

**ONTARIO
SUPERIOR COURT OF JUSTICE
(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 **TRIBALSCALE INC. AND 2800741
ONTARIO INC.**

Applicants

FACTUM OF THE APPLICANTS
(Re: Motion Returnable January 28, 2021)

January 26, 2021

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PART I – OVERVIEW

1. TribalScale Inc. (“**TribalScale**”) and 2800741 Ontario Inc. (“**Newco**”, and together with TribalScale, an “**Applicant**”) bring this motion for an Order, substantially in the form attached at **Tab 5** of the Motion Record, that, among other things:

- (a) Extending the stay of proceedings until June 30, 2021;
- (b) Approving a litigation funding agreement (the “**Litigation Funding Agreement**”) between TribalScale and Newco;
- (c) Discharging TribalScale from this CCAA proceeding upon the Implementation Date (as defined in a plan of compromise and arrangement dated January 4, 2021 (the “**Plan**”));
- (d) Approving the Third and Fourth Reports of MNP Ltd., in its capacity as court appointed monitor (the “**Monitor**”) of the Applicants, and the activities as set out therein;
- (e) Approving the Monitor’s fees to date;
- (f) Sealing the confidential Motion Record until further order of the Court; and
- (g) Such further and other relief as this Honorable Court deems just.

Stay Extension

2. The current stay period expires on February 1, 2021 (the “**Stay Period**”).
3. On January 11, 2021, the Honorable Justice Cavanagh granted an Order (the “**Sanction Order**”) that, among other things, (i) sanctioned the Plan; (ii) vested in Newco all of TribalScale’s unsecured liabilities; and (iii) vested in Newco all of TribalScale’s claims against Sirius XM Connected Vehicle Services Inc. (“**SiriusXM**”), including (among other things) any actions, claims, rights or lawsuits of any nature owing to TribalScale by SiriusXM under the SiriusXM Contract (defined below) (the “**SiriusXM Receivable**”).¹
4. The proposed extended Stay Period will allow Newco to bring a motion (the “**SiriusXM Motion**”) for an Order directing SiriusXM to pay the US\$504,182.77 outstanding under a professional services agreement between TribalScale and SiriusXM dated April 26, 2019 as further particularized through individual statements of work including the statement of work effective November 23, 2019 (the “**SiriusXM Contract**”).²
5. The SiriusXM Motion will be brought for the exclusive benefit of the unsecured creditors of Newco (formerly the unsecured creditors of TribalScale). The SiriusXM Motion is:
 - (a) the only means of recovery for unsecured creditors;
 - (b) is a fundamental element of the Plan; and

¹ Affidavit of Sheetal Jaitly sworn January 26, 2021, [Motion Record Returnable January 28, 2021](#) [Record], Tab 2 at pages 17-18 (PDF pages 21-22) at para 7 [Jaitly Affidavit].

² Jaitly Affidavit, *supra* at [Record](#) page 19 (PDF page 23) at para 12.

- (c) one of the two stated objectives of this CCAA Proceeding (the other being a going concern restructuring of TribalScale, which is achieved through the Plan).³

Discharge of TribalScale

6. The Implementation Date of the Plan is anticipated to occur prior to the return of the within motion. Following the Implementation Date, TribalScale's restructuring will be complete. It will have a new ownership and capital structure and the releases in Article 10 of the Plan will be effective. As such, TribalScale will be ready to make a "fresh start" and will no longer require the protection of the CCAA to continue going concern operations.⁴

PART II – FACTS

A. Background

7. On May 19, 2020, TribalScale filed a Notice of Intention to File a Proposal (the "NOI").⁵
8. On July 31, 2020, TribalScale converted the NOI Proceeding into this CCAA Proceeding.
9. Following the CCAA conversion, TribalScale focused on engineering a going-concern restructuring of its business.
10. On October 30, 2020, TribalScale was authorized by this Honourable Court to execute a restructuring support agreement (the "RSA") with its largest secured creditor 1924191 Ontario Inc. ("192") and did so shortly thereafter.

³ Jaitly Affidavit, *supra* at [Record](#) pages 19-20 (PDF pages 23-24) at paras 17-19.

⁴ Jaitly Affidavit, *supra* at [Record](#) page 21 (PDF page 25) at para 24.

⁵ Affidavit of Sheetal Jaitly sworn July 24, 2020, [Record](#), Tab 4 at page 209 (PDF page 213) at para 1.

11. The RSA outlined the transaction that was effected through the Plan. Specifically, a restructuring of TribalScale's ownership and capital structure whereby: (i) 192 would become the super-majority owner in exchange for half of its debt; (ii) TribalScale's founder and CEO Sheetal Jaitly would maintain a 10% equity stake; (iii) Scotiabank would be given a 5% equity stake; and (iv) the only other secured creditor would be repaid in full. The RSA also contemplated that TribalScale's unsecured creditors would be vested out to a newly incorporated entity, and that entity would hold the SiriusXM Receivable such that it could recover on it for the benefit of the unsecured creditors.

12. On January 4, 2021, 100% in number and value of TribalScale's secured creditors approved the Plan.

13. The Implementation Date of the Plan is expected to have occurred prior to the return of the within motion.

14. Now that TribalScale has achieved its main goal of developing and implementing a going concern restructuring transaction, recovering the SiriusXM Receivable is the remaining critical objective of this CCAA Proceeding.

PART IV – LAW & ARGUMENT

A. Extension of the Stay Period

15. The Applicant is seeking an extension of the Stay Period up to and including June 30, 2021.

16. 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.⁶

The Proposed Stay Extension is Appropriate

17. If the requested stay extension is granted, Newco intends to bring a motion (the “**SiriusXM Motion**”) as soon as practicable for an Order directing SiriusXM to pay all amounts owing under the SiriusXM Contract to Newco.

18. Any funds collected from SiriusXM in respect of the SiriusXM Receivable will be distributed to unsecured creditors of Newco, less the costs associated with pursuing the claim. Such creditors were formerly the unsecured creditors of TribalScale who now have claims against Newco pursuant to the reverse vesting transaction in the Plan.

19. The cost of SiriusXM Motion will be entirely funded by TribalScale, pursuant to a funding agreement (the “**Litigation Funding Agreement**”) between TribalScale and Newco. The Litigation Funding Agreement is currently being drafted with the Monitor’s assistance.⁷

20. Pursuant to the Litigation Funding Agreement, the Monitor will supervise Newco’s conduct of the SiriusXM Motion.

21. The costs associated with the SiriusXM Motion will be Newco’s only expenses. The Litigation Funding Agreement will ensure that Newco has sufficient liquidity to operate throughout the proposed Stay Period.

⁶ *Companies Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA] at s 11.02(3).

⁷ *Jaitly Affidavit*, *supra* at [Record](#) page 19 (PDF page 23) at para 14.

22. No creditors are expected to suffer material prejudice because of the stay extension. In fact, if the Stay Period is not extended, the unsecured creditors of Newco are unlikely to obtain any meaningful recovery. The pursuit of the SiriusXM Receivable outside of this CCAA Proceeding will likely be expensive and time-consuming, and would reduce the proceeds available for distribution to creditors.⁸

23. Conversely, Newco's unsecured creditors are likely to recover a materially higher amount if the SiriusXM Motion is heard on an expedited basis in this CCAA Proceeding (and if Newco is successful).⁹

24. The Applicant has been advised by the Monitor that it supports the proposed stay extension.

The Applicant is Acting in Good Faith and with Due Diligence

25. The Applicant's actions since the Initial Order illustrate that that it is acting in good faith and with due diligence. The Applicant's evidence on this motion is that it will continue to act in good faith and due diligence during the proposed extended Stay Period.¹⁰

B. The Litigation Funding Agreement Should be Approved

26. The Court has the authority under section 11 of the CCAA to approve a debtor company entering into a agreement to facilitate a restructuring, provided that the order sought is appropriate in the circumstances.¹¹

⁸ *Jaitly Affidavit, supra* at [Record](#) pages 19-20 (PDF pages 23-24) at paras 16-18.

⁹ *Jaitly Affidavit, supra* at [Record](#) page 20 (PDF page 24) at para 18.

¹⁰ *Jaitly Affidavit, supra* at [Record](#) page 20 (PDF page 24) at para 22.

¹¹ CCAA, *supra* at s 11; *Re US Steel Canada Inc*, [2017 ONSC 1967](#) at para 19; *Re US Steel Canada Inc*, [2016 ONSC 7899](#) at para 41.

27. In general, third party funding agreements should be approved, subject to the following principles:¹²

- (a) *The third party funding agreement must be necessary to provide to a plaintiff access to justice:* without the Litigation Funding Agreement, NewCo does not currently have any means to pursue the Sirius XM Motion.¹³
- (b) *The Plaintiff's right to instruct and control the litigation should not be diminished by the third party funding agreement:* Under the Litigation Funding Agreement, Newco, under the direction of the Creditors Committee and with oversight of the Monitor, shall remain in control of the conduct of the litigation.
- (c) *The third party funding agreement must not compromise or impair the lawyer and client relationship or the lawyer's duties of loyalty and confidentiality:* There are no terms of the Litigation Funding Agreement that would compromise or impair NewCo's relationship with their counsel.
- (d) *The compensation of the third party funder must be fair and reasonable:* the funder, TribalScale, does not receive any compensation beyond reimbursement of the expenses incurred unless the claims of the unsecured creditors are paid in full.
- (e) *The third party funder undertakes to keep confidential any confidential or privileged information:* Under the Litigation Funding Agreement, TribalScale undertakes to keep confidential all privileged or confidential information.

C. TribalScale Should be Removed as an Applicant from this CCAA Proceeding

28. Further to the reasons described at paragraph 6 above, the Plan's conditions to closing are expected to have been fulfilled and/or waived in advance of the within motion. If so, the Applicant

¹² *Arrangement relatif à 9354-9186 Québec inc (Bluberi Gaming Technologies Inc) -and- Ernst & Young Inc*, [2018 QCCS 1040](#) at para 74, aff'd [2020 SCC 10](#) [Bluberi].

¹³ *Jaitly Affidavit*, [supra](#) at [Record](#) page 19 (PDF page 23) at para 16.

has been advised that the Monitor will file the Monitor's Implementation Date Certificate (as defined in the Sanction Order) in advance of the within motion.

29. The Applicant has been advised by the Monitor that it supports the removal of TribalScale as an Applicant.

30. The Applicant therefore submits that the Order sought is reasonable in the circumstances and should be approved.

D. The Confidential Motion Record should be Sealed

31. The Applicant seeks to seal certain portions of the Litigation Funding Agreement as it contains commercially sensitive information. Among other things:

- (a) the unredacted Litigation Funding Agreement details the NewCo's access to financing and, in turn, its ability to fund the SiriusXM Motion, and any further steps to collect the SiriusXM Receivable; and
- (b) the unredacted Litigation Funding Agreement establishes the terms related to funding the SiriusXM Motion, and any further steps to collect the SiriusXM Receivable.

32. The *Courts of Justice Act* (Ontario) grants this Court the discretion to order that any document filed in a civil proceeding be treated as confidential and sealed and not form part of the public record.¹⁴

¹⁴ *Courts of Justice of Act*, RSO, 1990 c C 43 at s 137(2).

33. As set out in *Sierra Club of Canada v Canada (Minister of Finance)*, the test to determine if a sealing order should be granted is as follows:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) 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 in this context includes the public interest in open and accessible court proceedings.¹⁵

34. In the insolvency context, courts have applied the *Sierra Club* test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders.¹⁶

35. Neither the Applicant nor the Monitor believe that any stakeholder will be prejudiced if the requested documents are sealed or redacted. Rather, sealing will further stakeholder interests. The redacted information contained within the Litigation Funding Agreement is the type of information that would provide a SiriusXM with a tactical advantage in how the litigation would be prosecuted or settled.¹⁷ NewCo's right to a fair trial with respect to the SiriusXM Motion may be compromised if its funding details are disclosed, as SiriusXM could use this information to the Applicant's detriment.

¹⁵ *Sierra Club of Canada v Canada (Minister of Finance)*, [2002 SCC 41](#) at para 53 [*Sierra Club*].

¹⁶ *Re Danier Leather Inc*, [2016 ONSC 1044](#) at para 82.

¹⁷ *Bluberi*, *supra* at para 84.

PART V – RELIEF REQUESTED

36. Based on the foregoing, the Applicant respectfully requests that this Court grant the proposed form of Order found at **Tab 5** of the Motion Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26th DAY OF
JANUARY, 2021**



WEISZ FELL KOUR LLP

SCHEDULE "A"**List of Authorities****Case Law**

1. *Re US Steel Canada Inc*, [2017 ONSC 1967](#);
2. *Re US Steel Canada Inc*, [2016 ONSC 7899](#);
3. *Arrangement relatif à 9354-9186 Québec inc (Bluberi Gaming Technologies Inc) - and - Ernst & Young Inc*, [2018 QCCS 1040](#), aff'd [2020 SCC 10](#);
4. *Sierra Club Of Canada v Canada (Minister Of Finance)*, [2002 SCC 41](#);
5. *Re Danier Leather Inc*, [2016 ONSC 1044](#).

SCHEDULE "B"**Statutory Authorities*****Companies Creditors Arrangement Act, RSC 1985, c C-36***

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (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.

Courts of Justice Act, R.S.O. 1990, c. C.43**Sealing documents**

137 (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.

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ACT, R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
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Proceedings commenced at Toronto

FACTUM
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