

**IN THE MATTER OF  
CANNIMED THERAPEUTICS INC.**

– and –

**IN THE MATTER OF  
AURORA CANNABIS INC**

**AMENDED APPLICATION  
OF THE SPECIAL COMMITTEE OF THE  
BOARD OF DIRECTORS OF CANNIMED THERAPEUTICS INC.**

(In connection with a transactional proceeding under Rule 16 and Under Sections 104 and 127(1) of the *Securities Act*, RSO 1990, C S.5 (the "**Ontario Act**") and Sections 101 and 134(1) of the *Securities Act, 1988*, S.S. 1988-1989, c. S-42.2 (the "**Saskatchewan Act**")

**A. ORDER SOUGHT**

The Applicant, the Special Committee of the Board of Directors (the "**Board**") of CanniMed Therapeutics Inc. ("**CanniMed**"), on behalf of CanniMed, requests that the Ontario Securities Commission (the "**OSC**") and the Financial and Consumer Affairs Authority of Saskatchewan (the "**FCAAS**", and together with the OSC, the "**Commissions**") make the following orders:

1. an order pursuant to subsections 104(1) and 127(1) of the Ontario Act and subsections 101 and 134(1) of the Saskatchewan Act that:
  - (a) Aurora Cannabis Inc. ("**Aurora**") and SaskWorks Venture Fund Inc. ("**SaskWorks**"), Apex Investments Limited Partnership ("**Apex**"), Golden Opportunities Fund Inc. ("**Golden Opportunities**"), and Vantage Asset Management Inc. ("**Vantage**" and together with Saskworks, Apex, Golden Opportunities collectively referred to herein as the "**Locked-up Shareholders**") are deemed to be "joint actors", as such term is defined in section 1.1 of Multilateral Instrument 61-101 *Protection of Minority Shareholders in Special Transactions* ("**MI 61-101**") and are "acting jointly or in concert" in connection with Aurora's unsolicited hostile take-over bid (the "**Hostile Bid**") to acquire all of the issued and outstanding common shares in the capital of CanniMed (the "**CanniMed Shares**") made pursuant to the take-over bid circular of Aurora dated November 24, 2017;

(b) the shares of the Locked-up Shareholders shall be excluded from the 50% minimum tender condition contained in section 2.29.1(c) of National Instrument 62-104 – *Take-Over Bids and Issuer Bids* (“NI 62-104”);

(c) the Hostile Bid is an “insider bid”, as such term is defined in section 1.1 of MI 61-101 and consequently:

i. Aurora shall obtain a formal valuation in connection with the Hostile Bid relating to the CanniMed Shares and its own shares and otherwise comply with the requirements in Part 2 of MI 61-101; and

ii. the Hostile Bid is cease-traded until the date which is 105 days after the date upon which a take-over bid circular that complies with the rules for an “insider bid” as governed by MI 61-101, is delivered to CanniMed shareholders;

2. an order pursuant to subsection 104(1)(b) of the Ontario Act and subsection 101(b) of the Saskatchewan Act requiring Aurora to retract and correct several materially false and misleading statements in connection with the Hostile Bid;

3. an order pursuant to subsections 104(1) and 127(1) of the Ontario Act and subsections 101 and 134(1) of the Saskatchewan Act declaring that ~~each of the Locked-up Shareholders~~ Aurora failed to issue press releases and file Early Warning Reports as required by Part 5 of NI 62-104 and Part 3 of National Instrument 62-103 – *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (“NI 62-103”); and

4. Such further and other relief as the Applicant’s lawyers may request and the Commissions may order.

## **B. GROUNDS**

The grounds for the request are:

### **Overview**

1. When a public company is subject to a change of control transaction, its shareholders are entitled to full and diligent oversight by its board through an appropriate process,

including proper advice from legal and financial advisors, to ensure that the transaction occurs at an optimal time and price.

2. In this case, given, among other things, the current opportunity in the Canadian recreational marijuana marketplace and the considerable, inherent value in CanniMed that has not yet been fully recognized by the market, the Board decided, in the exercise of its business judgment, that it was not an appropriate time or circumstance, to engage in a strategic sale process. Accordingly, the Board decided not to initiate and oversee a market canvass that would have been performed by it and its legal and financial advisors had it decided to pursue a sale process. At the same time, the Board decided to investigate potential acquisitions with a view to pursuing its business plan and unlocking its unrecognized, inherent value. After conducting detailed due diligence and extensive negotiations and having received fairness opinions from two financial advisors, the Board ultimately decided that an accretive acquisition of Newstrike Resources Limited ("**Newstrike**") was the best way to maximize shareholder value. This accretive acquisition was highly strategic in that it would allow CanniMed to enter the recreational cannabis market and to diversify from, and augment its already strong, medical cannabis roots.
3. Notwithstanding this determination of the Board, two directors, Rob Duguid ("**Duguid**") and Doug Banzet ("**Banzet**"), who were, at the time, both directors and/or officers and fiduciaries of two of the Locked-up Shareholders, disagreed with these decisions and, as a result, together with the Locked-up Shareholders, decided to circumvent the Board's function and seek to usurp and frustrate the decisions of the Board. With no qualifications or process, and without the authority or knowledge of the Board, Duguid and Banzet, together with the Locked-up Shareholders, embarked upon shopping CanniMed and apparently decided on a bidder. Through their actions, they have tried to engineer a *fait accompli* without regard to either the Board's decisions, their own duties and responsibilities as Board members, or, most importantly, the interests of other shareholders. In only a few days, with no market canvass and no fairness advice, they sold out CanniMed shareholders.
4. As part of this conduct, despite acting as a group together with the Locked-up Shareholders they approached, the Locked-up Shareholders did not issue or file press releases or Early Warning Reports as they were obliged to do under Canadian

securities laws and, later, countenanced the inaccurate description of their Lock-up Agreements (as defined herein) by Aurora in its public disclosure. If the Locked-up Shareholders had issued and filed proper press releases and Early Warning Reports when they formed their group and collectively decided to sell CanniMed, the marketplace would have been advised, as would CanniMed under section 5.6 of NI 62-104. As a result, the decision not to issue and file press releases and Early Warning Reports had significant consequences and presumably was deliberate. In fact, it appears that Aurora and the Locked-Up Shareholders consciously made this decision as evidenced by the self-serving, and meaningless, mutual representation in each of the Lock-up Agreements (as defined below) that state that Aurora and the Locked-Up Shareholders are not acting jointly or in concert. This representation, which is unusual to include in a lock-up agreement, was made in a veiled attempt to show that the parties were not acting jointly.

5. The effect of these actions, if allowed to stand, would be that CanniMed shareholders have not had the benefit of the Board conducting the careful, diligent and thorough sale process to which they are entitled, and that has to be addressed in this forum and at this time.
6. Added to this is the fact that Canaccord Genuity Corp. ("**Canaccord**"), Aurora's financial advisor, was in the CanniMed data room that was established for the purposes of the Newstrike acquisition reviewing confidential CanniMed information, ostensibly on behalf of Newstrike, immediately prior to or at the same time as it was advising Aurora on bidding for CanniMed. Canaccord was subject to non-disclosure obligations with respect to CanniMed's confidential information and a breach of these obligations has significant administrative law consequences. Aurora knew or should have known of this inappropriate conduct and the consequences of such actions.
7. The cumulative effect of these breaches results from the parties acting jointly and in concert to run roughshod over processes and protections of which CanniMed shareholders ought to have had the benefit.
8. The Commissions have the tools and, as discussed herein, must fashion the appropriate remedy to address the effect of the actions described above and provide shareholders of CanniMed with that to which they are entitled and deserve.

9. The proper way to do this is to treat the Hostile Bid as an insider bid and to provide that the shares of the Locked-up Shareholders are not counted in determining the success or failure of the Hostile Bid.
10. The framework of securities law and the public interest both support and require the intervention of the Commissions in this manner.

## **The Parties**

### **CanniMed**

11. The Applicant, CanniMed, is a corporation incorporated under the laws of Canada and a Canadian-based international plant biopharmaceutical company. CanniMed is a public company with its common shares traded on the Toronto Stock Exchange under the ticker symbol "CMED".
12. CanniMed is a market leader in the Canadian medical cannabis industry, with 16 years of pharmaceutical cannabis cultivation experience, a state-of-the-art, Good Manufacturing Process-compliant plant production process and facility, including 281 points of quality control, and world class research and development platforms with a wide range of pharmaceutical-grade cannabis products.
13. CanniMed, through its subsidiary Prairie Plant Systems, Inc., was the sole producer and supplier of medical cannabis for the Government of Canada between December 2002 and March 2014.

### **Relevant Shareholders and Directors of CanniMed**

14. Saskworks, Apex, and Golden Opportunities are Saskatchewan-based investment funds that own, direct and/or control 1,934,064 (7.92%, calculated on a non-diluted basis), 798,497 (3.27%, calculated on a non-diluted basis), and 3,978,668 (16.28%, calculated on a non-diluted basis) of the CanniMed Shares, respectively.
15. PFM Capital Inc. ("PFM") manages both of SaskWorks' and Apex's investments. In doing so, PFM is responsible for, among other things, screening, monitoring and the on-going investment decisions for SaskWorks and Apex.

16. Duguid is the Chief Executive Officer of PFM, Vice President (Investments) of both PFM and Apex, and the Chief Financial Officer and Corporate Secretary of SaskWorks. Duguid was previously a recent director of CanniMed, having served in such capacity from 2001 to November 17, 2017.
17. Westcap Mgt. Ltd. ("**Westcap**") manages Golden Opportunities' investments. In doing so, Westcap is responsible for, among other things, screening, monitoring and the on-going investment decisions for Golden Opportunities.
18. Banzet is the Chief Financial Officer and a director of Golden Opportunities and Chief Operating Officer and a director of Westcap. Additionally, Banzet is a current director of CanniMed having joined the Board in 2001.
19. Vantage, is a Toronto-based investment manager that owns 2,000,000 (8.19%, calculated on a non-diluted basis) of the CanniMed Shares.

#### Newstrike

20. Newstrike, through its subsidiaries, is a licensed producer of medical cannabis. Newstrike's common shares are listed on the TSX Venture Exchange. Newstrike is the parent company of Up Cannabis, a licensed producer of cannabis that received its cultivation license on December 19, 2016. Newstrike, together with its strategic partners, including the Tragically Hip, an iconic Canadian rock band, plans to participate in the recreational market for cannabis and related products through its wholly-owned subsidiary Up Cannabis. Up Cannabis is executing a business strategy focused on the development of high-quality, distinct cannabis brands, each of which is designed to appeal and be marketed to key segments of the adult use recreational cannabis market.

#### Aurora

21. Aurora is a corporation incorporated under the *Business Corporations Act* (British Columbia). Aurora, through its wholly-owned subsidiary, Aurora Cannabis Enterprises Inc., is in the business of producing and distributing medical cannabis in Canada. Aurora is a public company with its common shares traded on the Toronto Stock Exchange under the ticker symbol "ACB"

22. Aurora is a new entrant into the Canadian cannabis market and made its first sale of dried cannabis less than two years ago on January 4, 2016. Aurora's share price has been extremely volatile and has fluctuated significantly. For example, in the 12 trading days prior to the launch of the Hostile Bid, Aurora's share price fluctuated by 125%.

#### **Background to the Newstrike Acquisition**

23. CanniMed has historically been focused on the Canadian medical cannabis industry. CanniMed has developed a particular expertise in medical cannabis and is widely considered a Canadian market leader in this field.
24. CanniMed considered Newstrike a potential acquisition target to enable it to enter into the recreational cannabis market and strategically diversify it from its exclusively medical cannabis roots. The successful acquisition of Newstrike would elevate CanniMed to a premier global cannabis company and provide its shareholders with the opportunity to participate in the growth of both the medical and recreational cannabis markets.
25. In June 2017, approximately five months before Aurora commenced the Hostile Bid, CanniMed and Newstrike, began informal and confidential discussions regarding, among other things, the possibility of collaborating with respect to the supply and storage of cannabis and the potential for a future collaboration that would allow CanniMed strategic access to the adult use recreational market.
26. On June 29, 2017, these discussions were formalized, and CanniMed and Newstrike entered into a mutual non-disclosure agreement (the "NDA"). During the summer and fall, discussions continued and on July 31, 2017, the parties entered into mutual exclusivity obligations that were regularly renewed and ultimately expired on November 17, 2017.
27. On September 6, 2017, John Knowles ("**Knowles**"), Chief Financial Officer of CanniMed, advised the Board that it would receive materials relating to certain business development initiatives being undertaken by CanniMed's management. Specifically, Knowles identified that the initiatives:

...would bring exposure for CanniMed to the recreational market in Canada and, eventually, the U.S. while maintaining

our primary medicinal focus and being careful to stay on the right side of U.S. legislation.

28. On September 7, 2017, Brent Zettl ("**Zettl**"), Chief Executive Officer of CanniMed, sent the Board a slide deck prepared by the Board's financial advisor, AltaCorp Capital Inc. ("**AltaCorp**"), recommending that CanniMed pursue a merger with Newstrike to strategically enter the recreational cannabis market.
29. The following day, on September 8, 2017, the Board met to discuss, among other things, the AltaCorp slide deck and the potential transaction with Newstrike. At this meeting, Zettl advised the Board of the opportunity for CanniMed to subscribe for a convertible debenture of Newstrike, which could assist with the potential acquisition strategy. The Board directed management to immediately engage AltaCorp and legal counsel in connection with a potential transaction between CanniMed and Newstrike.
30. On September 20, 2017, the Board unanimously approved the terms of a financing of Newstrike by which CanniMed would subscribe for a convertible debenture in the principal amount of \$4,000,000 and 10,958,904 common share purchase warrants exercisable at \$0.42 per common share. During this meeting, the Board also created a subcommittee of the Board (the "**First Committee**") to review potential merger and acquisition opportunities and strategies and to make recommendations to the Board in relation to such strategies and opportunities.
31. The First Committee was comprised of Duguid, Donald Ching ("**Ching**"), Dwayne Lashyn and Richard Hoyt.
32. At all material times prior to and including the September 20, 2017 Board meeting, the Board was unanimously in favour of pursuing a transaction to acquire Newstrike; however, shortly thereafter, Duguid and Banzet changed course and became vocal opponents of that transaction.
33. On September 27, 2017, to the surprise of the other Board members, Duguid commenced a Board meeting by questioning CanniMed's continued focus on the medical cannabis market and arguing that CanniMed should entertain a strategic sale to a player better positioned for the coming recreational cannabis sector. Duguid expressed his view that the purpose of the First Committee should be to (i) determine the potential outcomes if another company approached CanniMed for acquisition; and



- (ii) to provide internal work in moving into the recreation market for the benefit of shareholders.
34. Duguid's position was particularly surprising because CanniMed had, only two weeks earlier, publicly released its third quarter financial results, reflecting an 80% increase in sales from the comparable period the previous year, which was a strong endorsement of its current business plan.
35. The majority of the Board strongly disagreed with Duguid's assessment and clarified, by way of a board resolution, that the First Committee's mandate did not extend to the initiation by CanniMed of a strategic sales process, including a potential change of control transaction.
36. Despite this clear Board resolution, unbeknownst to the Board at the time, Duguid, Banzet and/or the Locked-up Shareholders actively pursued a change of control transaction.

#### **Attempts to Usurp the Board's Function and Effect a Change of Control Transaction**

37. On October 4, 2017, Zetl ran into Banzet at the VIII Capital Cannabis Conference in Toronto. Banzet arrived at the conference with Johanna Salloum, a Partner and Director (Investments) at PFM. Banzet advised Zetl that neither he nor Golden Opportunities support the Newstrike transaction as they were of the view that it would not provide them with immediate liquidity. Notwithstanding that the potential Newstrike transaction was confidential, it was clear that Banzet had disclosed this information to Golden Opportunities.
38. The next day, on October 5, 2017, Vantage sent a letter addressed to the Board expressing the view that there is only one viable option for CanniMed and that "the best path forward" for all shareholders is for CanniMed to undertake a strategic sale process (the "**First Vantage Letter**").
39. Despite the Newstrike negotiations being carried on in strict confidence and not being publicly disclosed, Vantage's letter specifically referred to CanniMed "attempting to acquire a smaller [licensed producer] or late stage applicant". At this point in time, there had been no publicly available information to suggest to Vantage that CanniMed was pursuing a strategic acquisition of a smaller licensed producer.

40. On October 11, 2017, management prepared a response to the First Vantage Letter and circulated it to the First Committee. The response rebutted each of Vantage's concerns with objective facts. Nevertheless, Duguid, as Chair of the First Committee, advised Zettl that he did not intend to review the letter with the First Committee and would only allow it to be discussed "if we have time".
41. On October 12, 2017, the First Committee met with a representative from AltaCorp to review the First Vantage Letter. AltaCorp advised that a company should be completely confident that an acquisition is the most appropriate course of action at this time as putting a company up for sale, absent any other catalyst, would be viewed by the market as a sign of weakness, not strength.
42. The Board was clearly not of the view that a change of control transaction was appropriate at that time. Despite this conclusion, on October 18, 2017, Banzet sent an e-mail to the Board addressing, among other things, that it was in the best interest of shareholders for CanniMed to canvass the market for a change of control transaction to obtain the highest premium over CanniMed's then current share price.
43. On October 19, 2017, Zettl replied to Banzet noting that the Board's obligations to the corporation do not require it to seek a change of control transaction. Rather, Zettl emphasized that the role of the Board is to determine whether executing on CanniMed's business plan would provide greater value to its shareholders.

#### **The Locked-up Shareholders Hijack the Board's Process**

44. Although the Board agenda and scheduling matters are kept confidential among Board members, throughout October and November numerous third parties appear to have obtained knowledge of CanniMed's scheduled Board meetings and leveraged this information to impede the Board's ability to act in the best interest of CanniMed.
45. Shortly prior to a meeting of the Board on October 27, 2017, Vantage sent a second letter (the "**Second Vantage Letter**") to the Board, dated October 23, 2017, essentially repeating the substance of the First Vantage Letter.
46. As Vantage apparently intended, the Board's October 27, 2017 meeting began with a discussion as to whether to provide Vantage an audience with respect to its change of control demands. During this meeting, the First Committee informed the Board that it

could not reach a consensus as to whether or not to undertake discussions with Vantage. The Board also received a presentation from its financial advisor, AltaCorp, which analyzed the various transactions which Vantage had raised in their letters, together with other potential transactions. The Board meeting was adjourned to 5:30 p.m. on October 30, 2017.

47. Notwithstanding the fact that the First Committee could not reach a decision on engaging with Vantage, the following day, on October 28, 2017, Banzet sent an email to the Board that, among other things, chastised Ching, as the Chair of the Board, for cutting short the debate about the Second Vantage Letter. He also stated:

I have some concerns not just in my role as a director but also being a significant shareholder, as follows:

As a prelude to some of my concerns, Golden Opportunities Fund Inc. (Golden) has been a shareholder of PPS/CMED since 2001 and supported the company through many tough periods in its evolution and has desired to exit its investment in CMED for the past number of years and more specifically at a substantial premium over the IPO price. Golden has significant skin in the game and any missteps that effect liquidity and value are real concerns.

1. The HIP transaction hardly moves the needle with respect to liquidity...

48. Minutes before its next scheduled Board meeting on October 30, 2017, the Board received yet another letter, this time from Vantage's counsel titled "Serious Concerns re CanniMed's Proposed Strategic Direction". Vantage threatened that if the independent directors did not engage with Vantage it "would be compelled to ...hold each director and officer of the Company personally accountable for their actions".
49. Although the Board meeting began with a standard motion to continue with the Board's agenda from the October 27, 2017 meeting, Duguid opposed the motion and referred the Board to his e-mail from earlier in the day which strongly condemned a transaction with Newstrike.
50. Duguid moved to invite Vantage to make a presentation to the Board however the majority of the Board opposed this motion. The Board was satisfied that a change of control transaction was not in CanniMed's best interests at that time. The majority of the Board then authorized management to enter into formal negotiations with

Newstrike in respect of a potential acquisition of Newstrike. The Board also instructed Ching, as Chair of the Board and a representative of AltaCorp to meet with representatives of Vantage to discuss the matters raised in their letters.

51. On November 1, 2017, Ching and AltaCorp spoke with Mark Tredgett (“**Tredgett**”), Managing Director and Max Mausner (“**Mausner**”), Senior Analyst, of Vantage. Tredgett and Mausner advised Ching and AltaCorp that Vantage had done a lot of research which purportedly demonstrated that a merger with a small licensed producer would not in its view be the proper course for CanniMed. At this time, there was still no public information to suggest to Vantage that CanniMed was considering a merger with a smaller licensed producer.
52. Later on November 1, 2017, Duguid requested that a second financial advisor, not directed by management, prepare an analysis of the Newstrike acquisition. To satisfy Duguid, Cormark Securities Inc. (“**Cormark**”) was retained by the First Committee to provide a second fairness opinion.
53. On November 2, 2017, just days after the Board had decided to proceed with discussions to acquire Newstrike, Vantage sent a third letter (leaving aside the letter from its counsel) stating its views with respect to a change of control transaction and stating its strong opposition to any potential acquisition of a smaller producer (the “**Third Vantage Letter**”). At this time, there had still been no public information to suggest that CanniMed was considering an acquisition of a smaller licensed producer.
54. Upon receipt of the Third Vantage Letter, Ching notified Vantage that the letter would be distributed to the Board. Given that the Third Vantage Letter was substantively the same as the First and Second Vantage Letters, Ching directed management to include the letter in its scheduled distribution of Board materials rather than to immediately send the letter to the Board.
55. Ching’s decision was not communicated to anyone other than management; however, Vantage became aware that certain Board members had not immediately received a copy of the letter. Less than 24 hours after sending the Third Vantage Letter, Tredgett e-mailed Ching stating:

... I would be obliged if CanniMed’s directors did not wait more than 24 hours to receive a copy of the [Third Vantage Letter]...

Accordingly, my polite request is that [the Board] receive this copy at your soonest convenience.

**Aurora Initiates Hostile Bid with Material and Undisclosed CanniMed Information**

56. Throughout the end of October and November 2017, CanniMed and Newstrike were engaged in extensive due diligence of one another. Newstrike's financial advisor was at that time Canaccord, who unbeknownst to either CanniMed or Newstrike at the time, was also subject to a right of first refusal arrangement with Aurora in connection with the Hostile Bid.
57. As is common, CanniMed's confidential documents were shared with Newstrike and Canaccord through an online CanniMed data room in connection with the due diligence that Newstrike was undertaking relating to the potential acquisition since the consideration payable by CanniMed was in CanniMed Shares. Since the data room is online, detailed logs are kept regarding who accesses, reviews and downloads confidential information in the data room.
58. On November 3, 2017, a Canaccord employee downloaded over 250 of CanniMed's confidential documents, including a "Capital Activity Report" relating to CanniMed's common shareholders.
59. On November 7, 2017, the same Canaccord employee previewed CanniMed's confidential documents relating to, among other things, CanniMed's common shares, stock options and warrants. At the same time, Canaccord's Managing Director and Co-Head of Mergers and Acquisitions reviewed these same confidential documents relating to CanniMed's common shares, stock options and warrants on the same day.
60. On November 10, 2017, Canaccord's Managing Director and Co-Head of Mergers and Acquisitions again accessed the data room. Later that day, Canaccord advised Newstrike that it could no longer act in connection with the CanniMed transaction due to a conflict of interest.
61. On November 12, 2017, Golden Opportunities, SaskWorks, Apex, and Vantage each entered into identical lock-up agreements with Aurora (the "**Lock-up Agreements**") in support of a proposal by Aurora to acquire all of the CanniMed Shares. Each of the Lock-up Agreements was identical in form and substance. This is unusual as lock-up agreements, especially hard lock-up agreements with sophisticated parties, are

generally negotiated. Hard lock-up agreements are also rare, as they do not allow locked-up shareholders to support a superior offer, which also has a coercive impact on the target company and its shareholders.

62. It is especially rare for an investment fund to enter into a hard lock-up agreement, since the fiduciary duties of the fund manager would typically require them to maintain the ability to support and tender to the highest and best possible transaction.
63. Although Aurora has repeatedly characterized the Lock-up Agreements as irrevocable lock-ups, the Lock-up Agreements allow the Locked-up Shareholders to terminate their agreements if CanniMed's share price falls below \$16 or \$18 (based on certain conditions). This is a highly unusual and concerning condition, as it shows that even the Locked-up Shareholders are concerned about the value of Aurora's shares, even in the near term. It also means that the Lock-up Agreements, while not allowing the Locked-up Shareholders to support a superior offer, are not at all "irrevocable" as Aurora has communicated to the public.
64. On November 13, 2017, and only one hour prior to the CanniMed Board meeting called to vote on the Newstrike acquisition, CanniMed received a letter from Aurora (the "**Aurora Proposal**") proposing an acquisition of CanniMed on the basis of a share exchange ratio of 4.52586207 Aurora Shares for each CanniMed Share, subject to a maximum value of \$24.00 (based on a formula related to Aurora's share price and payable in Aurora Shares) per CanniMed Share. In the Aurora Proposal, Aurora indicated that it had entered into irrevocable lock-up agreements with CanniMed shareholders, representing 38% (on a non-diluted basis and as of the date of the Hostile Bid Lock-up Agreements) of the outstanding CanniMed Shares, pursuant to which such CanniMed shareholders agreed to support the Aurora Proposal. Aurora requested a response by 5:00 p.m. (Pacific Standard Time) on November 17, 2017.
65. At approximately the same time, Ching received a call from the President and Chief Executive Officer of Golden Opportunities who advised Ching that Golden Opportunities had entered into an irrevocable Lock-up Agreement with Aurora. Moreover, at approximately the same time, the Board also received a letter from Salloum, on behalf the President and Chief Executive Officer (at that time) of PFM,

advising that PFM had also committed its CanniMed Shares to the Aurora Proposal (i.e. it had entered into a Lock-up Agreement with Aurora).

66. At this time, CanniMed was still bound by the exclusivity provisions in the Newstrike NDA and therefore CanniMed could not engage in discussions with Aurora or anyone else regarding a potential transaction. As such, CanniMed simply responded to Aurora acknowledging receipt of the Aurora Proposal.
67. At the Board meeting on November 13, 2017, with all members of the Board being present, AltaCorp provided its analysis of the Newstrike acquisition and its fairness opinion in respect of that transaction from a financial point of view. Cormark also provided to the Board its financial analysis and delivered its oral fairness opinion in respect of the Newstrike acquisition. The Board then discussed the Aurora Proposal and resolved to form a special committee comprised of all the independent directors of the CanniMed Board (the "**Special Committee**"), with a mandate to consider the Aurora Proposal and report to the CanniMed Board at a meeting scheduled for November 17, 2017. In the course of the meeting, Banzet and Duguid confirmed that Golden Opportunities, SaskWorks and Apex, respectively, had entered into the Lock-up Agreements with Aurora in support of the Aurora Proposal but claimed not to have had any knowledge of the Lock-up Agreements. CanniMed proceeded to request copies of the Lock-up Agreements from Aurora; however, Aurora refused to provide them.
68. On November 14, 2017, Aurora issued a press release disclosing its proposal to CanniMed and confirming its intention to proceed with a formal offer for all of the issued CanniMed Shares if CanniMed did not respond by 5:00 p.m. (Pacific Standard Time) on November 17, 2017. On the same day, CanniMed issued a press release in response to Aurora's press release, advising CanniMed shareholders that it was reviewing Aurora's press release and disclosed for the first time that CanniMed was in exclusive negotiations with Newstrike regarding the proposed Newstrike acquisition.
69. The Special Committee engaged independent legal counsel and Cormark as financial advisors and met on numerous occasions during the period between November 13, 2017 and November 17, 2017.

70. On November 17, 2017, the Board met to discuss the Aurora Proposal and also to consider and, if deemed appropriate, to authorize the Newstrike acquisition. Prior to commencing any formal business at the Board meeting, Banzet recused himself due to his conflict of interest and Duguid resigned from the Board. The Board then received presentations and reports from both AltaCorp and Cormark. AltaCorp and Cormark were asked and confirmed that, notwithstanding that the Aurora Proposal had been made, they were not withdrawing their prior fairness opinions, given as of November 13, 2017, regarding the Newstrike acquisition and each of AltaCorp and Cormark also provided their respective views on the Aurora Proposal.
71. At the Board meeting, the Special Committee reported to the Board that it was its unanimous view that CanniMed should not engage in discussions with Aurora at such time in light of a number of factors, including the recent sharp increase in the price of Aurora's common shares, the risk to CanniMed shareholders of a correction in the Aurora share price, the conditionality of the Aurora Proposal, the uncertainty with respect to Aurora's projected production capacity, the fact that CanniMed was in an exclusivity period with Newstrike and Newstrike would not agree to further extend the exclusivity period, and an accretive transaction with Newstrike was immediately available to CanniMed and its shareholders. Among other things, the Board then discussed the terms of the Newstrike acquisition and proposed arrangement agreement, the report from its financial advisor, AltaCorp, the report from the financial advisor to the Special Committee, Cormark, the report of the Special Committee and the advice of legal counsel, and subsequently approved the execution and delivery of the Newstrike arrangement agreement.
72. Shortly after the conclusion of the November 17, 2017 Board meeting, CanniMed entered into an arrangement agreement with Newstrike (the "**Arrangement Agreement**") to govern the acquisition by CanniMed of all of the outstanding common shares of Newstrike pursuant to a court approved plan of arrangement (the "**Arrangement**"). Pursuant to the Arrangement Agreement, CanniMed agreed to purchase all of the issued and outstanding shares of Newstrike in exchange for shares of CanniMed, by way of the Arrangement. The Arrangement Agreement contains customary mutual non-solicit provisions which preclude CanniMed from, among other things, soliciting, negotiating or encouraging offers relating to a change of control transaction without consent from Newstrike. The Arrangement Agreement provides a



customary mutual “fiduciary out” clause that allows either company to respond to unsolicited offers that meet certain criteria. It also enables either company to enter into a definitive agreement relating to a change of control transaction that meets certain customary, though fairly stringent, criteria, including the payment of a break fee by the terminating party. The break fees payable are roughly proportionate to the respective market capitalizations of Newstrike and CanniMed.

73. As the resulting issuance of Common Shares under the Arrangement by way of consideration will be greater than 25% of the issued and outstanding Common Shares, applicable TSX Rules require that CanniMed seek shareholder approval for such issuance of Common Shares.
74. On November 24, 2017, Aurora formally launched the Hostile Bid. While a take-over of CanniMed and the Newstrike acquisition are not on their face mutually exclusive, the Hostile Bid is, at Aurora’s choice, conditional on, among other things, the Newstrike Arrangement Agreement being terminated.

#### **Aurora Acted Jointly and In Concert with the Locked-up Shareholders**

75. The assessment of whether a joint actor relationship has been established requires a factual analysis based on the plain and ordinary meaning of the words “acting jointly or in concert”, informed by the principles of the Ontario Act, the Saskatchewan Act, MI 61-101, NI 62-104, and related policies.
76. The Locked-up Shareholders, together with Duguid and Banzet, played an integral role in the planning, promoting and structuring of the Hostile Bid and acted together with Aurora to bring about the Hostile bid. On November 29, 2017, Aurora admitted this very fact: in an interview with James West from the Midas Letter, Cam Battley, Executive Vice-President of Aurora, disclosed that it was actually the Locked-up Shareholders who approached Aurora to solicit an offer to purchase the CanniMed Shares after shopping CanniMed and vetting and modeling other potential purchasers:

...the investors who have already come to us...38 percent of the investors in CanniMed approached Aurora – they came to us... And they had vetted and modeled every other [licensed producer] in the sector, and they chose us as the best choice.

77. This is unlike the typical situation in which a bidder is in control of the acquisition process and identifies and approaches target shareholders. Rather, four shareholders representing approximately 38% of the CanniMed Shares actively sought out Aurora and convinced Aurora to make the Hostile Bid. Prior to convincing Aurora to make the Hostile Bid, the Locked-up Shareholders actively sought out other licensed producers, such as Canopy Growth Corporation.
78. The Lock-up Agreements entered into by the Locked-up Shareholders are unusual. Hard lock-ups of such a large number of shares have a chilling effect on potential market canvass. These agreements make it much more difficult for the Board to engage in any activities to benefit of shareholders, such as a potential market canvass of other superior transactions.
79. Importantly the Locked-up Shareholders and Canaccord had confidential non-public inside information about CanniMed, which confidential information was used to structure the Hostile Bid, usurp the function of the Board and seek to frustrate the Newstrike acquisition. Without such information, it is inconceivable that any shareholder would enter into a hard lock-up agreement that prevents it from obtaining a better deal if one emerges.
80. Moreover, the Locked-up Shareholders entered into the Lock-up Agreements based solely on the Aurora Proposal, which was an informal letter providing conceptual terms for a potential deal. It is unbelievable that any shareholder would enter into a hard lock-up agreement without knowing the precise terms of the transaction to which they agreed to submit their shares. The only reasonable conclusions are that the Locked-up Shareholders (i) ought to have known of and negotiated the precise terms of the Hostile Bid while in possession of highly confidential and undisclosed information; and (ii) agreed to enter into the Lock-up Agreements when they only had an informal letter rather than a binding offer because they understood the impact that having 38% of shareholders locked-up to hard lock-ups could have on the Board in considering, and potentially negotiating, the Aurora Proposal. As such, the Locked-up Shareholders were not simply agreeing to tender to an offer they found attractive, but rather intentionally working with Aurora to try to gain an advantage over the Board in negotiating the Aurora Proposal.

81. The unauthorized direct or indirect sharing of non-public information by any of Duguid, Banzet, the Locked-up Shareholders and/or Canaccord with Aurora, and the resulting Lock-up Agreements based on non-public information, breached section 76(2) of the Ontario Act and section 85(4) of the Saskatchewan Act.
82. As members of the Board, Duguid and Banzet were privy to all of CanniMed's confidential information during the relevant period. As advisor to Newstrike up until the day it declared a conflict, Canaccord had full access to CanniMed's highly confidential information.
83. Canaccord has had unfettered access to CanniMed's confidential information throughout 2016 and 2017. In December 2016, Canaccord conducted extensive due diligence on CanniMed in order to underwrite CanniMed's initial public offering. Less than one year later, in October 2017, Canaccord was retained by Newstrike to act as its financial advisor in connection with CanniMed's proposed acquisition of Newstrike. During this time, Canaccord once again had unfettered access to CanniMed's confidential information to conduct due diligence. After downloading and/or previewing confidential documents from a CanniMed data room from November 3 to November 10, 2017 Canaccord advised Newstrike suddenly and unexpectedly on November 10, 2017, that it had a conflict of interest and could no longer act as its financial advisor. Only one week later, Aurora announced Canaccord as its financial advisor in connection with the Aurora Proposal and then the Hostile Bid.
84. CanniMed has grave concerns that Canaccord has inappropriately disclosed the CanniMed confidential information to Aurora and that Aurora and Canaccord have used such information in structuring and advising regarding the Hostile Bid. CanniMed was subject to the mutual NDA executed by CanniMed and Newstrike, which expressly restricted Canaccord (as financial advisor to Newstrike at the time) from "[instigating, encouraging or assisting] any third party (including forming a group or acting in concert with any such third party) to do, or enter into any discussions, agreements, arrangements or understandings (whether written or oral) with any third party with respect to [the exclusivity agreement between CanniMed and Newstrike]."
85. Given Canaccord's intimate knowledge of CanniMed's confidential information, Canaccord is in a position to significantly reduce Aurora's risk where Aurora should

otherwise have only had access to the public record. This places Aurora at a significant advantage relative to any other market participant. Unlike most hostile bids, Aurora has not made access to confidential information concerning CanniMed a condition (albeit waivable) of its bid.

86. Aurora knew full well of Canaccord's relationship with CanniMed. Aurora knew or ought to have known that Canaccord had access to confidential information and was subject to the terms of the Newstrike NDA with CanniMed. Nevertheless, Aurora leveraged Canaccord's information to commence the Hostile Bid.
87. Aurora knew or ought to have known that the information it was receiving, whether directly or indirectly from Duguid, Banzet, the Locked-up Shareholders, and/or Canaccord, was highly confidential and not publicly available to any other market participants.
88. As a result, Aurora's Hostile Bid ought to be subject to the insider bid regime contained in MI 61-101 and specifically subject to the requirements of Part 2, which includes a formal and independent valuation prepared under the supervision of independent directors of CanniMed.
89. Moreover, the Lock-up Agreements require the Locked-Up Shareholders to vote their CanniMed Shares in concert with Aurora, and in particular against the Arrangement. The Lock-up Agreements are too broad in nature to fall under the exception to the "joint actor" definition that exists where shareholders merely agree to tender their shares to a bid, or to vote at a shareholder meeting in connection with a shareholder approved sale. In this case, the Lock-up Agreements go far beyond that.
90. It is in the public interest for participants in the capital markets to perceive all bids as fairly valued. Where, as here, the bidder is a joint actor with an insider, that bid cannot be perceived to be fairly valued without compliance with insider bid requirements, including perhaps most importantly any required independent valuations to ensure that all shareholders are making a decision based on a level playing field.
91. The Aurora Bid should not be exempt from the requirement in MI 61-101 to provide a valuation for the CanniMed Shares. Specifically:

- (i) Golden Opportunities, SaskWorks and Apex, who are acting jointly and in concert with Aurora, currently have representation on the Board;
  - (ii) there were no previous arm's length negotiations between Aurora and CanniMed; and
  - (iii) the Hostile Bid was not made in the context of an auction.
92. In addition to obtaining a formal and independent valuation, the CanniMed Shares owned, controlled or directed by the Locked-up Shareholders ought to be excluded from the 50% minimum tender condition pursuant to section 2.29.1 of NI 62-104. Section 2.29.1 was added to NI 62-104 in February 2016 to ensure that the acquisition of control of a target through a take-over bid will only occur if a majority of independent shareholders support the transaction. Allowing the Locked-up Shareholders to tender their CanniMed Shares to the Hostile Bid in the foregoing circumstances fundamentally defeats the purpose of section 2.29.1 and will subject CanniMed's minority shareholders to the improper, illegal and unfair practices of two rogue directors and the Locked-up Shareholders.

#### **Other Breaches of Securities Laws**

93. Subsection 5.2(1) of NI 62-104 requires that every acquiror that acquires beneficial ownership of, or control or direction over, voting or equity securities of any class of a reporting issuer or securities convertible into, voting or equity securities of any class of a reporting issuer that, together with such acquiror's securities of that class (which includes the securities held by joint actors), would constitute 10% or more of the outstanding securities of that class to promptly issue a press release and file an Early Warning Report pursuant to NI 62-103.
94. Subsection 5.2(2) of NI 62-104 further requires a press release and an Early Warning Report to be filed where there is any change in a material fact in a previously filed report, or where an acquiror or any person acting jointly or in concert with the acquiror, acquires or disposes of beneficial ownership of, or acquires or ceases to have control or direction over, securities in an amount equal to or convertible into 2% or more of the outstanding securities of the class.
- ~~95. Golden Opportunities previously filed an Early Warning Report on December 30, 2016 with respect to its ownership of CanniMed shares; however, since then, there has~~

~~been a material change in the information contained in such Early Warning Report and it has clearly changed its intentions with respect to its ownership in CanniMed Shares. This is a material fact that ought to have been disclosed in a press release and revised Early Warning Report, as is required by subsection 5.2(2) of NI 62-104.~~

95. ~~96.~~ Moreover, since September 20, 2017, it is clear that the Locked-up Shareholders actively sought a change of control transaction and at some point prior to November 13, 2017, being the date of the Aurora Proposal, the Locked-up Shareholders approached Aurora to purchase their shares through a take-over bid. These shareholders' acted jointly and in concert with Aurora with respect to the Hostile Bid; however, none of these parties, including Aurora, issued a press release or filed an Early Warning Report as is required by subsection 5.2(2) of NI 62-104.
97. ~~Notwithstanding the Hostile Bid, Apex, SaskWorks and Vantage have also otherwise failed to issue a press release and file an Early Warning Report since December 2016. Given that PFM is both SaskWorks' and Apex's fund manager, and Apex and SaskWorks collectively own more than 10% of the CanniMed Shares, SaskWorks and Apex ought to have issued a press release and filed an Early Warning Report pursuant to NI 62-103. Their failure to do so since December 2016 is a material breach of securities laws and regulations.~~
96. ~~98.~~ As a result of these shareholders' Aurora's failure to issue press releases and file Early Warning Reports, neither CanniMed nor its shareholders could respond accordingly.
97. ~~99.~~ As part of this conduct, despite acting as a group, the ~~Locked-up Shareholders~~ Aurora did not issue press releases or file Early Warning Reports as ~~they~~ it were obliged to do, and when the Lock-up Agreements were eventually disclosed, the Locked-up Shareholders countenanced the misleading description of their Lock-up Agreements. If ~~they~~ Aurora had issued press releases and filed proper Early Warning Reports when they formed the group and ~~decided to seek to sell their CanniMed Shares~~ a group with the Locked-Up Shareholders, the marketplace would have been advised, as would CanniMed under s. 5.6 of NI 62-104, so the decision not to issue press releases and file reports had real consequences and presumably was deliberate. Had the Board received notice of the Lock-up Agreements ~~and/or Golden~~

~~Opportunities' changed intentions to sell CanniMed, CanniMed could have moved to adopt its shareholder rights plan at that time, and prevented the Locked-up Shareholders from engaging in their oppressive conduct.~~

### **Public Interest**

98. ~~400.~~—The public interest requires the intervention of the Commissions in the circumstances of this case.
99. ~~401.~~—This relief is not, at its core, enforcement-oriented in nature; rather, it simply seeks to remedy the improper leveraging of material and undisclosed information in commencing the Hostile Bid and the failure to file Early Warning Reports to protect market participants from unfair, improper or illegal practices.
100. ~~402.~~—The Locked-up Shareholders and their nominee directors, Duguid and Banzet, usurped the Board's role and marketed CanniMed for sale without a proper process or appropriate advice. They leveraged their inside knowledge of CanniMed, recruited another significant shareholder to join their efforts, and "chose" Aurora to engage in an unsolicited hostile take-over.
101. ~~403.~~—In all respects, the Locked-up Shareholders and Aurora were acting jointly and in concert with one another.
102. ~~404.~~—It is unfair and improper to allow the Locked-up Shareholders to effectively dictate the future of CanniMed for the other 62% of shareholders. The relief sought in this Application could allow all shareholders the opportunity to fairly consider whether a Newstrike acquisition or a complete change of control transaction, or another transaction that may emerge over time, is their preferred approach.
103. ~~405.~~—The Special Committee relies on the following statutes, rules and instruments:
- (a) *Securities Act*, R.S.O. 1990, c. S.5;
  - (b) *Statutory Powers Procedure Act*, S.O. 1990, c. S.22;

- (c) Ontario Securities Commission Rules of Procedure;
- (d) *The Securities Act, 1988*, S.S. 1988-89, c S-42.2;
- (e) Saskatchewan Policy Statement 12-602, Procedure for Hearings and Reviews;
- (f) National Instrument 62-104, Take-Over Bids and Issuer Bids;
- (g) Multilateral Instrument 61-101, Protection of Minority Security Holders in Special Transactions;
- (h) National Instrument 62-103 – *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*.

### C. EVIDENCE

104. ~~406.~~ The Applicant intends to rely on affidavit evidence, to be sworn, and submissions (memorandum of fact and law) to be delivered in advance of the hearing.

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