

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Michalowski (Trustee) v. Gold Flora Corporation*,  
2025 BCSC 1554

Date: 20250813  
Docket: S236209  
Registry: Vancouver

Between:

**Julian Michalowski as trustee of Julian Michalowski TR Julian Michalowski 2020 Revocable Trust Dated 12/1/2020, Cameron Gharabiklou, Jason Victor Lam, Corrine Perez Steiger, Big Horse LLC, Malante Hayworth, Treasure Dragon Holdings Ltd., Sandra Elizabeth Wertelet, Kevin McGrath, Joshua Ginsberg, Andoni Garcia, and Myles Peck**

Petitioners

And:

**Gold Flora Corporation (formerly TPCO Holding Corp.)**

Respondent

Before: The Honourable Justice V. Jackson

## Reasons for Judgment

Counsel for the Petitioners:

R.P. Agarwal  
A. Sabur  
T. Morrison (Legal Representative)

Counsel for the Respondent:

M. Fleming  
S. Chang

Place and Date of Hearing:

Vancouver, B.C.  
October 16-18, 2024

Place and Date of Judgment:

Vancouver, B.C.  
August 13, 2025

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I. **OVERVIEW**

[1] This is a shareholder dissent case.

[2] TPCO Holding Corp. (“TPCO”) was a British Columbia incorporated cannabis company headquartered in San Jose California, trading on the (then) NEO Exchange (GRAM.U) and the OTCQX (GRAMF). Gold Flora, LLC (“Old Gold Flora”) was a privately held company also carrying on business in the cannabis industry in California.

[3] In December 2023, by way of a Plan of Arrangement approved by this Court, a newly formed company, the Respondent Gold Flora Corporation, acquired all of the issued and outstanding common shares of The Parent Company (also “TPCO”) and all of the issued membership units in the capital of Gold Flora LLC (“Old Gold Flora”) in a merger transaction (at times referred to in these reasons as the “Merger”, the “Arrangement”, the “Transaction” or the “Business Combination”).

[4] The Petitioners were minority shareholders of TPCO who opposed the Arrangement. They petition this Court seeking a determination of the “payout value” of their TPCO shares under the Dissent Proceedings provisions of the *Business Corporations Act*, S.B.C. 2002, c. 57 (BCBCA), Part 8, Division 2, ss. 237-247.

[5] The Petitioners argue the payout value of their TPCO shares is \$.9847 (USD) per share, which they say was the share price agreed to by the parties as part of the Merger and the share price announced by TPCO to its shareholders, to the public, and to its regulator.

[6] The Respondent argues the \$.9847 (USD) per share was not a share or deal price, but was only “an implied value” that was “derived from the share exchange ratio negotiated by the parties and the deemed value of \$1.50 per share that Old Gold Flora – a private company without a publicly traded share price – ascribed to itself. The Respondent argues the payout value of the Petitioners’ TPCO shares is \$.17 (USD) per share, which was TPCO’s trading price on June 15, 2023, the date the parties agree is the applicable valuation date.

[7] For the reasons that follow, I find the payout value of the Petitioners' TPCO shares as at the statutory valuation date is \$.9847 (USD) per share.

**II. APPLICABLE LEGAL PRINCIPLES**

[8] A shareholder is entitled to dissent in certain circumstances including in respect of a resolution to approve an arrangement that permits dissent by its terms: *BCBCA*, s. 238(1)(d). Where they do so, the shares in respect of which dissent is being exercised are referred to as Notice Shares: *BCBCA*, s. 237(1). Where a shareholder has dissented, the company and the dissenter may agree on the payout value of their notice shares, but failing such agreement either party can apply to the court for a determination of the "payout value" of the notice shares: *BCBCA*, s. 245(2)(a). For the purposes of dissent proceedings relevant to this petition, "payout value" means the fair value that the notice shares had immediately before the passing of the resolution, excluding any appreciation or depreciation in anticipation of the corporate action approved or authorized by the resolution or court order unless such exclusion would be inequitable: *BCBCA*, s. 237(1)(a).

[9] While "fair value" is related to fair market value, they are not equivalent in dissent proceedings: *Bamrah v. Waterton Precious Metals Bid Corp.*, 2020 BCCA 122, application for leave dismissed 2020 CanLII 68948 (SCC) at para. 8; *Grandison v. NovaGold Resources Inc.*, 2007 BCSC 1780 at para. 152. While fair market value is described as "the highest price available in an open and unrestricted market between informed and prudent parties, acting at arm's length and under no compulsion to act", the focus on the *en bloc* value in determining the fair value in dissent proceedings means that "the minority discount that would ordinarily be applied when determining the fair market value of a minority interest is ignored": *Grandison* at para. 152.

[10] Dissent proceedings are not intended to enrich a dissenter by providing more than what is reasonable, or to impoverish the dissenter by compelling the acceptance of less, but rather to ensure that a dissenter is treated fairly by assuring

receipt of a proportionate share of the *en bloc* fair market value of all shares”: *Grandison* at para. 157.

[11] In *Bamrah*, the Court of Appeal endorsed the legal framework articulated by Mr. Justice Harris in *Carlock v. ExxonMobil Canada Holdings ULC*, 2020 YKCA 4, as the principles applicable to dissent proceedings. Justice Abrioux summarized those principles at para. 30 of the Court’s judgment:

- no party bears the onus of proving the fair value of the dissenter’s shares, as the “ultimate onus is on the court to arrive at a fair value based upon an assessment of the evidence presented”: *Ashton Mining of Canada Inc. v. Kwantes*, 2007 BCSC 1374 at para. 18, *aff’d* 2008 BCCA 248;
- the court’s obligation is to consider all relevant evidence;
- “[t]he value attributed to the shares by the plan of arrangement is but one piece of evidence to be considered”, along with other evidence such as the history of the transacting companies, the trading price of the shares, the context of the plan of arrangement and the negotiated price per share, and expert opinions: *Grandison v. NovaGold Resources Inc.*, 2007 BCSC 1780 at para. 5;
- the focus is the *en bloc* value—that is, the fair market value of all issued shares of the company—not the fair market value of the dissenter’s shares: *Grandison* at para. 152;
- fair market value is the price that an informed buyer and seller, acting rationally, at arm’s length, and under no compulsion to act, would accept in an open market transaction;
- fair market value is preferably established by an actual transaction, rather than a hypothetical estimate;
- theoretical valuations are necessary where the right of dissent is engaged and there is no truly open market transaction from which to establish a fair value for the shares (e.g., where the corporate action does not involve a disposition of shares, or involves a non-arm’s length transaction): *Grandison* at paras. 163–165; and
- where the right of dissent is engaged in the context of a broadly-based open market transaction involving an independent third-party, the market transaction provides the starting point, and in some circumstances, may be the best evidence of fair value: *Grandison* at para. 165.

[12] In dissent proceedings, the “one true rule is to consider all the evidence that might be helpful, and to consider the particular factors in the particular case, and to exercise the best judgment that can be brought to bear on all the evidence and all

the factors”: *Cyprus Anvil Mining Corp. v. Dickson*, 1986 CanLII 811 (BC CA), [1986] 33 D.L.R. (4th) 641 (B.C.C.A.) at para. 51. Factors which may be critically important in one case may be meaningless in another: *Cyprus Anvil* at para. 50. Everything that has a bearing on the question of value must be considered: *Grandison* at para. 154.

### **III. FACTS**

[13] TPCO was incorporated on June 17, 2019, under the name Subversive Capital Acquisition Corp. On January 15, 2021, in connection with the closing of another transaction, the corporate name was changed to TPCO and it became an operating company. TPCO was a leading consumer-focussed, vertically integrated cannabis company.

[14] In late 2020 and early 2021, there was significant optimism within the U.S. cannabis industry about the legalization or decriminalization of cannabis at the federal level. Optimism waned in late 2021, Covid "cash" dried up and restrictions ended, resulting in people having less disposable income and working more than had been the case in 2020. In addition, according to a May 22, 2022 memo to the TPCO Executive Team from CFO Mike Batesole, some poor management decisions had been made within TPCO. All these factors led to TPCO experiencing a drop in revenues leaving it with net operating losses. By the end of the third quarter of 2021, TPCO had tripled its retail footprint in California, but its Q3 revenue declined to \$39.7 million, representing a 27% decrease from Q2, and its cash and equivalents had dropped to \$206.7 million from \$257.5 million the previous quarter, which equaled a “\$50 million cash burn” in the course of three months. This trend continued over the last quarter of 2021 and into 2022. TPCO's decline in its financial position throughout 2022, combined with increased competition in a softening cannabis market, led TPCO's management and Board to consider “transformative strategic change”. TPCO did not believe it's trading share price reflected its assets, including its significant cash reserves.

[15] In July 2022, TPCO engaged Hyperion Capital Inc. ("Hyperion") as its financial advisor in connection with its investigation of potential strategic opportunities in the U.S. (the "Strategic Process"). TPCO chose to retain Hyperion because Hyperion had "substantial M&A experience in the cannabis industry, including various corporate transactions.

[16] The Strategic Process began with an informal reach out to a targeted group of third parties, which did not include Old Gold Flora, to assess an initial interest in advancing strategic discussions. TPCO met with various third parties to discuss potential business combinations and/or commercial relationships. Following those meetings, TPCO directed Hyperion to identify other parties for a potential strategic transaction and compare those proposals with the ones already presented by the third parties with whom TPCO had already met.

[17] TPCO also engaged KPMG to review the company's cost structure to determine whether there were opportunities to adjust its cost structure to have a sustainable business. The outcome of the cost review was that TPCO either needed more scale or to merge with another company in order to be sustainable.

[18] In August 2022, as part of the Strategic Process, a broad canvass of the market was undertaken and a number of businesses were identified for a potential merger transaction with TPCO. Hyperion worked with TPCO management to identify 24 potential third parties, including Old Gold Flora. From those 24 third parties identified, TPCO directed Hyperion to contact 12, including Old Gold Flora. Several of those third parties entered into nondisclosure agreements with TPCO in the course of discussions about potential strategic alignments.

[19] On September 6, 2022, Hyperion had initial conversations with Old Gold Flora to gauge interest in a potential business combination with TPCO. Following that conversation, the two companies entered into mutual nondisclosure agreements. In the fall of 2022, representatives of the two companies exchanged information, including financial models, financial statements and selected relevant financial metrics, preliminary *pro forma* metrics such as brand revenue, dispensary count and

synergy opportunities. As a consequence of their mutual extensive due diligence process, Old Gold Flora had significant information about TPCO's financial position, and vice versa.

[20] On October 31, 2022, Hyperion met with management of TPCO to discuss the status of discussions with various third parties, including but not limited to Old Gold Flora, and provided TPCO with an analysis on the implied public market and tangible book value of TPCO, including an *en bloc* valuation summary of TPCO and a valuation range analysis using comparable companies and precedent transactions.

[21] On November 3, 2022, Old Gold Flora presented TPCO with an initial draft of a letter of intent (the "Initial LOI") setting out the terms of a proposed business combination between the parties. The Initial LOI described Old Gold Flora's existing capital structure as having a \$2.21 unit value and described TPCO's capital structure. The Initial LOI then described the proposed "consideration" in the following language:

[Gold Flora Corporation] will acquire all of the issued and outstanding TPCO Shares in an all stock transaction at an implied price of approximately US\$0.60 per TPCO share ("TPCO Share Value"), a 81.8% premium to the recent closing price on November 2, 2022, subject to TPCO having a minimum cash balance of US \$80,000,000 ("Minimum Cash Balance"). In the event that TPCO's net cash balance (calculated net of obligations described immediately above) is less than the Minimum Cash Balance at the time of executing the Definitive Agreement, the TPCO Share Value will be adjusted downward by an amount that the net cash balance is below the Minimum Cash Balance divided by the number of TPCO common shares outstanding as of the closing date. The purchase price consideration to [Old] Gold Flora shareholders will be the newly issued common equity of [Gold Flora Corporation] calculated by dividing the [Old] Gold Flora unit value by the TPCO share value ["Share Exchange Ratio"]. For greater certainty, based on the terms of this LOI, we expect the Share Exchange Ratio will be approximately 3.68 shares of TPCO issued for every membership unit outstanding of [Old] Gold Flora, resulting in a pro forma ownership of [Gold Flora Corporation] of approximately 70% [Old] Gold Flora and 30% to the former shareholders of TPCO.

[22] On November 7, 2022 management of TPCO met with Hyperion to review and consider the Initial LOI, and in particular the two companies' financial models and implied valuations. On the same day members of TPCO's management and

Hyperion met with members of Old Gold Flora's management, where Old Gold Flora pitched the merits of the initial LOI. However, the TPCO Board believed that the initial LOI undervalued TPCO's contribution.

[23] On November 10, 2022, the Board and management of TPCO met with Hyperion to discuss the Strategic Process, including but not limited to the status of discussions with Old Gold Flora. As part of those discussions, Hyperion provided valuation considerations as they related to TPCO and the initial LOI, including implied valuations.

[24] On November 17, 2022, there was a further meeting between representatives of TPCO and Old Gold Flora and Hyperion to discuss the initial LOI, the respective businesses, and among other things, ownership entitlements and potential deal structures.

[25] Between November 16 and 20, 2022, two additional third party entities reached out to TPCO, directly or through Hyperion, proposing the potential acquisition of TPCO and a potential strategic transaction with TPCO.

[26] On November 20, 2022, and without TPCO having made a counter-offer in response to the Initial LOI, Old Gold Flora presented TPCO with a revised LOI (the "Revised LOI") which proposed further adjustments to the consideration which were more favorable to TPCO than the Initial LOI.

[27] On November 28, 2022, the TPCO Board established a M&A committee (the "Special Committee") to review the various strategic opportunities that were available to TPCO, including but not limited to the potential proposed transaction with Old Gold Flora, and the two third parties who had reached out in mid-November. The Special Committee was tasked with providing advice to the TPCO management and Board regarding the strategic alternatives available to TPCO, and review material mergers, acquisitions, dispositions or other potential transactions. Mark Castaneda, a member of the TPCO Board of Directors, and chair of TPCO's Audit Committee, chaired the Special Committee.

[28] On November 29, 2022, the Special Committee held its initial meeting with members of TPCO management and Hyperion to discuss the Revised LOI and other potential strategic options. With input from Hyperion, the Special Committee analysed the merits of each proposed transaction involving parties other than Old Gold Flora, and considered the Revised LOI to be the most appealing. The Special Committee instructed TPCO management and Hyperion to make a counter-proposal to Old Gold Flora, which further adjusted the consideration terms to be more favourable to TPCO.

[29] On December 1, 2022, Old Gold Flora made a further counter-offer (the "Further Revised LOI"). The Further Revised LOI described Old Gold Flora's existing capital structure as having a \$1.65 unit value and described TPCO's capital structure. The Further Revised LOI then described the proposed consideration in the following language:

[Gold Flora Corporation] will acquire all of the issued and outstanding TPCO Shares in an all stock transaction at an implied price of approximately US \$0.88 per TPCO share ("TPCO Share Value"), a ~ 280% premium to the recent closing price on November 30, 2022, subject to TPCO having a minimum cash balance of US \$80,000,000 ("Minimum Cash Balance"), net of any outstanding debts or off-balance-sheet liabilities or obligations but excluding (i) any assumed lease obligations, and (ii) other liabilities to be mutually agreed and specified in the Definitive Agreement. In the event that TPCO's net cash balance (calculated net of obligations described immediately above) is less than the Minimum Cash Balance at the time of executing the Definitive Agreement, the TPCO Share Value will be adjusted downward by an amount that the net cash balance is below the Minimum Cash Balance divided by the number of TPCO common shares outstanding as of the closing date. To provide [Old] Gold Flora some degree of comfort relating to the cash balance at closing the Proposed Transaction, TPCO will agree to reasonable interim covenants relating to the conduct of business for the period of time between executing the Definitive Agreement and closing the proposed transaction. Such interim covenants may include limitations relating to dividends, mortgages, pledges, encumbrances, indebtedness, significant capital expenditures and other material cash expenses not incurred in the ordinary course of business. The purchase price consideration to [Old] Gold Flora shareholders will be the newly issued common equity of [Gold Flora Corporation] calculated by dividing the [old] gold flora unit value by the TPCO Share Value ["Share Exchange Ratio"]. For greater certainty, based on the terms of this LOI, we expect the pro forma ownership of [Gold Flora Corporation] of approximately 57.5% [old] gold flora and 42.5% to the former shareholders of TPCO.

[30] On December 2, 2022, the Special Committee recommended that the TPCO Board approve entering into the non-binding Further Revised LOI, subject to certain changes. In making its recommendation, the Special Committee relied on a fairness opinion from Hyperion in considering whether the consideration to be received by the TPCO Shareholders was fair from a financial point of view. On the same day, TPCO and Old Gold Flora entered into the non-binding Further Revised LOI on the terms authorized by the TPCO Board. Based on a time limited agreement to exclusively negotiate with Old Gold Flora, all other third parties, with whom TPCO had been engaging, were advised that TPCO was unable to continue discussions with them.

[31] On December 18, 2022, TPCO provided a draft Business Combination agreement to Old Gold Flora.

[32] On December 22, 2022, members of TPCO management and Hyperion met with and updated the Special Committee with respect to the status of the upcoming arrangement, including financial considerations and synergies.

[33] On December 21, 2022 and January 9, 2023, a period during which the exclusivity agreement remained in place, TPCO received unsolicited communications from two third parties, one of which was a letter of intent. The January 9, 2023 proposal outlined an acquisition of TPCO's shares at a share exchange ratio of 4.75 and a per share value of \$0.40, which it was prepared to provide in cash. On the recommendation of the Special Committee, neither option was pursued because TPCO believed that the Business Combination with Old Gold Flora would create more value.

[34] Throughout December 2022 and January 2023, the parties continued to negotiate the Business Combination agreement and other ancillary agreements.

[35] On January 10, 2023, the CEO of Old Gold Flora, Laurie Holcomb, at the request of the TPCO Board, provided a detailed overview of Old Gold Flora, the

potential *pro forma* profile of the combined company, and the merits of the proposed Business Combination from her perspective.

[36] On January 18, 2023, the TPCO Board engaged INFOR Financial Inc. (“INFOR”) to also serve as a financial advisor to the Special Committee and the TPCO Board, and to provide a second independent fairness opinion with respect to the Business Combination. The Board selected INFOR to provide a second independent fairness opinion in part because INFOR had substantial M&A experience in the cannabis industry, including transactions similar to the Arrangement being considered.

[37] Between January 19 and February 19, 2023, the parties and their respective advisors continued to negotiate the terms of the Business Combination agreement and ancillary agreements.

[38] At its meeting on January 30, 2023, the Special Committee determined that “as a result of certain diligence findings ... the previously agreed economics of the transaction needed to be revisited”. At that meeting, Hyperion’s analysis “focused on the anticipated outstanding debt of the potentially combined entity”. Minutes also reference outstanding litigation against Old Gold Flora.

[39] TPCO’s internal Business Combination material of February 15, 2023 stated that “the Business Combination Agreement [as it had evolved by that date] [had] been extensively negotiated to protect TPCO shareholders to the extent possible given the nuances / risks of this counter-party”, and reflected that the parties had agreed part of the Arrangement would include an ancillary loan and security agreement, by which TPCO would advance \$2,000,000 to Old Gold Flora at signing and that Old Gold Flora would be permitted to withdraw a further \$1,000,000 every 30 days thereafter, to a maximum of \$5,000,000. The parties had also negotiated that while TPCO was “entitled to entertain ‘superior bids’ as they arise prior to closing”, Old Gold Flora was “not permitted to do the same”. Following extensive discussions, the parties tentatively agreed to revise the economic terms of the Business Combination agreement to provide consideration terms that were more

favourable to TPCO. The holders of Old Gold Flora units would receive 1.5320 and shareholders of TPCO would receive 1.0 common shares, respectively, in Gold Flora Corporation per Old Gold Flora unit and TPCO common shares held, representing a 51/49 pro forma ownership of Gold Flora Corporation with the Business Combination valuing TPCO common shares at \$0.98 and Old Gold Flora Units at \$1.50.

[40] On February 20, 2023, the Special Committee attended a meeting with members of TPCO management, Hyperion and INFOR, and TPCO’s external legal counsel, in connection with the Business Combination. At the meeting, the Special Committee received a verbal presentation from both Hyperion and INFOR, with accompanying slide decks. Both Hyperion and INFOR confirmed that “the TPCO Consideration to be paid to TPCO Shareholders... was fair, from a financial point of view, to TPCO Shareholders”. The Special Committee determined that the Business Combination was fair to, and in the best interests of, TPCO based on its consideration of, among other things, the two fairness opinions including the valuation information they included, and resolved to recommend that the TPCO Board recommend to shareholders the approval of the Merger.

[41] The slide deck that accompanied Hyperion’s oral presentation included the following:

We have not been asked to prepare and have not prepared a formal valuation or appraisal of [TPCO] or any of its affiliates or of any of the assets, liabilities or securities of TPCO or any of its affiliates, and our Opinion should not be construed as such. In addition, our Opinion is not, and should not be construed as, advice as to the price at which common shares of TPCO or Gold Flora, LLC (“Gold Flora”) may trade or be valued at any future date.

...

Except as expressly noted above and under the slide “Scope of Review”, we have not conducted any investigation concerning the financial condition, assets, liabilities (contingent or otherwise), business, operations or prospects of TPCO or its affiliates.

...

Our Opinion is rendered on the basis of securities markets, economic, financial and general business conditions prevailing as at the date hereof and the conditions and prospects, financial and otherwise, of TPCO, as they are

reflected in the TPCO Information or otherwise obtained by us from public sources including the materials noted above under the slides “Scope of Review”, and as they were represented to us in our discussions with management of TPCO and its affiliates and advisors. Our Opinion is conditional on all assumptions being correct.

...

[42] The Executive Summary slide of Hyperion’s fairness opinion presentation included the following about the agreed to economic terms of the Proposed Transaction:

On February [●], 2023, [Old] Gold Flora and TPCO agreed that [Old] Gold Flora would acquire TPCO pursuant to the Business Combination Agreement. As consideration, the holders of securities of [Old] Gold Flora and TPCO would receive **[1.5320]** and **[1.0000]** common shares, respectively, in a newly-incorporated parent entity [Gold Flora Corporation] per [Old] Gold Flora unit and TPCO common share held, on an as-converted basis, representing [51.0%] and [49.0%] pro forma ownership of [Gold Flora Corporation], respectively. The Proposed Transaction implies a purchase price per TPCO common share of [\$0.98], based on a deemed price per Gold Flora Unit of [\$1.50].

- Based on the closing price of TPCO on February [●], 2023, the Proposed Transaction represents a premium to TPCO shareholders of [226.4%].
- Based on the 10-Day VWAP<sup>1</sup> of TPCO ending on February [●], 2023, the Proposed Transaction represents a premium to TPCO shareholders of [●%].
- Hyperion’s mandate is to provide a Fairness Opinion to the Board with respect to the Proposed Transaction that would provide an assessment of the fairness, from a financial point of view, of the consideration to be received by TPCO shareholders pursuant to the Proposed Transaction
- As of the date hereof and based on our analysis and subject to such other matters as we have considered relevant, it is the opinion of Hyperion that the consideration to be paid to TPCO shareholders by [Old] Gold Flora is fair, from a financial point of view, to the shareholders of TPCO

[43] INFOR’s presentation material contained a limitation disclaimer similar to that of Hyperion, namely that it had “not made or prepared any valuation or appraisal of the securities, assets or liabilities (including any contingent, derivative or off-balance-sheet assets and liabilities) of TPCO, [Old] Gold Flora, or been furnished with any such valuations or appraisals, and the information contained in its presentation was

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<sup>1</sup> I understand VWAP to be “volume-weighted average price”, being a measurement of the average of a publicly traded stock’s trading price over a specified period of time.

not to be construed as any such valuation or appraisal. INFOR's presentation stated that "the advice and opinions provided [were] not intended to constitute an opinion as to the "fair value" of [TPCO] of [Old] Gold Flora".

[44] The INFOR presentation material set out certain financial aspects of the proposed transaction including the following:

- The Shareholders will receive [1] share in Newco in exchange for each TPCO Share (the "Consideration") resulting in the Shareholders owning 49.0% of Newco on a fully-diluted basis and implying a value of \$0.98 for each TPCO share ("TPCO Share Value")
- Gold Flora Shares have been ascribed a value of \$1.50 per share (the "Gold Flora Unit Value") and will be acquired by Newco at a share exchange ratio of [1.5320], which is calculated by dividing the Gold Flora Unit Value by the TPCO Share Value. Stately Shares will be acquired at the same price and share exchange ratio as the Gold Flora Shares
- As part of the transaction, TPCO must maintain a minimum cash balance of \$80MM, net of outstanding debts or off-balance sheet liabilities (the "Minimum Cash Balance") but excluding leases or other liabilities specified in the TPCO Disclosure Schedule

[45] The INFOR presentation material noted that the TPCO Share Value implied a premium to TPCO's trading close price on February 14, 2023 of 226.8%.

[46] INFOR analysed the consideration the proposed transaction would provide TPCO from a financial perspective using methodologies that included, a comparison of other U.S. cannabis companies, cash per share analysis, a relative contribution analysis, and an indicative valuation analysis of the new combined entity, however its focus was on the reasonableness of the implied value of \$1.50 USD of Old Gold Flora units. This was critical information for TPCO to obtain secure because Old Gold Flora was not a publicly traded company and therefore had no visible valuation metrics in the market. It was INFOR's opinion that the \$1.50 per unit value for Old Gold Flora was "within a reasonable range of valuation outcomes".

[47] On February 20 and 21, 2023, respectively, INFOR and Hyperion delivered their written fairness opinions to the Special Committee and the TPCO Board. Both Hyperion and INFOR were of the opinion that the consideration to be received by

TPCO shareholders via the Business Arrangement was fair, from a financial point of view, to TPCO shareholders.

[48] On February 20, 2023, TPCO's Board met to consider the Transaction, but the meeting was adjourned to a later date "in order to enable resolution of a key transaction point". Based on the minutes of the February 20, 2023 Board meeting, this appears to have been whether TPCO Director and Board Chair, Troy Datcher, would serve as Chair of Gold Flora Corporation.

[49] The Board meeting reconvened after the market closed on February 21, 2023 and, having considered the Special Committee's recommendation, the two fairness opinions, and Old Gold Flora having agreed that Mr. Datcher would serve as Chair of the Gold Flora Corporation Board, resolved to recommend the Business Combination to TPCO shareholders. That same evening, the Business Combination agreement and all ancillary agreements were executed.

[50] On February 22, 2023, TPCO issued a press release announcing that it had entered into the Merger agreement with Old Gold Flora. The press release stated:

The Business Combination will be completed, subject to the Merger Agreement, by way of a court-approved plan of arrangement under the *Business Corporations Act (British Columbia)*, whereby a newly formed British Columbia corporation ("New Parent"), created to manage and hold the combined business of The Parent Company [TPCO] and Gold Flora, will, directly and indirectly, acquire all of the issued and outstanding common shares of The Parent Company ("TPCO Shares") and all of the issued and outstanding membership units in the capital of Gold Flora ("Gold Flora Units"). New Parent will then domesticate in the United States as a Delaware corporation pursuant to Section 388 of the Delaware General Corporation Law.

Under the terms of the Merger Agreement, holders of TPCO Shares will receive one share of common stock in the capital of New Parent ("New Parent Shares") for each TPCO Share held pursuant to the Merger Agreement and holders of Gold Flora Units will receive 1.5233 New Parent Shares for each Gold Flora Unit held pursuant to the Merger Agreement, resulting in the issuance of an aggregate of approximately 312,138,271 New Parent Shares. The Business Combination values Gold Flora at \$1.50 per Gold Flora Unit and The Parent Company at \$0.9847 per TPCO Share.

Following completion of the Business Combination, current holders of TPCO Shares will hold approximately 49% of New Parent and current holders of Gold Flora Units will hold approximately 51% of New Parent.

[51] Pursuant to the Transaction, TPCO Shareholders received one share in Gold Flora Corporation for each TPCO share held and holders of Old Gold Flora membership units received 1.5233 shares of Gold Flora Corporation for each Old Gold Flora unit held.

[52] The Arrangement provided TPCO shareholders with the right to dissent in respect to the Merger in accordance with the Dissent Provisions of the *BCBCA*.

[53] Once the transaction was completed, Gold Flora Corporation remained a reporting issuer in Canada and the United States with its shares being listed on the same exchanges as TPCO had traded.

[54] Following the announcement of the Arrangement, TPCO's shares fell by approximately 34% from \$0.27 (USD) on the date of the announcement of the Transaction to \$0.177 (USD) on June 15, 2023. The parties agree and I conclude the statutory valuation date is June 15, 2023, being immediately before the passing of the TPCO shareholder resolution adopting the Arrangement.

[55] On April 27, 2023, the TPCO Board received the audited financial statements of Old Gold Flora for the year ending December 31, 2022, which had recently been issued. The Board asked INFOR whether the updated financial information affected INFOR's fairness opinion, and was advised by INFOR that the new information did not require a modification or withdrawal of its fairness opinion.

[56] On May 12, 2023, TPCO sought and obtained an interim order from this Court allowing it to call and hold an annual general and special meeting of TPCO shareholders on June 15, 2023 to, amongst other things, vote on the Business Combination with Old Gold Flora. In seeking that order, TPCO tendered a copy of the circular which it intended to provide to TPCO shareholders as part of the meeting materials.

[57] TPCO subsequently issued a Notice of 2023 Annual General and Special Meeting of TPCO shareholders along with a Proxy Statement and Circular (the

"Circular"), recommending that TPCO shareholders vote in favour of the proposed Transaction at the meeting.

[58] Among the documents included in the Circular were TPCO's Form 10-K Annual Report for the fiscal year ended December 31, 2022, which had been filed with the U.S. Securities and Exchange Commission (the "Form 10-K") and the Hyperion and INFOR fairness opinions.

[59] Between May 26 and June 6, 2023, all of the Petitioners sent written notices of dissent to TPCO in respect of their TPCO Shares.

[60] At the TPCO shareholder meeting on June 15, 2023, the TPCO shareholders passed the resolution approving the Arrangement, with over 84% of shareholders who voted approving the Arrangement.

[61] On June 20, 2023, Justice Brundrett of this Court approved a Plan of Arrangement under the *BCBCA*, as part of the overall Business Arrangement to merge TPCO and Old Gold Flora to be Gold Flora Corporation. On the same date, TPCO sent the dissenting shareholders a notice of intention to proceed with the Arrangement. Between July 3 and July 13, 2023, all of the Petitioners signed written statements requiring that TPCO purchase their Notice Shares.

[62] The Respondent acknowledges all of the Petitioners have fulfilled their obligations under the Arrangement and the *BCBCA* to become dissenters under the *BCBCA*.

[63] The merger took place in December 2023 with the merged entity carrying on business as Gold Flora Corporation.

#### **IV. POSITIONS OF THE PARTIES**

[64] Briefly summarized, the position of each of the parties is as follows.

[65] The Petitioners argue that \$0.98 USD per share was the deal price negotiated in an open market between informed and prudent parties acting at arm's length, that

it was the value approved by the Court, and that it should be accepted as fair value. They submit that share value was an essential feature of the transaction for which the parties bargained, and that the key consideration in the negotiations was not the relative equity interest of each company in Gold Flora Corporation as argued by the Respondent.

[66] The Respondent argues the fair value is \$.17 (USD) and that the \$0.98 USD per share figure was simply an implied value derived from the share exchange ratio negotiated by the parties and the \$1.50 per share value that Old Gold Flora ascribed to itself. The Respondent argues the evidence, including the expert opinions, does not support a finding that the implied value is the fair value.

[67] The Petitioners say the Respondent’s argument that the deal price was merely an “implied value” is inconsistent with the contemporaneous evidence, including the documentation of the parties negotiations, the Hyperion and INFOR fairness opinions relied on by TPCO in deciding to recommend the merger to its shareholders, as well as TPCO’s representations to its securities regulator in its required securities filings, which were also transmitted to TPCO shareholders, and is not supported by the expert evidence filed in this proceeding.

**V. ANALYSIS**

[68] In *Grandison*, Justice Pitfield wrote that in a dissent proceeding “the value attributed to the shares by the plan of arrangement is but one piece of evidence to be considered... Other evidence includes that pertaining to the history of [the transacting companies], the trading price of the shares in the public market, the evolution and formulation of the plan of arrangement and the value of the shares specified in it, and the opinions regarding value expressed by expert witness called by the petitioners and the respondents respectively”: at para. 5.

[69] The Respondent says this is a case of first instance and that previous reported cases have all involved share purchase transactions. Nonetheless, I consider *Grandison* provides a useful framework for organizing and considering all

of the evidence, although in the circumstances of this case I prefer to address the evidence in a different order.

**A. The experts and their qualifications**

[70] Since the experts' opinion evidence is relevant to several issues, I begin with a brief summary of the expert opinions and the qualifications of the experts. Given the Respondent was the first party to have expert evidence prepared, and the Petitioners' expert evidence followed, I refer first to the expert evidence tendered and relied on by the Respondent.

**1. The Respondent's experts**

**a) Brent Walker**

[71] The Respondent relies on the expert opinion of Brent Walker, Managing Director and Co-Founder of MPA Morrison Park Advisors Inc., an independent investment banking firm in Toronto that provides financial and strategic advisory services. Although he is not a Chartered Business Valuator (CBV), Mr. Walker has experience in performing valuations.

[72] Mr. Walker was retained to provide an expert opinion in relation to various issues related to business combinations and fairness opinions. In his December 22, 2023 Report (the "First Walker Report"), Mr. Walker expresses his opinion that:

- a. The merger between Old Gold Flora and TPCO was a merger of equals;
- b. In a merger of equals, the key factors that are negotiated between the parties are the business case for the merger, the governance of the merged entity, other "social" issues (such as the allocation of management responsibilities), and the exchange ratio which ultimately determines the allocation of share ownership in the combined company as between the shareholders of the predecessor companies;
- c. An "implied value" is not an actual value, but rather a relative statement of value based on the exchange ratio between the parties, and does not automatically equate to fair market value;
- d. Fairness opinions are not generally considered to be *de facto* opinions on valuation;

- e. The fairness opinions provided by Hyperion and INFOR did not conclude that the fair market value of TPCO's shares was at least \$0.9847 (USD); and
- f. Market participants did not view the value of what was being received by the TPCO shareholders to be \$0.9847 (USD) per share.

**b) Kenneth Johnston**

[73] The Respondent also relies on the expert opinion of Kenneth Johnston, a CBV and partner in the Financial Advisory practice of, and the British Columbia Modeling & Value Advisory leader for, Deloitte Canada, with experience in the cannabis sector.

[74] Mr. Johnston was retained by the Respondent to provide a valuation report with respect to the *en bloc* fair value of all the issued and outstanding shares of TPCO Holding Corp. as of June 15, 2023.

[75] In his December 22, 2023 written report (the “First Johnston Report”), Mr. Johnston opined that the fair value of TPCO on a per share basis as at June 15, 2023 was “in the range of \$0.17 to \$0.18 [USD]” and that “based on 150,031,326 shares issued and outstanding as at the Valuation Date, the *en bloc* fair value of all issued and outstanding shares of TPCO is in the range of \$25.5 million to \$27.0 million”. In arriving at that opinion, Mr. Johnston considered indications from the Transaction as well as other offers received by TPCO during the Strategic Process.

**2. The Petitioners’ experts**

**a) Alan Hibben**

[76] The Petitioners rely on the expert opinion of Alan Hibben, Chartered Financial Analyst, principal of Shakerhill Partners, an independent advisory and investment firm with over 40 years of experience in financial advisory roles, including serving as director and chair of numerous special committees both for private and public companies, and various positions within the Royal Bank of Canada and its affiliates including Managing Director in the Mergers and Acquisitions group of RBC Capital Markets and Chief Executive Officer of RBC Capital Partners, the private equity

investment arm of RBC Financial Group. He has experience as a public company Board member and as Chair of Special Committees.

[77] Mr. Hibben provided two reports, the first dated April 2, 2024 (the “First Hibben Report”). In the First Hibben Report, Mr. Hibben focussed his opinion on three points. It was his opinion that the Strategic Process undertaken by TPCO more closely resembled an auction process than a merger of equals, TPCO’s goal was value maximization, particularly given its significant cash asset, and it was very unlikely the share exchange ratio was the focus of the negotiations between TPCO and Old Gold Flora.

[78] Mr. Hibben was provided with additional documents received from the Respondent on May 3, 2024 and prepared a further report dated May 23, 2024 (the “Second Hibben Report”). In the Second Hibben Report he states that there was “nothing in the documents ...that would provide any meaningful impact on [the First Hibben Report], but included the caveat that “very large amounts of the Board minutes [had] been redacted”.

[79] Mr. Hibben observed that “in several of the meetings there appeared to be a discussion of the value of TPCO” but that “no such documents have been provided” to him. In his opinion it would be “unusual ...that such critical evaluations would be made without any presentations from management or [the consultant] particularly as a significant amount of time had lapsed between original valuation work by [the consultant] and the dates of these determinations by the Board and/or the [Special] Committee”.

**b) *Robert Patton***

[80] The Petitioners also rely on the expert opinion of Robert Patton, an economist and Chartered Financial Analyst (CFA). Mr. Patton is the Managing Director of NERA Economic Consulting, an international consultancy that provides financial and economic analysis and advice to corporations, governments, law firms, regulatory agencies, trade associations and international agencies.

[81] The Respondent argues Mr. Patton lacks the expertise to provide a persuasive opinion in this proceeding. It argues his experience is focussed on quantifying damages in class actions and that his opinion merits little weight since he has never provided a fairness opinion or a valuation to a board of directors considering a proposed transaction.

[82] In my view Mr. Patton possesses the expertise necessary to ground his opinion. His designation as a CFA would have involved assessment of his valuation abilities and he has familiarity with and has performed business valuations as part of his extensive work history. The valuation process he undertook was very similar to the valuation analysis undertaken by the Respondent's expert, Mr. Johnston.

[83] In his report dated April 2, 2024 (the "First Patton Report"), Mr. Patton opines that the \$0.9847 (USD) per share value negotiated for the exchange for shares in Gold Flora Corporation was "a conservative estimate of fair value per common share of TPCO as at February 22, 2023". Mr. Patton's opinion is that the \$0.9847 USD per share value was the result of arm's-length negotiation between knowledgeable parties who were under no compulsion to act, it is a reliable indication of fair value. Mr. Patton is also of the opinion that \$0.9847 (USD) per share is a reasonable estimate of the fair value of TPCO shares as at June 15, 2023. According to Mr. Patton, for reasons elaborated in the First Patton Report, TPCO's shares were not trading in an efficient market.

[84] Mr. Patton was also provided with additional documents received from the Respondent on May 3, 2024 and prepared a further report dated May 24, 2024 (the "Second Patton Report") in which he stated that the opinions in the First Patton Report remained unchanged, and that the additional documents lent further support to his conclusions.

**c) *George Kostolampros***

[85] The Petitioners also rely on the expert opinion of George Kostolampros. I address his qualifications and opinion later in these reasons.

**3. Reply opinions of the Respondent**

**a) Mr. Walker's Reply Report**

[86] Mr. Walker was also asked to prepare a second report responding to the opinions expressed in the First Hibben Report and the Second Hibben Report (the "Walker Reply Report"). In the Walker Reply Report, Mr. Walker disagreed that the Transaction was a "sale of the company for shares" as opposed to a merger of equals. His opinion is that the "key issue in the negotiation between the parties was the exchange ratio, not the implied value that was eventually calculated based on the final share exchange ratio". According to Mr. Walker, when a Board decides to sell a company, its rationale is more singularly focused on the cash or cash-equivalent value of potential transactions, the financial strength of potential buyers, and, where shares were offered as consideration, the value and liquidity of those shares, and typically less focus by the Board of the selling company on factors that are more uniquely critical in a merger transaction, such as increased scale, synergies, cost reduction opportunities, or would be important to a buyer, but not a seller.

**b) Mr. Johnston's Reply Report**

[87] The Respondent obtained a further report from Mr. Johnston commenting on the First Patton Report and the Second Patton Report (the "Johnston Reply Report"). The Johnston Reply Report disputes Mr. Patton's conclusion that TPCO's shares were not trading in an efficient market and challenges Mr. Patton's opinion of the fair value of the TPCO shares.

**4. Expert evidence in dissent proceedings**

[88] While expert opinion is important evidence which I have taken into account in arriving at a determination of fair value, I am aware that where each side relies on expert opinion evidence, "the court is not bound to choose one expert's opinion of value over that of another": *Grandison* at para. 79.

[89] All of the experts are accomplished professionals within their fields. In my view the opinions proffered by all of the experts fall within their respective areas of

expertise. However, on the facts I consider most material in undertaking my analysis of, and reaching my conclusion on, the fair value of the TPCO shares at the valuation date, for the reasons outlined below I prefer the evidence of Petitioners' experts Mr. Hibben and Mr. Patton to the opinion evidence of Mr. Walker and Mr. Johnston prepared on behalf of the Respondent.

**B. History of the parties**

[90] Earlier in these reasons I outlined some of the facts relating to the history of each of the TPCO and Old Gold Flora. In determining the *en bloc* fair value of the TPCO shares at the valuation date, I have considered all of those facts and the following additional facts which I view as relevant. TPCO had significant cash assets, and Old Gold Flora had little in the way of cash and significant debt.

[91] TPCO was a publicly traded company and Old Gold Flora was privately held. Publicly traded companies have access to equity through a broad public market and may have greater access to easier debt financing as regulated entities. Closely held companies often need to rely on the owner's own finances or the recruitment of venture capitalists.

**C. The evolution of the deal**

**1. Share ratio was not the sole focus of the parties' negotiations**

[92] Mr. Walker's opinion is that the deal was a "merger of equals". However, I prefer the opinion of Mr. Hibben that the Strategic Process undertaken by TPCO, including its negotiations with Old Gold Flora, was "much more similar to an auction process than the typical genesis of a merger of equals".

[93] In Mr. Walker's opinion, a key attribute in a merger of equals is a roughly equal allocation of shareholdings in the combined company. In his opinion, "an ownership split of greater than 60/40 would typically not be seen as a merger of equals" and that in merger of equals transaction the parties are typically focused on the share exchange ratio and not a per-share value.

[94] However, although the final share split negotiated was 51/49, Old Gold Flora initially proposed a 70/30 share split, in my view an indicator that it did not view the proposed transaction as a merger of equals.

[95] Further, in my view the evidence does not reflect that the parties' focus in negotiations was the share exchange ratio, as Mr. Walker opined one would typically see in a merger of equals transaction.

[96] Mr. Castaneda made two affidavits that form part of the evidentiary record. The first was made May 10, 2023 (Castaneda #1), before any notices of dissent had been given, and was filed in support of the Arrangement in the Plan of Arrangement proceeding before Justice Brundrett. The second was made December 21, 2023 (Castaneda #2) and was filed in this dissent proceeding.

[97] In Castaneda #2, Mr. Castaneda also deposes that “during the negotiations with Gold Flora, the ascribed values of Gold Flora and TPCO Shares were not a focus of the parties' negotiations” and that instead “the focus of the negotiations was the share exchange ratio and the ultimate relative equity interest of each party in the new combined entity”. Mr. Castaneda’s affidavit evidence on this point is uncorroborated and I find it to be unreliable.

[98] As Mr. Walker admitted during his cross-examination, reasonably in my view, the factors that are important to the parties in any merger transaction are dependent on the circumstances of that particular transaction. Mr. Walker’s opinion cannot be used to support what the parties to this particular Merger considered to be the focus of their negotiations.

[99] In making the decisions to recommend the Transaction, the Special Committee and the Board “did not assign relative weights to the factors considered” and, as acknowledged in Castaneda #1, “individual members of the TPCO special committee and the TPCO Board may have given different weight to different factors”. Despite Mr. Castaneda’s affidavit evidence that the “key consideration” was the relative equity interest each of TPCO and Old Gold Flora's shareholders would hold

in Gold Flora Corporation, there is no evidence contemporaneous to the negotiations that support that statement. The Respondent initially refused to provide various documents including minutes of meetings where negotiations were discussed, which could shed light on the validity of Mr. Castaneda's evidence on this point. When certain disclosure was provided it was heavily redacted. Given these circumstances, in my view it would be unwise to place any weight on Mr. Castaneda's evidence on this point and I decline to do so.

## **2. The TPCO share value was a focus of the negotiations for TPCO**

[100] Further, I accept as logical Mr. Hibben's evidence that the focus on share exchange ratio was "very unlikely" due to the nature of each company's earnings and capital position. The deal was not the result of two roughly equal players collectively forming the view that there was a business case for a merger and then proceeding to divide the pie that was to be the new entity. This was a case of Old Gold Flora pursuing TPCO. Old Gold Flora upped its Initial LOI proposal without any counter-offer from TPCO. TPCO had received numerous expressions of interest through its Strategic Process. TPCO continued to receive other offers, including an offer for \$0.40 per share cash and TPCO maintained the right to accept a "Superior Proposal" (defined in the Arrangement as a proposal "which is more favourable, from a financial point of view to the TPCO shareholders") until the Merger deal had closed. TPCO's focus throughout was value maximization for TPCO and TPCO's share value was a measure of that maximization and a focus of the negotiations. That TPCO felt the Merger with Old Gold Flora offered the best value does not in any way mean maximum value for its shares was not a key focus.

[101] The Respondent argues the fairness opinions are not admissible as evidence of value because they are hearsay opinion evidence: *Re Bear Lake Gold Ltd.*, 2014 ONSC 3428 at paras. 13-16. However, as Justice Wilton-Siegel acknowledged in *Re Bear Lake* at para. 14, fairness opinions assist a special committee or a board of directors in assessing a proposed transaction. The Respondent does not dispute the

fairness opinions are properly considered as evidence of the evolution of the negotiations and I have considered them for that purpose.

[102] Despite Hyperion's stated disclaimer, Hyperion did perform a valuation of the *en bloc* value of TPCO and of Old Gold Flora. The fairness opinions of Hyperion and INFOR state that they were prepared in accordance with the disclosure standards that govern formal valuations and fairness opinions. In undertaking its *en bloc* value determination, Hyperion employed numerous recognized valuation methodologies: *Carlock* at para. 15. It undertook examined comparable peer companies, looked at precedent transactions, did a relative contribution analysis (i.e. of each Old Gold Flora and TPCO to Gold Flora Corporation), assessed the tangible book value per share, did a trading value analysis, and employed a discounted cash flow approach. Hyperion presented a comparison of the *en bloc* valuations achieved using several of those methodologies in relation to the \$0.98 TPCO share value consideration agreed to by the parties and a mirror *en bloc* valuation summary comparison in relation to the \$1.50 Old Gold Flora unit value they had agreed to in the course of their negotiations.

[103] The TPCO share value negotiated by the parties was a benchmark used by TPCO's financial advisor Hyperion in conducting its valuation work on and opining on the fairness of the proposed transaction, on which TPCO relied in deciding to approve the Merger and on which they invited their shareholders to rely in voting on the proposed Transaction. Similarly, INFOR's focus on the Old Gold Flora share value negotiated by the parties informed TPCO's decision to approve the Merger and on which they invited their shareholders to rely in considering whether to support the Merger. The negotiated share value was a focus of the negotiations for TPCO as a metric to assess the proposed Merger and whether to recommend it to its shareholders.

**D. The value attributed to the TPCO shares in the Transaction**

[104] The parties negotiated and stated a TPCO share value as part of the Arrangement.

[105] Mr. Walker's opinion is that the \$0.98 value announced by TPCO is not fair value, but rather an implied value which was simply illustrative of TPCO's relative piece of "the pie", with the size of the "pie" being the "absolute value of the combined company", which had "no impact on relative ownership". Mr. Walker is of the opinion that the \$0.98 and the \$1.50 were irrelevant to TPCO because whatever implied value of the TPCO shares, the economic interests of TPCO shareholders would be unaffected.

[106] I find this aspect of Mr. Walker's opinion difficult to accept as being applicable in the circumstances of this Transaction. As noted by Mr. Walker, a merger of equals typically involves two companies agreeing to combine assets and proceed to negotiate the share split. As I have outlined in the evolution of this Transaction, this deal was very much the result of Old Gold Flora pursuing TPCO. TPCO was considering not only how equity in any merged entity would be allocated, but also whether to merge with Old Gold Flora. I find the stated TPCO share value was not irrelevant to TPCO; to the contrary, it was of critical importance to TPCO.

[107] I agree with the opinion expressed by Mr. Hibben that in a share exchange transaction (like this Merger) where one party is a privately held company (as Old Gold Flora was) the value of the transaction is typically disclosed by the parties, in order to provide a reliable foundation for the merits of the deal to be assessed by shareholders.

[108] As Mr. Walker acknowledged, the share exchange ratio can be expressed "in any number of ways" and is derived following "an analysis of the relative contribution by each company of relevant financial metrics (such as assets, liabilities, revenues, earnings, and cash flow) and operating metrics". Each company's relative share value is one such financial metric.

[109] In Castaneda #2, Mr. Castaneda refers to the press release announcing the Merger. As I have already outlined, the press release stated that "the Business Combination values [Old] Gold Flora at \$1.50 per Gold Flora Unit and [TPCO] at \$0.9847 per TPCO Share". However, in Castaneda #2, Mr. Castaneda added an

additional gloss to his description of what the press release had “stated”, by using language that characterized the \$0.9847 (USD) per TPCO Share value as being “based on the share exchange ratio negotiated by the parties, which in turn was based on the implied or attributed undiscounted value of Gold Flora at \$1.50 per unit during the negotiations”. That language was not stated in the press release and in my view is unsupported by objective evidence of the parties negotiations and their relative financial positions I find reliable, including TPCO’s focus on share value maximization and the broad environmental scan undertaken by TPCO in its Strategic Process.

[110] As Mr. Walker acknowledged, even in a merger of equals, the value of the shares of each merging entity may very well be important, and that parties may ultimately identify a per share value, expressed in dollars and cents, and that it “happens with public companies, yes for sure”, and can also happen with private companies.

[111] The Petitioners submitted the expert report of George Kostolampros, a lawyer with extensive experience practicing in the area of U.S. securities law and securities litigation and former senior counsel in the Division of Enforcement of the United States Securities and Exchange Commission (SEC), the U.S. securities regulator. I find his opinion is both reliable and highly persuasive.

[112] I find that under the U.S. securities laws, the SEC requires most U.S. publicly traded companies to annually file a Form 10-K with the SEC, to disclose material information related to, and material results of, their business operations for the previous fiscal year. Both U.S. laws and SEC regulations prohibit companies from making materially false or misleading statements in their Form 10-K. Information included within a Form 10-K must be truthful and not misleading. There are serious consequences under U.S. securities laws if an issuer's material statements within its Form 10-K are not accurate and /or are misleading, including disgorgement and penalties, as well as a private right of action for material misstatements or material omissions. It is often the case that issuers incorporate Form 10-K filings by reference

in subsequent SEC filings, and where they do so, those subsequent filings, including any documents incorporated by reference, must be accurate and not misleading.

[113] Among other things, TPCO's Form 10K, which was included in the Circular sent to all TPCO shareholders, stated with respect to "consideration":

"... Holders of TPCO Common Shares will receive one Newco [Gold Flora Corporation] Share for each TPCO Share held (the "TPCO Exchange Ratio") and holders of [Old] Gold Flora Units will receive 1.5233 Newco Shares for each [Old] Gold Flora Unit held (the "Gold Flora Exchange Ratio"). The Business Combination values [Old] Gold Flora at \$1.50 [USD] per [Old] Gold Flora Unit and TPCO as \$0.9847 [USD] per TPCO Share. Following the completion of the Business Combination, current holders of TPCO Common Shares will hold approximately 49% of Newco and current holders of [Old] Gold Flora Units will hold approximately 51% of Newco."

[114] TPCO repeated the same information about consideration, share values in its Form 10-Q filing for the quarterly period ended March 31, 2023 submitted to the SEC pursuant to Section 13 or 15(d) of *The Securities Exchange Act* of 1934.

[115] Therefore the negotiated and stated TPCO share value was far from irrelevant to TPCO. It was a representation about its share value which, by law, could not be misleading.

[116] Although Mr. Walker suggested that the parties could have chosen any share values at all and they would have been as "equally valid" as the \$0.98 and the \$1.50 transaction prices they mutually agreed on, this fails to take into account Old Gold Flora's convertible debentures. Mr. Hibben's opinion was that in the context of this particular Business Combination, the value of the shares also had to be disclosed because of convertible debentures of Old Gold Flora held by a third party. This is because the stated and agreed upon share value of Old Gold Flora value drove the conversion ratio at which Old Gold Flora's convertible debentures could be exchanged for shares in Gold Flora Corporation, which in turn would have a direct impact on TPCO's overall relative equity position.

[117] After numerous proposals, exchanged in the context of an open and unrestricted market, these arms length parties negotiated on and agreed to a \$0.98

(USD) TPCO share value. Their agreement followed extensive mutual due diligence and was the share value they agreed reflected what TPCO, as a publicly traded company, was able to bring to the table.

**E. TPCO's trading price**

[118] Mr. Johnston's opinion is that the market approach is the preferable method by which to determine *en bloc* fair value of TPCO shares. Mr. Johnston relied primarily on TPCO's stock market valuation, his choice of methodology was premised on his opinion that it provided objective market evidence and that "absent evidence to the contrary, it is generally accepted that the public trading price reflects the considered view of market participants as to the value of a company's shares".

[119] Mr. Johnston's analysis also considered indications from the Transaction. However, I note that in considering the Transaction Mr. Johnston assumed that the stated TPCO share value was "relevant to [TPCO] ... insofar as it impacted the resultant exchange ratio", but that "based on [his] review of [Castaneda #2] the absolute amount was not a particular focus of either party". He further assumed that the Transaction's stated TPCO share value "was a calculated number (based on the \$1.50 per unit that [Old] Gold Flora ascribed to itself and reflecting the exchange ratio agreed by the parties) and that neither the [stated TPCO stated share value] nor the [Old Gold Flora] \$1.50 per unit were supported by independent valuation analysis".

[120] As I have already outlined, Mr. Castaneda's evidence about the meaning of the stated TPCO share value and that value being a derivative of the share exchange ratio is unreliable. The reliability of Mr. Johnston's opinion, in assuming those facts, suffers as a consequence. Further, the TPCO and Old Gold Flora values stated in the Transaction were supported by the valuation work undertaken by Hyperion and INFOR in the course of preparing their independent fairness opinions.

[121] However, as outlined below those are not my only concerns about the reliability of Mr. Johnston's opinion.

**1. TPCO was not trading in an efficient market**

[122] As Mr. Johnston acknowledged during his cross-examination, a stock's trading price does not always reflect fair value because the market can both over and under value an entity. Where trading is characterized by low volume and liquidity, a low level of participation by informed investors, and a failure to respond to respond to value-relevant news, stock is not trading in an efficient market and market price is not a reliable indicator of share value.

[123] In my view, the evidence establishes that TPCO was not trading in an efficient market.

[124] As explained by Mr. Patton, efficient markets are characterized by sufficient liquidity to allow prices to incorporate new information and also by the presence of sophisticated investors who can correctly interpret the value implications of available information, and trade on any perceived mispricing. Mr. Patton's analysis reliably demonstrates that TPCO's stock did not react to value-relevant news, even though analysts covering TPCO stock prices were reacting. In fact, TPCO stock more often had a meaningful price adjustment when there was no news that would be relevant to stock value. This suggests that sophisticated investors were not setting the price of TPCO during the period analyzed by Mr. Johnston. Where unsophisticated "noise traders" dominate a market, the market price can be less reliable of a stock's value because they are making decisions based on beliefs that are neither fully rational or justified. Although Mr. Johnston says that serial correlation (or absence of correlation) doesn't necessarily establish market inefficiency, I accept that it is an indicia of market inefficiency.

[125] Further, in relying on market price, Mr. Johnston did not take into account that TPCO traded in an over the counter (OTC) market in the United States, which requires a broker, rather than on a fully accessible centralized public exchange like the NASDAQ or the NYSE. On cross-examination Mr. Johnston acknowledged that shares are more liquid (and therefore the market price is a more reliable indicator of value) when the stock is traded on a centralized exchange.

[126] Mr. Johnston’s opinion is one of the most important considerations in assessing whether stock market trading activity can be relied upon for fair value determination in the liquidity of its shares. According to Mr. Johnston, liquidity can be influenced by various factors, including where a stock is traded and how widely its shares are held. Companies that are more widely held tend to have a market for shares that is deeper (i.e. easier to buy and sell shares as there are numerous market participants) and hence more liquidity. The higher a company’s free float percentage (the shares of a company that can be publicly traded and are not restricted i.e. held by insiders) the greater the market liquidity. Mr. Johnston calculated TPCO’s free float to be 78.6%.

[127] However, a number of the TPCO shareholders on which Johnston relied as establishing a significant free float metric were “insiders” in relation to TPCO - related persons, TPCO directors, and even TPCO’s Chairman and CEO at the time of the transaction, Troy Datcher. Together, their combined shareholdings represented almost 51% of the shareholdings on which Mr. Johnston had relied. Mr. Johnston admitted on cross-examination that he did not know whether any of the shareholders he had relied on were insiders, or whether they would be shareholders on which a free float metric could be reliably determined.

***2. The petitioner’s expert’s company comparables provide a more reliable base for determining fair value***

[128] Mr. Johnston also undertook a secondary analysis that examined comparable companies, as a means of confirming his market valuation approach. In my view, his approach to selecting comparator companies was flawed in several material respects. As but one example, one comparable selected by Mr. Johnston was noted as having nil revenue for 24 months. First, in my view that is not an appropriate comparator for TPCO which had a revenue of approximately \$80,000,000 per year. Second, Mr. Johnston stated he had relied on data sources including the “Deloitte Analysis”, which was not defined or described, and Mr. Johnston acknowledged he had not taken steps to verify the accuracy of the data he had relied on. During cross-examination, Mr. Johnston was taken to evidence that demonstrated the information

about comparator companies, either as he had pulled it or as he had recorded it, contained serious inaccuracies. By contrast, Mr. Patton took steps to review source documents (in the form of quarterly and annual reports) to verify the accuracy and reliability of the data summary source he had relied on.

[129] Further, a majority of the peers Mr. Johnston selected were delinquent in their financial reporting, which as Mr. Patton points out and I find “often has a negative effect on share price which would correspondingly affect financial ratios such as the EV/LTM revenue multiple that the [First Johnston Report] computes for comparison with TPCO”. Further, Mr. Johnston did not treat lease liabilities in a consistent manner for TPCO and the peer comparators he chose, which adversely affects the reliability of his peer comparison results in my view.

[130] In contrast, I find the Mr. Patton’s choice of peer comparators was reasonable, that he undertook his various valuation methodologies rigorously, and that his analysis produced reliable results which I find persuasive.

**3. Fair value includes a control premium not recognized in TPCO’s trading price**

[131] The parties agree that fair value includes a control premium.

[132] Mr. Johnston’s opinion is that “any premium for control is already reflected in TPCO’s stock price at the Valuation date and it would be double counting to add any additional premium to determine the *en bloc* fair value of the shares of TPCO”. His opinion was based on his conclusion that while control premiums are paid for some transactions they are not paid in all, and that once the Merger had been announced “TPCO’s stock price should have priced in the market’s view of the value of the control premium that existed”.

[133] I disagree. Mr. Johnston’s opinion about an automatic market adjustment for control premium is dependent on the assumption that TPCO was trading in an efficient market, which I have rejected.

[134] Mr. Patton calculated a control premium based on precedent transactions by comparing the trading price, which is understood as reflecting a minority discount, with the deal purchase price. After excluding extreme values, the control premium ranged from 14.5% to 42.1% and adding those premiums to Mr. Patton's estimates of TPCO's fair market value per share resulted in a fair value of \$1.15 to \$2.31 per share as at the announcement date and \$0.73 to \$1.79 as at the valuation date. In other words, as at the valuation date the negotiated, agreed and stated TPCO share value fell within that range. In my view, this supports the conclusion that the \$0.98 per share price is the per share fair value.

## **VI. CONCLUSION**

[135] As part of a broad environmental scan of potential business opportunities by TPCO, during which TPCO was at all times focussed on the maximization of its share value, TPCO and Old Gold Flora - arms length parties - engaged in negotiations and their concluded Arrangement included an agreement to accord a value to the TPCO shares.

[136] In the lead up to concluding that Arrangement, a Special Committee was established and TPCO undertook extensive due diligence including obtaining advice about the value of both TPCO and Old Gold Flora, analyses that were tethered to the stated share values that TPCO and Old Gold Flora had agreed on.

[137] TPCO had significant value to contribute to the Merger, value that was not recognized in its trading price but was inherent in its *en bloc* value – its cash and what that meant for Old Gold Flora and its status as a publicly traded company. As part of the Merger TPCO brought a minimum of \$80,000,000 cash (net) to the combined entity (described in the Arrangement as the Minimum Cash Value) and a “working capital facility agreement”, by which TPCO had agreed to advance \$2,000,000 to Old Gold Flora at signing and that Old Gold Flora would be permitted to withdraw a further \$1,000,000 every 30 days thereafter, to a maximum of \$5,000,000, which it did.

[138] TPCO's status as a publicly traded company was a significant asset. A condition of the Arrangement was Gold Flora Corporation's approval as a publicly traded entity, which provided it with access to a capital market without the cost and risk associated with proceeding with its own initial public offering (IPO). Old Gold Flora's presentation to its investors in March 2023 heralded the Merger as transforming the privately held Old Gold Flora into a "publicly listed leader by revenue" and described the "consideration to [its] shareholders" in language confirming that the Arrangement stated share values, namely "[Old] GF at \$1.50 per [Old] Gold Flora Unit and [TPCO] at \$0.9847 per TPCO Share". Old Gold Flora repeated that information in its May 2023 presentation to its investors.

[139] The \$0.98 TPCO share value in the Arrangement had meaning. Having considered all of the evidence, the purposes for which the various evidence may properly be used, the applicable legal principles and the submissions of the parties, I find that meaning was the fair value of TPCO's shares, expressed in cash terms. It was the value TPCO used to inform its assessment of the proposed Merger, it was the value TPCO urged on its regulator and its shareholders. The stated TPCO share value may also have had meaning in relation to the tax implications of the Transaction, which evidence indicates TPCO's advisors took into account, and tax consequences for TPCO shareholders, although I do not base any of my factual findings or my determination of fair value on this point as there was no evidence or argument offered.

[140] For all of the reasons I have outlined, I find the payout value of the Petitioners' TPCO shares as at the statutory valuation date is \$.9847 (USD) per share.

## **VII. SUMMARY AND CONCLUSION**

[141] I find the fair value of the petitioners' TPCO shares is \$0.9847 (USD) per share as at the valuation date.

[142] Subject to further submissions by the parties on this issue, the Petitioners are entitled to pre-judgement interest on the fair value of their shares from the date on

which they delivered their respective notices of dissent to the date of this judgment, as well as post judgement interest, both in accordance with the *Court Order Interest Act*, RSBC 1996, c 79.

[143] I find the Petitioners were the successful parties in this proceeding. Subject to further submissions by the parties on this issue, the Petitioners are entitled to their costs of this proceeding, which I would fix at Scale C on the basis that the matter involved a difficult issue of fact, considered issues of first instance being dissent proceedings in the context of a merger rather than a share purchase transaction, was a matter of importance to both the parties to this proceeding as well as being of general interest given its first instance consideration of the issue I have noted, to be assessed by the Registrar failing agreement between the parties regarding quantum.

[144] In the event that either party wishes to make further submissions on the issues of costs or interest, they may arrange an appearance before me in accordance with the Court's Practice Direction 18. Any such Request to Appear must be submitted within 30 days of the date of this judgment.

"V. Jackson J."