction**”) contemplated in the Asset Purchase Agreement between Bio-Tech and 10213358 Manitoba Ltd. (the “**Purchaser**”), dated November 11, 2024 (the “**APA**”), regarding the Property (defined below); and
 - b. a temporary sealing order for the Confidential Exhibit (the “**Confidential Exhibit**”) to the Fifth Affidavit of John Arbuthnot IV, sworn on November 8, 2024 (the “**Fifth Affidavit**”) and the Confidential Appendices (the “**Confidential Appendices**” and together with the Confidential Exhibit, the “**Confidential Materials**”) to the Fourth Report of the Monitor, dated November 13, 2024 (the “**Fourth Report**”).
2. The Proposed Transaction is the result of an extensive marketing and sales process in respect of the Property, offers the best price for the Property, and is supported by the Monitor.
3. The Confidential Materials, which contain confidential information relating to the sales process, should be sealed and kept confidential until the Proposed Transaction has closed to avoid potential prejudice to future efforts to liquidate the Property, should the Proposed Transaction not close.

II. FACTUAL BACKGROUND

4. The facts and background for the Application are set out more fully in the Fifth Affidavit and the Fourth Report and are summarized below.
5. Capitalized terms used herein that are not otherwise defined have the meaning ascribed to them in the Application and the Fifth Affidavit.

A. Status of the CCAA Proceedings

6. On July 15, 2024, the Delta 9 Group sought and obtained an order (the “**Initial Order**”) under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the “**CCAA**”). Pursuant to the Initial Order, Alvarez & Marsal Canada Inc. was appointed Monitor of the Applicants (the “**Monitor**”).
7. On July 24, 2024, the Honourable Associate Chief Justice K.G. Nielsen granted the Amended and Restated Initial Order (the “**ARIO**”) which, among other things, extended the initial stay period until September 15, 2024, and approved a sales investment and solicitation process (the “**SISP**”) in respect of the business and/or assets of Bio-Tech (the “**SISP Order**”).
8. On September 11, 2024, the Honourable Justice C. D. Simard granted an Order extending the stay of proceedings pursuant to the ARIO up to and including November 1, 2024.
9. On November 1, 2024, the Honourable Justice M.A. Marion granted an Order further extending the stay of proceedings pursuant to the ARIO up to and including January 31, 2024.

B. Bio-Tech and the Property

10. Delta 9 is a vertically integrated group of companies in the business of cannabis cultivation, processing, extraction, wholesale distribution, retail sales, and business to business sales.¹
11. Bio-Tech is the licensed producer in Delta 9’s corporate structure. It holds a license pursuant to the *Cannabis Act*, SC 2018, c 16, from Health Canada permitting Bio-Tech to produce and sell cannabis oils, extracts and derivative products.²
12. Bio-Tech also owns and operates a 95,000 square foot cannabis cultivation and processing facility located in Winnipeg, Manitoba (the “**Cultivation Facility**”).³ The Cultivation Facility contains 297 modular “grow pods”, which are 320 square-foot shipping containers that have been retrofitted to support specific, micro-cultivation processes for the cultivation of certain types of cannabis plants (collectively, the “**Grow Pods**”).⁴

¹ Fifth Affidavit of John Arbutnot IV, sworn on November 8, 2024 (the “**Fifth Affidavit**”) at para 4.

² Fifth Affidavit at para 5.

³ Fifth Affidavit at para 6.

⁴ *ibid.*

13. Bio-Tech owns all of the inventory and intellectual property associated with the Grow Pods in its own name.⁵

C. The SISP

14. As outlined in further detail in the Fourth Report, the Monitor, with the assistance of Delta 9, implemented the SISP contemplated in the SISP Order in respect of Bio-Tech's assets and business, including the Grow Pods (the "**Sales Process**").
15. In summary, the Monitor and Bio-Tech:
 - a. created a broad but focused list of prospective bidders;
 - b. distributed teaser letters and non-disclosure agreements to potential bidders and published notice of the SISP in the Insolvency Insider, the National Post, New Cannabis Ventures, StrattCann and Newswire;
 - c. prepared and made available comprehensive marketing materials to be available in a virtual data room;
 - d. retained Capital Commercial Real Estate Services Inc. to assist with the marketing of the Cultivation Facility;
 - e. made key staff of Bio-Tech, as well as the Monitor, the CRO, and the Sales Agent available to answer questions and provide information to prospective bidders who submitted a non-disclosure agreement; and
 - f. reviewed and considered offers received by the bid deadline in respect of the property subject to the SISP.⁶
16. Bio-Tech, with the assistance of the Monitor, selected a bid tendered within the SISP by the Purchaser for the purchase of 17 of the Grow Pods, intellectual property and certain enumerated personal property, as more fully particularized in the APA (collectively, the "**Property**" or the "**Purchased Assets**").⁷

⁵ Fifth Affidavit at para 8.

⁶ Fourth Report of the Monitor, dated November 13, 2024 ("**Fourth Report**") at paras 20 to 22.

⁷ Fifth Affidavit at para 11.

17. Bio-Tech and the Monitor identified the Purchaser's offer as the best offer, as it represented the highest and best offer for the Purchased Assets and provided the greatest recovery available for Delta 9's stakeholders.⁸
18. Accordingly, the parties proceeded to prepare the APA, which was subsequently executed by Bio-Tech and the Purchaser on November 11, 2024.
19. The key terms of the APA are as follows:
 - a. the Property is being purchased on an "as is, where is" basis and the Purchaser will assume the right, title and interest to the Property;
 - b. the Purchaser has made payment of a deposit;
 - c. the Purchaser will be responsible for the payment of any applicable GST;
 - d. it is conditional upon the Court's approval but does not otherwise contain any material conditions; and
 - e. closing of the Proposed Transaction shall occur 5 business days after approval of the Proposed Transaction is granted by the Court (the "**Sale Approval Order**") or 5 business days following the resolution, dismissal or withdrawal of an appeal in respect of the Sale Approval Order, or on such other date as the parties may agree in writing.⁹

III. ISSUES

20. The issues to be determined by the Court are whether:
 - a. the APA and the Proposed Transaction contemplated therein should be approved; and
 - b. temporary sealing relief should be granted in respect of the Confidential Materials.

IV. LAW AND ARGUMENT

A. The Court Should Approve the Proposed Transaction

⁸ Fifth Affidavit at paras 12 to 14.

⁹ Confidential Appendix "3" to the Fourth Report.

21. Pursuant to section 36 of the CCAA, the Court has the jurisdiction to approve a sale transaction within the context of CCAA proceedings. Section 36(3) of the CCAA sets out the relevant factors for consideration as follows:
- a. whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - b. whether the Monitor approved the process leading to the proposed sale or disposition;
 - c. whether the Monitor filed with the Court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - d. the extent to which the creditors were consulted;
 - e. the effect of the proposed sale or disposition on the creditors and other interested parties; and
 - f. whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.¹⁰
22. The above factors, however, are not intended to be exhaustive nor to be considered a checklist that must be followed in every transaction.¹¹
23. Canadian Courts have also continued to consider the *Soundair* criteria as relevant to whether or not a sale approval should be approved in a CCAA proceeding. Those factors are similar to those in section 36(3) of the CCAA, and are as follows:
- a. whether the Court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;
 - b. the interest of all parties;
 - c. the efficacy and integrity of the process by which the offers are obtained; and
 - d. whether there has been unfairness in the working out of the process.¹²

¹⁰ [Companies' Creditors Arrangement Act](#), RSC 1985, c C-36 [CCAA], s. 36(3).

¹¹ [Target Canada Co \(Re\)](#), 2015 ONSC 1487 [Target] at para 16.

¹² [Royal Bank of Canada v Soundair Corp.](#), 1991 CanLII 2727 (ONCA) [Soundair] at para 16; see also *Target* at paras 14 to 17.

24. The APA and the Proposed Transaction contemplated therein satisfies the above test, given that:
- a. the process undertaken by the Monitor, with the assistance of Bio-Tech, to market the Purchased Assets was commercially reasonable and consistent with the terms of the SISP Order;
 - b. the APA is the highest and best offer obtained for the Property following a wide canvassing of the market, and therefore, maximizes value to stakeholders in the circumstances;
 - c. the Proposed Transaction is unconditional, except for Court approval;
 - d. the deposit paid by the Purchaser is non-refundable unless the Court does not approve the Proposed Transaction;
 - e. the Monitor is supportive of the Proposed Transaction and believes that the approval of the APA and the Proposed Transaction contemplated therein is in the best interests of Delta 9's stakeholders, as outlined in its Fourth Report;
 - f. the fulcrum creditor and Plan Sponsor, 2759054 Ontario Inc. operating as Fika Herbal Goods, supports the Proposed Transaction.¹³
25. Based on the foregoing, the Applicants respectfully submit that the marketing process and the APA are commercially reasonable in the circumstances and should be approved in the form of Sale Approval and Vesting Order sought.

B. The Confidential Materials Should be Sealed

26. The Applicants request to seal the Confidential Materials.
27. Pursuant to Part 6, Division 4 of the Alberta *Rules of Court*, AR 124/2010, the Court has the discretionary authority to order that a document filed in a civil proceeding is confidential, may be sealed, and not form part of the public record of the proceedings.¹⁴
28. A sealing order may be granted where the applicant demonstrates that: (a) Court openness poses a serious risk to an important public interest; (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably

¹³ Fourth Report at paras 25 to 29.

¹⁴ [Rules of Court](#), AR 124/2010, [Part 6, Division 4](#).

alternative measures will not prevent this risk; and (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.¹⁵

29. The disclosure of the information contained in the Confidential Materials could have a detrimental impact on any future sale efforts of the Applicants and the Monitor, should the Proposed Transaction not close.¹⁶
30. The proposed form of Sealing Order contemplates that the Order will remain in place only until May 15, 2024, at the latest. For that reason, the salutary effects of a sealing order outweigh any negative effects to the principles of Court openness.
31. The proposed Sealing Order is the least restrictive and prejudicial alternative to prevent the dissemination of commercially sensitive information.

V. RELIEF SOUGHT

32. The Applicants submit that they have met all of the qualifications required to obtain the requested relief and respectfully request that this Court grant the proposed form of Sale Approval and Vesting Order and the Sealing Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF NOVEMBER, 2024.

MLT AIKINS LLP



Ryan Zahara/Molly McIntosh
Counsel for the Delta 9 Group

¹⁵ [Sherman Estate v Donovan](#), 2021 SCC 25 at [para 38](#).

¹⁶ Fifth Affidavit at para 19.

LIST OF AUTHORITIES

A. Legislation

1. [Companies' Creditors Arrangement Act](#), RSC 1985, c C-36
2. [Rules of Court](#), AR 124/2010.

B. Case Law

1. [Target Canada Co \(Re\)](#), 2015 ONSC 1487
2. [Royal Bank of Canada v Soundair Corp.](#), 1991 CanLII 2727 (ONCA)
3. [Sherman Estate v Donovan](#), 2021 SCC 25