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JUDICIAL CENTRE	CALGARY	
MATTER	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF 420 INVESTMENTS LTD., 420 PREMIUM MARKETS LTD. and GREEN ROCK CANNABIS (EC 1) LIMITED	
APPLICANTS	420 INVESTMENTS LTD., 420 PREMIUM MARKETS LTD. and GREEN ROCK CANNABIS (EC 1) LIMITED	
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS**	
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I. INTRODUCTION

1. This Bench Brief is submitted on behalf of the Applicants, 420 Investments Ltd. ("**420 Parent**"), 420 Premium Markets Ltd. ("**420 Premium**") and Green Rock Cannabis (EC 1) Limited ("**GRC**") (collectively, the "**Applicants**"), who seek the following relief in this Application:

   a) abridging the time for service of the Application and the materials filed in support thereof, and dispensing with further service thereof;

   b) extending the time within which the Applicants are required to file a proposal to their creditors for 45 days to August 12, 2024, pursuant to section 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "**BIA**"), and seeking additional terms in the stay extension;

   c) directing that the proposal proceedings and estates of the Applicants shall be procedurally consolidated and shall continue under a single estate (each individual estate being an "**Estate**", and the consolidated estate being the "**Consolidated Estate**"), authorizing and directing the Proposal Trustee (defined below) to administer the Estates making up the Consolidated Estate on a consolidated basis, and granting ancillary relief arising from the procedural consolidation of the Estates;

   d) authorizing and empowering the Applicants to obtain and borrow under an interim facility loan agreement (such facility, the "**Interim Facility**" and such agreement, the "**Interim Facility Agreement**"), the terms of which are still being negotiated and will be disclosed in a supplemental affidavit if an agreement is reached;

   e) granting the following super-priority charges on all the property, assets and undertaking of the Applicants (the "**Property**"):

      i an Administration Charge (the "**Administration Charge**") to KSV Restructuring Inc. ("**KSV**"), in its capacity as Trustee under the Notices of Intention to Make a Proposal filed by the Applicants (the "**Proposal Trustee**"), counsel to the Proposal Trustee and the Applicants' counsel, as security for their professional fees and disbursements up to the maximum amount of $300,000;

      ii a charge (the "**Interim Lender's Charge**") to secure the Applicants' obligations under the Interim Facility Agreement;

      iii a Directors' and Officers' Charge (the "**D&O Charge**") in the amount of $721,000;

      iv a charge as security for payments under the KERP, up to the maximum amount of $373,928.17 ("**KERP Charge**");

   f) granting the following priority to the Court-ordered charges on the Property of the Applicants;

      i First – Administration Charge;

      ii Second – Interim Lender's Charge;

iii Third – D&O Charge; and

iv Fourth – KERP Charge;

g) approving a Key Employee Retention Plan ("**KERP**") described in the Confidential Exhibit (as defined below) for certain key employees of the Applicants ("**KERP Employees**"); and

h) an Order (the "**Sealing Order**") sealing **Exhibit "Q"** of the Morrow Affidavit (the "**Confidential Exhibit**") on the Court record in relation to the KERP and KERP Charge.

II. STATEMENT OF FACTS

2. The Applicants' application is supported by the Affidavit of Scott Morrow, Chief Executive Officer of each of the Applicants, sworn on June 19, 2024 (the "**Morrow Affidavit**").[1] The Applicants rely on the Statement of Facts contained in the Morrow Affidavit for the purposes of this Brief. Capitalized terms not defined herein have the meanings given to them in the Morrow Affidavit.

III. ISSUES

3. The issues to be determined by this Court are as follows:

a) Should the NOI Proceedings be consolidated?

b) Should the Court extend the time to file a proposal?

c) Should the enhanced Stay language be approved?

d) Should the Court grant the Administration Charge?

e) Should the Court grant the D&O Charge?

f) Should the Court approve the KERP and grant the KERP Charge?

g) Should the Court grant a sealing order in relation to the KERP and KERP Charge?

h) Should the Court approve the Interim Lender's Charge?

i) What should the priority of the BIA Charges be?

j) Should a Sealing Order be granted with respect to the KERP and the KERP Charge?

k) Should the Garnished Funds be returned to the Applicants?

[1] Affidavit of Scott Morrow, sworn on June 19, 2024 [Morrow Affidavit].

IV. LAW AND ARGUMENT

A. This Court Should Consolidate the NOI Proceedings

4. Although the BIA does not confer an express power to consolidate the administration of estates, Courts throughout Canada have routinely relied on section 183 of the BIA to grant a procedural order to consolidate multiple debtors' proposal proceedings.[2]

5. In doing so, Courts have recognized that it is appropriate to consolidate notice of intention proceedings where doing so will avoid a multiplicity of proceedings and will reduce costs due to multiple filings. This is particularly the case where the debtors are closely aligned.[3]

6. In *Electro Sonic Inc, Re*,[4] the Ontario Superior Court of Justice held the following:

> Bankruptcy proceedings in this Court operate subject to the general principle that the litigation process should secure the just, most expeditious and least expensive determination of every proceeding on its merits. One practical application of that general principle occurs when courts join together two closely-related bankruptcy proceedings so that they can proceed and be managed together. This procedural or administrative consolidation does not involve the substantive merger or consolidation of the bankruptcy estates, merely their procedural treatment together by the court.[5]

7. In this case, consolidating the proceedings of the three Applicants is just and expeditious, will avoid a multiplicity of proceedings, will reduce the costs associated with serving and filing separate sets of largely identical materials with this Court at each juncture of the proceedings, and will facilitate a faster and more efficient restructuring. No creditor will be materially prejudiced by procedural consolidation.

8. The three Applicants are affiliated corporations; 420 Premium and GRC are both 100% controlled by 420 Parent.[6] The Applicants will likely apply together at future dates for relief such as stay extensions and transaction approvals.

9. As such, the Applicants respectfully submit that for reasons of time and cost efficiency, this Court should authorize the procedural consolidation of the NOI Proceedings.

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[2] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 183 [BIA] **[TAB 1]**; *Gray Aqua Group of Companies, Re*, 2015 NBQB 107 at para 10. **[TAB 2]**
[3] *Mustang GP Ltd, Re*, 2015 ONSC 6562 at para 25 [*Mustang*]. **[TAB 3]**
[4] 2014 ONSC 942. **[TAB 4]**
[5] *Ibid* at para 4.
[6] 420 Premium is 100% controlled by the holding company 420 Dispensaries Ltd. which is 100% controlled by 420 Parent. See Morrow Affidavit, *supra* note 1 at paras 10-11.

B. The Court should extend the time to file a proposal

10. The Applicants filed their NOIs on May 29, 2024. Pursuant to section 50.4(8) of the BIA, the Applicants are required to file a proposal within 30 days (the "**Proposal Period**"). As such, the Applicants must file a proposal on or before June 28, 2024, unless an extension is granted by this Court.

11. Pursuant to section 50.4(9) of the BIA, a debtor in a proposal proceeding may apply to the Court for an order extending the time to file a proposal by a maximum of 45 days provided the Court is satisfied that:

a) the insolvent person has acted, and is acting, in good faith and with due diligence;

b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

c) no creditor would be materially prejudiced if the extension was granted.[7]

12. The Applicants are seeking a stay extension to August 12, 2024, in these proposal proceedings. The Applicants respectfully submit that the test in section 50.4(9) of the BIA is satisfied, and the stay extension should be approved. At all times, the Applicants have acted, and continue to act, in good faith and with due diligence and have taken the following steps, amongst others:

a) prepared and analyzed lists of creditors and identified issues specific to certain creditors;

b) provided the Proposal Trustee with access to their books and records;

c) worked with the Proposal Trustee on the preparation of the Cash Flow Projections and weekly monitoring for the Applicants;

d) communicated with stakeholders regarding the proposal process;

e) worked with counsel and other professional advisors in beginning to develop a proposal;

f) sent 16 Notices of Disclaimer in relation to the Disclaimed Leases for uneconomic, subleased or non-operating locations;

g) terminated 15 full-time employees and 34 part-time employees;

h) consolidated inventory to operating stores from locations subjected to the Disclaimed Leases;

i) reduced salaries in employment contracts;

[7] *BIA*, *supra* note 2, s 50.4(9). **[TAB 1]**

j) sent a Notice of Disclaimer in relation to the head office space and have moved to a remote working environment;

k) commenced the process of creating a sales and investment solicitation process ("**SISP**") and liaising with potential bidders; and

l) reviewed operating expenses, pursued the collection of accounts receivable and took other steps to ensure the Applicants remain financially viable during these proceedings.[8]

13. The stay extension is required to protect the Applicants' business and operations while the Applicants work to develop a viable proposal for the benefit of stakeholders. In particular, the stay extension will allow the Applicants to engage a sales advisor to canvass the market for potential refinancing or asset sale transactions.[9]

14. Without the stay extension, the Applicants would be forced to shut down operations, which would be extremely detrimental to the Applicants' landlords, suppliers, lenders, customers, and employees.[10] It is the Applicants' view that an extension of the Proposal Period will not materially prejudice any of the Applicants' creditors.

15. The Applicants therefore submit that an extension of the Proposal Period is necessary and appropriate in the circumstances and this Honourable Court should exercise its discretion to grant the stay extension.

C. The Expanded Stay of Proceedings

16. The Applicants seek an expansion of the traditional stay of proceedings language (the "**Expanded Stay**") normally granted in NOI proceedings. In particular, the Applicants seek the language listed in the proposed form of order included under the headings "No Interference with Rights", "Continuation of Services", and "Cash Management System".

17. The need for an expanded stay of proceedings was made clear due to the actions of High Park, which has – despite the statutory stay of proceedings provided by the BIA – taken steps to enforce on the HP Judgment by garnishing 420 Parent's Bank of Montreal Bank account. High Park (acting through BMO) has seized approximately $15,500 of 420 Parent's funds.[11]

18. Furthermore, Moneris, which facilitates credit and debit card purchases for 420 Premium, notified the Applicants on June 10, 2024, that, effective immediately (and without any advanced notice), it would begin allocating 25% of the value of the transactions it processes to a reserve (the

[8] Morrow Affidavit, *supra* note 1 at para 68.
[9] *Ibid* at paras 69-70.
[10] *Ibid* at para 70.
[11] *Ibid* at paras 63-65.

"**Reserve**") until the Reserve has $100,000. Moneris has also shifted to collecting interchange and other fees on a daily basis.[12] Moneris' unilateral decision to establish the reserve and change how it collects fees represents a change in the *status quo*.

19. These unexpected moves in the face of the current stay of proceedings have resulted reduced cash flow receipts, which is detrimental to the Applicants' financial situation and may hinder their ability to restructure. The "No Interference with Rights", "Continuation of Services", and "Cash Management System" provisions of the proposed order are intended to address the aforementioned situations, prevent them from occurring again, and ensure that the Applicants are able to maintain the *status quo* during the NOI Proceedings, thereby preserving value for all of the Applicants' stakeholders. The Applicants also note that the language used in the "Continuation of Services" and "Cash Management System" sections mirror the enhanced stay provisions from the model CCAA Initial Order,[13] such that they are common to restructuring proceedings.

20. The Applicants submit that the proposed expanded stay language is both fair and reasonable and note that this Court has recently granted an extension order in the Nilex NOI proceedings containing the same language for "No Interference with Rights" and "Continuation of Services".[14] The Ontario Superior Court of Justice also recently granted an extension order in the BRR Logistics NOI proceedings containing the same language for "Cash Management System".[15] Additionally, the Applicants note that the Proposal Trustee has indicated its support for the Expanded Stay.

21. The Applicants therefore request that this Honourable Court exercise its discretion to grant the Expanded Stay.

D. The Administration Charge should be granted

22. The Applicants seek the Administration Charge in an amount of up to $300,000 to secure the fees and expenses of its own counsel and of the Proposal Trustee and the Proposal Trustee's counsel (collectively, the "**Administrative Professionals**") whose services are critical to these NOI Proceedings. The Administration Charge is to rank first in priority ahead of all other claims and charges.

23. This Court has jurisdiction under section 64.2 of the BIA to grant the Administration Charge:

> **64.2(1)** ***Court may order security or charge to cover certain costs:*** On notice to the secured creditors who are likely to be affected by the security

[12] *Ibid* at paras 60-61.
[13] Model CCAA Initial Order at paras 4(d), 17. **[TAB 5]**
[14] *In the matter of the notice of intention to make a proposal of Nilex Inc and Nilex USA Inc*, Order of Little J. dated November 8, 2022 at para 4. **[TAB 6]**
[15] *In the matter of the notice of intention to make a proposal of BRR Logistics Limited*, Order of Conway J. dated February 27, 2024 at para 5. **[TAB 7]**

> or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of
>
> > (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
> >
> > (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division;
> >
> > […]
>
> **64.2(2)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.[16]

24. Administration charges have been approved in BIA proposal proceedings, where, as in the present case, the participation of insolvency professionals is necessary to ensure a successful restructuring under the BIA.[17]

25. The Applicants submit that granting the Administration Charge and priority over any pre-existing security interests and encumbrances is necessary and appropriate in the circumstances to ensure that the Applicants have access to the Administrative Professionals throughout the course of these NOI Proceedings.[18] The quantum of the proposed Administration Charge is both fair and reasonable given the size and complexity of the Applicants' business. The Proposal Trustee is supportive of the Administration Charge.

26. As a result of the foregoing, the Applicants respectfully submit that this Honourable Court should exercise its discretion to grant the Administration Charge.

E. The Interim Facility Agreement should be approved and the Interim Lender's Charge should be granted

27. The Applicants seek authorization to obtain and borrow under the Interim Facility Agreement with the Interim Lender and further seek a second ranking Interim Lender's Charge in relation thereto.

28. Subsection 50.6(1) of the BIA provides this Court with the jurisdiction to order a charge to secure interim financing advanced to a debtor on notice to the secured creditors who are likely to be

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[16] *BIA*, *supra* note 2, s 64.2. **[TAB 1]**
[17] See e.g., *Mustang*, *supra* note 3 at paras 32-33 **[TAB 3]**; *In the matter of the notice of intention to make a proposal of BR Capital LP et al*, Order (Procedural Consolidation, Administration Charge, Interim Financing, Interim Financing Charge, D&O Charge and Stay Extension) of Dario J. dated October 14, 2022 at para 9 **[TAB 8]**; *In the matter of the notice of intention to make a proposal of Trakopolis IoT Corp et al,* Order (Extension of the Stay, Administration Charge, FA Charge, D&O Charge) of Macleod J. dated December 16, 2019 at para 3. **[TAB 9]**
[18] Morrow Affidavit, *supra* note 1 at paras 71-72.

affected by the charge in an amount that the court considers appropriate, provided that such a charge does not "secure an obligation that exists before this order is made."[19] Pursuant to subsection 50.6(3), the charge may "rank in priority over the claim of any secured creditor."[20]

29. When determining whether to grant a charge securing interim financing, subsection 50.6(5) of the BIA requires the Court to consider, amongst other things:

a) the period during which the debtor is expected to be subject to proceedings under this Act;

b) how the debtor's business and financial affairs are to be managed during the proceedings;

c) whether the debtor's management has the confidence of major creditors;

d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

e) the nature and value of the debtor's property;

f) whether any creditor would be materially prejudiced as a result of the security or charge; and

g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.[21]

30. The factors listed under section 50.6 are non-exhaustive, are subject to judicial discretion, and are highly fact-specific.[22]

31. In considering the appropriateness of interim financing, this Court should consider the benefit to preserving the *status quo* to allow for the Applicants and the Proposal Trustee to establish a proposal to the benefit of the Applicants' stakeholders.[23]

32. While the projected 13-week cashflow statement prepared by the Applicants with the assistance of the Proposal Trustee currently indicates that no additional financing will likely be required, the Applicants view it as a prudent step to have interim funding available in the event it is required.[24]

33. The Proposal Trustee has indicated its support for the Interim Facility Agreement and the corresponding Interim Lender's Charge.[25]

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[19] *BIA*, *supra* note 2, s 50.6(1). **[TAB 1]**
[20] *Ibid*, s 50.6(3). **[TAB 1]**
[21] *Ibid*, s 50.6(5) **[TAB 1]**; *Eureka 93 Inc et al, Re*, 2020 ONSC 1482 at para 16 [*Eureka*]. **[TAB 10]**
[22] *Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd*, 2021 ABCA 66 at para 19. **[TAB 11]**
[23] *Eureka*, *supra* note 21 at para 24. **[TAB 10]**
[24] Morrow Affidavit, *supra* note 1 at paras 75-82.
[25] *Ibid* at para 83.

34. If the Interim Lender's Charge is not granted at this time, but interim funding is subsequently required, it will require a further application, the expense for which will further deplete the Applicants' assets at the expense of the Applicants' stakeholders.

35. As a result of the foregoing, the Applicants respectfully submit that this Honourable Court should exercise its discretion to grant the Interim Lender's Charge.

F. The D&O Charge should be granted

36. The Applicants seek approval of the D&O Charge in the maximum amount of $721,000 indemnifying the directors for obligations and liabilities which they may incur in their capacities as officers and directors after the commencement of these NOI Proceedings. The D&O Charge is proposed to rank third in priority, behind the Administration Charge and the Lender's Charge.

37. Section 64.1 of the BIA confers on the Court the statutory jurisdiction to grant the D&O Charge during the NOI Proceedings:

> **64.1(1)** ***Security or charge relating to director's indemnification:*** On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 property of the person is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.
>
> […]
>
> **64.1(2)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

38. The purpose of a D&O charge is to:

a) keep directors and officers in place during the restructuring by providing them with protection against liabilities they incur during the process, and in addition avoid a potential destabilization of the business;[26] and

b) enable a debtor company to benefit from an experienced board of directors and senior management.[27]

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[26] *Northstar Aerospace Inc, Re*, 2013 ONSC 1780 at para 29. **[TAB 12]**
[27] *Ibid*.

39. Courts have previously granted D&O charges in situations where the charge is only sought to the extent that the directors and officers do not have coverage under existing insurance policies, there is a possibility that the remaining directors and officers may not continue their services and involvement without the protection of the D&O Charge, the continued involvement of said directors and officers is critical to the success of any proposal, and the Proposal Trustee has indicated its support for the D&O Charge.[28]

40. The Applicants respectfully submit that the circumstances of this case are appropriate for this Honourable Court to grant the D&O Charge. The Applicants' successful restructuring will only be possible with the continued participation of their D&Os. These individuals have specialized expertise and relationships with the Applicants' stakeholders. In addition, the D&Os have gained significant knowledge of the cannabis industry that cannot be easily replaced or replicated.[29]

41. The Applicants maintain directors' and officers' liability insurance (the "**D&O Insurance**") for their directors and officers, which provides up to $2 million in aggregate coverage for all claims. There is, however, uncertainty as to whether the D&O Insurance will be sufficient to adequately protect the Applicants' directors or incentivize the D&Os to continue their service with the Applicants.[30] Although the Applicants intend to comply with all applicable laws and regulations, including with respect to the timely remittance and deductions at source and federal and provincial sales tax, the D&Os nevertheless remain concerned about their potential personal liability given the number of employees and sales transactions that the Applicants' conduct in the ordinary course of business.[31]

42. The D&O Charge is expected to only be used to the extent that the D&Os do not have coverage under the D&O Insurance or such coverage is insufficient to pay the amounts indemnified.[32]

43. The Proposal Trustee has advised that it is supportive of the proposed D&O Charge and quantum thereof. The quantum of the D&O Charge is reasonable in the circumstances and was calculated in consultation with the Proposal Trustee to specifically reflect the potential liabilities that could be outstanding at any time during the NOI Proceedings, including with respect to payroll, termination pay, vacation pay, and excise taxes.[33]

44. Accordingly, the Applicants respectfully submit that this Court should exercise its discretion to grant the D&O Charge.

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[28] See e.g., *Colossus Minerals Inc, Re*, 2014 ONSC 514 at paras 16-21 **[TAB 13]**; *Mustang*, *supra* note 3 at para 35. **[TAB 3]**
[29] Morrow Affidavit, *supra* note 1 at para 79.
[30] *Ibid* at para 78.
[31] *Ibid* at para 81.
[32] *Ibid* at para 82.
[33] *Ibid* at paras 84-85.

G. The KERP should be approved and the KERP Charge granted

45. The Applicants seek approval of the KERP for key employees of the Applicants (the "**KERP Employees**") and further seek a fourth-ranking priority charge as security for payments under the KERP, up to the maximum amount of $373,928.17 (the "**KERP Charge**").

46. KERPs have frequently been approved in proposal proceedings under the BIA. KERPs are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts.[34]

47. In *Grant Forest Products Inc, Re*,[35] Newbould J. set out a non-exhaustive list of factors that the Court should consider in determining whether to approve a KERP, including the following:

a) whether the employees who are subject of the KERP are truly "key employees" whose continued employment is critical to the successful restructuring;

b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the KERP;

c) whether the quantum of the proposed retention payments is reasonable;

d) whether the court-appointed officer supports the KERP; and

e) the business judgment of the board of directors regarding the necessity of the retention payments.[36]

48. The Court's role in assessing a request to approve a KERP is to assess the totality of circumstances to determine whether the process is reflective of objective business judgment and whether the end result is objectively reasonable. Three criteria underlie the factors applicable to approving a KERP, namely: (a) arm's length safeguards, (b) necessity, and (c) reasonableness of design. Within these parameters, the scope of the KERP and the amounts allocated to beneficiaries are both highly fact-dependent and based on the needs of the particular debtor and the role of the beneficiaries in the business and the restructuring.[37]

49. The KERP Employees are critical to the implementation and success of the NOI Proceedings and any restructuring of the Applicants. The KERP Employees include members of the Applicants' senior management, operations, human resources and finance teams. They collectively provide critical leadership, experience and resources to run the Applicants' business operations, will provide strategic and technical direction for the restructuring efforts, and will be necessary to

[34] See e.g., *Danier Leather Inc, Re*, 2016 ONSC 1044 at paras 75-77. **[TAB 14]**
[35] 2009 CanLII 42046. **[TAB 15]**
[36] *Ibid* at paras 8-22. **[TAB 15]**
[37] *Aralez Pharmaceuticals Inc, Re*, 2018 ONSC 6980 at paras 27-30. **[TAB 16]**

identify, develop and implement initiatives intended to maximize value. The Applicants have carefully considered the roles of the KERP Employees in both their ongoing business operations and their restructuring efforts in light of the role played by the Proposal Trustee and do not believe there is any unwarranted duplication of roles.[38]

50. Due to their experience and expertise, the KERP Employees will likely have more certain employment opportunities available to them with other companies and, without the benefit of the KERP, there is a real and genuine risk that the KERP Employees will consider those other employment opportunities.[39]

51. As a result of the foregoing, the retention payments set forth in the terms of the KERP are reasonable in all the circumstances. The KERP is proportionately reasonable to the size and nature of the business. The total quantum of the KERP payment is modest and the KERP is structured in a way that reasonably incentivizes retention. Under the terms of the KERP, the retention payments are earned in the following manner:

a) 25% of the total retention payment is paid at the end of week 7 of the NOI Proceedings; and

b) 75% of the remaining total retention payment is paid following the closing of an asset sale transaction or a restructuring transaction that results in the conclusion of the NOI Proceedings.[40]

52. Retention payments will only be paid to the respective KERP Employees if they have not resigned or been terminated for cause.[41]

53. The decision to implement the KERP represents a valid exercise of business judgment by the Applicants' boards of directors (which has approved the KERP and the associated KERP Charge) and was developed in conjunction with the Applicants' legal counsel and the Proposal Trustee to ensure arm's length safeguards.[42] The Proposal Trustee has advised that it is supportive of the KERP and the corresponding KERP Charge.[43]

54. As such, the Applicants respectfully submit that this Honourable Court should exercise its discretion to approve the KERP and grant the requested KERP Charge.

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[38] Morrow Affidavit, *supra* note 1 at paras 89-90, 92.
[39] *Ibid* at para 91.
[40] *Ibid* at para 93.
[41] *Ibid* at para 94.
[42] *Ibid* at paras 89, 96.
[43] *Ibid* at para 97.

H. Priority of the BIA Charges

55. The Applicants request that the priorities of the Administration Charge, the Interim Lender's Charge, the D&O Charge and the KERP Charge be ranked as follows:

a) First – the Administration Charge;

b) Second – the Interim Lender's Charge;

c) Third – the D&O Charge; and

d) Fourth – the KERP Charge.

56. Pursuant to subsections 50.6(3), 64.1(2), and 64.2(2) of the BIA, this Court has discretion to order that the Administration Charge, D&O Charge, and Interim Lender's Charge rank in priority over the claim of any secured creditor. Though there is no express provision in the BIA allowing for same for the KERP Charge, Courts have previously exercised their broad discretion to grant priority charges to KERPs.[44]

57. This priority of the charges reflects the priority of the interests associated with these proceedings.

58. As such, the Applicants submit that the various charges should be granted the priority statuses as set forth above.

I. A Sealing Order should be granted in relation to the KERP and KERP Charge

59. Pursuant to Part 6, Division 4, of the *Alberta Rules of Court*, this Court has the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.[45]

60. The test to be applied to determine whether a sealing order is appropriate is set out in *Sierra Club of Canada v Canada (Minister of Finance)*,[46] as recast in *Sherman Estate v Donovan*:[47]

a) whether court openness poses a serious risk to an important public interest;

b) whether the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[48]

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[44] See e.g., *Danier*, *supra* note 34 at paras 74, 78. **[TAB 14]**
[45] *Rules of Court*, AR 124/2010, Part 6, Division 4. **[TAB 17]**
[46] 2002 SCC 41 [*Sierra Club*]. **[TAB 18]**
[47] 2021 SCC 25 [*Sherman Estate*]. **[TAB 19]**
[48] *Ibid* at paras 37-38 **[TAB 19]**; *Sierra Club*, *supra* note 46 at para 53. **[TAB 18]**

61. The Supreme Court of Canada has explicitly recognized that a party's legitimate commercial interests constitute an "important public interest" for purposes of this test.[49] An important commercial interest includes preserving information that is intended to be confidential, and where disclosure would frustrate the promotion and protection of competition.[50] Whether a sealing order should be granted is ultimately a matter of judicial discretion.[51]

62. It is common practice for the details of a KERP to be subject to a sealing order, as Courts have recognized the potentially damaging impact that disclosure of such sensitive information could have on the business operations of the debtor company, a potential restructuring, and the employees subject to the KERP.

63. In *Danier Leather Inc, Re*,[52] a case also involving proposal proceedings under the BIA, the Court granted a sealing order in respect of the details of a KERP. In so doing, Penny J. wrote the following:

> [82] In the insolvency context, courts have applied [the *Sierra Club* test] and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders. (citations omitted)
>
> [83] It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.
>
> […]
>
> [85] The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.[53]

64. The Confidential Exhibit meets the test for a sealing order. The Confidential Exhibit contains personal information that is confidential and of a highly sensitive commercial nature, including a list of the KERP Employees, their salaries, their respective retention payments, and a short summary of their roles and importance to the Applicants' business and restructuring efforts.[54]

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[49] *Sherman Estate*, *supra* note 47 at para 41 **[TAB 19]**; *Sierra Club*, *supra* note 46 at paras 60-61. **[TAB 18]**
[50] *Dow Chemical Canada ULC v Nova Chemicals Corporation*, 2015 ABQB 81 at paras 50-51, 54 **[TAB 20]**; see also *Lewis v Uber Canada Inc*, 2023 ONSC 5134 at para 12. **[TAB 21]**
[51] *Dow Chemical*, *supra* note 50 at para 36. **[TAB 20]**
[52] 2016 ONSC 1044. **[TAB 14]**
[53] *Ibid* at paras 82-83, 85. **[TAB 14]**
[54] Morrow Affidavit, *supra* note 1 at para 98-100.

65. Disclosure of the information contained in the Confidential Exhibit will be prejudicial to the Applicants, the KERP Employees and others. Among other issues, disclosure of the Confidential Exhibit could: (a) create morale and other issues as between employees who are either not subject to the KERP or are receiving different entitlements under the KERP; (b) allow the Applicants' business competitors and others to attempt to induce the KERP Employees to depart from their employment for more lucrative opportunities; and (c) make it more difficult for the Applicants to negotiate employment terms for replacement employees if required. In addition, and generally speaking, salary and compensation levels for employees is a particularly personal and private matter to employees.[55]

66. There are no alternative measures that could prevent these risks. Furthermore, the requested Sealing Order has been construed as narrowly as possible and only seeks to maintain the confidentiality of the KERP Employees and the KERP.[56]

67. Overall, the salutary effects of the sealing order, which will maintain confidentiality over a party's legitimate commercial interests, outweigh the deleterious effects of restricting the accessibility of court proceedings. It is reasonable and appropriate in the circumstances to grant the requested sealing order over the Confidential Affidavit.

J. The Garnished Funds should be returned to the Applicants

68. High Park, through BMO, breached the terms of the stay of proceedings by taking approximately $15,500 from 420 Parent's bank account without the authorization of the Applicants, the Proposal Trustee or the Court. The appropriate remedy for this breach is for the funds subject to High Park's garnishment to be returned to 420 Parent.

69. Upon the commencement of the NOI Proceedings, 420 Parent benefited from an immediate and automatic stay of proceedings pursuant to s. 69(1) of the BIA: "[N]o creditor has any remedy against the insolvency person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy".[57]

70. The stay in s. 69(1) is "aimed at maintaining the status quo" [58] and providing the reorganizing debtor with some "breathing room" during which it can negotiate with its creditors and put together a prospective financial restructuring.[59] The stay provides a "general ceasefire" that prevents "any

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[55] *Ibid* at para 99.
[56] *Ibid* at para 100.
[57] BIA, *supra* note 2, s 69(1)(a). **[TAB 1]**
[58] *1635623 Alberta Ltd (Adrenaline Diesel and Bonnie's Equipment Services Ltd), Re*, 2022 ABQB 361 at para 19 [*Adrenaline Diesel*]. **[TAB 22]**
[59] *Blade Energy Services Corp, Re,* 2024 ABKB 100 at para 22 [*Blade*] **[TAB 23]**, citing *Golden Griddle Corp v Fort Erie Truck & Travel Plaza Inc*, 2005 CanLII 81263 (Ont Sup Ct J).

creditor from gaining an edge over other creditors or otherwise improving or in any way changing its position."[60] As Strathy J.A. wrote in *Dilollo, Re*:[61]

> [Section 69, 69.1, 69.2, and 69.3 of the BIA] promote the objects of the BIA by providing an orderly and fair distribution of the property of the bankruptcy amongst creditors and by preventing proceedings by a creditor that would give that creditor an advantage over others […].[62]

71. In this light, the terms "remedy" and "other proceedings" as used in s. 69(1) of the BIA are broadly interpreted to include both judicial and extrajudicial debt-collection steps.[63] Indeed, remedies "which in any way hinder or could impair" the restructuring objectives of a BIA proposal are caught within s. 69(1) and stayed.[64]

72. A garnishment constitutes a "remedy" that is stayed by s. 69(1) of the BIA.[65] The present scenario closely aligns with *Savant Industries Inc (Trustee of) v Saskwest Television Inc*,[66] in which Saskwest, a creditor, garnished moneys from a debtor subject to a proposal proceeding. Justice Baynton held that despite Saskwest not having notice of the proposal proceedings, the automatic stay of proceedings under the BIA stayed Saskwest's garnishment action. The appropriate remedy for Saskwest's breach of the stay of proceedings was to hand over to the proposal trustee all moneys it had garnished after the commencement of the proposal proceedings.[67]

73. Courts have repeatedly held that a stay of proceedings has effect regardless of whether a creditor has knowledge that a debtor filed a notice of intention or a proposal.[68]

74. By garnishing 420 Parent's bank account, BMO (acting pursuant to High Park) undertook a remedy that violated the stay of proceedings benefiting 420 Parent.

75. The Garnished Funds were held in 420 Parent's bank account for its on-going business operating expenses and employee wage entitlements. The Garnished Funds are 420 Parent's property.[69]

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[60] *Adrenaline Diesel*, *supra* note 58 at para 27. **[TAB 22]**
[61] 2013 ONCA 550. **[TAB 24]**
[62] *Ibid* at para 40. **[TAB 24]**
[63] *Blade*, *supra* note 59 at para 14, citing *Vachon v Canada Employment and Immigration Commission*, [1985] 2 SCR 417. **[TAB 23]**
[64] *Blade*, *supra* note 63. **[TAB 23]**
[65] *Savant Industries Inc (Trustee of) v Saskwest Television Inc*, 1994 CarswellSask 203 at paras 14-15, 26 **[TAB 25]**; *Chaulk Air Inc, Re*, 2012 CarswellNB 204 at para 8 **[TAB 26]**; *Blade*, *supra* note 59 at paras. 47-48 (obiter). **[TAB 23]**
[66] 1994 CarswellSask 203. **[TAB 25]**
[67] *Ibid* at paras 14-15, 26. **[TAB 25]**
[68] *Ibid* at paras 12-15; *Hover, Re*, 2000 ABQB 938 at para 36. **[TAB 27]**
[69] Morrow Affidavit, *supra* note 1 at para 63-66.

76. High Park has, by means of BMO's garnishment, leapfrogged over 420 Parent's other creditors and obtained a recovery on its unsecured claim that undermines the objectives of the NOI Proceeding and prejudices both 420 Parent and its creditors.

77. High Park should not be rewarded for flouting the provisions of the BIA and rejecting the rules of priority, fairness and good faith that apply to all stakeholders in these NOI Proceedings. This Court ought to direct that the Garnished Funds be immediately returned to 420 Parent.

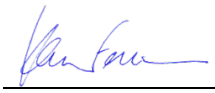
78. The proposed form of order is drafted broadly such that, when the location of the Garnished Funds is identified (either at BMO or the Accounting Department of this Court), the party holding the Garnished Funds has a clear direction to return them to 420 Parent.

V. CONCLUSION

79. For the foregoing reasons, the Applicants respectfully submit that this Court should grant the form of Orders appended as **Schedule "A"** and **Schedule "B"** to the Notice of Application dated June 19, 2024.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19 DAY OF JUNE 2024.

STIKEMAN ELLIOTT LLP
By:



Karen Fellowes, K.C.
Lawyer for the Applicants

VI. TABLE OF AUTHORITIES

TAB	DOCUMENT
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3.
2.	*Gray Aqua Group of Companies, Re*, 2015 NBQB 107
3.	*Mustang GP Ltd, Re*, 2015 ONSC 6562
4.	*Electro Sonic Inc, Re* 2014 ONSC 942
5.	Model CCAA Initial Order
6.	*In the matter of the notice of intention to make a proposal of Nilex Inc and Nilex USA Inc* Order of Little J. dated November 8, 2022
7.	*In the matter of the notice of intention to make a proposal of BRR Logistics Limited,* Order of Conway J. dated February 27, 2024
8.	*In the matter of the notice of intention to make a proposal of BR Capital LP et al*, Order (Procedural Consolidation, Administration Charge, Interim Financing, Interim Financing Charge, D&O Charge and Stay Extension) of Dario J. dated October 14, 2022
9.	*In the matter of the notice of intention to make a proposal of Trakopolis IoT Corp et al,* Order (Extension of the Stay, Administration Charge, FA Charge, D&O Charge) of Macleod J. dated December 16, 2019
10.	*Eureka 93 Inc et al, Re*, 2020 ONSC 1482
11.	*Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd*, 2021 ABCA 66 at para 19.
12.	*Northstar Aerospace Inc, Re*, 2013 ONSC 1780
13.	*Colossus Minerals Inc, Re*, 2014 ONSC 514
14.	*Danier Leather Inc, Re*, 2016 ONSC 1044
15.	*Grant Forest Products Inc, Re*, 2009 CanLII 42046
16.	*Aralez Pharmaceuticals Inc, Re*, 2018 ONSC 6980
17.	*Rules of Court*, AR 124/2010, Part 6, Division 4
18.	*Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41
19.	*Sherman Estate v. Donovan*, 2021 SCC 25
20.	*Dow Chemical Canada ULC v Nova Chemicals Corporation*, 2015 ABQB 81
21.	*Lewis v Uber Canada Inc*, 2023 ONSC 5134
22.	*1635623 Alberta Ltd (Adrenaline Diesel and Bonnie's Equipment Services Ltd), Re*, 2022 ABQB 361
23.	*Blade Energy Services Corp, Re*, 2024 ABKB 100
24.	*Dilollo, Re*, 2013 ONCA 550
25.	*Savant Industries Inc (Trustee of) v Saskwest Television Inc*, 1994 CarswellSask 203
26.	*Chaulk Air Inc, Re*, 2012 CarswellNB 204
27.	*Hover, Re*, 2000 ABQB 938