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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(IN BANKRUPTCY AND INSOLVENCY)**  
**COMMERCIAL LIST**

**IN THE MATTER OF THE *BANKRUPTCY AND*  
*INSOLVENCY ACT*, R.S.C. 1985, C. B-3, as amended**

**IN THE MATTER OF THE BANKRUPTCY OF AYANDA  
CANNABIS CORPORATION OF THE COUNTY OF  
NORFOLK, IN THE PROVINCE OF ONTARIO**

**FACTUM OF THE BANKRUPTCY TRUSTEE**

December 17, 2023

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**PART I - OVERVIEW**

1. On February 4, 2022, Ayanda Cannabis Corporation (the “**Company**”) filed a Notice of Intention to Make a Proposal (the “**NOI**”) under the *Bankruptcy and Insolvency Act* (“**BIA**”). Richter Inc. was named as the proposal trustee (the “**Proposal Trustee**”) under the NOI.
2. The Company carried on business as a licenced producer of cannabis. The Company commenced the NOI proceeding in response to financial and operational challenges including intense industry competition, licensing delays exacerbated by the pandemic, cost overruns, difficulties securing capital, and internal conflicts among its founders, investors, and senior management.<sup>1</sup>
3. During the NOI proceeding, the Company presented a proposal under Part III of the BIA (the “**Proposal**”) to its creditors, which was unanimously approved. The successful

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<sup>1</sup> First Report at para. 4, Tab 2 of the Motion Record of the Bankruptcy Trustee, returnable December 19, 2023 (the “**Motion Record**”).

performance of the Proposal depended on completing a share purchase transaction dated February 22, 2022. However, the Company terminated the transaction on May 19, 2023, after the initial purchaser failed to close despite several amendments to the purchase agreements and extensions to the closing date.<sup>2</sup>

4. On July 18, 2023, the Proposal Trustee filed a material adverse change report in respect of the Company that outlined the Company's limited liquidity, the initial purchaser's failure to close the transaction and the Company's inability to perform the Proposal. On August 4, 2023, and August 23, 2023, respectively, the Proposal Trustee filed the Third Report and the Supplementary Third Report (the "**Supplementary Third Report**") in support of the Proposal Trustee's motion to annul the Proposal and deem the Company bankrupt.
5. On August 25, 2023, the Court granted an order annulling the Proposal, deeming the Company assigned into bankruptcy and appointing Richter Inc. as the trustee-in-bankruptcy (in such capacity, the "**Trustee**"). On September 14, 2023, the Trustee held the first meeting of creditors. At that meeting, the creditors appointed five estate inspectors (the "**Inspectors**") and confirmed the Trustee's appointment. Since this appointment, the Trustee's focus has been on marketing the Company's assets to maximize recoveries for its creditors.
6. The Trustee's marketing efforts, based on the proposed realization strategy for the Company's remaining assets as described in the Supplementary Third Report and the sales process (the "**Sales Process**") outlined in the First Report of the Bankruptcy Trustee dated

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<sup>2</sup> Supplementary Third Report at paras. 8 and 9, Tab 2 (Appendix A) of the Motion Record

December 12, 2023 (The “**First Report**, and collectively, the “**Reports**”), culminated in the execution of an asset purchase agreement dated December 12, 2023 (the “**APA**”).

7. This factum is filed in support of the Trustee’s motion seeking an order (the “**Ayanda Sale Approval Order**”), among other things: (a) approving the APA and the associated transaction (the “**Transaction**”) among the Trustee, the Land Owner, and the Purchaser, thereby vesting in the Purchaser all rights, title, and interest in the Purchased Assets (each as defined in the APA), free and clear of any claims and encumbrances; and (b) approving the Reports and the associated activities of the Trustee and its counsel, including their fees and disbursements as set out in the First Report. The Trustee is of the view that the proposed Transaction stands as the optimal avenue for maximizing value for the Company’s creditors. It presents a superior option compared to alternatives within the sale process or a potential liquidation if the Purchased Assets are not acquired.
  
8. The Court should grant the Ayanda Sale Approval Order for the following reasons:
  - (a) **Approval of the Transaction:** The proposed Transaction represents the highest offer received following the re-marketing of the Ayanda Assets and it is fair and reasonable in the circumstances. The Trustee has consulted with the inspectors and the creditors (including the secured creditor) with respect to the proposed Transaction, who support the Transaction. The Trustee approves the proposed Transaction and is of the view that it maximizes value for the benefit of the Company’s creditors.
  
  - (b) **Approval of Fees and Activities of the Trustee:** It is appropriate for the Court to approve the fees and activities of the Trustee at critical junctures in a proceeding,

such as the approval of a transaction for substantially all of the assets of the estate. The Trustee has described in detail its activities, which were reasonable, necessary and done in the best interests of the creditors.

- (c) **Sealing of the Confidential Appendices:** The proposed sealing of Confidential Appendices “1”, “2” and “3” represent the protection of an important public interest. The Confidential Appendices include disclosure of the purchase price in the proposed Transaction. Should the proposed Transaction fail to close, the public disclosure of the purchase price will set an upper limit on the sale of the Ayanda Assets in any re-marketing efforts, to the detriment of the stakeholders of the Company. The Trustee has included redacted copies of the relevant documents such that the only information that is sealed is the purchase price. The Ayanda Sale Approval Order contemplates that the Confidential Appendices will become unsealed after the proposed Transaction closes. The Trustee has proportionately balanced the fundamental principle of court openness with the protection of a serious public interest.

9. Capitalized terms used herein that are not otherwise defined shall have the meaning ascribed to such terms in either the First Report or the APA.

## **PART II - FACTS**

The relevant facts are set out in detail in the First Report at Tab 2 of the Motion Record and are briefly summarized herein.

A. **Trustee's Activities Since the Commencement of the Bankruptcy Proceedings**

10. **Preservation and Marketing of the Company's Assets.** The Trustee has taken actionable steps towards the preservation and marketing of the assets vested in the Trustee. Since the commencement of bankruptcy proceedings, the only remaining assets are the Ground Lease in respect of the Facility Land, and the Company's equipment (collectively, the "Ayanda Assets")<sup>3</sup>. The Trustee concentrated on two primary objectives related to Ayanda Assets. The first objective has been to safeguard and preserve Ayanda Assets. The second objective has been to actively seek third-party interest in the acquisition and purchase of Ayanda Assets.<sup>4</sup>The measures implemented by the Trustee in pursuit of these two objectives are detailed as follows:

- (a) ***Trustee has taken protection and preservation measures.*** For instance, the Trustee undertook actions such as restricting Facility Land access by deactivating all but one key fob, maintaining the alarm system, transferring cash assets to the estate bank account, obtaining appropriate insurance coverage, and backing up important electronic records and data.<sup>5</sup> Additionally, the Trustee organized eight meetings with the Inspectors, managed claims related to the Company's property, and is in the process of overseeing the Canada Revenue Agency's (CRA) proposed reassessment in response to the prior destruction of the Company's cannabis assets during the NOI proceeding.<sup>6</sup>

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<sup>3</sup> First Report at para. 33, Tab 2 of the Motion Record.

<sup>4</sup> First Report at para. 34, Tab 2 of the Motion Record.

<sup>5</sup> First Report at para. 34 (c), Tab 2 of the Motion Record.

<sup>6</sup> First Report at para. 34 (g), Tab 2 of the Motion Record.

(b) *Trustee sought third-party interest in the acquisition of Ayanda Assets.* Steps taken by the Trustee in this regard involved selecting a listing agent and a cannabis advisory firm to market the Ayanda Assets, managing communications and marketing materials, preparing virtual data room content including, with the assistance of its counsel, a template purchase agreement, coordinating due diligence activities such as site visits, communicating with potential buyers, evaluating offers, and finalizing the sale agreement with the purchaser.<sup>7</sup>

11. **Conducting Sale of Ayanda Assets.** The Trustee's approach to the Sales Process can be categorized into three components. First, the Trustee took steps to identify the Ayanda Assets to be included in the marketing and sale for the benefit of the creditors. Second, experienced sales and listing agents were retained to ensure a comprehensive marketing of the Ayanda Assets. Finally, the Sales Process invited bids from potential purchasers for the acquisition of Ayanda Assets. Each of the components of the Sales Process is detailed below:

(a) *Trustee identified Ayanda Assets with potential to maximise returns for stakeholders.* Ayanda Assets includes the Facility Land, which covers approximately two acres and is subject to the Ground Lease that commenced in June 2022 with a ten-year term, extendable for two additional five-year terms. The rent payable under the Ground Lease is below market at \$400 (plus HST). In addition, the Company is required to pay all expenses associated with utilities, property taxes, and any other expenses related to the Facility Land. Once the term

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<sup>7</sup> First Report at para. 34 (h), Tab 2 of the Motion Record.

of the Ground Lease expires, ownership of the Building and Improvements (as defined in the Ground Lease) transfers to the Company (the tenant under the Ground Lease).<sup>8</sup> The Trustee's strategy aimed to maximize value by offering the ability for the Facility Land, with the consent of the Land Owner, to be marketed in the sale of the Ayanda Assets.<sup>9</sup>

(b) ***Trustee retained sales and listing agent with approval of the Inspectors.*** The Trustee sought proposals from four real estate firms, receiving two submissions. At the first Inspectors' meeting, the Trustee provided its recommendation of Avison Young Commercial Real Estate Services ("AY") as the real estate listing agent, and Hyde Advisory as the cannabis marketing advisor for the Ayanda Assets. The Inspectors unanimously approved the engagement of Hyde Advisory and AY, subject to the Trustee negotiating more favourable terms with AY. The goal was to ensure broad exposure to potential purchasers and secure favorable returns. At the second Inspectors' meeting, the Trustee provided an update to the Inspectors that mutually agreeable terms were finalized and approved, including respective commissions payable to both agents.<sup>10</sup>

(c) ***Trustee successfully culminates the Sales Process with the approval of Inspectors.*** The key milestones<sup>11</sup> of the Sales Process included:

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<sup>8</sup> First Report at para. 35, Tab 2 of the Motion Record.

<sup>9</sup> Supplementary Third Report at para 33, Tab 2 (Appendix A) of the Motion Record.

<sup>10</sup> First Report at paras. 37 to 42, Tab 2 of the Motion Record.

<sup>11</sup> First Report at paras. 44 (a) to 44 (i), Tab 2 of the Motion Record.



- (i) AY listed the opportunity on multiple listing service and emailed a brochure to 4,300 unique addresses. Hyde Advisory contacted 33 groups, shared it on their website, social media, and in their October 2023 newsletter to over 3,000 subscribers.
- (ii) Interested parties executed a Non-Disclosure Agreements before receiving access to the respective data rooms managed by AY and Hyde Advisory. Four parties visited and inspected the Facility Land during site tours.
- (iii) On November 13, 2023, two parties submitted offers for the Ayanda Assets: one through AY and another through Hyde Advisory. The Trustee proceeded to engage the prospective purchaser with respect to the offer received by Hyde Advisory because it had more favourable economic terms.
- (iv) At the eighth meeting of the Inspectors, unanimous authorization was provided to the Trustee to finalize the APA with the Purchaser, based on the terms presented in its resubmitted offer. The Inspectors also reached unanimous agreement regarding the Purchase Price and its allocation among the Ayanda Assets and the Facility Land.

**B. The Transaction**

- 12. The Purchaser, the Land Owner and Trustee have signed the APA, pending the Ayanda Sale Approval Order. The Trustee must obtain the Ayanda Sale Approval Order as a closing condition under the APA.<sup>12</sup>

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<sup>12</sup> APA, at para 4.1, Tab 2 (Appendix E) of the Motion Record.

13. The proposed Transaction appears to be the best transaction available when considering the other offer received by the Trustee as part of the Sales Process. In the Trustee's view, there is no incremental benefit to further marketing the Ayanda Assets because the estate does not have the requisite funding to continue to pay the limited operational expenses required to preserve the Ayanda Assets, and the additional professional fees incurred. Even if the estate had the funding, the Trustee is of the view that the ongoing professional and other costs would erode recoveries with no certainty that a superior transaction would be completed.<sup>13</sup>
14. Accordingly, this Transaction stands as the optimal avenue for maximizing value for the Company's creditors. It presents a superior option compared to alternatives within the Sales Process or the potential liquidation if the Purchased Assets are not acquired.<sup>14</sup> The Trustee is supportive of the proposed APA and the associated Transaction as the alternative that maximizes value and recoveries to the Company's stakeholders.<sup>15</sup> Consequently, the Inspectors, the Land Owner and certain of the Company's creditors support the Transaction.<sup>16</sup>
15. A summary of the key terms and conditions<sup>17</sup> of the Transaction are as follows:

<b>Summary of Key Terms of the Transaction</b>	
<b>Purchaser</b>	First Class Extracts Corporation, or its assignee.
<b>Purchased Assets</b>	(i) the Ground Lease; (ii) the Facility and all fixtures existing on the Facility Land; and (iii) all of the equipment located within the Facility, excluding any property that is

<sup>13</sup> First Report at para 47 (c), Tab 2 of the Motion Record.

<sup>14</sup> First Report at para 47 (h), Tab 2 of the Motion Record

<sup>15</sup> First Report at para 47 (j), Tab 2 of the Motion Record.

<sup>16</sup> First Report at para 47 (i), Tab 2 of the Motion Record

<sup>17</sup> First Report at para 45, Tab 2 of the Motion Record.

<b>Summary of Key Terms of the Transaction</b>	
	finally determined by the Bankruptcy Trustee or the Court to be property that is subject to a valid property claim under section 81 of the BIA.
<b>Deposit</b>	Equal to 10% of the aggregate of: (i) the Cash Purchase Price and (ii) the Facility Land Cash Payment.
<b>Closing Date</b>	January 19, 2024, or such other date as the Trustee and Purchaser may agree to in writing.
<b>Material Condition</b>	Ayanda Sale Approval Order
<b>Conveyance of Facility Land to Purchaser</b>	Following the execution of the APA, the Purchaser and the Land Owner will work co-operatively to sever the Facility Land. If severance is granted, the Land Owner will convey the Facility Land to the Purchaser in exchange for a cash payment (the “ <b>Facility Land Cash Payment</b> ”). The Trustee is of the view that the Facility Land Cash Payment, which was approved by the Inspectors, is fair and reasonable.

### **PART III - ISSUES & ARGUMENT**

16. The issues on this motion are the following:
- (a) Should the Court approve the Transaction and grant the Ayanda Sale Approval Order?
  - (b) Should the Court approve the fees and activities of the Trustee and its counsel?
  - (c) Should the Court seal the Confidential Appendices?

**A. The Court should approve the Transaction and grant Ayanda Sale Approval Order**

17. Pursuant to Section 65.13 (1)<sup>18</sup> of the BIA, this Court has the jurisdiction to approve a sale or disposition of assets outside of the ordinary course of business. Subsection 65.13 (4)<sup>19</sup> sets out the following list of non-exhaustive factors for the Court to consider in determining whether to approve a debtor’s sale of assets outside the ordinary course:

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<sup>18</sup> [BIA](#), Section 65.13 (1)

<sup>19</sup> [BIA](#), Section 65.13 (4)

(4) Factors to be considered

In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee 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 effects 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.

18. The principles for the Court to consider on a motion for the approval of a sale of assets are set out in *Royal Bank v. Soundair Corp*<sup>20</sup>. Therefore, the *Soundair* factors, which overlap with the Section 65.13 (4) factors, remain relevant when considering the statutory test:

(a) whether sufficient effort has been made to obtain the best price and that the receiver or debtor (as applicable) has not acted improvidently.

(b) whether the interests of all parties have been considered;

(c) the efficacy and integrity of the process by which offers have been obtained; and

(d) whether there has been unfairness in the working out of the process.

19. It is clear based on the case law that the Court has the jurisdiction to approve a sale transaction within BIA proceedings. Such an Order may be made where the Court is

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<sup>20</sup> [\*Royal Bank v. Soundair Corp.\*](#) (1991), 83 D.L.R. (4th) 76 (Ont. C.A.) [*Soundair*] at para. 16 and [\*Re Nelson Education Limited\*](#), 2015 ONSC 5557 at para. 37

satisfied that the criteria set out in Section 65.13 (4) has been satisfied<sup>21</sup> such as in this case wherein:

- (a) ***Reasonableness of the Sales Process.*** The length and scope of the Sales Process has been reasonable in the circumstances given the limited funds on hand to run the Sales Proceeding. The Trustee engaged both a real estate listing agent and a cannabis advisory in order to maximize the number of parties who would be contacted regarding the opportunity. The Trustee has no reason to believe a longer marketing process would yield any superior transactions.
- (b) ***Trustee's Approval.*** The Trustee approves the proposed Transaction and is of the view that it is fair and reasonable in the circumstances.
- (c) ***Benefit to Creditors.*** The sale of the Ayanda Assets, representing substantially all of the assets of the estate, is more beneficial to creditors than a piecemeal liquidation sale of the assets. The proposed Transaction maximizes value for the benefit of the creditors.
- (d) ***Consultation with Creditors.*** Since its appointment, the Trustee has held eight meetings with the Inspectors and sought approval of key activities along the way. The Inspectors are supportive of the proposed Transaction. In addition, the Trustee has consulted with the sole secured creditor, who is also supportive of the Transaction.

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<sup>21</sup> [Komtech Inc. \(Re\)](#), 2011 ONSC 3230 at para. 33.

- (e) ***Effect on Creditors and Other Parties.*** In the Trustee's view, the proposed Transaction represents the best option in the circumstances and will maximize value for the Company's creditors.
- (f) ***Reasonableness of Consideration.*** The consideration to be received for the Ayanda Assets is fair and reasonable. The Trustee, in consultation with its advisors and Inspectors, determined the terms of the APA, including the Purchase Price and allocation of the Purchase Price. This, along with the Inspectors' approval of the Facility Land Cash Payment, suggests a fair assessment of the market value of the Purchased Assets.

20. The proposed Transaction satisfies the *Soundair* Principles and therefore the Transaction should be approved for the following reasons:

- (a) ***Sufficient effort was made to obtain the best price.*** Sufficient effort was made to obtain the best price by engaging both a real estate listing agent and a cannabis advisory firm who reached out to over 4,300 prospects. The advisors ran a robust process to canvass the market and solicit interest from potential purchasers. Interested parties were provided with a reasonable opportunity to consider the potential transaction and make an offer by the bid deadline set by the Trustee which ran for a 6-weeks period.<sup>22</sup> The Trustee believes that the purchase price is fair and reasonable and that further marketing efforts are unlikely to yield a superior transaction.<sup>23</sup>

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<sup>22</sup> First Report at para 43, Tab 2 of the Motion Record

<sup>23</sup> First Report at para 47 (b), Tab 2 of the Motion Record

- (b) ***The interests of all parties have been served.*** The Transaction offers the best possible outcome under the circumstances for all parties with an economic interest in these proceedings. The Trustee consulted with and sought the approval of the Inspectors before selecting the Purchaser as the winning bidder, and they authorized the Trustee to proceed with the Transaction. The Trustee consulted with the Company's only secured creditor who is supportive of the Transaction. Finally, the Trustee has served all of the Company's shareholders. As such, the interests of all parties have been served, and the underlying objective of these bankruptcy proceedings has been achieved.<sup>24</sup>
- (c) ***The Sales Process was run with integrity.*** The Purchased Assets were extensively marketed by the Trustee with the assistance of the listing agent and cannabis advisory firm, both of whom are respected in their industries. All interested parties were given a meaningful opportunity to participate in the Sales Process and were provided access to the data room upon executing the appropriate confidentiality arrangements.<sup>25</sup> As a result, the Transaction was negotiated by the Trustee in good faith and with due diligence.
- (d) ***There was no unfairness.*** The Sales Process was robust. Furthermore, the Trustee was directly involved in negotiating the terms and conditions of the Transaction through the sales and listing agents<sup>26</sup> and believes that the arrived terms of the Transaction are fair and reasonable under the given circumstances.<sup>27</sup> The Sales

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<sup>24</sup> First Report at para 47 (g), (i) and (j), Tab 2 of the Motion Record

<sup>25</sup> First Report at para 44 (c), Tab 2 of the Motion Record.

<sup>26</sup> First Report at para 44 (f), Tab 2 of the Motion Record

<sup>27</sup> First Report at para 45 (f), Tab 2 of the Motion Record

Process was not improvident or an abuse of process. No exceptional circumstances have surfaced that would lead this Court to proceed contrary to the recommendation of the Trustee.

21. Furthermore, the Court should consider the impact on various parties and contemplate whether their position and proposed treatment would realistically be any different if an additional process was undertaken; this is unlikely to be the case where the process actually followed is consistent with what a court would have approved if the process was conducted post-filing.<sup>28</sup>
22. The Trustee is authorized under the BIA to sell the Ayanda Assets with the approval of Inspectors. Pursuant to section 30 (1) of the BIA, the Trustee, with the approval of the inspectors is empowered to, among other things:  

[...]

(a) sell or otherwise dispose of for such price or other consideration as the inspectors may approve all or any part of the property of the bankrupt, including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt, by tender, public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels.
23. The proposed Transaction was approved by resolution of the Inspectors of the Company, which included two persons who filed Proofs of Claim as creditors of the Company.<sup>29</sup>
24. The Transaction under APA is reasonable and fair due to a comprehensive and transparent Sales Process, including extensive market outreach that yielded no superior offers and

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<sup>28</sup> *Tool-Plus Systems Inc. (Re)*, 2008 CanLII 54791, paras. 15 to 19.

<sup>29</sup> Appendix D of the Motion Record.



emphasized the transaction's viability. The urgency stemming from the company's limited liquidity necessitated a prompt and efficient sale, further justified by the involvement of highly qualified advisors, Hyde Advisory and AY, lending credibility and expertise. The terms of the APA, including the Purchase Price, are considered fair, receiving broad approval from Inspectors, creditors, and the Land Owner. The Trustee's belief that this transaction ensures superior overall recoveries compared to alternative offers or liquidation, along with the consensus that it represents the best opportunity to maximize recoveries for all stakeholders, highlights the transaction's fairness and appropriateness in these circumstances.

25. For all of the foregoing reasons, the Trustee respectfully submits that the Court should approve the Transaction and the Ayanda Sale Approval Order because the Trustee has satisfied the criteria in section 65.13 of the BIA and the *Soundair* principles.

**B. The Court should approve the fees and activities of the Trustee and its counsel.**

26. Where a court-appointed officer meets the objective test of demonstrating that it has acted reasonably, prudently, and not arbitrarily, this Court has the inherent jurisdiction to approve the Trustee's activities as set out in its reports.<sup>30</sup>
27. *Target Canada*<sup>31</sup> can provide this Court with guiding factors for approving the activities of the Trustee. In *Target Canada*, the Court identified several good policy and practical reasons for monitors in *Companies' Creditors Arrangement Act* ("CCAA") proceedings to

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<sup>30</sup> *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 1647 (O.C.J. Gen. Div.) at paras. 2-5, BOA, Tab 2; aff'd [1996] O.J. No. 2806 (C.A.); *Lang Michener v. American Bullion Minerals Ltd.*, 2005 BCSC 684 at para. 21.

<sup>31</sup> *Target Canada Co., (Re)*, 2015 ONSC 7574 at paras. 2 and 22 to 23.

routinely seek court approval of their reports and activities, and for courts to grant such approval. These include:

- (a) allowing the monitor to bring its activities before the Court;
- (b) allowing an opportunity for stakeholders' concerns to be addressed;
- (c) enabling the Court to satisfy itself that the monitor's activities have been conducted in a prudent and diligent manner;
- (d) providing protection for the monitor not otherwise provided by the CCAA; and
- (e) protecting creditors from delay that may be caused by re-litigation of steps or potential indemnity claims by the monitor.

28. All of the Trustee's activities, as set out in the First Report, were reasonable, necessary, and undertaken in good faith and in accordance with the Trustee's powers and duties and were undertaken in the best interests of the Companies' stakeholders. The Trustee and its legal counsel have ensured a transparent and fair Sales Process. Their diligence in conducting a comprehensive market outreach and evaluating offers has ensured that the best possible outcome was achieved, reflecting a commitment to fairness and integrity. The strategic approach and interventions by the Trustee and legal counsel have added significant value to the bankruptcy proceedings. Their actions have not only preserved but also enhanced the value of the estate, benefiting the creditors and other stakeholders. Accordingly, the First Report and the activities of the Trustee described therein should be approved.
29. Pursuant to the appointment by this Court, the Trustee and its legal counsel are entitled to be paid their reasonable fees and disbursements and are required to pass their accounts from time to time.

30. In *Confectionately Yours Inc. (Re)*,<sup>32</sup> the Court summarized the requirements for the substance or content of the accounts:

(a) The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged, and the total charges for each of the categories of services rendered;

(b) The accounts should be in a form that can be easily understood by those affected by the receivership so that such person can determine the amount of time spent by the receiver's employees (and others the receiver may have hired) with respect to the various discrete aspects of the receivership; and

(c) the receiver's accounts and solicitor's accounts should be verified by affidavit.

[...]

The general standard of review for the accounts of a court-appointed receiver is whether the amount claimed for remuneration and the disbursements incurred in carrying out the receivership are fair and reasonable.

31. The Court is to consider all of the relevant factors in a holistic manner and need not examine "dockets, hours, explanations, or disbursements line by line." The focus of such a review should be the fair and reasonable assessment of what was accomplished, not the time it took.<sup>33</sup>

32. The Ontario Court of Appeal<sup>34</sup> has endorsed a non-exhaustive list of factors to be considered in determining whether the fees are fair and reasonable, including:

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<sup>32</sup> *Confectionately Yours Inc. (Re)*, 2002 CanLII 45049 (ON CA) at paras. 37 to 38, and para 42.

<sup>33</sup> *Bank of Nova Scotia v Diemer*, 2014 ONSC 365 at para. 19 and *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at para. 45.

<sup>34</sup> *Federal Business Development Bank v Belyea and Fowler*, 1983 CanLII 4086 (NB CA) at para. 9; *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at para. 33; and *Confectionately Yours Inc. (Re)*, [2002] O.J. No. 3569 (C.A.) at paras. 45 to 46.

- (a) the nature and extent of the value of the assets handled;
- (b) the complications and difficulties encountered;
- (c) the degree of assistance provided by the company, its officers, or its employees;
- (d) the time spent;
- (e) the receiver's knowledge, experience, and skill;
- (f) the diligence and thoroughness displayed by the receiver;
- (g) the responsibilities assumed;
- (h) results of the receiver's efforts; and
- (i) the cost of comparable services.

33. The accounts of the Trustee and its counsel, Thornton Grout Finnigan LLP, meet each of the above-noted requirements. Given the scope of work, the level of expertise required, and the outcomes achieved, the costs incurred by the Trustee and its legal counsel are reasonable. These costs are commensurate with the services provided and the benefits accrued to the bankruptcy estate and its creditors. Most importantly, the intricate nature of this bankruptcy proceedings, involving extensive asset marketing, negotiation, and legal intricacies, necessitates specialized expertise. The costs incurred by the Trustee and its legal counsel are thus reflective of the complexity and challenges posed by the case.
34. Further, the Trustee is a specialized licensed insolvency trustee and has staffed this matter with insolvency specialists at various levels of seniority. Likewise, TGF is a sophisticated law firm specializing in restructuring and litigation, which has staffed this matter with subject matter experts, including insolvency experts at appropriate levels of seniority. The Trustee's and TGF's hourly rates are consistent with the rates charged by comparable firms practicing in the area of insolvency in the Toronto market and the Trustee is of the view that Richter Inc.'s and TGF's fees and disbursements are reasonable and appropriate in the circumstances.

**C. The Court Should Seal the Confidential Appendices**

35. The Trustee requests the Court seal Confidential Appendices “1”, “2”, and “3” attached to the First Report. These appendices include the Offer Summary, an unredacted resolution of the Inspectors, and an unredacted copy of the APA.
36. The *Courts of Justice Act* (Ontario) provides the Court with discretion to order that any document filed in a civil proceeding be treated as “confidential”, sealed and not form part of the public record.<sup>35</sup>
37. In *Yukon (Government of) v. Yukon Zinc Corporation*, the Court held that it is standard practice in a sales process to keep all aspects of the bidding or sales process confidential. The Court found that sealing this information ensures the integrity of the sales and marketing process, and avoids misuse of information by bidders to obtain an unfair advantage in any subsequent sale process (which may be necessary if the initial process fails in some respect). In essence, the sealing order puts all bidders on a level playing field until a transaction has been approved and consummated.<sup>36</sup>
38. In *Sierra Club of Canada v. Canada (Minister of Finance)*<sup>37</sup>, the Supreme Court described two circumstances in which a court should seal part of a record before it:
- (a) when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and

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<sup>35</sup> *Courts of Justice Act*, RSO 1990, c C 43, [s 137\(2\)](#)

<sup>36</sup> *Yukon (Government of) v Yukon Zinc Corporation*, 2022 YKSC 2 at para. 39.

<sup>37</sup> *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII) at para. 53 [*Sierra Club*].

(b) when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings

39. In the context of court-supervised sale proceedings, this Court has routinely applied *Sierra Club* and held that it is appropriate to seal information and documentation filed in support of a motion to approve a sale where the materials valuations of the assets under sale, the details of the bids received by the court appointed officer and the purchase price contained in the offer for which court approval is sought. Sealing the summaries of the offers received is necessary to protect the integrity and fairness of the sale process, preventing competitors or potential bidders from gaining an unfair advantage by obtaining commercially sensitive information, and ensuring the Trustee can maximize value for the Company's estate if the Transaction does not close<sup>38</sup>
40. This Court has routinely evaluated sealing requests by reference to the *Sierra Club* factors and frequently sealed asset purchase agreements on the basis that they contain highly sensitive commercial information, which if disclosed prior to the closing of the related transaction could be harmful to stakeholders, pose a serious risk to the restructuring process, and jeopardize dealings with any future prospective purchasers.<sup>39</sup>
41. In *Sherman Estate v. Donovan*<sup>40</sup>, the Supreme Court of Canada highlighted that it is a fundamental element of Canadian democracy that the court proceedings remain open to the

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<sup>38</sup> [GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.](#), 2014 ONSC 1173 (CanLII) at paras. 32 to 34 [*GE Canada*].

<sup>39</sup> [Re Comstock Canada Ltd.](#), 2014 ONSC 493 at para. 16.

<sup>40</sup> [Sherman Estate v. Donovan](#), 2021 SCC 25 at paras. 30, 38, and 41 [*Sherman Estate*].

public, while also providing that a person asking the court to exercise discretion in a way that limits the open court presumption should establish the following pre-requisites:

- (a) court openness poses a serious risk to an important public interest (which captures a broad array of public objectives, including commercial interests);
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order out-weigh its negative effects

42. In regard to the first pre-requisite, Courts have acknowledged that there is a public interest in the “general commercial interest of preserving confidential information” and in maximizing recoveries in an insolvency, each of which goes beyond the individual’s case.<sup>41</sup>
43. The Trustee believes that these documents should remain confidential and not be made publicly available. Should the Transaction fail to close, the disclosure of this information could potentially set a ceiling on the value of the assets in any subsequent sales efforts. Such an outcome would materially prejudice the creditors of the Company. Given these circumstances, the Trustee is of the opinion that the aforementioned Appendices should be submitted to the Court confidentially and sealed until either the Transaction is closed or a further order from the Court is issued.<sup>42</sup>
44. Moreover, the sealing order is essential to protect the integrity of the Sales Process, as the benefits of maintaining confidentiality significantly outweigh the minor drawbacks of restricting public access to a limited amount of information. In this context, the request to

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<sup>41</sup> *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 41 and *Danier Leather Inc., Re*, 2016 ONSC 1044 at para. 84.

<sup>42</sup> First Report at para 49, Tab 2 of the Motion Record

seal documents is both appropriate and proportionate. It ensures that the confidential information is preserved until the Transaction is finalized, which is expected to happen shortly after if the Ayanda Sale Approval Order is granted, thereby clearly surpassing any potential negative effects of public disclosure.

45. Given the foregoing, the Trustee respectfully submits that the proposed sealing order satisfies both the tests in *Sierra Club* and *Sherman Estate* and that it is therefore appropriate for this Court to grant the sealing order, subject to further order of this Court.

#### **CONCLUSION & ORDER SOUGHT**

46. The Trustee has determined that the sale of the Ayanda Assets pursuant to the Transaction represents the best available offer in the circumstances and will maximizing value for the Company's creditors. It is respectfully requested that the Court approve the Transaction and grant the other relief requested. Given the nature of the business and the Purchased Assets in question, it is vital that the Transaction be approved and implemented as soon as possible, for all the reasons respectfully submitted above.
47. For all of the foregoing reasons, the Trustee respectfully requests an order in the form appended at Tab 3 to the Motion Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 17th day of December 2023.

*Thornton Grout Finnigan LLP*

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**Thornton Grout Finnigan LLP**  
Lawyers for the Bankruptcy Trustee



## SCHEDULE “A”

### LIST OF AUTHORITIES

No.	Caselaws
1.	<a href="#"><i>Royal Bank v. Soundair Corp.</i></a> (1991), 83 D.L.R. (4th) 76 (Ont. C.A.)
2.	<a href="#"><i>Re Nelson Education Limited</i></a> , 2015 ONSC 5557
3.	<a href="#"><i>Komtech Inc. (Re)</i></a> , 2011 ONSC 3230
4.	<a href="#"><i>Tool-Plas Systems Inc., Re (2008)</i></a> , 48 C.B.R. (5th) 91 (Ont. S.C.J. [Commercial List])
5.	<a href="#"><i>Bank of America Canada v. Willann Investments Ltd.</i></a> , [1993] O.J. No. 1647 (O.C.J. Gen. Div.) aff’d [1996] O.J. No. 2806 (C.A.)
6.	<a href="#"><i>Lang Michener v. American Bullion Minerals Ltd.</i></a> , 2005 BCSC 684
7.	<a href="#"><i>Target Canada Co., (Re)</i></a> , 2015 ONSC 7574
8.	<a href="#"><i>Confectionately Yours Inc. (Re)</i></a> , 2002 CanLII 45049 (ON CA)
9.	<a href="#"><i>Bank of Nova Scotia v Diemer</i></a> , 2014 ONSC 365
10.	<a href="#"><i>Bank of Nova Scotia v Diemer</i></a> , 2014 ONCA 851
11.	<a href="#"><i>Federal Business Development Bank v Belyea and Fowler</i></a> , 1983 CanLII 4086 (NB CA)
12.	<a href="#"><i>Bank of Nova Scotia v Diemer</i></a> , 2014 ONCA 851
13.	<a href="#"><i>Confectionately Yours Inc. (Re)</i></a> , [2002] O.J. No. 3569 (C.A.)
14.	<a href="#"><i>Yukon (Government of) v Yukon Zinc Corporation</i></a> , 2022 YKSC 2
15.	<a href="#"><i>Sierra Club of Canada v. Canada (Minister of Finance)</i></a> , 2002 SCC 41 (CanLII)
16.	<a href="#"><i>GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.</i></a> , 2014 ONSC 1173 (CanLII)
17.	<a href="#"><i>Re Comstock Canada Ltd.</i></a> , 2014 ONSC 493 at para. 16.
18.	<a href="#"><i>Sherman Estate v. Donovan</i></a> , 2021 SCC 25
19.	<a href="#"><i>Danier Leather Inc., Re</i></a> , 2016 ONSC 1044

## SCHEDULE "B"

### RELEVANT STATUTES

#### *Bankruptcy and Insolvency Act, RSC 1985, c B-3*

#### **Powers exercisable by trustee with permission of inspectors**

**30 (1)** The trustee may, with the permission of the inspectors, do all or any of the following things:

- (a) sell or otherwise dispose of for such price or other consideration as the inspectors may approve all or any part of the property of the bankrupt, including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt, by tender, public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;
- (b) lease any real property or immovable;
- (c) carry on the business of the bankrupt, in so far as may be necessary for the beneficial administration of the estate of the bankrupt;
- (d) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;
- (e) employ a barrister or solicitor or, in the Province of Quebec, an advocate, or employ any other representative, to take any proceedings or do any business that may be sanctioned by the inspectors;
- (f) accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time, subject to such stipulations as to security and otherwise as the inspectors think fit;
- (g) incur obligations, borrow money and give security on any property of the bankrupt by mortgage, hypothec, charge, lien, assignment, pledge or otherwise, such obligations and money borrowed to be discharged or repaid with interest out of the property of the bankrupt in priority to the claims of the creditors;
- (h) compromise and settle any debts owing to the bankrupt;
- (i) compromise any claim made by or against the estate;
- (j) in its existing form among the creditors, according to its estimated value, any property that from its peculiar nature or other special circumstances cannot be readily or advantageously sold;
- (k) to retain for the whole part of its unexpired term, or to assign, surrender, disclaim or resiliate any lease of, or other temporary interest or right in, any property of the bankrupt;  
and

- (1) appoint the bankrupt to aid in administering the estate of the bankrupt in such manner and on such terms as the inspectors may direct.

### **Restriction on disposition of assets**

**65.13 (1)** An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

### **Factors to be considered**

**64.13 (4)** In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the trustee approved the process leading to the proposed sale or disposition;
- (c) whether the trustee 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) extent to which the creditors were consulted;
- (e) the effects 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.

### **Persons claiming property in possession of bankrupt**

**81 (1)** Where a person claims any property, or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.

### ***Courts of Justice Act, RSO 1990, c C.43***

#### **Documents public**

- **137 (1)** On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

**Sealing documents**

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

**Court lists public**

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

**Copies**

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, as amended.  
AND IN THE MATTER OF THE BANKRUPTCY OF AYANDA CANNABIS CORPORATION OF THE COUNTY OF  
NORFOLK, IN THE PROVINCE OF ONTARIO**

Estate/Court File No.: BK-22-02802344-0035

*ONTARIO*  
**SUPERIOR COURT OF JUSTICE  
IN BANKRUPTCY AND INSOLVENCY  
(COMMERCIAL LIST)**

Proceedings commenced at Toronto

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