Court File No. CV-21-00669781-00CL

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

IN THE MATTER OF *THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36*, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MEDIFOCUS INC. (the "Applicant").

FACTUM OF MEDIFOCUS INC.

(Re: Motion Returnable February 8, 2022)

February 4, 2021

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TO: THE SERVICE LIST

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PART I – OVERVIEW

1. This factum is filed by the applicant, Medifocus Inc. (the "**Applicant**" or "**Medifocus**") in support of its motion to, among other things, approve the sale of Medifocus by way of a corporate reorganization and reverse vesting transaction (the "**Reorganization and Reverse Vesting Transaction**" or the "**Proposed Transaction**").

2. The Proposed Transaction satisfies section 36(3) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**") as well as the *Soundair* test and should therefore be approved. The Proposed Transaction follows a judicially approved sale process and is the only alternative to a bankruptcy of Medifocus. msi Spergel in its capacity as monitor (the "**Monitor**") recommends and supports the transaction and, as of the date hereof, the transaction is unopposed.

3. Moreover, the proposed reverse vesting structure of the transaction is essential in the circumstances. Medifocus is a medical device company. A reverse vesting structure allows Medifocus to preserve the benefit of existing federal regulatory approvals and avoid a lengthy and expensive "re-licensing" process. This rationale has been the basis for approving reverse vesting orders in recent cases.

4. As part of the Reorganization and Reverse Vesting Transaction, a release of the directors and officers of the Applicant, Applicant's counsel and counsel to the Monitor is being sought. The proposed third party release should be approved because it meets the criteria established for doing so in a reverse vesting context following *Green Relief Inc.*[1] and *Beleave Inc.*.[2]

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[1] *Re Green Relief Inc.*, 2020 ONSC 6837 ("***Green Relief***").
[2] *Beleave Inc., Re*, Endorsement dated September 18, 2020, Court File No. CV-20-00642097-00CL (ONSC [Commercial List]) ("***Beleave Inc.***").

5. Additionally, the Applicant seeks relief that will facilitate the Proposed Transaction and quickly and efficiently wind down these CCAA proceedings: a brief stay extension until March 15, 2022, and following closing of the Proposed Transaction, termination of these CCAA proceedings as against Medifocus and discharge of the Monitor. This relief is necessary and appropriate. In summary, granting such relief should – if the Proposed Transaction is approved – facilitate the conclusion of these CCAA proceedings without time and expense of returning before this Honourable Court.

PART II – FACTS

A. Background

6. The detailed factual background to this motion is set out in the Affidavit of Raymond Tong, sworn February 2, 2022, included in the Applicant's Motion Record at Tab 2. The detailed factual background to the Applicant's CCAA proceedings can be found in the Affidavit of Raymond Tong, sworn October 4, 2021,[3] included the Applicant's Motion Record at Tab 3.

7. Medifocus is engaged in the research, development and sale of medical device systems that deliver focused microwave-generated heat to diseased tissue, thereby destroying or shrinking the targeted tissue.[4] Medifocus has developed two thermotherapy platforms (the "**Business**"), namely:

(a) "**Prolieve**": a thermotherapy platform that delivers heat directly to diseased tissue via catheter. Prolieve is used to treat Benign Prostatic Hyperplasia ("**BPH**"), also known as an enlarged prostate;[5] and

[3] Affidavit of Raymond Tong, sworn October 4, 2021, Applicant's Motion Record, p. 66 (Caselines: A531)
[4] Affidavit of Raymond Tong, sworn February 2, 2022, Applicant's Motion Record, p. 14, para. 2 (Caselines: A479)
[5] Affidavit of Raymond Tong, sworn October 4, 2021, Applicant's Motion Record, p. 68, para. 10 (Caselines: A533)

(b) The "**APA Platform**" or "**APA 1000**": a thermotherapy platform that delivers heat to diseased tissue via microwave beams originating outside of the patient's body. The APA Platform is being developed for the treatment of breast cancer.[6]

8. Medifocus' ability to operate the Business depends on obtaining and maintaining regulatory approvals from the United States Food and Drug Administration (the "**FDA**"). The FDA has approved Prolieve for medical use (the "**FDA Approval**").[7] The APA Platform is currently paused at Phase III clinical trials due to insufficient cash flow.[8]

9. Medifocus also holds regulatory approvals in a number of Asian countries, including Hong Kong, Singapore, Thailand, South Korea, and Malaysia (the "**Asia Approvals**"). The Asia Approvals are contingent on the FDA Approval. Should Medifocus lose, transfer, or otherwise have a third party apply to the FDA to receive the approvals, the third party would need to re-enter the time consuming regulatory process to receive necessary Asia Approvals.[9]

10. Medifocus' common shares were previously traded on the Toronto Stock Exchange ("**TSX**") under the trading symbol "MFS" and the OTC Markets under the trading symbol "MDFZF". On September 4, 2020, the Ontario Securities Commission issued a cease trade order (the "**Cease Trade Order**") for the shares of the Applicant due to certain failures in periodic disclosure.[10]

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[6] Affidavit of Raymond Tong, sworn October 4, 2021, Applicant's Motion Record, p. 68, para. 11 (Caselines: A533)
[7] Affidavit of Raymond Tong, sworn October 4, 2021, Applicant's Motion Record, p. 68, para. 10 (Caselines: A533)
[8] Affidavit of Raymond Tong, sworn October 4, 2021, Applicant's Motion Record, p. 68, para. 12 (Caselines: A533)
[9] Affidavit of Raymond Tong, sworn February 2, 2022, Applicant's Motion Record, p. 20, para. 20 (Caselines: A485)
[10] Affidavit of Raymond Tong, sworn February 2, 2022, Applicant's Motion Record, p. 14, para. 3 (Caselines: A479)

B. Insolvency, Notice of Intention, and Initial Order

11. Since its inception, the Applicant incurred substantial losses while operating in a competitive and capital-intensive industry.[11] COVID-19 exacerbated these losses and therefore access to credit and investment.[12] Sales of Prolieve were halted in May 2021.[13]

12. On September 8, 2021, Medifocus filed a Notice of Intention to Make a Proposal ("**NOI**") pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "**BIA**"), and MSI was appointed as the proposal trustee.[14]

13. On October 7, 2021, Medifocus obtained an initial order (the "**Initial Order**") to continue its NOI proceedings under the CCAA.[15]

14. Among other things, the Initial Order appointed MSI as Monitor of the Applicant and approved interim financing secured by a priority charge up to a maximum of $700,000 (the "**DIP Facility**") in favour of Medifocus' sole secured creditor, Asset Profits Limited (the "**Stalking Horse Bidder**" or the "**Purchaser**").

15. In addition, the Court approved a stalking horse sale process (the "**Sale Process**") designed to solicit bids for the purchase of the assets of Medifocus on terms superior to the offer submitted by the Stalking Horse Bidder.

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[11] Affidavit of Raymond Tong, sworn October 4, 2021, Applicant's Motion Record, p. 70, para. 24 (Caselines: A535)
[12] Affidavit of Raymond Tong, sworn October 4, 2021, Applicant's Motion Record, pp. 68-70, paras. 13-16 (Caselines: A533)
[13] Affidavit of Raymond Tong, sworn October 4, 2021, Applicant's Motion Record, p. 72, para. 31 (Caselines: A537)
[14] Affidavit of Raymond Tong, sworn February 2, 2022, Applicant's Motion Record, p. 15, para. 4 (Caselines: A480)
[15] Affidavit of Raymond Tong, sworn February 2, 2022, Applicant's Motion Record, p. 15, para. 5 (Caselines: A480)

C. Sale Process

16. The approved Sale Process contemplated the following steps:[16]

(a) the Applicant would enter into a conditional asset purchase agreement (the "**Stalking Horse Bid**") with the Stalking Horse Bidder;

(b) as soon as reasonably practicable after approval of the Sale Process, the Monitor would prepare an initial offering summary (the "**Teaser Letter**") and publish newspaper notices inviting prospective purchasers to express their interest in respect of the Applicant's assets;

(c) any person determined by the Applicant and the Monitor to have a *bona fide* interest in pursuing a transaction would be given the opportunity to sign a non-disclosure agreement ("**NDA**") and access confidential due diligence materials in an electronic data room;

(d) bids would be collected in the form of executed asset purchase agreements, with a blackline against the Stalking Horse Bid, by 5:00 p.m. EST on November 22, 2021 (the "**Bid Deadline**"); and

(e) if no bid other than the Stalking Horse Bid was received by November 22, then the Applicant would declare the Stalking Horse Bidder to be the successful bidder and pursue a sale transaction with the Stalking Horse Bidder.

17. Shortly after the Initial Order was granted on October 7, 2021, the Applicant and the Monitor took steps to implement the Sale Process. On October 13, 2021, the Monitor published

[16] Affidavit of Raymond Tong, sworn February 2, 2022, Applicant's Motion Record, p. 15, para. 6, (Caselines: A480) and see Exhibit C (Caselines: A515)

notices in the Globe and Mail, Washington Post, and Baltimore Sun, supplemented by notices in Insolvency Insider and on the Monitor's case website.[17]

18. Three parties indicated that they wished to commence due diligence. Two of the three interested parties executed NDAs and were provided access to the confidential electronic data room.[18]

19. At the expiry of the Bid Deadline, no bids other than the Stalking Horse Bid had been received. Accordingly, the Applicant and the Monitor declared the Stalking Horse Bid to be the successful bidder. [19]

20. The key features of the Stalking Horse Bid are as follows:[20]

(a) the purchase of substantially all of the assets of Medifocus (the "**Purchased Assets**") and the assumption of substantially all of its liabilities relating to the Purchased Assets which are due and payable or relate to the period from and after the closing date;

(b) the purchase price payable by the Stalking Horse Bidder to the Applicant would be the aggregate of the following:

(i) the assignment and assumption of the amount of the DIP loan advanced by the Asset Profits to Medifocus;

(ii) the payment in cash, or the assumption of, any priority payables of Medifocus, which by operation of law, are in priority to the security interest of Asset Profits in respect to the Stalking Horse Bid; and

[17] Affidavit of Raymond Tong, sworn February 2, 2022, Applicant's Motion Record, p. 17, para. 13, (Caselines: A482)
[18] Affidavit of Raymond Tong, sworn February 2, 2022, Applicant's Motion Record, p. 18, para. 14, (Caselines: A483)
[19] Affidavit of Raymond Tong, sworn February 2, 2022, Applicant's Motion Record, p. 18, para. 15, (Caselines: A483)
[20] Affidavit of Raymond Tong, sworn February 2, 2022, Applicant's Motion Record, p. 18, para. 16, (Caselines: A483)

(iii) the amount of $1,079,818.85 as a credit bid of the secured indebtedness owing by Medifocus to the Purchaser.

(c) an expense reimbursement of a maximum of $25,000 payable to the Purchaser for its expenses reasonably incurred in connection with the Stalking Horse Bid, payable upon termination of the Stalking Horse Bid.

21. On January 7, 2022, the Court approved an extension of the stay of proceedings until and including February 8, 2022, in order to permit the Applicant and the Purchaser to finalize the form of transaction to be employed. The Stalking Horse Bidder has requested that the transaction be structured as a reverse vesting transaction in order to preserve the FDA Approval and Asia Approvals, which would be lost if transferred.

D. The Reorganization and Reverse Vesting Transaction

22. The proposed Reorganization and Reverse Vesting Transaction will occur as follows:[21]

(a) all of the liabilities of Medifocus other than the Assumed Liabilities[22] shall be transferred to and vested in a newly incorporated company ("**ResidualCo**");

(b) Medifocus shall apply to the Ontario Securities Commission ("**OSC**") for a partial lifting of the Cease Trade Order in accordance with the *Securities Act* (Ontario), R.S.O. 1990, c. S5;

(c) the constating documents of Medifocus shall be altered to, among other things, (i) permit the consolidation of the issued and outstanding common shares of Medifocus (including, for the avoidance of doubt, any common shares that are issued as described in subsection 22(d) below); and (ii) provide for such additional

[21] Affidavit of Raymond Tong, sworn February 2, 2022, Applicant's Motion Record, p. 21, para. 23, (Caselines: A486)
[22] All liabilities with respect to the assets of Medifocus that arise or are incurred from and after the delivery of the Discharge Certificate; and the debtor in possession facility in the maximum amount of $700,000 owed by Medifocus to Assets Profits Limited or its assignee.

changes to the rights and conditions attached to the common shares as may be agreed to by Medifocus and PurchaseCo (defined below);

(d) The Purchaser or its permitted assignee (the "**Assignee**" and together with the Purchaser, "**PurchaseCo**"), as the case may be, shall subscribe for new shares of Medifocus, to be paid by way of a credit bid of the secured indebtedness of the Purchaser, via private placement to be coordinated with the Toronto Stock Exchange;

(e) all equity interests, compensation plans and other securities in Medifocus, other than PurchaseCo's interest, shall be cancelled such that PurchaseCo becomes the sole shareholder of Medifocus; and

(f) Medifocus shall apply to the OSC to cease to be a reporting issuer, including full revocation of the Cease Trade Order.

23. Once these transaction steps are completed, ResidualCo will make an assignment in bankruptcy. Following the closing of the Reorganization and Reverse Vesting Transaction, and completion of other matters in these CCAA proceedings involving the Monitor, the Monitor will sign, serve and file a discharge certificate substantially in the form attached as Schedule "B" to the draft Order; MSI will be discharged as Monitor, and the CCAA proceedings terminated.[23]

PART III – ISSUES

24. The issues to be considered by the Court on this motion are:

(a) Whether the sale of Medifocus should be approved;

(b) Whether the reverse vesting order should be approved;

(c) Whether the proposed third party release should approved;

[23] Affidavit of Raymond Tong, sworn February 2, 2022, Applicant's Motion Record, p. 21, para. 24, (Caselines: A486)

(d) Whether ResidualCo should be added as an applicant in these CCAA proceedings; and

(e) Whether the Stay Period should be extended up to and including March 15, 2022;

The Applicant respectfully submits that all of the requested relief should be granted.

PART IV – LAW & ARGUMENT

A. The Sale Should be Approved

25. This Court has jurisdiction under s. 36 of the CCAA to approve a sale of assets outside of the ordinary course of business.[24]

26. Section 36(3) of the CCAA sets out the following list of factors for the Court to consider in determining whether to approve a sale transaction outside the ordinary course:[25]

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

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

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

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[24] *CCAA,* s. 36; *Nortel Networks Corporation (Re)* (2009), 55 C.B.R. (5th) 229, at para. 48 ("***Nortel***").
[25] *CCAA,* s. 36(3).

(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.

27. As Pepall J. (as she then was) indicated in *Canwest Publishing Inc.*, *Re* the factors enumerated at s. 36(3) of the CCAA generally incorporate and overlap with the principles articulated by the Court of Appeal for Ontario in *Royal Bank of Canada v Soundair Corp* before the enactment of s. 36(3).[26]

28. In addition to the above, the factors developed by Morawetz J. in *Nortel Networks Corporation, Re* and *Brainhunter Inc., Re* have been applied to determine whether to approve a stalking horse sale:[27]

(a) is the sale warranted at this time?

(b) will the sale benefit the whole "economic community"?

(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) is there a better viable alternative?

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[26] *Re Canwest Publishing Inc.*, 2010 ONSC 2870, at para. 13; *Royal Bank of Canada v Soundair Corp.* (1991) 4 O.R. (3d) 1.

[27] *Re Brainhunter Inc.* (2009), 62 C.B.R (5th) 41, at paras. 13-17 ("***Brainhunter***"), citing *Nortel,* at para. 49.

29. Unless a proposed transaction clearly offends s. 36(3) or the *Soundair* and *Brainhunter* principles, the Court will generally uphold the business judgment of the parties and the court-appointed officer overseeing the sale, in this case the Monitor.[28]

30. In this case, the Applicant submits that the Sale Process and resulting transaction meet the test under s. 36(3) of the CCAA and satisfy the *Soundair* and *Brainhunter* criteria, namely:

(a) **The Sale Process leading to the Reorganization and Reverse Vesting Transaction was fair, transparent, and reasonable in the circumstances.** The Sale Process was developed with significant input from the Monitor and after extensive discussions regarding potential alternatives. The process was designed to be broad, transparent, and flexible, with the aim of attracting new investment beyond the Stalking Horse Bidder. As a result of the Sale Process, the Applicant's assets were exposed to market in both of the Applicant's principal markets: the U.S. and Canada.

(b) **The Monitor approves of the Sale Process and the Reorganization and Reverse Vesting Transaction.** The Monitor assisted the Applicant with the implementation of the Sale Process culminating in the Reorganization and Reverse Vesting Transaction. In its Third Report, the Monitor concludes that "the value of the proposed transaction substantially exceeds the liquidation value of the company's assets".

(c) **The Sale Process was conducted in a manner that was fair and reasonable to existing creditors and new potential purchasers.** Creditors were invited to bid on

[28] *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (Ont. C.A.), at para. 23.

the assets of the company. The successful bidder was ultimately the Applicant's sole secured creditor.

(d) **There is no prejudice to any creditor as a consequence of the Reorganization and Reverse Vesting Transaction.** The alternative to the Sale Process and Proposed Transaction would have been the liquidation or bankruptcy of the Applicant, resulting in a significant loss of going-concern value. No creditor objected to the Sale Process when it was first proposed, and the Applicant is not aware of any objection to the proposed Reorganization and Reverse Vesting Transaction.

(e) **There are no viable alternatives to the Reorganization and Reverse Vesting Transaction.** Despite a number of expressions of interest, the Stalking Horse Bid was the only bid received. The alternative to the proposed sale is an assignment in bankruptcy. Similarly, if the Reorganization and Reverse Vesting structure is not approved, Medifocus will lose the FDA Approval and the Asia Approvals, resulting in a loss of going-concern value.

(f) **The Reorganization and Reverse Vesting Transaction benefits the whole economic community of stakeholders by permitting the Business to continue as a going concern**. The going-concern sale of the Business preserves valuable medical research pipelines, regulatory approvals, and supplier relationships. In particular, the proposed reverse vesting structure ensures that Medifocus's regulatory approvals are preserved for the Purchaser to operate the Business as a going concern.

(g) **The consideration given by the Purchaser is fair and reasonable in the circumstances**. The Applicant is not currently profitable, and its medical technologies, while promising, require further development and marketing. The Purchaser's credit bid is fair and reasonable in the circumstances. As evidenced by the Sale Process, no superior offer is available.

31. Taking all of these factors into account, the Applicant submits that the proposed Sale Transaction meets the test for approval under section 36(3) of the CCAA and satisfies the *Soundair* and *Brainhunter* criteria. The additional requirement imposed by section 36(4) of the CCAA – which is triggered when the sale is to a related person – is inapplicable in this case.

B. The Reverse Vesting Order Should be Approved

32. This Court has jurisdiction to grant the proposed reverse vesting order ("**RVO**") under sections 11 and 36 of the CCAA. In *Nemaska Lithium*, Gouin J. of the Superior Court of Quebec held,[29] and the Court of Appeal agreed,[30] that the considerations guiding the exercise of the Court's discretion to grant an RVO are essentially the same as those that would apply to any sale approval under s. 36 of the CCAA:

(a) Whether sufficient efforts to get the best price have been made and whether the parties acted providently;

(b) The efficacy and integrity of the process followed;

(c) The interests of the parties; and

(d) Whether any unfairness resulted from the process.

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[29] *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, at para. 50 ("***Nemaska Lithium***"), citing *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742.

[30] *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488, at para. 13, citing *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742.

33. For all the reasons discussed at paragraph 30 above, the Applicant submits that the proposed RVO meets these criteria.

34. This case fits squarely within the judicial rationale for approving reverse vesting orders. As the Supreme Court of British Columbia noted in *Quest University (Re)*,[31] citing Conway J. in *Beleave Inc.*,[32] RVOs provide a means of restructuring highly regulated debtors holding non-transferable licenses and regulatory approvals. Indeed, the ability of an RVO structure to preserve valuable licenses formed the basis of Penny J.'s recent approval of a reverse vesting transaction in *Junction Craft Brewing Inc.*[33]

35. Moreover, in *Junction Craft Brewing Inc.* Penny J. noted that no prejudice resulted from granting the requested RVO.[34]

36. In these circumstances, the RVO is necessary to preserve the FDA Approval and the Asia Approvals, the loss of which would effectively erase the going-concern value of the Business and frustrate the Applicant's restructuring. The loss of the FDA Approval and the Asia Approvals would require the Purchaser to re-enter the slow and expensive approval process. During that time, the ability to resume sales of Prolieve as COVID-related supply chain disruptions ease and healthcare providers restart non-emergent procedures will be thwarted. .

37. The proposed Reverse Vesting an Reorganization Transaction does not prejudice any stakeholder of Medifocus; and no alternative transaction structure – such as a plan or a standard approval and vesting of the Applicant's assets – would offer a greater benefit to other stakeholders.

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[31] *Quest University Canada (Re)*, 2020 BCSC 1883, at para. 138.
[32] *Beleave Inc., Re*, Endorsement dated September 18, 2020, Court File No. CV-20-00642097-00CL (ONSC [Commercial List]).
[33] *Junction Craft Brewing Inc., Re*, Endorsement dated November 8, 2021, Court File No. 31-2774500 (ONSC [Commercial List]).
[34] *Junction Craft Brewing Inc., Re*, Endorsement dated November 8, 2021, Court File No. 31-2774500 (ONSC [Commercial List]).

The Purchaser, being the sole secured creditor of Medifocus is the only stakeholder with an economic interest and its Stalking Horse Bid is the only offer available. There is no option on the table in which unsecured creditors, let alone equity, would receive a recovery. The alternative to the proposed transaction is an immediate bankruptcy, which will result in the destruction of stakeholder value.

C. A Release of the Directors and Officers, the Monitor and Counsel Should be Granted

38. The Order sought includes a release of the Monitor, counsel to the Applicant and the Monitor and the Applicant's directors and officers..

39. It is well established that the court may grant third party releases in the context of CCAA proceedings.[35] Recently, the courts have granted third party releases in reverse vesting orders.[36]

40. In *Green Relief*, Koehnen J. granted a third party release in an RVO in the face of opposition.[37] In the analysis, Koehnen J. relied upon the six non-exhaustive *Lydian* factors, plus the additional consideration of "the quality of the claims the objectors wish to maintain":

(a) Whether the claims to be released are rationally connected to the purpose of the plan;

(b) Whether the plan can succeed without the releases;

(c) Whether the parties being released contributed to the plan;

(d) Whether the releases benefit the debtors as well as the creditors generally;

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[35] *Lydian International Limited (Re)*, 2020 ONSC 4006, at para. 54 ("***Lydian***"); *Re Cline Mining Corp.*, 2015 ONSC 622, at para. 23; *Re SkyLink Aviation Inc.*, 2013 ONSC 2519, at paras. 30-33, citing *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587.

[36] *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488; *Beleave Inc., Re*, Endorsement dated September 18, 2020, Court File No. CV-20-00642097-00CL (ONSC [Commercial List]); *Re Green Relief Inc.*, 2020 ONSC 6837.

[37] *Re Green Relief Inc.*, 2020 ONSC 6837, at para. 27.

(e) Whether the creditors voting on the plan have knowledge of the nature and effect of the releases;

(f) Whether the releases are fair, reasonable and not overly-broad; and

(g) The quality of the claims that the objectors wish to maintain.

Koehnen J. stated that "as in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted."[38]

41. Similarly, in *Beleave Inc.,* Conway J. approved the release of all claims (except for claims against directors that could not be released due to s. 5.1(2)) of the CCAA) against the debtor's then current directors, officers, employees, legal counsel and advisors, and against the Monitor and its legal counsel, on the following basis:[39]

> …the releases are reasonably connected to the proposed restructuring and are necessary for the successful restructuring of the Applicants. The release has been specifically disclosed in the motion materials and there has been no objection to same.

42. As such, the Applicant submits that a release may be granted in an RVO if the factors relied upon in *Green Relief,* and *Beleave Inc.* demonstrate that it is appropriate to do so.

43. In the case at hand, the following factors support granting the release:

(a) **The release sought is reasonably connected to the proposed restructuring**: The released parties are the Applicant's directors and officers who continued to act as directors and officers in these proceedings to facilitate the restructuring. In addition, the Applicant's counsel, the Monitor and its counsel are for obvious reasons, connected to the proposed restructuring;

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[38] *Re Green Relief Inc.*, 2020 ONSC 6837, at para. 28, citations omitted.
[39] *Beleave Inc., Re*, Endorsement dated September 18, 2020, Court File No. CV-20-00642097-00CL (ONSC [Commercial List]).

(b) **The parties being released contributed to the restructuring**: The released parties facilitated Medifocus' going concern restructuring through the Proposed Transaction. As stated by Koehen J. in *Green Relief*: "a CCAA proceeding quite obviously cannot proceed" without these parties;[40]

(c) **Whether the releases benefit the debtors as well as the creditors generally**: the release does not prejudice other creditors and benefits the debtor;

(d) **Whether the creditors have knowledge of the nature and effect of the releases**: the proposed release was disclosed to the Applicant's creditors through the materials for this motion, which were served on the service list;

(e) **Whether the releases are fair, reasonable and not overly-broad**: the release is as narrow in scope as possible and do not contravene the provisions of the CCAA; and

(f) **The quality of the claims that the objectors wish to maintain**: there are no objections to the release and, to counsel's knowledge, no pending or extant claims against the proposed released parties.

44. While it is unknown whether the restructuring could succeed without the release, this fact is not dispositive according to Koehnen J.[41]

45. As such, the Applicant respectfully submits that the requested release should be granted.

D. ResidualCo Should be Added to these CCAA Proceedings

46. The CCAA applies to any debtor company, or an affiliate of any debtor company, if the total claims against the debtor company are more than $5,000,000.[42]

[40] *Re Green Relief Inc.*, 2020 ONSC 6837, at para. 50.
[41] *Re Green Relief Inc.*, 2020 ONSC 6837, at para. 52.
[42] CCAA, s. 3(1).

47. As a current CCAA applicant, Medifocus is a debtor company within the meaning of the CCAA.

48. ResidualCo is incorporated under the laws of Ontario as a wholly-owned subsidiary of the Applicant and therefore an "affiliated debtor company" pursuant to subsections 3(2) and (4) of the CCAA.

49. Moreover, upon the transfer of Medifocus' liabilities to ResidualCo, ResidualCo will have no assets and at least $5 million in debts. As such, it will also be a "debtor company" to whom the CCAA applies pursuant to section 3(1).

E. The Stay Extension Should be Granted

50. Medifocus is seeking an extension of the stay period up to and including March 15, 2022.

51. Under section 11.02 of the CCAA, the Court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the Court that it has acted, and is acting, in good faith and with due diligence.

52. In this case, the requested stay extension is appropriate:

(a) The Applicant has at all times continued its operations and research activities, and there is going-concern value to be realized from the sale of the business in accordance with the Proposed Transaction; and

(b) The cash flow projections, reviewed and prepared with the Monitor, and attached as an appendix to the Third Report of the Monitor, project that the Applicant will have sufficient funding to continue operating until and including March 15, 2022.

53. The Applicant's actions to date – described above and in the Tong affidavits – illustrate that it is acting in good faith and with due diligence.

54. The Applicant is not aware of any creditors who will be materially prejudiced by an extension of the stay of proceedings.

F. The Fees and Activities of the Monitor and its Counsel Should be Approved

55. The activities of the Monitor and its Counsel are addressed in the Third Report of the Monitor, dated February 3, 2022.

PART V – RELIEF REQUESTED

56. For the reasons set out above, the Applicant requests that this Honourable Court grant the Order included at Tab 5 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th DAY OF FEBRUARY, 2022

/s/ WEISZ FELL KOUR

WEISZ FELL KOUR LLP

SCHEDULE "A"

List of Authorities

1.	*Beleave Inc., Re*, Endorsement dated September 18, 2020, Court File No. CV-20-00642097-00CL
2.	*Re Brainhunter Inc*., 62 CBR (5th) 41
3.	*Re Canwest Publishing Inc.*, 2010 ONSC 2870
4.	*Re Cline Mining Corp*., 2015 ONSC 622
5.	*Re Green Relief Inc.,* 2020 ONSC 6837
6.	*Junction Craft Brewing Inc., Re,* Endorsement dated November 8, 2021, Court File No. 31-2774500 (ONSC [Commercial List]).
7.	*Lydian International Limited (Re)*, 2020 ONSC 4006,
8.	*Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218
9.	*Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488
10.	*Nortel Networks Corporation (Re)* (2009), 55 C.B.R. (5th) 229
11.	*Quest University Canada (Re)*, 2020 BCSC 1883
12.	*Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355
13.	*Royal Bank of Canada v Soundair Corp*., [1991] OJ No 1137
14.	*Re SkyLink Aviation Inc*., 2013 ONSC 2519

SCHEDULE "B"

Statutory Authorities

***Companies Creditors Arrangement Act*, RSC 1985, c C-36**

2(1)

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies; (compagnie)

debtor company means any company that

(a) is bankrupt or insolvent

(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent; (compagnie débitrice)

3 (1)

This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

10(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

(4) In deciding whether to make an order, the court is to consider, among other things,

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

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

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

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

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

(a) proceedings commenced under Part III of the Bankruptcy and Insolvency Act may be taken up and continued under this Act only if a proposal within the meaning of the Bankruptcy and Insolvency Act has not been filed under that Part; and

(b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the Bankruptcy and Insolvency Act but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i) the operation of subsection 50.4(8) of the Bankruptcy and Insolvency Act, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the Bankruptcy and Insolvency Act.

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the Bankruptcy and Insolvency Act.

(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the Civil Code of Quebec that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

36 (1) A debtor company in respect of which an order has been made under this Act 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.

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) 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 monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the 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.

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

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insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (personne insolvable)

Interpretation Act, RSC, 1985, c I-21

11 The expression “shall” is to be construed as imperative and the expression “may” as permissive.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MEDIFOCUS INC.

Court File No. CV-21-00669781-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

FACTUM
(Re: Motion Returnable February 8, 2022**)**

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