

AMENDED THIS Sept 29, 2021 PURSUANT TO
MODIFIÉ CONFORMÉMENT À
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Toronto Superior Court of Justice / Cour supérieure de justice
 RULE/LA RÉGLE 26.02 ()

Court File No./N° du dossier du greffe: CV-20-00644524-00CP

THE ORDER OF JUSTICE AKBARALI
L'ORDONNANCE DU
DATED/FAIT LE SEPTEMBER 27, 2021

CV-20-00644524-00CP

Diane Rhoden

Digitally signed by Diane Rhoden
DN: cn=Diane Rhoden, o=Diane Rhoden@ontario.ca, c=US
Date: 2021.10.14 21:15:01 -0400

REGISTRAR

GREFFIER

ONTARIO SUPERIOR COURT OF JUSTICE

SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

B E T W E E N:

TIMOTHY KWONG

Plaintiff

– and –

**IANTHUS CAPITAL HOLDINGS, INC.,
HADLEY FORD AND JULIUS KALCEVICH**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO

PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY
CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$5,000.00 for costs, within the time for
serving and filing your statement of defence you may move to have this proceeding
dismissed by the court. If you believe the amount claimed for costs is excessive, you
may pay the plaintiff's claim and \$400 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has
not been set down for trial or terminated by any means within five years after the action
was commenced unless otherwise ordered by the court.

Date July 23, 2020

Issued by "E-Filed"
Local Registrar

330 ~~96~~ University Avenue, ~~10~~⁸ Floor (8th)
Toronto, Ontario M5G 1E6

TO:

McMILLAN LLP

Brookfield Place
181 Bay Street, Suite 4400
Toronto, ON M5J 2T3

Jeffrey Levine
Tel: 416.865.7791

Calie Adamson
Tel: 416.865.7240

On behalf of IANTHUS CAPITAL HOLDINGS, INC. and JULIUS KALCEVICH

AND TO:

DMG ADVOCATES LLP

1230-155 University Avenue
Toronto, ON M5H 3B7

Kathryn J. Manning
Tel: 416.238.7461

On behalf of HADLEY FORD

DEFINED TERMS

1. In addition to the terms defined in ss. 1(1) and 138.1 of the *Securities Act*, R.S.O. 1990, c. S. 5, and elsewhere herein, the following capitalized terms used throughout this Statement of Claim have the meanings indicated below:

(a) “**Canaccord**” means Canaccord Genuity Corp., the investment bank;

(b) “**CJA**” means the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(c) “**Class A**” means all persons, other than Excluded Persons, who acquired IAN’s common shares in the secondary market on or after April 12, 2019, and who held some or all of those securities until after the close of trading on April 5, 2020;

(d) “**Class B**” means all persons, other than Excluded Persons, who acquired IAN’s common shares prior to April 12, 2019, and who held some or all of those securities until after the close of trading on April 5, 2020;

(e) “**CPA**” means the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended;

(f) “**CSE**” means the Canadian Securities Exchange, a stock exchange based in Toronto, Ontario.

(g) “**Equivalent Securities Act**” means, collectively, the *Securities Act*, R.S.A. 2000, c. S-4, as amended; the *Securities Act*, R.S.B.C. 1996, c 418, as amended; *The Securities Act*, C.C.S.M. c. S50, as amended; the *Securities Act*, S.N.B. 2004, c. S-5.5, as amended; the *Securities Act*,

R.S.N.L. 1990, c S-13, as amended; the *Securities Act*, S.N.W.T. 2008, c. 10, as amended; the *Securities Act*, R.S.N.S. 1989, c. 418, as amended; the *Securities Act*, S Nu 2008, c. 12, as amended; the *Securities Act*, R.S.P.E.I. 1988, c S-3.1, as amended; the *Securities Act*, R.S.Q. c V-1.1, as amended; *The Securities Act*, 1988, S.S. 1988-89, c. S-42.2, as amended; and the *Securities Act*, S.Y. 2007, c. 16, as amended;

(h) “**Excluded Persons**” means any executive level employee of IAN and their immediate family members, any other investor that had knowledge of any of the impugned omitted material facts, and any person that issued a claim against IAN arising from acquiring IAN’s securities through a non-public transaction as of the date of the issuing of this Fresh as Amended Statement of Claim;

(i) “**GAAP**” means Generally Accepted Accounting Principles in Canada;

(j) “**GGP**” means Gotham Green Partners, LLC;

(k) “**IAN**” means iAnthus Capital Holdings, Inc., a responsible issuer;

(l) “**Impugned Statements**” means IAN’s documents released between May 14, 2018, and March 9, 2020; and

(m) “**Public Corrective Statement**” means the statement released by IAN dated April 6, 2020.

CAUSES OF ACTION

2. The causes of action asserted in this Claim are:

(a) Section 138.3 of the *OSA* as against the Defendants for releasing the

Impugned Statements containing misrepresentations;

(b) Common law secondary market misrepresentations against the Defendants for releasing the Impugned Statements containing misrepresentations; and

(c) Common law oppression against the Defendants for releasing the Impugned Statements containing misrepresentations and thus inducing the members of Class B to hold IAN's securities until after the release of the Public Corrective Statement.

RELIEF CLAIMED

3. The Plaintiff claims on his own behalf and on behalf of the members of the Classes:

(a) An order pursuant to s. 5 of the *CPA* certifying this action as a class proceeding and appointing the Plaintiff as the representative plaintiff for the Classes;

(b) An order granting leave to pursue the statutory causes of action set out in Part XXIII.1 of the *OSA* and the comparable provisions in the Equivalent Securities Acts for the period from when the Impugned Documents commencing with the F/2018 MD&A and financial statements were released until they were publicly corrected on April 6, 2020;

(c) A declaration that the Impugned Statements released by the Defendants contain misrepresentations related to IAN's business, operations and finances because the documents and statements omitted material facts concerning:

- (i) IAN and GGP, its creditor, had a, undisclosed until after the Class Period, side letter agreement that obligated IAN to provide GGP with a \$10 million exit fee that accrued at a 13% interest rate, which would become immediately due and payable upon default;
 - (ii) IAN did not re-establish, fund or maintain its interest escrow obligations arising from the September 30, 2019 loan facility;
 - (iii) Defendant Ford obtained an undisclosed loan in the amount of \$100,000 from GGP's managing partner and \$60,000 from the broker, which was later determined to be associated with multiple undisclosed loans to Defendant Ford totaling over \$300,000; and
 - (iv) IAN knew or should have known that it was not going to release its 4Q 2019 quarterly financial statements and MD&A ending December 31, 2019 in a timely manner.
- (d) Costs of this action on a full indemnity scale, or in an amount that provides substantial indemnity, plus, pursuant to s. 26(9) of the *CPA*, the costs of administering the plan of distribution of the recovery in this action; and
- (e) Such further and other relief that this Honourable Court deems just.

NATURE OF THIS ACTION

4. The Defendant IAN is one of Ontario's new-economy cannabis companies. It claimed to be one of the largest multi-state cannabis operators in the United States by developing, owning, and operating "best-in-class" licensed cannabis.

5. Between May 14, 2018 and March 9, 2020, IAN released statements within its core and non-core documents containing misrepresentations because they omitted material facts (i.e., the Impugned Documents).

6. On April 6, 2020, the Defendants released the Public Corrective Statement reporting that:

(a) IAN could not release its 4Q 2019 quarterly financial statements and MD&A ending December 31, 2019, and the 2019 annual financial statements and MD&A;

(b) It had engaged a Special Committee to investigate possible wrongdoing of Individual Defendant Ford;

(c) It had engaged, although the date was omitted, Canaccord to analyze various financial options for IAN that would result in a material change; and

(d) It had defaulted, including corresponding cross defaults, on its 13% senior secured and 13% unsecured convertible debentures.

7. On April 7, 2020, IAN's common shares closed down 64%, from \$0.67 to \$0.24. The price and value of IAN's common shares never recovered; most Class Members lost 100% of their investment.

8. Subsequent to the Class Period, which appears to have been discovered by the Special Committee of the Board of Directors, (i) IAN disclosed that it and GGP had a side letter agreement commencing with the May 2018 Loan that obligated IAN to provide GGP with a \$10 million exit fee that accrued at a 13% interest rate, which would become immediately due and payable upon default; and (ii) IAN did not re-establish, fund or maintain its interest escrow obligations arising from the September 30, 2019 loan facility, both of which contributed to the Public Corrective Statement and subsequent restructuring event.

THE PLAINTIFF

9. Plaintiff Timothy Kwong, a resident of Ontario, realized a loss by relying upon IAN's continuous disclosure documents and purchased IAN's securities during the Class Periods and held these securities until after the release of the Public Corrective Statement and suffered an economic injury greater than \$50,000.

10. The Plaintiff, individually and on behalf of the Classes, advances claims: (i) under sections 138.3(1) and (2) of the *OSA* for secondary market misrepresentations (and the concordant provisions of the Equivalent Securities Acts); (ii) at common law for secondary market misrepresentation; and (iii) common law for oppression.

THE DEFENDANT

11. IAN is a company incorporated pursuant to the British Columbia *Business Corporations Act*, that is based in Toronto, Ontario. During the Class period, it reported that its principal business address was located at 22 Adelaide Street West, Suite 2740, Toronto, Ontario M5H 4E3.

12. During and prior to the class period, IAN's securities were listed on and publicly traded on the CSE under the ticker symbol "IAN" with CUSIP identifier number 45074T, under ticker symbol "ITHUF" on the U.S. over-the-counter market, and under ticker symbol "2IA" on the Frankfurt Stock Exchange.

13. Hadley Ford was the Chief Executive Officer and a director of IAN during the relevant time period. Ford signed certification forms associated with the Impugned Documents allegedly affirming that they did not contain misrepresentations.

14. Julius Kalcevich was the Chief Financial Officer of IAN during the relevant time period. Kalcevich signed certification forms associated with the Impugned Documents allegedly affirming that they did not contain misrepresentations.

THE MATERIAL EVENTS

15. On **May 14, 2018**, IAN released a statement announcing that it closed a financing tranche with GGP in the amount of \$50 million, including \$40 million of high-yield secured notes and \$10 million worth of "units." On **May 24, 2018**, IAN released a corresponding Material Change Report of the May 2018 Loan with a copy of the loan.

16. This material information became part of the total mix of information to the market about IAN's business operations and finances. However, this impugned document contained misrepresentations because it omitted the following material facts:

(a) IAN and GGP had a side letter agreement that obligated IAN to provide GGP with a \$10 million exit fee that accrued at a 13% interest rate, which would become immediately due and payable upon default; and

(b) Defendant Ford obtained multiple undisclosed loans from counterparties to IAN, which was later determined to total over a few hundred thousand dollars.

17. On **April 12, 2019**, IAN released its F/2018 financial statements and MD&A. The Individual Defendants certified that these were accurate, conveyed a fair representation of IAN, and that there were no misrepresentations.

18. This material information became part of the total mix of information to the market about IAN's business operations and finances. However, this impugned document contained misrepresentations because it omitted the following material facts:

(a) IAN and GGP had a side letter agreement that obligated IAN to provide GGP with a \$10 million exit fee that accrued at a 13% interest rate, which would become immediately due and payable upon default; and

(b) Defendant Ford obtained multiple undisclosed loans from counterparties to IAN, which was later determined to total over a few hundred thousand dollars.

19. On **September 30, 2019**, IAN released a statement announcing that it had closed its tranche of a \$20 million senior secured convertible note with GGP as part of a broader \$100 million credit facility (i.e., the September 2019 Loan). On **October 10**,

2019, IAN released a corresponding Material Change Report of the September 2019 Loan with a copy of the loan (Second Amended), which included a debt covenant to establish an Interest Escrow in the amount of US\$5.27 million.

20. This material information became part of the total mix of information to the market about IAN's business operations and finances. However, this impugned document contained misrepresentations because it omitted the following material facts:

- (a) IAN and GGP had a side letter agreement that obligated IAN to provide GGP with a \$10 million exit fee that accrued at a 13% interest rate, which would become immediately due and payable upon default;
- (b) Defendant Ford obtained multiple undisclosed loans from counterparties to IAN, which was later determined to total over a few hundred thousand dollars; and
- (c) IAN did not re-establish, fund or maintain its interest escrow obligations arising from the September 30, 2019 loan facility.

21. On **November 20, 2019**, IAN released its 1Q 2019 financial statements and MD&A. The Individual Defendants certified that these were accurate, conveyed a fair representation of IAN, and that there were no misrepresentations.

22. This material information became part of the total mix of information to the market about IAN's business operations and finances. However, this impugned document contained misrepresentations because it omitted the following material facts:

- (a) IAN and GGP had a side letter agreement that obligated IAN to provide GGP with a \$10 million exit fee that accrued at a 13% interest rate, which would become immediately due and payable upon default;
- (b) Defendant Ford obtained multiple undisclosed loans from counterparties to IAN, which was later determined to total over a few hundred thousand dollars; and
- (c) IAN did not re-establish, fund or maintain its interest escrow obligations arising from the September 30, 2019 loan facility.

23. On **December 20, 2019**, IAN released a news release announcing that it had closed its initial tranche of a \$36 million senior secured convertible note with GGP as part of a broader \$100 million credit facility (i.e., the December 2019 Loan). On **December 30, 2019**, IAN released a corresponding Material Change Report of the December 2019 Loan with a copy of the loan.

24. This material information became part of the total mix of information to the market about IAN's business operations and finances. However, this impugned document contained misrepresentations because it omitted the following material facts:

- (a) IAN and GGP had a side letter agreement that obligated IAN to provide GGP with a \$10 million exit fee that accrued at a 13% interest rate, which would become immediately due and payable upon default;
- (b) IAN did not re-establish, fund or maintain its interest escrow obligations arising from the September 30, 2019 loan facility; and

(c) Defendant Ford obtained an undisclosed loan in the amount of \$100,000 from GGP's managing partner and \$60,000 from the broker, which was later determined to be associated with multiple undisclosed loans to Defendant Ford totaling over \$300,000.

25. On **March 9, 2020**, IAN released a non-core statement that its 4Q 2019 quarterly financial statements and MD&A ending December 31, 2019 and the 2019 annual financial statements and MD&A would be released late on April 6, 2020.

26. This material information became part of the total mix of information to the market about IAN's business operations and finances. However, this impugned document contained misrepresentations because it omitted the following material facts:

(a) IAN and GGP had a side letter agreement that obligated IAN to provide GGP with a \$10 million exit fee that accrued at a 13% interest rate, which would become immediately due and payable upon default;

(b) IAN did not re-establish, fund or maintain its interest escrow obligations arising from the September 30, 2019 loan facility;

(c) Defendant Ford obtained an undisclosed loan in the amount of \$100,000 from GGP's managing partner and \$60,000 from the broker, which was later determined to be associated with multiple undisclosed loans to Defendant Ford totaling over \$300,000; and

(d) IAN knew or should have known that it was not going to release its 4Q 2019 quarterly financial statements and MD&A ending December 31, 2019, and the 2019 annual financial statements and MD&A in a timely manner.

27. On **April 6, 2020**, rather than releasing its 4Q 2019 quarterly financial statements and MD&A ending December 31, 2019, and the 2019 annual financial statements and MD&A, IAN released the Public Corrective Statement declaring that:

(a) It could not release its 4Q 2019 quarterly financial statements and MD&A ending December 31, 2019, and the 2019 annual financial statements and MD&A;

(b) It had engaged a Special Committee to investigate wrongdoing of Defendant Ford;

(c) It had engaged, although the date was omitted, Canaccord to analyze various financial options for IAN; and

(d) It had defaulted, including corresponding cross defaults, on its 13% senior secured and 13% unsecured convertible debentures.

28. On **April 7, 2020**, IAN's common shares closed down 64%, from \$0.67 to \$0.24, resulting in tens of millions of damages. The share price has never recovered.

POST CLASS PERIOD PUBLIC CORRECTIVE STATEMENTS

29. On **April 27, 2020**, Hadley Ford resigned as a director and officer of IAN.

30. On **June 23, 2020**, IAN released a statement announcing that GGP served a demand for payment of all prior loans with interest, fees, costs, and other allowable charges (which is now known to include the \$10 million exit fee) and intention to enforce payment under section 244 of the Bankruptcy and Insolvency Act.

31. On **July 31, 2020**, IAN released its 4Q 2019 quarterly financial statements and

MD&A ending December 31, 2019, and the 2019 annual financial statements and MD&A. For the first time, IAN disclosed that it and GGP had a side letter agreement that obligated IAN to provide GGP with a \$10 million exit fee that accrued at a 13% interest rate, which would become immediately due and payable upon default.

32. On **August 14, 2020**, IAN released its 1Q 2020 financial statements and MD&A. IAN disclosed that the accrued interest was \$2.164 million. By year end 2020, the interest had ballooned to \$3.8 million.

NO STATUTORY DEFENCE FOR FORWARD-LOOKING INFORMATION

33. To the extent that any of the disclosure documents or public statements addressed in this Fresh as Amended Statement of Claim contained forward-looking information, some or all of those forward-looking statements constituted misrepresentations because the Defendants had no reasonable basis for the underlying assumptions on which the forward-looking information was based, for the reasons particularized above.

34. Further or in the alternative, to the extent that the statutory defences in sections 132.1 and 138.4 of the *OSA* do apply to any forward-looking statements pleaded herein, the Defendants are liable for those forward-looking statements containing the alleged misrepresentations because, at the time each of those forward-looking statements was made, the Defendants knew or should have known that the particular forward-looking statements were misrepresentations for the reasons alleged herein.

THE MISREPRESENTATIONS AND THE PRICE OF IAN'S SECURITIES

35. The price and value of IAN's securities were directly affected each time the Defendants disclosed (or omitted to fully disclose) material changes and material facts about IAN's financial statements and MD&A.

36. The Defendants intended that the members of Class would rely upon these disclosures, which they did to their detriment, in purchasing and holding the common shares.

37. The disclosure documents referred to herein were filed with SEDAR and thereby became available to and were reproduced for inspection for the benefit of the Plaintiff and the other members of Class, the public, financial analysts and the financial press through the internet and financial publications.

38. The price at which IAN's securities traded incorporated the information contained in the disclosure documents referred to herein.

THE VICARIOUS LIABILITY OF IAN

39. The acts particularized and alleged in this Statement of Claim to have been done by IAN were authorized, ordered and done by the senior officers, agents, employees and representatives who were engaged in the management, direction, control and transaction of IAN's business, finances, and operations and are, therefore, acts and omissions for which IAN is vicariously liable.

STATUTORY LIABILITY UNDER THE *OSA*

40. The Plaintiff will seek leave under s. 138.8(1) of the *OSA* to assert, on behalf of himself and the members of the Class, the causes of action set out in Part XXIII.1 of the

OSA in respect of the Impugned Statement and the Public Corrective Statement dated April 6, 2020.

41. As a result of the conduct of the Defendant as alleged, the Plaintiff and each other member of Class suffered losses and damages as a result of acquiring IAN's securities at artificially inflated prices and holding some or all of those securities until after the Public Corrective Statement because, at a minimum, each of IAN's quarterly reports were not reliable enough to consolidate into an AIF or annual audited financial report and MD&A for year 2019.

42. Therefore, the Defendants are liable to pay damages pursuant to s. 138.5 of the *OSA* to the Plaintiff and to the other members of the Class.

43. The Plaintiff and the other members of Class are also entitled to recover as damages, or costs in accordance with the *CPA*, the Plaintiff's legal fees and the costs of administering the plan to distribute the recovery in this action.

REAL AND SUBSTANTIAL CONNECTION WITH ONTARIO

44. This action has a real and substantial connection with Ontario because, among other things:

- (a) IAN is a reporting issuer in Ontario; and
- (b) There are members of the Class who are residents of Ontario, relied on IAN's disclosure documents in Ontario, acquired IAN securities in Ontario and suffered damage and loss in Ontario.

RELEVANT LEGISLATION

45. The Plaintiff pleads and relies upon the *CJA*, the *CPA*, NI 51-102, NI 52-109, the

OSA, and the Equivalent Securities Acts.
July 23, 2020
Date: ~~September XXX, 2021~~

M. SINGH LAW, P.C.
TH05 - 2220 Lake Shore Blvd., W.
Toronto, Ontario M8V 0C1

Manjit Singh (LSO#: 55976D)
msingh@msinghlaw.ca
Tel.: (647) 722-8400

KIM SPENCER MCPHEE BARRISTERS, P.C.
1200 Bay Street, Suite 1203
Toronto, Ontario M5R 2A5

Andrew J. Morganti (LSO#: 57895E)
amorganti@investorcomplexlaw.com
Tel.: (248) 787-6078

Lawyers for the Plaintiff

Case File No.: CV-20-00644524-00CP

TIMOTHY KWONG - and - **IANTHUS CAPITAL HOLDINGS, INC., et al.**
Plaintiff Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

FRESH AS AMENDED STATEMENT OF CLAIM

M. SINGH LAW PROFESSIONAL CORPORATION

TH05 - 2220 Lake Shore Blvd., W.
Toronto, Ontario M8V 0C1

Manjit Singh (LSO#: 55976D)

msingh@msinghlaw.ca

Tel.: (647) 722-8400

Lawyer for the Plaintiff