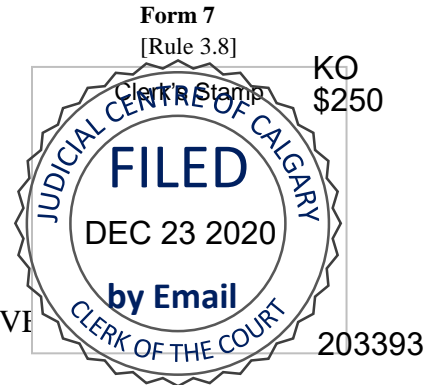


COURT FILE NUMBER 2001-17016
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
APPLICANT STEPHEN SMYTH AS REPRESENTATIVE APPLICANT
RESPONDENT TERVITA CORPORATION
DOCUMENT **ORIGINATING APPLICATION**



ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
LAWSON LUNDELL LLP
Barristers and Solicitors
1100, 225 – 6th Avenue SW
Calgary, AB T2P 2V7
Tel: (403) 269-6900
Fax: (403) 269-9494
Email: gvogeli@lawsonlundell.com / jselnes@lawsonlundell.com
File No. 037384-151880

Attention: Grant Vogeli, Q.C. and Jonathan H. Selnes

NOTICE TO THE RESPONDENT TERVITA CORPORATION

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date: ~~Tuesday, January 26, 2021~~ March 1, 2021
Time: 10:00 a.m.
Where: Calgary Courts Centre Virtually, via WebEx
Before: Justice in Chambers

Go to the end of this document to see what you can do and when you must do it.

To appear by video:

<https://www.albertacourts.ca/qb/court-operations-schedules/scheduling>

Civil Chambers - Virtual Courtroom 58 (CCC QB)

To appear by telephone:

Dial in Number: 780-851-3573

Access code: 968 555 507

Basis for this claim:

1. The Representative Applicant, Stephen (Steve) Smyth, seeks to vindicate his shareholder rights, as well as the rights of the individuals in the same situation as himself, that he received during his employment with the Respondent, Tervita Corporation (**Tervita**).
2. Tervita established a long-term incentive plan that rewarded certain employees with restricted stock option units. Tervita oppressively and unlawfully failed to abide by the contractual terms that Tervita established and unilaterally purported to amend for the vesting of the awards that vested on January 2, 2020 based on a purported blanket black-out period. While a handful of Tervita's senior employees were under black-out, there was no such general black-out period under Tervita's policies. The failure to vest and/or pay the long-term incentives in accordance with the amended policies caused damages to unit holders not in black-out and benefited Tervita.

The Parties

3. Mr. Smyth is an individual resident in Calgary, Alberta. Mr. Smyth was employed by the Respondent Tervita as in-house legal counsel and senior legal counsel from 2012 to 2017.
4. Mr. Smyth brings this action on his own behalf and on behalf of all persons who are current and former employees (excluding those that are Designated Individuals as defined and recognized under Tervita's Insider Trading Policy, were terminated for cause, or voluntarily quit) of Tervita who were granted RSUs pursuant to Tervita's 2017 Restricted Stock Unit Plan with a maturity date of January 2, 2020, but did not materially vest until March 27, 2020 (the **Class**).
5. The Respondent, Tervita, is a corporation incorporated pursuant to the laws of Alberta with its registered office in Calgary, Alberta.

The Claim against Tervita

Tervita's Restricted Stock Unit Plan

6. In 2016, Tervita restructured its affairs under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 (**CCAA**). Following Tervita's restructuring under the CCAA, the company established the 2017 Restricted Stock Unit Plan (**RSU Plan**). Tervita issued restricted stock units as a form of long-term incentive for selected employees as participants, which were intended to:
 - (a) assist in attracting, retaining, engaging, and rewarding participants of Tervita (Article 1); and
 - (b) provide an opportunity for participants to earn competitive total compensation (Article 1).

7. The materials terms of the RSU Plan include, *inter alia*:
- (a) Tervita would grant certain employees RSUs (Article 4).
 - (b) Each participant employee to whom RSUs were granted would enter into a Restricted Stock Unit Agreement, which set out the number of RSUs, the term, the maturity date, and the circumstances when the maturity of the RSUs might be accelerated (Article 14(a)).
 - (c) Tervita's Board may, in its discretion but subject to any necessary approvals, provide for the extension of the maturation of a RSU, waive any restriction or other provision of the RSU Plan or a RSU or otherwise amend or modify a RSU in any manner that is either:
 - (i) not adverse to the holder of such RSU, or
 - (ii) consented to by such RSU holder.

(Article 3(b))
 - (d) Each RSU granted pursuant to the RSU Plan will have a fixed term of not more than 36 months following the grant date of the RSU (Article 5).
 - (e) The maturity date of the RSUs is the day which is 36 months following the grant date of the RSU (Article 5).
 - (f) The amount payable to each participant will be determined by multiplying the number of RSUs held by such participant that matured on the maturity date of such RSU by the fair market value of the shares as at the maturity date (Article 6(a)).

“Fair Market Value” is defined in the RSU Plan as “the volume weighted average trading price of the Shares on Exchange (or if the Shares are listed on more than one Exchange, on such Exchange as may be designated by the Board for such purpose) for the five Trading Days immediately preceding the date of grant of Restricted Stock Units and, for this purpose, the volume weighted average trading price shall be calculated by dividing the total volume of Shares traded for such period” (Article 2(k)).

“Exchange” is defined in the RSU Plan as “the Toronto Stock Exchange or such other stock exchange on which the Shares are listed and posted for trading” (Article 2(j)).

- (g) The amount payable to each participant will be paid as reasonably practicable following the maturity date (Article 6(b)).
 - (h) Tervita's Board may revise, suspend, or discontinue the RSU Plan in whole or in part if in its sole discretion it determines that such revision is in the best interest of Tervita. No revision or suspension or discontinuance shall alter or impair the rights of a participant in respect of matured RSUs of such participant without the consent of the participant (Article 12).
 - (i) The RSU Plan is dated effective as of January 1, 2017 (Article 17).
8. Mr. Smyth was granted 5,100 RSU's at a grant price of \$10.00 per unit on June 1, 2017 pursuant to the terms of the RSU Plan.
 9. The RSUs granted to Mr. Smyth matured on January 2, 2020 (**Maturity Date**). Payouts of RSUs were to be made by Tervita as soon as reasonably possible after the Maturity Date.
 10. Prior to maturity, Mr. Smyth and a number of other RSU holders were no longer employed with Tervita, but they continued to maintain a portion of their RSUs and associated RSU holder's rights after the cessation of their employment pursuant to the termination terms of the RSU Plan.

Tervita's purported RSU Amendments, none of which affected the Maturity Date nor allowed for a deferred vesting of the RSUs held by the Class Members

11. Tervita was a private company until a merger that occurred on or about July 19, 2018. At the time the merger was announced, Tervita confirmed with RSU holders that all RSUs remained outstanding and expressly stated that RSUs continued to vest on the same basis as before.
12. Tervita purported to make amendments to the RSU Plan on April 30, 2018, which were referenced in Appendix "E" that was part of Tervita's 2019 Annual Circular (the **RSU Amendments**).
13. The RSU Holders did not receive any notice of these purported RSU Amendments.
14. The purported RSU Amendments were not posted on Shareworks (previously called Solium) with the other plan documents nor were they circulated to RSU holders in any manner.

Tervita's Insider Trading Policy

15. As a public company, Tervita also established an Insider Trading Policy (the **ITP**). The purpose of Tervita's ITP is to "explain certain legal concepts and to implement certain rules with respect to trading and reporting of trading in the securities by certain persons who are

either employed by Tervita and its subsidiaries or in a particular relationship with Tervita” (Article 1).

16. The material terms regarding blackout periods in Tervita’s ITP include the following, *inter alia*:

(a) Tervita’s ITP applies to all persons in a “Special Relationship” with Tervita (Article 2).

"Special Relationship" is defined in Tervita’s ITP as meaning “persons in a special relationship with the Corporation and may include (but is not limited to):

(a) directors, officers, and employees of the Corporation;

(b) any person retained by or engaged in any business or professional activity with or on behalf of the Corporation (such as a consultant, independent contractor, or adviser);

(c) a family member, spouse or other person living in the household or a dependent child of any of the individuals referred to above;

(d) partnerships, trusts, corporations, RRSP's, and similar entities over which any of the above-mentioned individuals exercise control or direction;

(e) directors and officers of corporations which have a significant investment (more than 10%) in the Corporation's equity; and

(f) any person who learns of a material fact or material change from any person referred to above.” (Article 3)

(b) Scheduled Blackout Period for Designated Individuals commence on the day following the end of a quarter and continue through the end of two (2) full days of trading following the issuance of a news release disclosing quarterly and/or annual financial results (Article 8.1).

(c) In addition to the regularly scheduled Blackout Periods for Designated Individuals and Blackout Periods following the release of material information that apply to Designated Individuals or those with actual knowledge of material information, additional Extraordinary Blackout Periods may, upon notice, be prescribed to certain individuals from time to time by Tervita’s CFO at any time at which it is determined there may be undisclosed Material Non-Public Information concerning the Corporation that makes it inappropriate for such individuals to be trading (Article 8.3).

“Blackout Period” is defined in Tervita’s ITP as “the period during which trading in the Securities is prohibited” (Article 3).

“Designated Individuals” are defined in Tervita’s ITP as “all individuals who are:

- (i) directors of the Corporation;
- (ii) executive officers of the Corporation; or
- (iii) involved in the preparation and/or review of the Corporation’s financial statements or with knowledge of financial results and information therein contained.

A list of Designated Individuals will be maintained by the CFO and all affected individuals will be advised of their status” (Article 3).

- 17. Tervita’s ITP does not apply to Mr. Smyth, nor any of the proposed members of the Class, as they were not in a “Special Relationship” with Tervita as defined in Tervita’s ITP.
- 18. Mr. Smyth, nor any of the proposed members of the Class, are “Designated Individuals” and they do not fit within its definition in Tervita’s ITP. No additional Blackout Periods were proscribed by Tervita’s Chief Financial Officer during the material time and on March 16, 2020, Tervita confirmed that for the purported Blackout Period in question it did not have any Material Non-Public Information.

Tervita’s Incentive Unit Plan

- 19. In 2018, Tervita introduced the current Incentive Unit Plan (**IUP**) for RSU’s that were granted in 2018.
- 20. The introduction of Tervita’s IUP did not change Tervita’s obligations under the RSU Plan, as Tervita’s IUP expressly states:

21. Effective Date

This Plan has been amended and restated effective as of December 31, 2018 and the amendments do not constitute, in whole or in part, a new incentive unit plan or a new grant of Share Units or a novation of the Plan or any Share Units granted under the Plan prior to December 31, 2018.

- 21. There are no provisions in Tervita’s IUP that affect the original Maturity Date of Tervita’s RSU Plan.

Tervita’s Breach of its RSU Plan

- 22. On December 2, 2019, Tervita used Shareworks to provide RSU holders with a 30-day vesting notice, confirming the vesting date of January 2, 2020.

23. On December 27, 2019, Tervita provided former employees that were RSU holders with a 5-day vesting notice, confirming the vesting date of January 2, 2020.
24. On December 29, 2019, two days after its last notice, Tervita inexplicably took the position that securities laws prevented Tervita from paying out the RSUs on the Maturity Date for all unit holders as Tervita *itself* was in a mandatory blackout. This was, in fact, not true.
25. Tervita's position is not contemplated by the ITP as the ITP applies to persons in a "Special Relationship" with the Tervita, which does not include Tervita itself. The ITP does not apply to Mr. Smyth nor the other Class members as they were not in a "Special Relationship" with Tervita nor were they "Designated Individuals" at the relevant time.
26. There was no basis for a blanket blackout applicable to RSU holders. Further, there was no restriction in the RSU Plan nor the related RSU documents that prevented Tervita from vesting the RSUs as of the Maturity Date.
27. The RSU Amendments confirm that the pushing out of the Maturity Date only applies when the *RSU holder* is subject to a blackout. The settlement provisions of the RSU Amendments state:

Settlement Provisions

All vested Restricted Share Units will be settled within 60 days of their Maturity Date and, in any event, no later than December 15 of the third year following the end of the year in which the Restricted Share Unit will be granted (the "**Settlement Date**"). If a Settlement Date falls on, or within nine business days immediately following a date upon which the holder of Restricted Share Units will be subject to trading restrictions due to a Black-Out Period then the Settlement Date will be automatically extended to the 10th business day following the date the relevant Black-Out Period ends ... [emphasis added]

28. This express provision would be redundant and unnecessary if Tervita was prevented from vesting RSUs for all RSU holders.
29. Subsequently, Tervita's representative acknowledged that the Class members were not subject to a Blackout Period. However, Tervita's representative took the position that a non-binding practice was the only reason the non-Designated Employees were not paid out on January 2, 2020.
30. There were no Blackout Periods that applied universally to Tervita in its ITP, RSU Plan, or IUP that prohibited the payment or vesting of the RSUs on the Maturity Date in the RSU Plan. Nor was there any mechanism for Tervita to delay the payment or the vesting of the RSUs. Despite this, and numerous protests by the Class members, Tervita asserted that a universal Blackout Period from January 2, 2020 to March 16, 2020 prevented the payment or vesting of awards.
31. During the course of the oppressively and unlawfully imposed purported Blackout Period, the Class members' legal counsel demanded Tervita fulfill its obligation to pay the RSU

holders based on the Fair Market Value of the share price as it ought to have be calculated on January 2, 2020, but Tervita refused.

32. The RSUs were eventually paid to all RSU holders on March 27, 2020 (the **Payout Date**).
33. Payment under the RSU Plan was based on the average closing stock prices for the 5-trading days preceding the Payout Date. The total payout to all RSU holders was approximately \$650,000.00 less than it would have been using the original Maturity Date of January 2, 2020.
34. As a result of Tervita's breach of the RSU Plan and its obligations to the holders of RSUs, the Class has suffered significant detriment and harm and Tervita has been enriched in this same amount.
35. To date, there are approximately 65 known RSU holders that were affected by Tervita's breach.

Class Certification

36. This Originating Application discloses a cause of action.
37. There is an identifiable class of two or more persons.
38. The claims of the prospective class members raise common issues.
39. A class proceeding is the preferable procedure for the fair and efficient resolution of the common issues.
40. There is an eligible person to be appointed as a representative applicant who will:
 - (a) Fairly and adequately represent the interest of the Class;
 - (b) Have produced a plan for the proceeding as set out in Schedule "A", attached hereto, which provides a workable method of advancing the proceeding on behalf of the Class; and
 - (c) Do not have, in respect of the common issues, an interest that is in conflict with the interests of the other prospective class members.
41. The representative applicant has the resources, knowledge, and certain records that would enable him to conduct the case on behalf of the Class members.

Remedy sought:

42. Mr. Smyth, on behalf of himself and the Class, claims against Tervita as follows:

- (a) A declaration that the Class members' rights pursuant to the 2017 Restricted Stock Unit Plan were violated by Tervita when Tervita imposed a blackout period between January 2, 2020 and March 16, 2020, pushing the Maturity Date of the Restricted Stock Units from its rightful date of January 2, 2020 to March 27, 2020, which harmed the Class and resulted in a material difference in payouts to the Class;
 - (b) Alternatively, a declaration that the Class members' RSU units should have vested on January 2, 2020 and been paid on that date or this vested amount should have been withheld and paid on March 27, 2020;
 - (c) Damages in the sum of \$650,000.00 or such other amount as proven at trial;
 - (d) Interest Pursuant to the *Judgement Interest Act*, RSA 2000, c J01, as amended;
 - (e) Costs of this Application, and
 - (f) Any other relief that this Honourable Court may allow.
43. Mr. Smyth, on behalf of himself and the Class, seek an Order:
- (a) Certifying this proceeding as a class proceeding;
 - (b) Appointing Steve Smyth as the Representative Applicant;
 - (c) Describing the Class as all persons who are current and former employees of the Tervita (excluding those that are Designated Individuals as defined and recognized under Tervita's Insider Trading Policy, were terminated for cause, or voluntarily quit) who were granted RSUs pursuant to Tervita's 2017 Restricted Stock Unit Plan with a Maturity Date of January 2, 2020, but did not materially vest until March 27, 2020;
 - (d) Stating the nature of the claims asserted on behalf of the Class;
 - (e) Stating the relief sought by the Class;
 - (f) Setting out the common issues of the Class as:
 - (i) Whether the value of the RSUs granted under the January 1, 2017 Restricted Stock Unit Plan should have vested on January 2, 2020.
 - (ii) Whether the payment under the January 1, 2017 Restricted Stock Unit Plan should have been made to individuals who received 2017 RSU grants on the Maturity Date of January 2, 2020.

- (iii) Whether Tervita violated its contractual obligations under the January 1, 2017 Restricted Stock Unit Plan by imposing a purported blackout period running from January 1, 2020 until March 16, 2020, making RSU payouts 10 business after the Blackout Period.
- (iv) Whether damages should be calculated and awarded using \$7.41 per share as the fair market value of Tervita's share price pursuant to the Restricted Stock Unit Plan for individuals who received 2017 RSU grants.
- (g) Approving the attached Schedule "A" Representative Applicant's Plan for Proceeding, or such other plan as directed by this Honourable Court.

Affidavit or other evidence to be used in support of this application:

- 44. Affidavit of Stephen Smyth sworn on December 23, 2020 and filed herein.
- 45. Any other materials filed or presented by the Applicant and this Honourable Court may permit.

Applicable Rules, Acts, and Regulations:

- 46. *Alberta Rules of Court*, Alta Reg 124/201, Rules 2.7, 2.9, 10.7, and 13.11.
- 47. *Class Proceedings Act*, SA 2003, c C-16.5.
- 48. Such further and other Rules, Acts and/or Regulations as counsel may advise and this Honourable Court may permit.

Any irregularity complained of or objection relied on:

- 49. None.

How the application is proposed to be heard or considered:

- 39. By the Presiding Justice in Chambers.

WARNING

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant and against all persons claiming under the applicant. You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant is entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the

date and at the time shown at the beginning of this form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant a reasonable time before the application is to be heard or considered.

SCHEDULE “A”

REPRESENTATIVE APPLICANT’S PLAN FOR PROCEEDING

General

The Representative Applicant proposes that, once certified, matters pertaining to the common issues proceed in accordance with the plan set out below (the **Plan**), subject to Court approval and subject to any amendments of the Plan, as directed by the Court.

The Representative Applicant will abide by the requirements of the *Class Proceedings Act, SA 2003, c C-16.5*, as amended (the **Act**), and applicable Alberta *Rules of Court*.

Amendment of Originating Application

The filing and service of an Amended Originating Application, if necessary, to conform with the terms of the certification order, will be completed by _____.

Notice of Certification

Subject to the direction this Honourable Court, the Representative Applicant proposes the following with respect to the providing of notice of certification to the potential Class members:

1. Means of Giving Notice

Notice to all potential Class members will be given in the following manner:

- (a) Mail to the last known address provided by Tervita of individuals who were granted RSUs under the 2017 RSU Plan;
- (b) Advertising in various newspapers throughout Alberta and Canada; and
- (c) A website to be hosted by Lawson Lundell LLP.

2. Cost of Giving Notice

The cost of giving notice to the potential Class members will be paid for at first instance by the Respondent.

3. Timing of Notice

Notice to all potential class member will be given by _____.

4. Content of the Notice

The notice will:

- (a) Describe the nature of the action and relief sought as:

In 2017, Tervita Corporation (**Tervita**) established a Restricted Stock Unit Plan (**RSU Plan**) as part of its compensation agreement with its employees. The RSU Plan had an effective date of January 1, 2017, and had a maturity date of January 2, 2020. In December 2020, despite Tervita sending two vesting notices confirming the maturity date of the RSUs as January 2, 2020, inexplicably changed its position and purportedly imposed an improper blackout period, against the terms of the RSU Plan. This purported blackout period pushed back the maturity date from January 2, 2020 to March 16, 2020. The RSUs were eventually paid to all RSU holders on March 27, 2020 (**Payout Date**). Payment under the RSU Plan was based on the average closing stock prices for the 5 trading days preceding the Payout Date, which resulted in a significant decrease in RSU payments to RSU holders.

An action has been commenced against Tervita to recover the loss in payout amounts to eligible RSU holders. In a class action one or more people called a “class representative” sue on behalf of the people who have similar claims. In this case, the class representative is Stephen Smyth, a former employee of Tervita from 2012 to 2017. All of these people are a “Class”. The court resolves the issues in common to everyone affected; except for those who remove themselves (opt out) from the Class.

(Tervita 2017 Restricted Stock Unit Plan Class Action Lawsuit)

- (b) Provide the definition of the class as:
- (i) as all persons who are current and former employees (excluding those that are Designated Individuals as defined and recognized under Tervita’s Insider Trading Policy, were terminated for cause, or voluntarily quit) of the Tervita who were granted RSUs pursuant to Tervita’s 2017 Restricted Stock Unit Plan with a maturity date of January 2, 2020, but did not materially vest until March 27, 2020 (the **Class**).
- (c) Set out the common issues as:
- (i) Whether the value of the RSUs granted under the January 1, 2017 Restricted Stock Unit Plan should have vested on January 2, 2020.
 - (ii) Whether the payment under the January 1, 2017 Restricted Stock Unit Plan should have been made to individuals who received 2017 RSU grants on the Maturity Date of January 2, 2020.

- (iii) Whether Tervita violated its contractual obligations under the January 1, 2017 Restricted Stock Unit Plan by imposing a blackout period running from January 1, 2020 until March 16, 2020, making RSU payouts 10 business after the Blackout Period.
- (iv) Whether damages should be calculated and awarded using \$7.41 per share as the fair market value of Tervita's share price pursuant to the Restricted Stock Unit Plan for individuals who received 2017 RSU grants.
- (d) State that the judgment on the common issues for the Class, whether reached by settlement or otherwise and whether favourable or not, will bind all member of the Class who do not opt out of the proceeding.
- (e) Provide the address, email address and phone number for Lawson Lundell LLP, attention: Grant Vogeli, Q.C. and Jonathan H. Selnes to which potential Class member may direct their inquiries about the proceedings and to provide their contact information.
- (f) Summarizing the agreement between Lawson Lundell LLP and the Representative Applicant respecting fees and disbursements.
- (g) Provide that a potential Class member may opt out of the proceeding by giving notice, in writing, to Lawson Lundell LLP, attention: Grant Vogeli, Q.C. and Jonathan H. Selnes which notice must be received by _____ and which notice will state:

If you would like to opt out of the Tervita 2017 Restricted Stock Unit Plan Class Action Lawsuit, you must advise Lawson Lundell LLP, by no later than _____, of your desire to do so. Your notice must be submitted in writing, and should include the following information:

- Your full name, current address, and telephone number;
- A statement that you wish to opt out of the Tervita 2017 Restricted Stock Unit Plan Class Action Lawsuit; and
- The number of Restricted Stock Units granted to you and the date that they were granted to you

Please send your notice my mail to:

Lawson Lundell LLP
 1100, 225 – 6th Avenue SW
 Calgary, AB T2P 2V7
 Attention: Grant Vogeli, Q.C. and Jonathan H. Selnes
 Or via fax to: (403) 269-9494

Or via email to: gvogeli@lawsonlundell.com
or
jselnes@lawsonlundell.com

(h) Give any other information this Honourable Court deems appropriate.

Updates to Class Members

Updates with respect to the status of the class proceeding will be provided by way of letter correspondence by mail which will be mailed to all Class members to the addresses provided by Tervita and by posting information on the website hosted by Lawson Lundell LLP.

Information Disclosure

Completion and exchange of records and the conducting of questioning on affidavits to the parties to the proceeding will be completed in accordance with the relevant provisions of the *Alberta Rules of Court*, subject to any agreement between the parties or as this Honourable Court otherwise orders.

Damages

It is proposed that damages for each member of the Class be quantified using \$7.41 per share as the fair market value of Tervita's share price pursuant to the Restricted Stock Unit Plan for individuals who received 2017 RSU grants.

Basis for this claim:

1. The Representative Applicant, Stephen (Steve) Smyth, seeks to vindicate his shareholder rights, as well as the rights of the individuals in the same situation as himself, that he received during his employment with the Respondent, Tervita Corporation (**Tervita**).
2. Tervita established a long-term incentive plan that rewarded certain employees with restricted stock option units. Tervita oppressively and unlawfully failed to abide by the contractual terms that Tervita established and unilaterally purported to amend for the vesting of the awards that vested on January 2, 2020 based on a purported blanket black-out period. While a handful of Tervita's senior employees were under black-out, there was no such general black-out period under Tervita's policies. The failure to vest and/or pay the long-term incentives in accordance with the amended policies caused damages to unit holders not in black-out and benefited Tervita.

The Parties

3. Mr. Smyth is an individual resident in Calgary, Alberta. Mr. Smyth was employed by the Respondent Tervita as in-house legal counsel and senior legal counsel from 2012 to 2017.
4. Mr. Smyth brings this action on his own behalf and on behalf of all persons who are current and former employees (excluding those that are Designated Individuals as defined and recognized under Tervita's Insider Trading Policy, were terminated for cause, or voluntarily quit) of Tervita who were granted RSUs pursuant to Tervita's 2017 Restricted Stock Unit Plan with a maturity date of January 2, 2020, but did not materially vest until March 27, 2020 (the **Class**).
5. The Respondent, Tervita, is a corporation incorporated pursuant to the laws of Alberta with its registered office in Calgary, Alberta.

The Claim against Tervita

Tervita's Restricted Stock Unit Plan

6. In 2016, Tervita restructured its affairs under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 (**CCAA**). Following Tervita's restructuring under the CCAA, the company established the 2017 Restricted Stock Unit Plan (**RSU Plan**). Tervita issued restricted stock units as a form of long-term incentive for selected employees as participants, which were intended to:
 - (a) assist in attracting, retaining, engaging, and rewarding participants of Tervita (Article 1); and
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- (a) Tervita would grant certain employees RSUs (Article 4).
 - (b) Each participant employee to whom RSUs were granted would enter into a Restricted Stock Unit Agreement, which set out the number of RSUs, the term, the maturity date, and the circumstances when the maturity of the RSUs might be accelerated (Article 14(a)).
 - (c) Tervita's Board may, in its discretion but subject to any necessary approvals, provide for the extension of the maturation of a RSU, waive any restriction or other provision of the RSU Plan or a RSU or otherwise amend or modify a RSU in any manner that is either:
 - (i) not adverse to the holder of such RSU, or
 - (ii) consented to by such RSU holder.(Article 3(b))
 - (d) Each RSU granted pursuant to the RSU Plan will have a fixed term of not more than 36 months following the grant date of the RSU (Article 5).
 - (e) The maturity date of the RSUs is the day which is 36 months following the grant date of the RSU (Article 5).
 - (f) The amount payable to each participant will be determined by multiplying the number of RSUs held by such participant that matured on the maturity date of such RSU by the fair market value of the shares as at the maturity date (Article 6(a)).

“Fair Market Value” is defined in the RSU Plan as “the volume weighted average trading price of the Shares on Exchange (or if the Shares are listed on more than one Exchange, on such Exchange as may be designated by the Board for such purpose) for the five Trading Days immediately preceding the date of grant of Restricted Stock Units and, for this purpose, the volume weighted average trading price shall be calculated by dividing the total volume of Shares traded for such period” (Article 2(k)).

“Exchange” is defined in the RSU Plan as “the Toronto Stock Exchange or such other stock exchange on which the Shares are listed and posted for trading” (Article 2(j)).

- (g) The amount payable to each participant will be paid as reasonably practicable following the maturity date (Article 6(b)).
 - (h) Tervita's Board may revise, suspend, or discontinue the RSU Plan in whole or in part if in its sole discretion it determines that such revision is in the best interest of Tervita. No revision or suspension or discontinuance shall alter or impair the rights of a participant in respect of matured RSUs of such participant without the consent of the participant (Article 12).
 - (i) The RSU Plan is dated effective as of January 1, 2017 (Article 17).
8. Mr. Smyth was granted 5,100 RSU's at a grant price of \$10.00 per unit on June 1, 2017 pursuant to the terms of the RSU Plan.
 9. The RSUs granted to Mr. Smyth matured on January 2, 2020 (**Maturity Date**). Payouts of RSUs were to be made by Tervita as soon as reasonably possible after the Maturity Date.
 10. Prior to maturity, Mr. Smyth and a number of other RSU holders were no longer employed with Tervita, but they continued to maintain a portion of their RSUs and associated RSU holder's rights after the cessation of their employment pursuant to the termination terms of the RSU Plan.

Tervita's purported RSU Amendments, none of which affected the Maturity Date nor allowed for a deferred vesting of the RSUs held by the Class Members

11. Tervita was a private company until a merger that occurred on or about July 19, 2018. At the time the merger was announced, Tervita confirmed with RSU holders that all RSUs remained outstanding and expressly stated that RSUs continued to vest on the same basis as before.
12. Tervita purported to make amendments to the RSU Plan on April 30, 2018, which were referenced in Appendix "E" that was part of Tervita's 2019 Annual Circular (the **RSU Amendments**).
13. The RSU Holders did not receive any notice of these purported RSU Amendments.
14. The purported RSU Amendments were not posted on Shareworks (previously called Solium) with the other plan documents nor were they circulated to RSU holders in any manner.

Tervita's Insider Trading Policy

15. As a public company, Tervita also established an Insider Trading Policy (the **ITP**). The purpose of Tervita's ITP is to "explain certain legal concepts and to implement certain rules with respect to trading and reporting of trading in the securities by certain persons who are

either employed by Tervita and its subsidiaries or in a particular relationship with Tervita” (Article 1).

16. The material terms regarding blackout periods in Tervita’s ITP include the following, *inter alia*:

(a) Tervita’s ITP applies to all persons in a “Special Relationship” with Tervita (Article 2).

"Special Relationship" is defined in Tervita’s ITP as meaning “persons in a special relationship with the Corporation and may include (but is not limited to):

(a) directors, officers, and employees of the Corporation;

(b) any person retained by or engaged in any business or professional activity with or on behalf of the Corporation (such as a consultant, independent contractor, or adviser);

(c) a family member, spouse or other person living in the household or a dependent child of any of the individuals referred to above;

(d) partnerships, trusts, corporations, RRSP's, and similar entities over which any of the above-mentioned individuals exercise control or direction;

(e) directors and officers of corporations which have a significant investment (more than 10%) in the Corporation's equity; and

(f) any person who learns of a material fact or material change from any person referred to above.” (Article 3)

(b) Scheduled Blackout Period for Designated Individuals commence on the day following the end of a quarter and continue through the end of two (2) full days of trading following the issuance of a news release disclosing quarterly and/or annual financial results (Article 8.1).

(c) In addition to the regularly scheduled Blackout Periods for Designated Individuals and Blackout Periods following the release of material information that apply to Designated Individuals or those with actual knowledge of material information, additional Extraordinary Blackout Periods may, upon notice, be prescribed to certain individuals from time to time by Tervita’s CFO at any time at which it is determined there may be undisclosed Material Non-Public Information concerning the Corporation that makes it inappropriate for such individuals to be trading (Article 8.3).

“Blackout Period” is defined in Tervita’s ITP as “the period during which trading in the Securities is prohibited” (Article 3).

“Designated Individuals” are defined in Tervita’s ITP as “all individuals who are:

- (i) directors of the Corporation;
- (ii) executive officers of the Corporation; or
- (iii) involved in the preparation and/or review of the Corporation’s financial statements or with knowledge of financial results and information therein contained.

A list of Designated Individuals will be maintained by the CFO and all affected individuals will be advised of their status” (Article 3).

- 17. Tervita’s ITP does not apply to Mr. Smyth, nor any of the proposed members of the Class, as they were not in a “Special Relationship” with Tervita as defined in Tervita’s ITP.
- 18. Mr. Smyth, nor any of the proposed members of the Class, are “Designated Individuals” and they do not fit within its definition in Tervita’s ITP. No additional Blackout Periods were proscribed by Tervita’s Chief Financial Officer during the material time and on March 16, 2020, Tervita confirmed that for the purported Blackout Period in question it did not have any Material Non-Public Information.

Tervita’s Incentive Unit Plan

- 19. In 2018, Tervita introduced the current Incentive Unit Plan (**IUP**) for RSU’s that were granted in 2018.
- 20. The introduction of Tervita’s IUP did not change Tervita’s obligations under the RSU Plan, as Tervita’s IUP expressly states:

21. Effective Date

This Plan has been amended and restated effective as of December 31, 2018 and the amendments do not constitute, in whole or in part, a new incentive unit plan or a new grant of Share Units or a novation of the Plan or any Share Units granted under the Plan prior to December 31, 2018.

- 21. There are no provisions in Tervita’s IUP that affect the original Maturity Date of Tervita’s RSU Plan.

Tervita’s Breach of its RSU Plan

- 22. On December 2, 2019, Tervita used Shareworks to provide RSU holders with a 30-day vesting notice, confirming the vesting date of January 2, 2020.

23. On December 27, 2019, Tervita provided former employees that were RSU holders with a 5-day vesting notice, confirming the vesting date of January 2, 2020.
24. On December 29, 2019, two days after its last notice, Tervita inexplicably took the position that securities laws prevented Tervita from paying out the RSUs on the Maturity Date for all unit holders as Tervita *itself* was in a mandatory blackout. This was, in fact, not true.
25. Tervita's position is not contemplated by the ITP as the ITP applies to persons in a "Special Relationship" with the Tervita, which does not include Tervita itself. The ITP does not apply to Mr. Smyth nor the other Class members as they were not in a "Special Relationship" with Tervita nor were they "Designated Individuals" at the relevant time.
26. There was no basis for a blanket blackout applicable to RSU holders. Further, there was no restriction in the RSU Plan nor the related RSU documents that prevented Tervita from vesting the RSUs as of the Maturity Date.
27. The RSU Amendments confirm that the pushing out of the Maturity Date only applies when the *RSU holder* is subject to a blackout. The settlement provisions of the RSU Amendments state:

Settlement Provisions

All vested Restricted Share Units will be settled within 60 days of their Maturity Date and, in any event, no later than December 15 of the third year following the end of the year in which the Restricted Share Unit will be granted (the "**Settlement Date**"). If a Settlement Date falls on, or within nine business days immediately following a date upon which the holder of Restricted Share Units will be subject to trading restrictions due to a Black-Out Period then the Settlement Date will be automatically extended to the 10th business day following the date the relevant Black-Out Period ends ... [emphasis added]

28. This express provision would be redundant and unnecessary if Tervita was prevented from vesting RSUs for all RSU holders.
29. Subsequently, Tervita's representative acknowledged that the Class members were not subject to a Blackout Period. However, Tervita's representative took the position that a non-binding practice was the only reason the non-Designated Employees were not paid out on January 2, 2020.
30. There were no Blackout Periods that applied universally to Tervita in its ITP, RSU Plan, or IUP that prohibited the payment or vesting of the RSUs on the Maturity Date in the RSU Plan. Nor was there any mechanism for Tervita to delay the payment or the vesting of the RSUs. Despite this, and numerous protests by the Class members, Tervita asserted that a universal Blackout Period from January 2, 2020 to March 16, 2020 prevented the payment or vesting of awards.
31. During the course of the oppressively and unlawfully imposed purported Blackout Period, the Class members' legal counsel demanded Tervita fulfill its obligation to pay the RSU

holders based on the Fair Market Value of the share price as it ought to have be calculated on January 2, 2020, but Tervita refused.

32. The RSUs were eventually paid to all RSU holders on March 27, 2020 (the **Payout Date**).
33. Payment under the RSU Plan was based on the average closing stock prices for the 5-trading days preceding the Payout Date. The total payout to all RSU holders was approximately \$650,000.00 less than it would have been using the original Maturity Date of January 2, 2020.
34. As a result of Tervita's breach of the RSU Plan and its obligations to the holders of RSUs, the Class has suffered significant detriment and harm and Tervita has been enriched in this same amount.
35. To date, there are approximately 65 known RSU holders that were affected by Tervita's breach.

Class Certification

36. This Originating Application discloses a cause of action.
37. There is an identifiable class of two or more persons.
38. The claims of the prospective class members raise common issues.
39. A class proceeding is the preferable procedure for the fair and efficient resolution of the common issues.
40. There is an eligible person to be appointed as a representative applicant who will:
 - (a) Fairly and adequately represent the interest of the Class;
 - (b) Have produced a plan for the proceeding as set out in Schedule "A", attached hereto, which provides a workable method of advancing the proceeding on behalf of the Class; and
 - (c) Do not have, in respect of the common issues, an interest that is in conflict with the interests of the other prospective class members.
41. The representative applicant has the resources, knowledge, and certain records that would enable him to conduct the case on behalf of the Class members.

Remedy sought:

42. Mr. Smyth, on behalf of himself and the Class, claims against Tervita as follows:

- (a) A declaration that the Class members' rights pursuant to the 2017 Restricted Stock Unit Plan were violated by Tervita when Tervita imposed a blackout period between January 2, 2020 and March 16, 2020, pushing the Maturity Date of the Restricted Stock Units from its rightful date of January 2, 2020 to March 27, 2020, which harmed the Class and resulted in a material difference in payouts to the Class;
 - (b) Alternatively, a declaration that the Class members' RSU units should have vested on January 2, 2020 and been paid on that date or this vested amount should have been withheld and paid on March 27, 2020;
 - (c) Damages in the sum of \$650,000.00 or such other amount as proven at trial;
 - (d) Interest Pursuant to the *Judgement Interest Act*, RSA 2000, c J01, as amended;
 - (e) Costs of this Application, and
 - (f) Any other relief that this Honourable Court may allow.
43. Mr. Smyth, on behalf of himself and the Class, seek an Order:
- (a) Certifying this proceeding as a class proceeding;
 - (b) Appointing Steve Smyth as the Representative Applicant;
 - (c) Describing the Class as all persons who are current and former employees of the Tervita (excluding those that are Designated Individuals as defined and recognized under Tervita's Insider Trading Policy, were terminated for cause, or voluntarily quit) who were granted RSUs pursuant to Tervita's 2017 Restricted Stock Unit Plan with a Maturity Date of January 2, 2020, but did not materially vest until March 27, 2020;
 - (d) Stating the nature of the claims asserted on behalf of the Class;
 - (e) Stating the relief sought by the Class;
 - (f) Setting out the common issues of the Class as:
 - (i) Whether the value of the RSUs granted under the January 1, 2017 Restricted Stock Unit Plan should have vested on January 2, 2020.
 - (ii) Whether the payment under the January 1, 2017 Restricted Stock Unit Plan should have been made to individuals who received 2017 RSU grants on the Maturity Date of January 2, 2020.

- (iii) Whether Tervita violated its contractual obligations under the January 1, 2017 Restricted Stock Unit Plan by imposing a purported blackout period running from January 1, 2020 until March 16, 2020, making RSU payouts 10 business after the Blackout Period.
- (iv) Whether damages should be calculated and awarded using \$7.41 per share as the fair market value of Tervita's share price pursuant to the Restricted Stock Unit Plan for individuals who received 2017 RSU grants.
- (g) Approving the attached Schedule "A" Representative Applicant's Plan for Proceeding, or such other plan as directed by this Honourable Court.

Affidavit or other evidence to be used in support of this application:

- 44. Affidavit of Stephen Smyth sworn on December 23, 2020 and filed herein.
- 45. Any other materials filed or presented by the Applicant and this Honourable Court may permit.

Applicable Rules, Acts, and Regulations:

- 46. *Alberta Rules of Court*, Alta Reg 124/201, Rules 2.7, 2.9, 10.7, and 13.11.
- 47. *Class Proceedings Act*, SA 2003, c C-16.5.
- 48. Such further and other Rules, Acts and/or Regulations as counsel may advise and this Honourable Court may permit.

Any irregularity complained of or objection relied on:

- 49. None.

How the application is proposed to be heard or considered:

- 39. By the Presiding Justice in Chambers.

WARNING

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant and against all persons claiming under the applicant. You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant is entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the

date and at the time shown at the beginning of this form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant a reasonable time before the application is to be heard or considered.

SCHEDULE "A"

REPRESENTATIVE APPLICANT'S PLAN FOR PROCEEDING

General

The Representative Applicant proposes that, once certified, matters pertaining to the common issues proceed in accordance with the plan set out below (the **Plan**), subject to Court approval and subject to any amendments of the Plan, as directed by the Court.

The Representative Applicant will abide by the requirements of the *Class Proceedings Act, SA 2003, c C-16.5*, as amended (the **Act**), and applicable Alberta *Rules of Court*.

Amendment of Originating Application

The filing and service of an Amended Originating Application, if necessary, to conform with the terms of the certification order, will be completed by _____.

Notice of Certification

Subject to the direction this Honourable Court, the Representative Applicant proposes the following with respect to the providing of notice of certification to the potential Class members:

1. Means of Giving Notice

Notice to all potential Class members will be given in the following manner:

- (a) Mail to the last known address provided by Tervita of individuals who were granted RSUs under the 2017 RSU Plan;
- (b) Advertising in various newspapers throughout Alberta and Canada; and
- (c) A website to be hosted by Lawson Lundell LLP.

2. Cost of Giving Notice

The cost of giving notice to the potential Class members will be paid for at first instance by the Respondent.

3. Timing of Notice

Notice to all potential class member will be given by _____.

4. Content of the Notice

The notice will:

- (a) Describe the nature of the action and relief sought as:

In 2017, Tervita Corporation (**Tervita**) established a Restricted Stock Unit Plan (**RSU Plan**) as part of its compensation agreement with its employees. The RSU Plan had an effective date of January 1, 2017, and had a maturity date of January 2, 2020. In December 2020, despite Tervita sending two vesting notices confirming the maturity date of the RSUs as January 2, 2020, inexplicably changed its position and purportedly imposed an improper blackout period, against the terms of the RSU Plan. This purported blackout period pushed back the maturity date from January 2, 2020 to March 16, 2020. The RSUs were eventually paid to all RSU holders on March 27, 2020 (**Payout Date**). Payment under the RSU Plan was based on the average closing stock prices for the 5 trading days preceding the Payout Date, which resulted in a significant decrease in RSU payments to RSU holders.

An action has been commenced against Tervita to recover the loss in payout amounts to eligible RSU holders. In a class action one or more people called a “class representative” sue on behalf of the people who have similar claims. In this case, the class representative is Stephen Smyth, a former employee of Tervita from 2012 to 2017. All of these people are a “Class”. The court resolves the issues in common to everyone affected; except for those who remove themselves (opt out) from the Class.

(Tervita 2017 Restricted Stock Unit Plan Class Action Lawsuit)

- (b) Provide the definition of the class as:
- (i) as all persons who are current and former employees (excluding those that are Designated Individuals as defined and recognized under Tervita’s Insider Trading Policy, were terminated for cause, or voluntarily quit) of the Tervita who were granted RSUs pursuant to Tervita’s 2017 Restricted Stock Unit Plan with a maturity date of January 2, 2020, but did not materially vest until March 27, 2020 (the **Class**).
- (c) Set out the common issues as:
- (i) Whether the value of the RSUs granted under the January 1, 2017 Restricted Stock Unit Plan should have vested on January 2, 2020.
 - (ii) Whether the payment under the January 1, 2017 Restricted Stock Unit Plan should have been made to individuals who received 2017 RSU grants on the Maturity Date of January 2, 2020.

- (iii) Whether Tervita violated its contractual obligations under the January 1, 2017 Restricted Stock Unit Plan by imposing a blackout period running from January 1, 2020 until March 16, 2020, making RSU payouts 10 business after the Blackout Period.
- (iv) Whether damages should be calculated and awarded using \$7.41 per share as the fair market value of Tervita's share price pursuant to the Restricted Stock Unit Plan for individuals who received 2017 RSU grants.
- (d) State that the judgment on the common issues for the Class, whether reached by settlement or otherwise and whether favourable or not, will bind all member of the Class who do not opt out of the proceeding.
- (e) Provide the address, email address and phone number for Lawson Lundell LLP, attention: Grant Vogeli, Q.C. and Jonathan H. Selnes to which potential Class member may direct their inquiries about the proceedings and to provide their contact information.
- (f) Summarizing the agreement between Lawson Lundell LLP and the Representative Applicant respecting fees and disbursements.
- (g) Provide that a potential Class member may opt out of the proceeding by giving notice, in writing, to Lawson Lundell LLP, attention: Grant Vogeli, Q.C. and Jonathan H. Selnes which notice must be received by _____ and which notice will state:

If you would like to opt out of the Tervita 2017 Restricted Stock Unit Plan Class Action Lawsuit, you must advise Lawson Lundell LLP, by no later than _____, of your desire to do so. Your notice must be submitted in writing, and should include the following information:

- Your full name, current address, and telephone number;
- A statement that you wish to opt out of the Tervita 2017 Restricted Stock Unit Plan Class Action Lawsuit; and
- The number of Restricted Stock Units granted to you and the date that they were granted to you

Please send your notice my mail to:

Lawson Lundell LLP
 1100, 225 – 6th Avenue SW
 Calgary, AB T2P 2V7
 Attention: Grant Vogeli, Q.C. and Jonathan H. Selnes
 Or via fax to: (403) 269-9494

Or via email to: gvogeli@lawsonlundell.com
or
jselnes@lawsonlundell.com

(h) Give any other information this Honourable Court deems appropriate.

Updates to Class Members

Updates with respect to the status of the class proceeding will be provided by way of letter correspondence by mail which will be mailed to all Class members to the addresses provided by Tervita and by posting information on the website hosted by Lawson Lundell LLP.

Information Disclosure

Completion and exchange of records and the conducting of questioning on affidavits to the parties to the proceeding will be completed in accordance with the relevant provisions of the *Alberta Rules of Court*, subject to any agreement between the parties or as this Honourable Court otherwise orders.

Damages

It is proposed that damages for each member of the Class be quantified using \$7.41 per share as the fair market value of Tervita's share price pursuant to the Restricted Stock Unit Plan for individuals who received 2017 RSU grants.