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JUDICIAL CENTRE	CALGARY

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

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Nov 1, 2024

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

APPLICANTS	2759054 ONTARIO INC. O/A FIKA HERBAL GOODS
DOCUMENT	**REPLY BRIEF OF LAW**

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PART I - INTRODUCTION

1. This Reply Brief is filed in response to the Bench Brief of SNDL Inc. ("**SNDL**") dated October 28, 2024 (the "**SNDL Brief**").

2. This Reply Brief should be read in conjunction with the Brief of Law filed by 2759054 Ontario Inc. o/a Fika Herbal Goods ("**Fika**" or the "**Plan Sponsor**") on October 24, 2024 (the "**Fika Brief**").

3. All capitalized terms not defined herein take their definitions from the Fika Brief.

PART II - LAW AND ANALYSIS

A. The Plan Does Not Violate the CCAA

The Plan is Consistent with Section 6(1) of the CCAA

4. The Plan does not violate Section 6(1) of the CCAA as alleged in the SNDL Brief. The SNDL Claim is an Unaffected Claim. SNDL raises two objections arising out of its classification as an Unaffected Creditor. The first relates to the potential acceleration of the SNDL Claim and the second relates to a potential modification of SNDL's collateral.

5. Section 3.9(a) of the Plan says that from and after the Retail Implementation Date, the SNDL Claim shall constitute valid outstanding indebtedness which shall be serviced in the ordinary course. Section 3.9(b) requires the Plan Sponsor to provide a guarantee of the Plan Entities' obligations under the SNDL Credit Agreement.

6. There is currently a dispute between the Applicants and SNDL as to whether the SNDL Demand Letters, as defined in the SNDL Brief, validly accelerated the SNDL Claim. The SNDL Demand Letters were issued only five days after SNDL purchased the SNDL Claim from CFCU, and since the SNDL Demands were issued, all payments due under the SNDL Claim have been kept current and have been serviced by the Applicants in accordance with the ARIO and the SNDL Credit Agreement.

7. There is currently time booked before this Honourable Court on December 5, December 9, and December 16 for half-days. On any of these dates, or on another date as may be agreed to by the parties, the Plan Sponsor and SNDL can have a hearing to determine whether or

not the SNDL Claim is due and owing, in full, at the conclusion of these proceedings. This does not change the fact that the debt is unaffected and uncompromised by the Plan.

8. As discussed below, the appropriate venue for addressing whether or not the SNDL Claim is validly accelerated is at a hearing specifically for that issue, rather than at the meeting order approval hearing for a Plan that is for unsecured creditors.

9. In addition, SNDL's objections relate to the Plan allegedly modifying the collateral that is secured by the SNDL Claim. SNDL's concerns are misplaced. The "collateral modification" discussed in Section 10.5 would only occur in the event of a "Successful Bid" in the Court-ordered Bio-Tech sale and investment solicitation process (the "**Bio-Tech SISP**").

10. The Bio-Tech SISP will only result in a Successful Bid if either: (i) SNDL consents to the transaction; or (ii) pursuant to section 22(a) of the Bio-Tech SISP, the SNDL Claim gets paid out in full. Thus, SNDL's suggestion in the SNDL Brief that it is somehow affected by the Court-approved Bio-Tech SISP is misguided. Bio-Tech's assets will only be removed from SNDL's collateral package in the event that SNDL expressly consents to a Successful Bid or is paid in full. SNDL *is* the beneficiary of the Bi-Tech SISP and SNDL consented to the Bio-Tech SISP.

11. The "Bid Deadline" for the Bio-Tech SISP was on Monday, October 28. Whether or not that process has led to any bids that are satisfactory to SNDL has not yet been determined. SNDL's arguments that the Plan violates section 6(1) of the CCAA are either misplaced or premature.

The Plan is Consistent with Section 6(8) of the CCAA

12. The purpose of Section 6(8) of the CCAA is to ensure that the limited resources of an insolvent company are distributed to creditors in full before they are distributed to equity holders. This is because equity holders have chosen to take on a higher level of risk in exchange for an unlimited return on their investment, whereas creditors have chosen to take on a lower level of risk in exchange for a limited return on their investment.[1] This

[1] *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732 at para 65; SNDL Brief at para 32.

principle was articulated in *Sino-Forest Corp., Re,* 2012 ONCA 816, which is cited in the SNDL Brief:

> In our view, in enacting s. 6(8) of the CCAA, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest *not* diminish the assets of the debtor available to general creditors in a restructuring.[2] [Emphasis added]

13. The Plan does not propose to take the Plan Entities' limited assets and distribute those resources to equity holders to the detriment of creditors. Rather, the Plan offers value to equity holders that would otherwise not exist to creditors, being shares in the Plan Sponsor (the "**Fika Shares**").[3] The creditors of the Applicants are not affected in any way by this consideration. If the Fika Shares are not distributed to the equity holders through the Plan, there is no additional benefit gained by creditors.

14. The proposed gain to the equity holders does not equate to a loss to the credit holders. Case law confirms this is consistent with the intended outcome of Section 6(8) of the CCAA.[4] Importantly, any distribution of Fika Shares to equity holders does not impact SNDL's Unaffected Claim in any way.

The Plan is Consistent with Section 22.1 of the CCAA

15. The SNDL Brief states that the Plan provides equity holders the right to vote, which violates Sections 6(1) and 22.1 of the CCAA.[5] However, the Plan expressly does not provide equity holders the right to vote. Section 2.4(a) of the Plan reads as follows:

> Equity Claimants, including the Existing Common Shareholders, shall not be entitled to vote on the Plan in respect of their Equity Claims or Existing Equity or attend the Meeting.[6] [Emphasis added]

16. The Plan clearly and unambiguously prohibits equity holders from voting.[7]

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[2] *Sino-Forest Corp., Re*, 2012 ONCA 816 [***Sino-Forest***] at para 56.

[3] Plan at Section 2.1(a)(iii).

[4] *Sino-Forest*, *supra* note 2 at para 56.

[5] SNDL Brief at para 46.

[6] Plan at Section 2.4(a).

[7] Plan at Section 2.4(a).

17. The Plan does not violate Section 22.1 or Section 6(1) of the CCAA because equity holders are not permitted to vote at the Meeting.

B. SNDL's Fairness and Reasonableness Arguments are for a Sanction Hearing

18. The SNDL Brief argues that a court must consider whether a plan is fair and reasonable to determine whether a meeting order should be granted.[8] This is incorrect. Case law across Canada is clear, whether a plan is fair and reasonable is not an issue for the meeting order hearing. As stated by the British Columbia Supreme Court:

> It is not the role of the Court at this stage to consider or rule on the fairness or reasonableness of the Plan. Rather, I adopt the discussion in *ScoZinc Ltd. (Re)*, 2009 NSSC 163 at para. 7; namely, that I should only exercise my discretion to refuse to refer the Plan to the creditors if the plan is doomed to fail at either the creditor or court approval stage.[9]

19. A similar sentiment is shared by the Ontario Superior Court of Justice (Commercial List), where the Court emphasized the procedural nature of the meeting order hearing:

> In view of Jaguar's desire to move quickly to implement the Recapitalization, I have also been persuaded that it is both necessary and appropriate to grant the Claims Procedure Order and the Meeting Order at this time. These are procedural steps in the CCAA process and do not require any assessment by the court as to the fairness and reasonableness of the Plan at this stage.[10]

20. SNDL has raised concerns that it has not been provided the opportunity to vote, and that it has been classified as an Unaffected Claim when it purports to be affected by the Plan.[11]

21. SNDL has had its entire SNDL Debenture (as defined in the Third Report) debt, of $11.6 million, paid out since the commencement of these proceedings.[12] In addition, the SNDL

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[8] SNDL Brief at para 16.

[9] *Quest University Canada (Re)*, 2020 BCSC 1845 [***Quest***] at para 32.

[10] *Jaguar Mining Inc. (Re)*, 2014 ONSC 494 at para 48.

[11] SNDL Brief at para 23.

[12] Subject to this Honourable Court determining, at the hearing scheduled for December 5, 2024, whether the Disputed Amount, as defined in the Third Report of Alvarez & Marsal Canada Inc. in its capacity as court-appointed Monitor of the Applicants (in such capacity, the "**Monitor**"), served October 29, 2024 (the "**Monitor's Third Report**"), is payable to SNDL.

Senior Debt is being serviced in the ordinary course such that SNDL continues to be kept whole in this proceeding.[13]

22. Any issues of fairness and reasonableness of the Plan that SNDL may have are not to be addressed at this procedural stage. As noted above, Court time has been reserved to address SNDL's concerns should the parties not be able to come to a resolution.

23. As this Court notes in *Kerr Interior Systems Ltd. (Re)*, 2011 ABQB 214 ("***Kerr***"), the factors for the Court to consider when issuing a meeting order are:

    1. Whether the plan of arrangement is doomed to fail due to a lack of creditor support;

    2. Whether there is no reasonable chance the debtor will be able to continue in business; and

    3. Whether the plan of arrangement is contrary to the creditors' interests.[14]

24. These criteria articulated in *Kerr* for the approval of a meeting order have been adopted and applied by courts in multiple jurisdictions.[15] These criteria are easily satisfied in this case.

C. The Plan is Fair and Reasonable

25. Notwithstanding the foregoing, while there is no requirement that this Court consider whether the Plan is fair and reasonable, the Plan is fair and reasonable.

26. The Applicants' management has advised there are no other viable alternatives other than the Plan, apart from a formal liquidation.[16] The Applicants also believe that the Plan provides the Applicants a better opportunity to continue to service their debts to SNDL and to emerge from these CCAA proceedings as a stronger entity.[17] Further, the Monitor is of

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[13] "SNDL Senior Debt" as defined in the SNDL Brief at para 5.

[14] *Kerr Interior Systems Ltd. (Re)*, 2011 ABQB 214 at para 29.

[15] See *Quest, supra* note 9 at para 32 and *Arrangement relatif à Bloom Lake*, 2018 QCCS 1657 at para 19.

[16] Monitor's Third Report at para 59.

[17] Monitor's Third Report at para 61.

the opinion that the Plan is fair and reasonable, provides the best available return to stakeholders, [18] and recommends the Court approve the Meeting Order.[19]

27. The Plan is being put forward for the benefit of the Plan Entities' unsecured creditors to which their alternative is no distributions. [20] They are the beneficiaries and primary stakeholders in the Plan. The Plan aims to preserve a going-concern business.

28. The Plan provides distributions and recovery to unsecured creditors and value to Delta Parent's shareholders, while also preserving employment and avoiding further store closures.[21] The Plan also avoids the additional professional fees and bankruptcy levy that would result from a liquidation.[22]

29. The alternative that SNDL is proposing, implicitly, by opposing the Meeting Order, is a liquidation where, per the Monitor's analysis at paragraph 67, SNDL scoops up all or almost all of the liquidation value.[23] The Applicants and the Plan Sponsor should be able to put this Plan to the Affected Creditors and let them decide whether they prefer their recovery under the Plan or in a liquidation. The issues surrounding the SNDL Claim can be dealt with in a future Court hearing.

30. SNDL is simply attempting to derail this process for leverage. Since the commencement of these proceedings, SNDL has accepted $11,696,814.19 of payment towards the SNDL Debenture. SNDL will reap the full benefits of the Bio-Tech SISP. SNDL continues to accept regular monthly payments of principal and interest on the SNDL Senior Debt.

31. The facts are clear that SNDL has been, and will continue to be a significant beneficiary of these proceedings. Similar to the findings of the Court of Appeal of Alberta in *12178711*

[18] Monitor's Third Report at para 74.
[19] Monitor's Third Report at para 102.
[20] Monitor's Third Report at para 62.
[21] Monitor's Third Report at para 68.
[22] Monitor's Third Report at para 63.
[23] Monitor's Third Report at para 67.

Canada Inc v Wilks Brothers, LLC ("***Calfrac***"), SNDL should not be able to exercise a veto that would remove value from the rest of the stakeholders and defeat the Plan.[24]

32. An unaffected creditor being barred from voting on a Plan does not alter fairness. Similar to SNDL, in *Calfrac* the unaffected "Second Lien Noteholders" were not given a vote. The Court of Appeal of Alberta held:

> Nor does the fact that the Second Lien Noteholders did not vote on the arrangement alter the fairness of the Plan. First, as found by the chambers judge, the Second Lien Notes are not compromised by the Plan. As the Supreme Court has noted, "**only security holders whose legal rights stand to be affected by the proposal are envisioned**": BCE at para 133…
>
> …The appellant submits that the failure to grant it a vote as Second Lien Noteholder and then require it to waive defaults is contrary to Canadian law, citing a decision of the British Columbia Supreme Court in *Re Doman Industries*, 2003 BCSC 376. I disagree. First, **I do not interpret *Doman* to require that all persons who might have default provisions that exist prior to or arising during restructuring must have a vote.** Rather, the court concluded that it ought not to grant an order waiving a *future* default, not a default that occurred before or during implementation of the plan itself. Second, I agree with the respondents that in these circumstances the absence of the waiver will very likely frustrate the restructuring efforts and is likely to be used by the appellant to attack the arrangement in a different forum.[25] [Emphasis added]

33. The Plan is fair and reasonable, including with regard to SNDL as an Unaffected Creditor. As a result, the Plan should be put forward to the Affected Creditors for consideration. The alternative would, to adopt the Court of Appeal of Alberta's reasons in *Calfrac*, grant SNDL a "veto that has the potential to completely derail and therefore defeat the Plan, however fair and reasonable it might otherwise be."[26]

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[24] *12178711 Canada Inc v Wilks Brothers, LLC*, 2020 ABCA 430 ("***Calfrac***") at para 46.

[25] *Calfrac* at para 43 and 44.

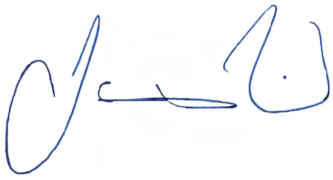
[26] *Calfrac* at para 46.

PART III - CONCLUSION

34. Based on the foregoing, the Plan Sponsor requests that this Honourable Court grant the relief sought in the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30th day of October, 2024

MILLER THOMSON LLP

Per: 

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