*ONTARIO*
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY)

Estate Number: 33-2618511
Court File No.: 33-2618511

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO**

**AND IN THE MATTER OF THREE RELATED INTENDED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., AND VITALITY CBD NATURAL HEALTH PRODUCTS INC.)**

# NINTH REPORT OF THE PROPOSAL TRUSTEE DELOITTE RESTRUCTURING INC.

**Dated September 9, 2020**

## TABLE OF CONTENTS


**INTRODUCTION AND BACKGROUND** ..... 1

**PURPOSE OF REPORT** ..... 4

**DOCUMENTATION REVIEWED BY PROPOSAL TRUSTEE** ..... 4

**GROUNDS FOR APPEAL** ..... 6

**GUARANTEE OF ARTIVA, LIVEWELL AND VITALITY** ..... 6

**NEW MEXICO TRANSACTION PAYMENT** ..... 9

**THE BIAS ALLEGATION** ..... 12


## APPENDICES


| | |
|---|---|
| **APPENDIX "A"** | Order of Justice MacLeod dated March 9, 2020 and related Endorsement |
| **APPENDIX "B"** | Case Conference Order and Direction of Justice MacLeod dated August 4, 2020 |
| **APPENDIX "C"** | Form 77 – Notices of Disallowances issued to Dominion Capital |
| **APPENDIX "D"** | Case Conference Memorandum of Justice MacLeod dated August 20, 2020 |
| **APPENDIX "E"** | Debtors' "Submission Re Disputed Claims of Noteholders" dated July 30, 2020 |
| **APPENDIX "F"** | Debtors' "Submission to Proposal Trustee re Noteholder Claims" dated August 9, 2020 |
| **APPENDIX "G"** | Noteholders' Case Conference Brief dated July 31, 2020 |
| **APPENDIX "H"** | Noteholders' August 11, 2020 Submission Letter |
| **APPENDIX "I"** | Security Purchase Agreements dated February 14, 2020 |
| **APPENDIX "J"** | Subordination and Postponement Agreement dated February 14, 2020 |
| **APPENDIX "K"** | Noteholders' Case Conference Memorandum dated August 19, 2020 |

## INTRODUCTION AND BACKGROUND

1. This ninth report (the "**Ninth Report**") is filed by Deloitte Restructuring Inc. ("**Deloitte**") in its capacity as proposal trustee (the "**Proposal Trustee**") in connection with the Notices of Intention to Make a Proposal (individually, an "**NOI**", and collectively, the "**NOIs**") filed by each of Eureka 93 Inc. ("**Eureka 93**"), LiveWell Foods Canada Inc. ("**LiveWell**"), Artiva Inc. ("**Artiva**") and Vitality CBD Natural Health Products Inc. ("**Vitality**" and, together with Eureka 93, LiveWell and Artiva, the "**Companies**").

2. On February 14, 2020 (the "**Filing Date**"), the Companies each filed an NOI under Section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C 1985, c.B-3, as amended (the "**BIA**"). Deloitte was appointed as Proposal Trustee under each NOI.

3. On March 9, 2020, Justice MacLeod made an order (the "**Initial Order**"), among other things,

   i) administratively consolidating the proposal proceedings for each of the Companies under the Estate and Court File number of Eureka 93;

   ii) granting that the Proposal Trustee, counsel for the Proposal Trustee and counsel to the Companies shall be entitled to the benefit of a charge (the "**Administration Charge**") on all of the assets, property and undertaking of the Companies (the "**Property**"), which charge shall not exceed an aggregate amount of $500,000, as security for their professional fees and disbursements, which charge was granted first priority over the Property;

   iii) allowing the Companies to borrow from Sprouter Corporation Inc. David Van Segbrook and Donna Van Segbrook (the "**Interim Lenders**") an amount that shall not exceed the amounts contemplated in a Commitment Letter dated January 2019 and granting the Interim Lenders a charge, which charge was granted second priority over the Property behind the Administration Charge; and

   iv) extending the date by which the Companies are required to file proposals to April

29, 2020 (the "**Proposal Filing Date**").

The Initial Order is attached hereto as **Appendix "A"**.

4. On April 23, 2020, the Court issued an order extending the Proposal Filing Date to June 12, 2020.

5. On June 12, 2020, the Companies filed their proposals (the "**Proposals**"), with Artiva and LiveWell filing a joint proposal (the "**Joint Proposal**"). The meetings of creditors to vote on the Proposals were scheduled for July 3, 2020.

6. At a case conference held on June 22, 2020, Justice MacLeod, among other things, ordered that the meetings of creditors to vote on the Proposals were to be held on July 28, 2020 (the "**Original Meetings**").

7. On July 27, 2020, Dominion Capital LLC ("**DC**"), as Collateral Agent on behalf of itself, Nomis Bay Ltd., BPY Limited and MMCAP International Inc. SPC (collectively, the "**Noteholders**") delivered proofs of claim in each of the Proposals (the "**Noteholders' Proofs of Claim**").

8. On July 28, 2020, the Proposal Trustee convened the Original Meetings. At each of the meetings, the Noteholders brought forward motions to adjourn the Original Meetings for the purposes of conducting certain examinations. The Companies advised at the Original Meetings that they were disputing the Noteholders' Proofs of Claim.

9. Following a Case Conference held on July 31, 2020, Justice MacLeod, among other things, directed the Proposal Trustee to assess and value the Noteholders' Proofs of Claim and, if necessary, issue its Form 77 - Notices of Disallowance (the "**Disallowances**") no later than August 14, 2020. Justice MacLeod further ordered that the meetings of creditors to vote on the proposals shall be completed no later than August 28, 2020. The Case Conference Order and Direction of Justice MacLeod dated August 4, 2020, is attached hereto as **Appendix "B"**.

10. On August 11, 2020, the DC delivered amended proofs of claim in each of the Proposals

("**Noteholders' Amended POC**").

11. On August 14, 2020, the Proposal Trustee delivered Disallowances to DC, in which it disallowed in their entirety the Noteholders' claims against Artiva, LiveWell and Vitality, and partially disallowed the Noteholders' claim against Eureka 93. Copies of the Disallowances are attached hereto as **Appendix "C"**.

12. On August 17, 2020, the Proposal Trustee advised all creditors that the reconvened general meetings of creditors (the "**Reconvened Meetings**") would be held on August 28, 2020.

13. In a Case Conference Memorandum held August 20, 2020 (the "**August 20 Memorandum**"), and attached hereto as **Appendix "D"**, Justice MacLeod, among other things, directed the Noteholders to serve its appeal of the Disallowances and supporting materials (the "**Appeal**") by August 26, 2020.

14. On August 26, 2020, the Companies filed amended Proposals (the "**Amended Proposals**"). Also on that date, DC served a Notice of Motion (Appeal of Disallowances) (the "**Noteholders Notice of Motion re: Appeal**").

15. On August 28, 2020, the Reconvened Meetings to vote on the Amended Proposals were held. Based on the voting, the Amended Joint Proposal of Artiva and LiveWell and the Amended Proposal of Vitality were both approved by their creditors. The Noteholders voted against both Amended Proposals, but with their claims marked "disputed", their claims were not included in the final tallies. If the Noteholders' claims were included, both Amended Proposals would have failed.

16. At the Reconvened Meeting for Eureka 93, the Noteholders also voted against the Amended Proposal, which resulted in the failure of that Amended Proposal. Therefore, Eureka 93 is now bankrupt.

17. On September 3, 2020, Justice MacLeod issued a Case Conference Order and Direction directing, among other things, the following:

    i) a motion for security for costs may be brought in advance of hearing of the Appeal

unless security in the amount of $50,000.00 is posted voluntarily (the "**Security**"), or the Proposal Trustee is satisfied that the Noteholders have sufficient assets in Ontario that such an order for security for costs is not necessary;

ii) the Proposal Trustee shall serve its responding materials for the Appeal by September 9, 2020; and

iii) the Appeal is to be heard on September 18, 2020 at 10:00 am.

18. By email dated September 8, 2020, counsel for the Proposal Trustee advised the Court that the Noteholders had not agreed to post the Security and had failed to provide any evidence of exigible assets in Ontario. As a result, Justice MacLeod set September 14, 2020 as the date for the hearing of motion for security for costs.

**PURPOSE OF REPORT**

19. This Ninth Report is delivered in response to the Appeal, and in support of a motion by the Proposal Trustee that the Noteholders post security for the Proposal Trustee's costs in respect of the Appeal. If the security is not posted forthwith, the Proposal Trustee seeks the dismissal of the Appeal with costs payable on a substantial indemnity basis.

**DOCUMENTATION REVIEWED BY PROPOSAL TRUSTEE**

20. DC delivered a motion record dated August 31, 2020, in respect of the Appeal (the "**Noteholders' Motion Record**"). The affidavit of Mikhail Gurevich sworn in support of the Appeal is about 1300 pages long with exhibits (the "**Noteholders' Appeal Affidavit**"), including over 500 pages of correspondence involving the Noteholders' counsel and the Proposal Trustee/Counsel for the Proposal Trustee purportedly in support of the Bias Allegation (as defined below).

21. Prior to issuing the Disallowances, the Proposal Trustee reviewed thematerial referenced in the Noteholders' Appeal Affidavit at subparagraphs 3(a) to 3(e) inclusive (and related Exhibits "A" to "E"). The Trustee also reviewed the following submissions from the

Debtors, which are attached hereto as **Appendices "E" and "F",** respectively:

a. Debtors' "Submission Re Disputed Claims of Noteholders" dated July 30, 2020 (12 pages excluding cover page, and 2 pages of statute citations); and

b. Debtors' "Submission to Proposal Trustee re Noteholder Claims" dated August 9, 2020 (7 pages excluding cover page).

22. Throughout the proof of claim process, the Proposal Trustee made repeated requests of the Noteholders to put forward in as much detail as they wished their submissions on the substantive issues raised by the Debtors regarding the Noteholders' claims against the Companies (the "**Issues**"), and provided the Noteholders with every opportunity to fully set out their responding positions on the Issues.

23. Notwithstanding these myriad requests and opportunities, there were no substantive submissions on the Issues from the Noteholders filed with the Noteholders' Proofs of Claim or the Noteholder's Amended POC's. Instead, the Noteholders' Proofs of Claim were simply accompanied by a bundle of ten documents (untabbed) comprising approximately 416 pages, and the Noteholders' Amended POC's were accompanied by a further bundle of fourteen documents (untabbed) comprising approximately 232 pages (see pages 39 to 710 of the Appeal Record).

24. The Receiver does note that on July 31, 2020, the Noteholders delivered a Case Conference Brief for a Case Conference before Justice MacLeod later that day in which they briefly addressed certain of the Issues. The Noteholders' Case Conference Brief dated July 31, 2020, is attached hereto as **Appendix "G".**

25. Also, on August 11, 2020 (the same day that the Noteholders' delivered the Noteholders'Amended POC's), the Noteholders also delivered a four page submission in letter form (the "**August 11 Letter**") to the Proposal Trustee's counsel that is attached hereto as **Appendix "H"** hereto and also marked as Exhibit "E" to the Noteholders' Appeal Affidavit (this document did not form part of the Noteholders' Amended POC's, but was still taken into account by the Proposal Trustee in evaluating the positions of the Noteholders

and the Debtors on the Issues).

## GROUNDS FOR APPEAL

26. The Noteholders' Notice of Motion re: Appeal sets out the following three grounds of appeal regarding the Disallowances for Artiva, Livewell and Vitality:

a. Artiva, LiveWell and Vitality not only guaranteed the 10% Senior Secured Convertible Notes Due February 20, 2020 (the "**February Notes**") but all of the monetary obligations of Eureka 93 under the February Notes and the 10% Senior Secured Convertible Notes Due April 20, 2020 (the "**March Notes**");

b. a USD$3 million payment related to the "New Mexico transaction" was to be applied at the Noteholders' absolute discretion, and did not apply exclusively to the February Notes; and

c. "The Trustee's misreading of the commercial documents, acknowledged failure to consider extrinsic evidence of the parties' intention, decision-making process in breach of the Directions of this Honourable Court, communications with Dominion's counsel and unexplainable support for the Proposals create a reasonable apprehension of bias or partiality on the Trustee's part" (the "**Bias Allegation**").

27. The Noteholders' Appeal of the partial Notice of Disallowance for Eureka 93 is based on the allegation that "[t]he Trustee's failure to allow any interest in the Eureka Proposal ignores both the underlying interest amounts, penalty rate and Mandatory Default amount stipulated in the Notes."

28. The Proposal Trustee notes that the Appeal does not address the Disallowance of the Director Claims.

## GUARANTEE OF ARTIVA, LIVEWELL AND VITALITY

29. As set out in the Disallowances for Artiva, LiveWell and Vitality, those entities each

provided a Guarantee of Obligations dated February 14, 2020 under the February Notes (the "**February Guarantee**"). Despite the Proposal Trustee's repeated requests to the Noteholders, they have not provided a guarantee of obligations under the March Notes. As such, it would appear that a guarantee of the March Notes does not exist.

30. The definition of "Obligations" under the February Guarantee refers to the definition of "Obligations" in the Security Agreement dated February 14, 2019 (the "**February Security Agreement"**)[1]. This is confirmed in both paragraph 25(a) of the Noteholders' Case Conference Brief dated July 31, 2020 (Appendix "G") and on page 2 of the August 11 Letter (Appendix "H"). The February Security Agreement defines "Obligations" by reference only to the February Notes. The February Guarantee also includes an expressed limitation of liability[2].

31. The Proposal Trustee notes that the quotation in paragraph 36(b) of the Noteholders' Appeal Affidavit does not accurately reflect the wording in the February Security Agreement, which defines "Obligations" as follows:

---

[1] See Noteholders' Motion Record, p 96. See also the definition of "Guaranteed Obligations at Motion Record, p 97

[2] See Noteholders' Motion Record, pp 101 and 102.

> " all obligations, liabilities and indebtedness of every nature of Debtors from time to time owed or owing under or in respect of this Agreement, the Purchase Agreement, the Notes, any of the other Security Documents and any of the other Transaction Documents, as the case may be, including, without limitation, the principal amount of all debts, claims and indebtedness, accrued and unpaid interest and all fees, costs and expenses, whether primary, secondary, direct, contingent, fixed or otherwise, heretofore, now and/or from time to time hereafter owing, due or payable whether before or after the filing of a bankruptcy, insolvency or similar proceeding under applicable federal, state, foreign or other law and whether or not an allowed claim in any such proceeding."[3]

32. The quotation in paragraph 36(b) of the Noteholders' Appeal Affidavit appears to come from the Security Agreement dated March 20, 2019 which is a companion document to the March Notes.[4]

33. The quotation in paragraph 36(c) of the Noteholders' Appeal Affidavit appears to come from the General Security Agreement dated February 14, 2019 (the "**February GSA**").[5] The February GSA is not the "Security Agreement" referred to in the February Guarantee. This is confirmed in paragraph 25(a) of the Noteholders' Case Conference Brief dated July 31, 2020 (Appendix "G") and on page 2 of the August 11 Letter ("Appendix "H"). It should be noted that the February GSA does not accord with the definition of "Security Agreement" in the February Guarantee.

---

3 See Noteholders' Motion Record, pp 215 and 216.
4 See Noteholders' Motion Record, pp 412 and 413.
5 See Noteholders' Motion Record, p 657.

## NEW MEXICO TRANSACTION PAYMENT

34. Paragraph (c) of the grounds for the motion in the Noteholders Notice of Motion re: Appeal states that "*the release of USD$3mil of debt pursuant to the New Mexico transaction was to be applied at the Noteholders' discretion and did not apply exclusively to the February Notes*". However, nowhere in the Noteholders' Appeal Affidavit do they substantiate this assertion.

35. The Proposal Trustee based its assessment of the allocation of the USD$3 million purchase price for the New Mexico property as set out below.

36. The Partial Payment Agreement dated December 18, 2019 (the "**Partial Payment Agreement**") which sets out the terms for the full transfer of the ownership of the New Mexico property to the Noteholders, provides that an amount equal to USD$3 million (the "**Agreed Amount**") "*may be allocated to all amounts due under the Notes* [defined as both the February Notes and the March Notes] *as the Holders may each decide* ***in accordance with and provided in the Transaction Documents***" [6] [Emphasis added]. As such, while the Noteholders may decide how to allocate the Agreed Amount, they are confined by the restrictions under the Transaction Documents.

37. The Transaction Documents are defined in the Security Purchase Agreements dated February 14, 2020 (the "**February SPA**") and March 20, 2019 (the "**March SPA**") to be "*this Agreement, the Notes, the Warrants, the Registration Rights Agreement, the Security Documents, and all exhibits thereto and hereto and any other documents or agreements executed in connection with the transaction contemplated hereunder.*" [7]

---

6 See Noteholders' Motion Record, p 699.

7 See, for example, Noteholders' Motion Record, p 62

38. Paragraph 2.4(g) of the February SPA provides that the February Notes are to enjoy a first priority mortgage and security interest as per the following:

> "*By no later than 60 days following the execution of this Agreement, the Companies shall ensure that Vitality (i) grant in favour of Dominion, as collateral agent,* ***a first priority mortgage and security interest on such New Mexico Property*** *and ensure that such mortgage and security interest have been registered, recorded or otherwise perfected or published wherever and however necessary to enforce and set up the rights thereunder against third persons; (ii) execute all documents necessary to ensure that Dominion, as collateral agent, has access to the New Mexico Property in order to access all personal property located thereon in the Event of a Default under the Note; and (iii) deliver to the Purchasers legal opinions from counsel to Vitality relating to the ranking, perfection, recordation, registration and/or publication of mortgage and security interest on such New Mexico Property.*"[8] [Emphasis added].

A copy of the February SPA is attached hereto as **Appendix "I"**.

39. Further, paragraph 2.4(g) of the March SPA clearly indicates that the March Notes are to enjoy a second priority mortgage and security interest as per the following:

> "*By no later than 60 days following the execution of this Agreement, the Companies shall ensure that Vitality (i) grant in favour of Dominion, as collateral agent,* ***a second priority mortgage and security interest on such New Mexico Property*** *and ensure that such mortgage and security interest have been registered, recorded or otherwise perfected or published wherever and however necessary to enforce and set up the rights thereunder against third persons; (ii) execute all documents necessary to ensure that Dominion, as collateral agent, has access to the New Mexico Property in*

[8] See Noteholders' Motion Record, p 66.

> *order to access all personal property located thereon in the Event of a Default under the Note; and (iii) deliver to the Purchasers legal opinions from counsel to Vitality relating to the ranking, perfection, recordation, registration and/or publication of mortgage and security interest on such New Mexico Property.*"[9] [Emphasis added].

40. In addition, Vitality entered into a Subordination and Postponement Agreement dated February 14, 2019 (the "**Subordination Agreement**") which provides for the priority payment of the February Notes. For example, the Subordination Agreement provides in paragraph 3 the following:

> "*LiveWell* [predecessor to Eureka 93] *hereby acknowledges and agrees that, upon any distribution of any of the assets of the Debtor to any of its creditors upon any dissolution, winding-up, total or partial liquidation, readjustment of debt, reorganization, compromise, arrangement with creditors or similar proceedings of the Debtor or any of its assets, or in any bankruptcy, insolvency or receivership, assignment for the benefit of creditors, marshalling of assets and liabilities or similar proceedings, or in the event of any bulk sale of any of the assets of the Debtor within the bulk transfer provisions of any applicable laws or similar proceedings in relation thereto, whether any of the foregoing is voluntary or involuntary, partial or complete, all of the Senior Obligations shall be paid in full before LiveWell shall be entitled to retain or receive any payment or distribution from the Debtor in respect of the Subordinated Loan.*"

A copy of the Subordination Agreement is attached hereto as **Appendix "J"**.

41. Senior Obligations under the Subordination Agreement refer to the "securities purchase agreement dated on or about the date hereof" which is a reference to the February Notes.

---

[9] See Noteholders' Motion Record, p 321.

42. As a result, the documentation reviewed by the Proposal Trustee establishes that any proceeds from the sale of the New Mexico property are to first be applied to the February Notes, and that the application of the Agreed Amount to the February Notes fully repaid the February Notes, resulting in the extinguishment of the February Guarantee. As there is no guarantee provided by Artiva, LiveWell or Vitality of the March Notes, as set out in the Notices of Disallowance, the Noteholders have "third party security" which effectively constitutes a guarantee of the obligations only to the extent of the value of the equity in the property charged. Since the Noteholders have conceded that the assessed value of their security is $Nil and are not challenging the valuation of their security, the claims of the Noteholders have been disallowed in their entirety.

43. With respect to the "Trustee's failure to allow any interest in the Eureka Proposal" which "ignores the underlying interest amounts, penalty rate and Mandatory Default amount stipulated in the Notes" as set out in the Noteholders Notice of Motion re: Appeal, the Noteholders submissions still do not provide detailed calculations of the mandatory default amount and it is remains unclear if the Noteholders are entitled to default interest.

**THE BIAS ALLEGATION**

44. The Bias Allegation was made in the Notice of Motion re Appeal notwithstanding that Justice MacLeod directed as follows in paragraph 4 of his August 20 Memorandum (Appendix "D"):

> The noteholders also wish to bring a motion to remove the Trustee. It appears the appeals should be dealt with first because part of the basis for removing the Trustee is the allegation that in disallowing the claims, the Trustee did not act neutrally and in accordance with its obligations.

45. In the same vein, at paragraph 8 of the August 20 Memorandum, Justice MacLeod directed as follows:

> I was asked to give further direction regarding the examinations previously voted on and discussed in my previous endorsement. I am not prepared to make

> findings about the conduct of the Trustee or the noteholders and whether or not the demands for production of documents or for funding of the examinations were reasonable at a case conference on the basis of contested facts. That would require a motion.

46. These Directions by Justice MacLeod made on August 20, 2020, were required as a result of a multiple allegations of impropriety and misconduct made against the Proposal Trustee and its counsel in an 81 page, 111 paragraph Case Conference memorandum delivered by the Noteholders the morning of the Case Conference held August 19, 2020 (the "**Noteholders August 19 Memorandum**"), in which they sought the following relief (among other relief):

> [5] A motion for the removal of the Trustee under section 14.04 of the *BIA* and an Order setting aside such actions of the Trustee pursuant to section 37 of the *BIA* as referenced herein".

The Noteholders' August 19 Memorandum (without exhibits) is attached hereto as **Appendix "K"**.

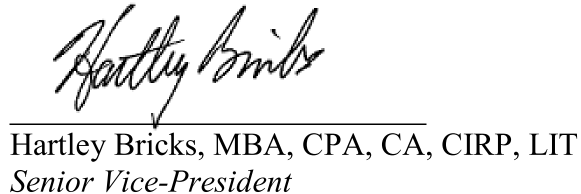
47. The Proposal Trustee categorically denies each and every allegation of impropriety and misconduct (including bias) made against it and its counsel by or on behalf of the Noteholders in the Noteholders' August 19 Memorandum, the Notice of Motion re: Appeal, the Noteholders' Appeal Affidavit, or elsewhere in these proceedings.

48. These allegations by the Noteholders are baseless and without merit. In fact, when any communications from or on behalf of the Proposal Trustee that the Noteholders purportedly rely for such allegations are read as part of the relevant email chain with the Noteholders' counsel Elliot Birnboim, the tone and content of these written communications actually reflect poorly on Mr. Birnboim.

49. Furthermore, these allegations are frivolous, scandalous and vexatious, put forward for collateral purposes, including as an attack on prior Orders of the Court without the required motions having been brought, and to attempt to leverage the Proposal Trustee's compliance with the Noteholders' positions.

All of which is respectfully submitted this 9th day of September, 2020.

**DELOITTE RESTRUCTURING INC,**
**solely in its capacity as the Proposal Trustee of the Companies and not in its personal or corporate capacity**



Per: ______________________________
Hartley Bricks, MBA, CPA, CA, CIRP, LIT
*Senior Vice-President*

# APPENDIX A

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**(IN BANKRUPTCY AND INSOLVENCY)**

| | | |
|---|---|---|
| **THE HONOURABLE MR** | ) | **MONDAY, THE 9TH** |
| | ) | |
| **JUSTICE MACLEOD** | ) | **DAY OF MARCH, 2020** |

Estate Number: **33-2618511**
Court File No.: **33-2618511**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO**

**AND IN THE MATTER OF THREE RELATED INTENDED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., AND VITALITY CBD NATURAL HEALTH PRODUCTS INC.)**

**ORDER**

**THIS MOTION**, made by Eureka 93 Inc., LiveWell Foods Canada Inc., Artiva Inc. and Vitality CBD Natural Health Products Inc. (the "**Debtors**") for various relief pursuant to the *Bankruptcy and Insolvency Act* (Canada), R.S.C. 1985, c. B-3, as amended (the "**BIA**"), was heard Friday 6 March 2020, at 161 Elgin Street, Ottawa, Ontario, with judgment being reserved to this day.

**ON READING** the Affidavits of Seann Poli sworn 18 February 20120, 25 February 2020 and 2 March 2020, the Affidavit of Robb Nelson sworn 2 March 2020, the Affidavit of Philip Gross sworn 28 February 2020, the Affidavit of Dirk Bouwer sworn 24 February 2020 and the First Report of Deloitte Restructuring Inc. in its capacity as the Debtors' proposal trustee ("**Deloitte**") dated 19 February 2020 (the "**First Report**"), on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel to the Debtors, counsel for Deloitte, counsel to Dominion Capital LLC and Perley-Robertson, Hill & McDougall LLP, no one else appearing:

## SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

## ADMINISTRATIVE CONSOLIDATION

2. **THIS COURT ORDERS** that the proposal proceedings of the Debtors (collectively, the "**Proposal Proceedings**") be and are hereby administratively consolidated and the Proposal Proceedings are hereby authorized and directed to continue under the following joint title of proceedings:

Estate Number: **33-2618511**
Court File No.: **33-2618511**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO**

**AND IN THE MATTER OF THREE RELATED INTENDED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., AND VITALITY CBD NATURAL HEALTH PRODUCTS INC.)**

3. **THIS COURT ORDERS** that all further materials in the Proposal Proceedings shall be filed only in the Eureka 93 Inc. estate and court file (estate number **33-2618511** and court file number **33-2618511**) and hereby dispenses with further filing thereof in the estate and court files of the other Debtors.

## ADMINISTRATION CHARGE

4. **THIS COURT ORDERS** that the Proposal Trustee, counsel for the Proposal Trustee and counsel to the Debtors shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on all of the assets, property and undertaking of the Debtors (the "**Property**"), which Administration Charge shall not exceed an aggregate amount of $500,000, as security for their professional fees and disbursements incurred at their standard rates and charges, both before and after making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 9 and 11 hereof.

**INTERIM FINANCING**

5. **THIS COURT ORDERS** that the Debtors shall be entitled, subject to the terms of the Commitment Agreement dated January 2019 (the "**Credit Agreement**") between the Debtors and Sprouter Corporation Inc., David Van Segbrook and Donna Van Segbrook (the "**Interim Lenders**") and attached as **Appendix C** to the First Report, to borrow from the Interim Lenders an amount that shall not exceed the amounts contemplated in the Credit Agreement.

6. **THIS COURT ORDERS** that the Debtors are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees or other definitive documents (the "**Definitive Documents**"), as are contemplated by the Credit Agreement.

7. **THIS COURT ORDERS** that as security for all of the obligations of Debtors to the Interim Lenders relating to advances made under the Credit Agreement from and after the date of this Order, the Interim Lenders shall be entitled to the benefit of, and are hereby granted, a charge (the "**Interim Lending Charge**") on the Property, and the Interim Lending Charge shall have the priority set out in paragraphs **9** and **11**.

8. **THIS COURT ORDERS AND DECLARES** that the Interim Lenders shall be unaffected: (a) by the stay of proceedings provided for in section 69 or 69.1 of the BIA, as applicable, or any other stay that may be ordered by the Court in any other proceedings initiated by the Debtors; and (b) under any proposal, or plan of compromise or arrangement filed by the Debtors.

**VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER**

9. **THIS COURT ORDERS** that the priorities of the Administration Charge and the Interim Lending Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $500,000); and

Second – Interim Lending Charge.

10. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge and/or the Interim Lending Charge (collectively, the "**Charges**") shall not be required,

and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

11. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property so charged by them and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any person.

12. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Debtors shall not grant any charge, security interest or other encumbrance over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Debtors obtain an Order of this Court.

13. **THIS COURT ORDERS** that the Charges, the Credit Agreement and the Definitive Documents shall not be rendered invalid or unenforceable, and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way, by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Debtors, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Credit Agreement or the Definitive Documents shall create or be deemed to constitute a breach by the Debtors of any Agreement to which any one of them is a party; and

(b) none of the Chargees shall have any liability to any person whatsoever as a result of any breach of any Agreement caused by or resulting from the Debtors entering

into the Credit Agreement or the Definitive Documents or the creation of the Charges, or the execution, delivery or performance of any such documents.

14. **THIS COURT ORDERS** that any of the Charges created by this Order over leases of real property in Canada shall only be a charge in the Debtors' interest in such real property leases.

## EXTENSION OF TIME TO MAKE PROPOSAL

15. **THIS COURT ORDERS** that the date by which the Debtors are required to file proposals be and is hereby extended to 29 April 2020.

16. **THIS COURTS ORDERS** that beginning on 23 March 2020, Deloitte shall file with the Court, and deliver to any party on the Service List that requests a copy, bi-weekly status reports: (a) confirming that the interim funding approved pursuant to paragraph 5 is in place; (b) verifying progress of construction at the facility owned by Artiva Inc. ("**Artiva**"); (c) confirming the continued validity of the cultivation licence of Artiva; and (d) setting out the progress towards production of a first crop by Artiva.

17. **THIS COURT ORDERS** that: (a) in the event that there is a significant deviation from Artiva's cash flow statement; or (b) any of the assumptions built into the Credit Agreement fail to materialize or require significant readjustment, any creditor may move to lift the stay arising under the BIA or for amendment of this Order.

**MR. JUSTICE C. MACLEOD**

TOR_LAW\ 10249477\2

**CITATION:** Eureka 93 Inc. et. al. (Re) 2020 ONSC 1482
**COURT FILE NO.:** 33-2618511
**DATE:** 2020/03/09

# COURT OF ONTARIO, SUPERIOR COURT OF JUSTICE (IN BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF THREE RELATED INTENEDED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., and VITALITY CBD NATURAL HEALTH PRODUCTS INC.)

**BEFORE:** Mr. Justice Calum MacLeod

**COUNSEL:** E. Patrick Shea, for the debtors

Sean Zweig, for Dominion Capital LLC

Lou Brzezinski, for the Proposal Trustee

**HEARD:** March 6, 2020

## DECISION AND REASONS

[1] The debtors (the NOI Companies) move to have four related matters consolidated, to extend the time for making proposals, and for approval of proposed interim priority financing arrangements ("DIP financing").

[2] Four related corporations have served notice of intention to make a proposal pursuant to s. 50.4 (1) of the *Bankruptcy and Insolvency Act*[1]. Three of the corporations are subsidiaries of Eureka 93, the publicly traded parent company. Only one of these corporations has any significant asset. That is Artiva Inc. which owns a 100 acre parcel of land containing a largely completed, licenced, but not yet operational, cannabis facility. The purpose of the proposed financing is to complete the facility and to generate sales so that there is cash flow.

[3] The temporary financing and extension of time to make a proposal is actively supported by the secured creditor holding the first mortgage. Other creditors are either in support of the plan or are neutral but the motion is strongly opposed by Dominion Capital on behalf of a group of three secured creditors ("the noteholders"). Dominion takes the view that "there is no business to rehabilitate, no air of reality to the NOI Companies' business plan, no significant assets apart from

[1] RSC 1985, C. B-3 as amended

the Ottawa facility, and no hope of satisfying the claims of creditors through the Proposal Proceedings."

[4] If an extension of time is not granted, then pursuant to s. 50.1 (8) of the *BIA* the NOI companies will be deemed to have made an assignment in bankruptcy on March 15th, 2020. If the interim financing is not granted then it is likely there will be a receivership and a liquidation of the assets. In that case there will be no recovery for the unsecured creditors. The total debt at this point in time appears to be in excess of $28 million although that is inclusive of intercompany debt.

[5] If the plan is approved it is possible but not guaranteed that the value of the business as a going concern will be higher than the "as is" value of the land, it is possible the debtors will put forward an acceptable proposal and possible there will be full recovery for the secured creditors and something for those that are unsecured. On the other hand, the plan may fail, the proposal may be voted down but there will be another $2.3 million in debt in priority to all other creditors.

[6] The court must decide if it is reasonable to authorize this additional debt while continuing to protect the debtors from their existing creditors in the hope that this will generate a better outcome. The noteholders urge the court not to do so.

**Background**

[7] Eureka 93 Inc. is the parent company of a corporate group that was intended to be a vertically integrated hemp and cannabis company. Livewell and Vitality are subsidiaries of Eureka and Artiva is a subsidiary of Livewell. Eureka is or was publicly traded until a cease trading order was issued by the Ontario Securities Commission (OSC) in September of last year when it ran into significant financial difficulty and was unable to meet its obligations as an issuer of securities.

[8] Eureka is a holding company and currently has five employees. Artiva owns a farm equipped with greenhouses and has a cannabis cultivation licence from Health Canada. This facility (the Ottawa facility) is not yet completed and it requires a further significant capital investment to begin production. None of the other corporations are operational at this time. The focus of the motion and of the intended proposal is to salvage the Ottawa facility and to generate positive cash flow through Artiva.

[9] Dominion describes the business of Artiva as more of an idea than a reality. They say that Artiva owns the land and the Ottawa facility but does not have a business. Despite the significant funds raised to date, the Ottawa facility remains incomplete and inoperable. The noteholders take the view that permitting the NOI companies to raise more funds in priority to the existing secured creditors is futile and will only result in further erosion of their collateral and any potential recovery for the existing creditors. Essentially, the moving party has no faith in Eureka's remaining management nor in the business plan the proponents now seek to put forward.

[10] I have reviewed the First Report of the Proposal Trustee (Deloittes). The Proposal Trustee has not audited the financial statements or verified any of the representations made by management. The trustee has reviewed the proposed cash flow and is satisfied that the interim financing would provide sufficient liquidity to bring the facility to completion and to begin. The Proposal Trustee recommends the plan. It believes it is a better option than either an immediate

bankruptcy or uncontrolled efforts by secured creditors to realize on their security. The facility is largely completed to Health Canada standards. It was successful in obtaining the licence to grow and sell cannabis in September of last year. No crop could have been legally grown before that date. It requires roughly $650,000.00 to complete the construction and $160,000.00 to purchase inventory.

[11] The interim financing plan is expensive and would add $2.3 million in debt to the burden already in place. A large potion of the cost is the cost of professional fees to work through the insolvency and restructuring and the cost of high risk borrowing. The plan involves at least three significant assumptions which cannot be tested and carry significant risks. There is the risk that the remaining construction will not be completed on time, to specification and within budget. There is the risk that production of cannabis will not ramp up as smoothly as predicted. There is the risk that buyers of the product will not be found in sufficient time or numbers to meet the cash flow predictions.

[12] In addition, there is always the risk that even if all of this falls into place, the proposal or proposals will prove unacceptable to the creditors and an insolvency or a receivership will still result. The debtors have reason to believe that if the facility is completed, they will be able to refinance the project or to sell it as a going concern. On the evidence before me, those are not empty hopes, but they are by no means guaranteed.

**Analysis**

[13] All parties agree to administrative consolidation of the four intended proposals. This makes sense. It is necessary for each corporation to make a proposal because of the ownership structure. All shares of the subsidiaries are owned by Eureka. There is no benefit to having four separate court files.[2]

[14] All parties are in agreement with the proposed sealing. It is not in the public interest to have sensitive financial information such as appraisals of the land or the identity of potential purchasers in the public domain at this time. The documents contained in the "confidential document brief" will be sealed until further order.[3]

[15] This is not a plan of rearrangement under the *Companies' Creditors Arrangement Act*[4] nor is it even a proposal at this point. It is a notice of intention to make a proposal under s. 50.4 (1) of the *BIA*. This procedure permits the debtor to gain the statutory protection of a stay of proceedings without initial court approval while, subject to compliance with the terms of the Act, it attempts to put itself in the position to make a proposal. But the Act only permits this for 30 days within which time it is necessary to either put together a proposal or to obtain further approval and protection from the court.[5]

---

[2] See *Electro Sonic Inc. (Re)*, 2014 ONSC 942 (Commercial List)
[3] See *Canwest Publishing Inc. (Re)*, 2010 ONSC 222 (Commercial List) @ paras 63 - 65
[4] *Companies' Creditors Arrangement Act*, R.S.C. , 1985, c. C-36
[5] See *Cumberland Trading Inc. (Re)*, (1994) 23 CBR (3d) 225 (Ont. Ct., Gen Div., Commercial List)

[16] The court may extend the time to make a proposal and during that time the court may approve interim financing pursuant to s. 50.6 (1) of the Act. In making that decision and in exercising its discretion, the court is mandated to consider all relevant factors including those set out in subsection (5). That subsection reads as follows:

**Factors to be considered**

(5) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the debtor is expected to be subject to proceedings under this Act;
- (b) how the debtor's business and financial affairs are to be managed during the proceedings;
- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

[17] It is the position of the noteholders that the proposed interim financing would materially prejudice the noteholders by placing another $2.3 million in debt in priority to its security. This of course is inherent in approving DIP financing and is not the only consideration.[6] Still it is part of the analysis. $2.3 million in additional debt over the next month is significant. It is also the position of the noteholders that they have no confidence in management or the ability of that management to successfully bring the project to fruition and generate positive cash flow.

[18] I appreciate the concerns of the noteholders. I share the concern that there is a significant risk inherent in cultivating a first crop of cannabis and finding buyers. This is an industry in its infancy and the struggles of some of the established companies in this area are public knowledge. In fact, on the day of the hearing Canopy Growth Corp. announced it was closing two greenhouse facilities in British Columbia and cancelling a project planned for Ontario.[7]

[19] Counsel for the debtor submitted that this was not an appropriate area for judicial notice particularly in light of the specific evidence before me. The affidavit evidence filed on behalf of the debtors indicated a different business strategy focused on seedlings or "clones" and painted an optimistic picture of quickly generating positive cash flow. I agree that a news report should not be taken as evidence, but it is useful background. There is no doubt that there is significant risk for any new business particularly in an evolving and volatile sector such as legal cannabis production.

---

[6] See *OVG Inc., (Re)*, 2013 ONSC 1794

[7] See: https://business.financialpost.com/cannabis/canopy-growth-lays-off-500-workers-shuts-massive-b-c-greenhouse-facilities

[20] The question is whether this is a risk worth taking despite the misgivings of the noteholders and the potential prejudice to their position. I am encouraged by the First Report of the Proposal Trustee and the support for the plan set out therein. I am also impressed by the support for the plan voiced by the representative of the first mortgagee and the interim lenders.

[21] I appreciate that both the interim lender and the first mortgagee are fully secured against the value of the land but the willingness to lend the additional funds is supported by their analysis of the plan as viable. Mr. Martin deposes that he has been working with Mr. Poli since September of 2019 and has full confidence in the plan. It is his position that the interim financing plan and proposal proceedings based on a completed and operational facility is likely to generate greater value for all stakeholders than would be the case in a liquidation.

[22] There are other stakeholders, not the least of which are two lien claimants and the unsecured creditors. There is at least $15 million in secured debt and over $9 million in unsecured debt. As noted, the other secured creditors support the motion and neither the lien holders nor the unsecured creditors appeared to oppose it.

[23] There are five current employees but perhaps 20 other employees who were laid off from the various companies. The completion of the project and the start of cannabis production would involve calling some of those employees back to work.

[24] I am persuaded that immediate liquidation would have dire effects whereas the brief extension of time and the interim financing hold at least the prospect of increased value and a successful proposal.[8]

**<u>Conclusion & Order</u>**

[25] I am granting the proposed order substantially in the form proposed although I have simplified the title of the proceedings in paragraph 2 of the draft order as shown at the top of these reasons. I am also imposing an additional term.

[26] During the extension period, the court will require a bi-weekly status report confirming the interim funding is in place, verifying progress of construction, the continued validity of the cultivation licence and progress towards production of a first crop.

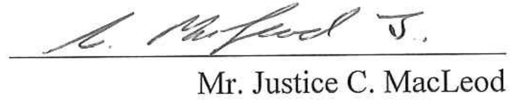
[27] In the event that there is a significant deviation from the plan as proposed or if any of the assumptions built into the interim financing plan fail to materialize or require significant readjustment, the noteholders or any other creditor may move to lift the stay or for amendment of the order.

[28] I may be spoken to for further direction if required or if there is any dispute as to the form of the order.

---

[8] See *Mustang GP Ltd (Re)*, 2015 ONSC 6562

[29] The parties may also arrange to speak to the matter if any party seeks costs.



Mr. Justice C. MacLeod

Date: March 9, 2020

**CITATION:** Eureka 93 Inc. et. al. (Re) 2020 ONSC 1482
**COURT FILE NO.:** 33-2618511
**DATE:** 2020/03/09

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

## (IN BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF THREE RELATED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., and VITALITY CBD NATURAL HEALTH PRODUCTS INC.)

**BEFORE:** Mr. Justice Calum MacLeod

**COUNSEL:** E. Patrick Shea, for the debtors

Sean Zweig, for Dominion Capital LLC

Lou Brzezinski, for the Proposal Trustee

---

**DECISION AND REASONS**

---

Mr. Justice C. MacLeod

**Released:** March 9, 2020

# APPENDIX B

**CITATION:** Eureka 93 Inc. et. al. (Re), 2020 ONSC 4703
**COURT FILE NO.:** 33-2618511
**DATE:** 2020/08/05

**COURT OF ONTARIO,**
**SUPERIOR COURT OF JUSTICE**
**(IN BANKRUPTCY AND INSOLVENCY)**

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF THREE RELATED INTENDED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., AND VITALITY CBD NATURAL HEALTH PRODUCTS INC.)

AND IN THE MATTER OF SECTION 192 OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED, AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF 12112744 CANADA LIMITED AND INVOLVING LIVEWELL FOODS CANADA INC. AND ARTIVA INC.

**BEFORE:** Mr. Justice Calum MacLeod

**COUNSEL:** E. Patrick Shea & Benoit Duchesne, for the debtors

Elliot Birnboim & Michael Crampton, for Dominion Capital LLC (noteholders)

Chad Kopach and Eric Golden for the Proposal Trustee

Hartley Bricks for the Proposal Trustee

Benjamin Blay for the Interim (DIP) Lenders

Barbara VanBunderen for Family Lending

**HEARD:** July 31, 2020

## CASE CONFERENCE ORDER & DIRECTION

[1] A case conference was convened at the request of the parties to this ongoing insolvency proceeding. A case conference is a useful device for obtaining orders and directions which do not require an extensive motion record. Although in some circumstances, the court can entertain an oral motion at a case conference, a case conference is not an appropriate forum for determining or deciding contested issues of fact.

[2] The following are relevant events in this proceeding.

a. On February 19th, 2020 the Debtors, having served notice of four intended proposals under s. 50.4 (1) of the BIA, brought a motion for administrative consolidation, extension of time and for the approval of DIP financing.

b. The intended proposals (now proposals) are as follows:

i. Artiva Inc. (33-2618510)

ii. Livewell Foods Canada Inc. (33-2618512)

iii. Vitality CBD Natural Health Products Inc. (33-2618513); and

iv. Eureka 93 Inc. (33-2618511)

c. Eureka 93 Inc. was a publicly traded company (on the TSC Venture Exchange and then the Canadian Stock Exchange) until there was a cease trading order by the OSC.

d. These proposals deal with only four of the corporations in the Eureka 93 Group, but they are interrelated because Eureka 93 is the owner of the shares of Livewell Foods Canada Inc. and Vitality CBD Natural Health Products Inc. Livewell Foods Canada Inc. in turn owns the shares of Artiva Inc. The shares of Livewell and Vitality were pledged as security to one of the secured creditors.

e. The focus of the proceeding to date has been the attempt by the debtors to salvage value from the operations of Artiva Inc., which is the owner of a farm property and greenhouse facility in Ottawa licenced by Health Canada to produce and sell cannabis.

f. The main purpose of the DIP financing was to complete the construction of the largely completed greenhouse facility so that Artiva Inc. could commence production of Cannabis seedlings (clones).

g. The motion was opposed by the noteholders and supported by the Proposal Trustee, the first mortgagee on the Artiva property, the proposed DIP lender and the debtors. Other creditors were either in support of the financing or were neutral. I granted an order on March 9th, 2020. (See reasons at 2020 ONSC 1482)

h. The order was granted because the Court was persuaded that there was some possibility of a viable proposal with a potentially better outcome for the creditors if the financing was granted than there would be in the bankruptcy which would otherwise result. One factor in making that order was the evidence in relation to the value of the land. Another was the prospect of a market for the cannabis seedlings which the facility was expected to produce.

i. Since the granting of the initial order, Ontario has been in various stages of lockdown due to the novel coronavirus (COVID-19). This has impacted court operations as well as most businesses. Despite COVID-19, the facility owned by Artiva was largely completed and cannabis cultivation has begun.

j. Unfortunately, the contract for sale of the cannabis clones has fallen through and a new valuation of the land suggests that the value of the property has declined by almost a third since the original appraisal was completed.

k. Although the proposals have now been developed and put to meetings of creditors, the proceeding has been delayed because of factual and procedural disputes between the noteholders and the debtors.

l. The noteholders have not been prepared to vote for or against the proposals without further information. In particular, they wish to obtain their own appraisal of the land owned by Artiva, they wish to examine Mr. Poli and others concerning the disposition of assets in the United States and they wish to obtain an accurate accounting for the amounts owing under the first mortgage.

m. On July 16th, 2020, I heard a motion by the noteholders seeking production of information and documents from the debtor's appraiser, seeking cross examination of Mr. Poli and seeking examination of other witnesses. I granted an order for production of information and documents, but I dismissed the motion for cross examination in advance of the scheduled meetings of creditors. (See 2020 ONSC 4415).

n. The meetings of creditors to vote on the proposals have now taken place. There were three votes (Artiva & Livewell jointly, Vitality and Eureka 93) but the noteholders voted to postpone the votes and to seek further investigation and examinations pursuant to s. 52 of the BIA. While this possibility was contemplated at the time of discussing the motion, there is now a new wrinkle.

o. The debtors have challenged whether or not the noteholders are creditors of Artiva and entitled to vote on the Artiva proposal. Firstly, in the proposal they have assessed the value of Dominion's security as $0, based on the fact that the land is now said to be worth less than the total of the first mortgage and the DIP financing. Secondly, and independently of that question, they challenge the status of the noteholders as unsecured creditors because Artiva's only liability to the noteholders is pursuant to a guarantee.

p. It should be noted that the Trustee has, at this point, nether accepted nor rejected the noteholders proofs of claim. That is apparently because the first proof of claim was submitted without supporting documents and the revised proof of claim was submitted with what I am told was over 400 attached pages categorized by the debtors as a "data dump". The trustee had not completed a review of those documents at the time of the case conference and had not issued a notice under s. 135 of the BIA.

q. The vote at the Artiva meeting of creditors to postpone the vote and to conduct investigation and examinations was taken pursuant to s. 108 (3) of the BIA. That is to say the chair marked the proof of claim as objected to and the vote as subject to being invalidated in the event of the objection to the vote being sustained.

r. The votes on all proposals are now postponed by reason of the investigations sought by the noteholders and the inability of the debtors and noteholders to reach agreement on the voluntary production of documents or examination of witnesses.

s. The noteholders have not stated definitively that they will vote against the proposals. It is their position that they may or may not vote for the proposals, but they wish to make a fully informed decision.

t. At this point in time, the debtors wish to bring an application to invalidate the noteholder vote on the Artiva proposal pursuant to s. 108 (3) but have not done so.

u. At this point, there is no appeal to the court by the noteholders pursuant to s. 50.1 (4), 51 (3) or any other provision of the BIA permitting an appeal to the court. Instead the noteholders seek an order from the court enforcing the outcome of the vote, setting a timetable for the debtors to deliver an application and requiring the Trustee to deliver a Form 77.

[3] It is not clear to me, from the skeleton outline of arguments against the background of disputed facts, precisely what the basis is for the debtors challenging the claim of the noteholders under Artiva's guarantee. In the original motion materials, Mr. Poli deposed that the debtors were indebted to the noteholders in the amount of up to $8.5 million. There appears to be no doubt that the noteholders are the largest creditor of Eureka 93 and the vote in that proposal would be valid.

[4] Prior to these insolvency proceedings in Ontario, there were dealings with two facilities in the United States. The noteholders obtained the interest of the debtors in a facility in New Mexico in exchange for reducing the noteholder debt by $3 million. As I understand it, the noteholders are now trying to reduce the amount of that write down of debt. This transaction may also be part of the argument now advanced by the debtors that Artiva is not liable under its guarantee.

[5] The second American facility was in Montana. Apparently, another creditor seized the equipment and plant. This is the subject matter of the proposed examination of Mr. Poli. The noteholders believed they were in a first secured position in relation to this property, but then were told that the creditor they had believed was unsecured was actually in first place. The noteholders wish to conduct an investigation into this transaction to see if there is value to be unlocked and applied against the noteholder debt.

[6] Factual disputes that were mentioned during the case conference include the following:

a. What amount is owing by Artiva to the noteholders and does any amount of that debt remain secured against the land and improvements?

b. What amount of unsecured debt is owing to the noteholders by each of the corporations making proposals and what number of votes do the noteholders have in each proposal?

c. What occurred in Montana to permit an unsecured creditor that was related to the debtors to become a secured creditor that is unrelated? Do the noteholders have any recourse which might reduce the amount owing to them or increase the recovery for the benefit of creditors generally?

d. Was the release of the New Mexico facility to the noteholders properly valued and a legitimate reduction in the amount of the debt?

e. Were any of the estimates of value of the Artiva land obtained by the debtors materially misleading? What is the actual value of the property with the completed improvements? What, if any, additional value does the business of Artiva have as a going concern even if the cannabis licence is not transferrable?

[7] It is open to the court to order a trial of an issue or an inquiry be made pursuant to s. 187 (8) of the BIA and this includes the possibility of either conducting a trial or referring the matter to a master or other court official. I might be prepared to make such an order if the issues are clearly defined, if there is no efficient procedure for determining the question pursuant to another provision of the BIA and if resolution of the issue would advance matters and prevent procedural gridlock.

[8] On the other hand, the court must be cautious about permitting peripheral issues that are of interest to only one of the creditors from hijacking the proceeding or complicating what are intended to be summary processes. While a bankruptcy court may be justified in taking an inquisitorial approach in some circumstances, the court ought not to do so on the basis of nebulous and ill-defined allegations, speculation, or competing correspondence attached to emails or case conference briefs. This is the antithesis of the orderly and commercially oriented approach to insolvency mandated by the legislation.

[9] I agree that the first step is for the Trustee to determine the validity of the proofs of claim and to value the noteholder's debt. This should not remain simply a dispute between the noteholders and the insolvent debtors. The Trustee must take a position.

[10] I also agree that the vote on the proposal cannot be delayed indefinitely while the noteholders investigate possible steps they could take in the United States. On the other hand, the vote in the Eureka 93 proposal is clearly valid and Mr. Poli is readily available for cross examination. He has filed several affidavits. I have already ordered the debtor's appraiser to disclose his source information and documents and the noteholders are completing their own appraisal. All of these steps should be completed within the next two weeks.

[11] Any decision about a trial of an issue should await one of the parties properly formulating the issue and bringing it before the court in a recognizable form. That will only be necessary if the parties fail to vote on the proposal or the proposal is defeated and becomes a bankruptcy.

**[12] The court orders and directs as follows:**

a. The Trustee is to forthwith assess and value the proofs of claim submitted by the noteholders and to issue its Form 77 no later than August 14, 2020. The noteholders and the debtors are to fully cooperate with the Trustee.

b. The examination of Mr. Poli and others as approved by the meeting of creditors in the Eureka 93 proposal shall proceed and shall be completed by August 18th, 2020. If the Trustee wishes to conduct the examinations, the Trustee shall do so. If not, then the noteholders may do so.

c. If the Trustee accepts the proof of claim in any of the proposals and the debtor (or any other creditor) wishes to challenge the validity of the debt owing to the noteholders, the said creditor(s) shall advise the noteholders in writing of the specific basis for doing so and shall undertake to bring the necessary application before the court.

d. Subject to further order or agreement in writing and to any application or appeal which must be determined in advance thereof, the votes on the proposals shall be completed no later than August 28th, 2020.

e. I may be spoken to for further direction should that be required.

Mr. Justice C. MacLeod

Date: August 5, 2020

**CITATION:** Eureka 93 Inc. et. al. (Re) 2020 ONSC 4703
**COURT FILE NO.:** 33-2618511
**DATE:** 2020/08/04

**ONTARIO**

# SUPERIOR COURT OF JUSTICE

**(IN BANKRUPTCY AND INSOLVENCY)**

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF THREE RELATED INTENDED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., AND VITALITY CBD NATURAL HEALTH PRODUCTS INC.)

AND IN THE MATTER OF SECTION 192 OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED, AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF 12112744 CANADA LIMITED AND INVOLVING LIVEWELL FOODS CANADA INC. AND ARTIVA INC.

**BEFORE:** Mr. Justice Calum MacLeod

**COUNSEL:** E. Patrick Shea & Benoit Duchesne, for the debtors

Elliot Birnboim & Michael Crampton, for Dominion Capital LLC (noteholders)

Chad Kopach and Eric Golden for the Proposal Trustee

Hartley Bricks for the Proposal Trustee

Benjamin Blay for the Interim (DIP) Lenders

Barbara VanBunderen for Family Lending

---

## CASE CONFERENCE ORDER

---

Mr. Justice C. MacLeod

**Released:** August 4, 2020

# APPENDIX C

District of: Ontario
Division No. 12 - Ottawa
Court No. 33-2618511
Estate No. 33-2618510

FORM 77

Notice of Disallowance of Claim, Right to Priority or Security or Notice of Valuation of Claim
(Subsection 135(3) of the Act)

In the matter of the proposal of
Artiva Inc.
of the City of Ottawa, in the Province of Ontario

Dominion Capital LLC, BPY Limited, Nomis Bay Ltd. & MMCAP
International Inc. SPC
C/O Chitiz Pathak LLP - Attn: E Birnboim
77 King St., W., Ste 700, TD North Twr PO Box 118
Toronto ON M5K1G8

Take notice that:

As trustee acting in the matter of the proposal of Artiva Inc., we have disallowed your claim (or your right to a priority or your security on the property) in whole, pursuant to subsection 135(2) of the Act, for the following reasons:

1. The underlying Eureka 93 Inc. debt to Dominion Capital LLC ("DC"), as collateral agent, in respect the February 2019 Securities Purchase Agreement, guaranteed by Artiva Inc. ("Artiva"), Livewell Foods Canada Inc. and Vitality CBD Natural Health Products Inc., among others, in the Guarantee of Obligations dated February 14, 2019 under the 10% Senior Secured Convertible Notes Due February 20, 2020 (the "Feb 2019 Guarantee"), has been paid out in full following the closing of the transaction under the Partial Payment Agreement dated December 18, 2019. As a result, the Feb 2019 Guarantee was extinguished. The DC mortgage registered against title to the Artiva real property municipally known as 5208 Ramsayville Road, Ottawa (the "Real Property"), secures the obligations owing by Artiva to Dominion Capital from time to time, and specifically references the Feb 2019 Guarantee. Since Artiva did not guarantee the 10% Senior Secured Convertible Notes Due April 20, 2020 (the "March Notes"), the DC mortgage does not secure the March Notes.

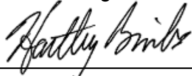
2. As noted above, Artiva did not guarantee the Eureka 93 Inc. debt to DC in respect the March Notes. With respect to the security agreements executed by Artiva in February and March, 2019, charging all property, including real property, of Artiva to secure the indebtedness of Eureka 93 Inc. and others, including Artiva, to DC from time to time, this constitutes only an unregistered mortgage that is "third party security", which means it constitutes a guarantee of the obligations only to the extent of the value of the equity in the property charged. Since this is an unregistered mortgage, it is behind all other registered mortgages and encumbrances on the Real Property, which means there is no equity to be charged in the Real Property. With respect to any personal property of the Debtor, it has no realizable value as third party security (which would also rank behind the Administrative Charge in any event). Accordingly, such unregistered charge/third party security is valued at $Nil, and thus the claim of DC is disallowed in its entirety.

3. The Director Claims are not provable under the Proposal. Furthermore, we note that over and above paragraphs 1 and 2 above (as grounds for also disallowing the Director Claims), the Director Claims are simply based on bald allegations in the Amended Proof of Claim that are not corroborated by the documents attached as a Schedule to the Amended Proof of Claim.

And further take notice that if you are dissatisfied with our decision in disallowing your claim in whole (or a right to rank or your security or valuation of your claim), you may appeal to the court within the 30-day period after the day on which this notice is served, or within any other period that the court may, on application made within the same 30-day period, allow.

Dated at the City of Toronto in the Province of Ontario, this 14th day of August 2020.

Deloitte Restructuring Inc. - Licensed Insolvency Trustee



Bay Adelaide East
8 Adelaide Street West, Suite 200
Toronto ON M5H 0A9
Phone: (416) 601-6072 Fax: (416) 601-6690

District of: Ontario
Division No. 12 - Ottawa
Court No. 33-2618511
Estate No. 33-2618512

FORM 77

Notice of Disallowance of Claim, Right to Priority or Security or Notice of Valuation of Claim
(Subsection 135(3) of the Act)

In the matter of the proposal of
LiveWell Foods Canada Inc.
of the City of Ottawa, in the Province of Ontario

Dominion Capital LLC, BPY Limited, Nomis Bay Ltd. and
MMCAP International Inc. SPC
C/O Chitiz Pathak LLP - Attn: E. Birnboim
77 King ST., W., Ste 700, TD Twr, PO Box 118
Toronto ON M5K 1G8

Take notice that:

As trustee acting in the matter of the proposal of LiveWell Foods Canada Inc., we have disallowed your claim (or your right to a priority or your security on the property) in whole, pursuant to subsection 135(2) of the Act, for the following reasons:

1. The underlying Eureka 93 Inc. debt to Dominion Capital LLC ("DC"), as collateral agent, in respect the February 2019 Securities Purchase Agreement, guaranteed by Artiva Inc. ("Artiva"), LiveWell Foods Canada Inc.("LiveWell") and Vitality CBD Natural Health Products Inc., among others, in the Guarantee of Obligations dated February 14, 2019 under the 10% Senior Secured Convertible Notes Due February 20, 2020 (the "Feb 2019 Guarantee"), has been paid out in full following the closing of the transaction under the Partial Payment Agreement dated December 18, 2019. As a result, the Feb 2019 Guarantee was extinguished. LiveWell did not guarantee the 10% Senior Secured Convertible Notes Due April 20, 2020 (the "March Notes").

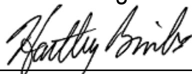
2. As noted above, LiveWell did not guarantee the Eureka 93 Inc. debt to DC in respect the March Notes. With respect to the security agreements executed by LiveWell in February and March, 2019, charging all property of LiveWell to secure the indebtedness of Eureka 93 Inc. and others, including LiveWell, to DC from time to time, this constitutes only "third party security", which means it constitutes a guarantee of the obligations only to the extent of the value of the equity in the property charged. Any personal property of the Debtor has no value as third party security (which would also rank behind the Administrative Charge in any event). Accordingly, such third party security is valued at $Nil, and thus the claim of DC is disallowed in its entirety.

3. The Director Claims are not provable under the Proposal. Furthermore, we note that over and above paragraphs 1 and 2 above (as grounds for also disallowing the Director Claims), the Director Claims are simply based on bald allegations in the Amended Proof of Claim that are not corroborated by the documents attached as a Schedule to the Amended Proof of Claim.

And further take notice that if you are dissatisfied with our decision in disallowing your claim in whole (or a right to rank or your security or valuation of your claim), you may appeal to the court within the 30-day period after the day on which this notice is served, or within any other period that the court may, on application made within the same 30-day period, allow.

Dated at the City of Toronto in the Province of Ontario, this 14th day of August 2020.

Deloitte Restructuring Inc. - Licensed Insolvency Trustee



Bay Adelaide East
8 Adelaide Street West, Suite 200
Toronto ON M5H 0A9
Phone: (416) 601-6072 Fax: (416) 601-6690

District of: Ontario
Division No. 12 - Ottawa
Court No. 33-2618511
Estate No. 33-2618513

FORM 77

Notice of Disallowance of Claim, Right to Priority or Security or Notice of Valuation of Claim
(Subsection 135(3) of the Act)

In the matter of the proposal of
Vitality CBD Natural Health Products Inc.
of the City of Ottawa, in the Province of Ontario

Dominion Capital LLC, BPY Limited, Nomis Bay Ltd. and
MMCAP International Inc. SPC
C/O Chitiz Pathak LLP - Attn: E. Birnboim
77 King St., W., Ste 700, TD North Twr, PO Box 118
Toronto ON M5K 1G8

Take notice that:

As trustee acting in the matter of the proposal of Vitality CBD Natural Health Products Inc., we have disallowed your claim (or your right to a priority or your security on the property) in whole, pursuant to subsection 135(2) of the Act, for the following reasons:

1. The underlying Eureka 93 Inc. debt to Dominion Capital LLC ("DC"), as collateral agent, in respect the February 2019 Securities Purchase Agreement, guaranteed by Artiva Inc., LiveWell Foods Canada Inc. and Vitality CBD Natural Health Products Inc. ("Vitality"), among others, in the Guarantee of Obligations dated February 14, 2019 under the 10% Senior Secured Convertible Notes Due February 20, 2020 (the "Feb 2019 Guarantee"), has been paid out in full following the closing of the transaction under the Partial Payment Agreement dated December 18, 2019. As a result, the Feb 2019 Guarantee was extinguished. Vitality did not guarantee the 10% Senior Secured Convertible Notes Due April 20, 2020 (the "March Notes").

2. As noted above, Vitality did not guarantee the Eureka 93 Inc. debt to DC in respect the March Notes. With respect to the security agreements executed by Vitality in February and March, 2019, charging all property of Vitality to secure the indebtedness of Eureka 93 Inc. and others, including Vitality to DC from time to time, this constitutes only "third party security", which means it constitutes a guarantee of the obligations only to the extent of the value of the equity in the property charged. Any personal property of the Debtor has no value as third party security (which would also rank behind the Administrative Charge in any event). Accordingly, such third party security is valued at $Nil, and thus the claim of DC is disallowed in its entirety.

3. The Director Claims are not provable under the Proposal. Furthermore, we note that over and above paragraphs 1 and 2 above (as grounds for also disallowing the Director Claims), the Director Claims are simply based on bald allegations in the Amended Proof of Claim that are not corroborated by the documents attached as a Schedule to the Amended Proof of Claim.

And further take notice that if you are dissatisfied with our decision in disallowing your claim in whole (or a right to rank or your security or valuation of your claim), you may appeal to the court within the 30-day period after the day on which this notice is served, or within any other period that the court may, on application made within the same 30-day period, allow.

Dated at the City of Toronto in the Province of Ontario, this 14th day of August 2020.

Deloitte Restructuring Inc. - Licensed Insolvency Trustee

Bay Adelaide East
8 Adelaide Street West, Suite 200
Toronto ON M5H 0A9
Phone: (416) 601-6072 Fax: (416) 601-6690

District of: Ontario
Division No. 12 - Ottawa
Court No. 33-2618511
Estate No. 33-2618511

FORM 77

Notice of Disallowance of Claim, Right to Priority or Security or Notice of Valuation of Claim
(Subsection 135(3) of the Act)

In the matter of the proposal of
Eureka 93 Inc.
of the City of Ottawa, in the Province of Ontario

Dominion Capital LLC, BPY Limited., Nomis Bay Ltd and MMCAP
International Inc. SPC
C/O Chitiz Pathak LLP - Attn: E Birnboim
77 King St., W., Ste 700, TD North Twr, PO Box 118
Toronto ON M5K 1G8

Take notice that:

As trustee acting in the matter of the proposal of Eureka 93 Inc., pursuant to subsection 135(2) of the Act, we have disallowed your secured claim in whole and allowed a unsecured claim in the amount of $11,129,160 (USD $8,400,000), for the following reasons:

1. Your secured claim has been valued at $Nil as there are no assets of any value;

2. Your unsecured claim has been adjusted down by USD$2,700,000 to reflect the Agreed Amount of USD$3,000,000 for the transaction under the Partial Payment Agreement dated December 18, 2019 and the Bill of Sale dated February 6, 2020;

3. Furthermore, your unsecured claim has also been adjusted down for the Mandatory Default Amount of USD$3,420,000 and Default Interest of USD$1,571,400 as you have not provided any calculations for how these two portions of your claim were determined such that it cannot determined what is being claimed for prior to the date of filing, and whether these two portions of your claim are penalties and/or contraventions of the Interest Act; and

4. The Director Claims are not provable under the Proposal. Furthermore, even if they were, the Director Claims are based on bald allegations in the Amended Proof of Claim that are not corroborated by the documents attached as a Schedule to the Amended Proof of Claim.

And further take notice that if you are dissatisfied with our decision in disallowing your claim in whole (or a right to rank or your security or valuation of your claim), you may appeal to the court within the 30-day period after the day on which this notice is served, or within any other period that the court may, on application made within the same 30-day period, allow.

Dated at the City of Toronto in the Province of Ontario, this 14th day of August 2020.

Deloitte Restructuring Inc. - Licensed Insolvency Trustee

Bay Adelaide East
8 Adelaide Street West, Suite 200
Toronto ON M5H 0A9
Phone: (416) 601-6072 Fax: (416) 601-6690

# APPENDIX D

ONTARIO

THE HONOURABLE CALUM MACLEOD
REGIONAL SENIOR JUSTICE
SUPERIOR COURT OF JUSTICE

COURT HOUSE
161 ELGIN STREET
OTTAWA, ONTARIO K2P 2K1

L'HONORABLE CALUM MACLEOD
JUGE PRINCIPAL RÉGIONAL
COUR SUPÉRIEURE DE JUSTICE

PALAIS DE JUSTICE
161, RUE ELGIN
OTTAWA (ONTARIO) K2P 2K1

# MEMORANDUM

To: Counsel in the Eureka 93 matters – Court File No. 33-2618511

Date: August 20, 2020

Re: Case Conference – August 19, 2020

---

As you are aware, a case conference was convened yesterday to discuss scheduling of certain matters. There was some dispute about the propriety of a lengthy brief filed by counsel for the noteholders. I used the document as an outline of the issues the noteholders wish to raise and the nature of those issues but of course any allegations or statements of fact are untested.

The noteholders state their intention to appeal the disallowance or partial disallowance of their claims in each of the proposals (there are now 3 because the Arteva and Livewell proposals are presented and voted on jointly). They have not launched those appeals but were prepared to do so within a shorter time than the 30 days permitted in the BIA. After discussion, I decided it was fruitless to set a timetable until the materials had been delivered, and the Trustee and other creditors had determined how they wish to respond.

As the validity of the noteholders claims for purposes of the insolvency proceedings will now be put before the court pursuant to s. 135 (1.1) (4) I see no need to order trial of an issue at this time.

The noteholders also wish to bring a motion to remove the Trustee. It appears the appeals should be dealt with first because part of the basis for removing the Trustee is the allegation that in disallowing the claims, the Trustee did not act neutrally and in accordance with its obligations.

Also after discussion, I determined there was no basis for me to make any order interfering with the orderly process of voting at the meetings currently scheduled for August 28th, 2020.

There was some discussion about the fact that the proposals are no longer necessarily intertwined. The debtors assert that because of the CBCA Arrangement, it is now possible for the Arteva / Livewell proposal to proceed even if there are bankruptcies in the Eureka 93 and Vitality matters. There was discussion about the possibility of ordering those debtors into bankruptcy pursuant to s. 187 (11) or 59 (2) but at this point the noteholders (who still control the Eureka 93 proposal) are not prepared to commit to voting down the proposal.

I was remined as well that Vitality was the owner of the New Mexico and Montana facilities (through U.S. subsidiaries) and the issues in relation to those properties could be investigated under either a proposal or a bankruptcy assuming either the Trustee or a creditor (such as the noteholders) wishes to do so.

I was asked to give further direction regarding the examinations previously voted on and discussed in my previous endorsement. I am not prepared to make findings about the conduct of the Trustee or the noteholders and whether or not the demands for production of documents or for funding of the examinations were reasonable at a case conference on the basis of contested facts. That would require a motion.

The noteholders did clarify that if they receive the documents they are seeking, that would eliminate the need for cross examination because the main purpose of the cross examination was to elicit those records. It is possible this may be resolvable between the debtors, the Trustee and the noteholders.

The precise status of Artiva's business, contracts and the DIP financing or first mortgage is not before the court because the biweekly reports I had ordered ceased when the intended proposals became proposals. It seems probable from the discussion that the DIP financing is exhausted, that the debtor is in arrears of interest payments and that currently there are no contracts. It would be reasonable to have an update from the Trustee for the next case conference.

In conclusion, the court is directing as follows:

1. The noteholders shall serve their appeals and supporting materials by August 26th, 2020.

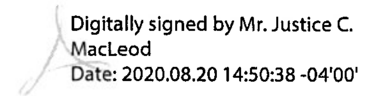
2. There will be a further case conference on September 2nd, 2020 at 9:00 a.m. by Zoom videoconference.

3. Nothing in this order has the effect of delaying the votes scheduled for August 28th and nothing in this order prevents the creditors from voting for a further adjournment or from voting on the proposals or any of them.

4. The Trustee is to update the last bi-weekly report prior to the next case conference.

August 20, 2020

Mr. Justice C. MacLeod



# APPENDIX E

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**(IN BANKRUPTCY AND INSOLVENCY)**

Estate Number: **33-2618511**
Court File No.: **33-2618511**

**AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO**

**AND IN THE MATTER OF THREE RELATED INTENDED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., AND VITALITY CBD NATURAL HEALTH PRODUCTS INC.)**

**AND IN THE MATTER OF SECTION 192 OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED, AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF 12112744 CANADA LIMITED AND INVOLVING LIVEWELL FOODS CANADA INC. AND ARTIVA INC.**

# SUBMISSION RE DISPUTED CLAIMS OF NOTEHOLDERS

Date: 30 July 2020


**GOWLING WLG (CANADA) LLP**
Barristers & Solicitors
1 First Canadian Place, Suite 1600
100 King Street West
Toronto, ON M5X 1G5

**E. PATRICK SHEA (LSO No. 39655K)**
Tel: (416) 369-7399 / Fax: (416) 862-7661
Email: patrick.shea@gowlingwlg.com

**BENOIT M. DUCHESNE (LSO No. 44922I)**
Tel: (613) 786-0142 / Fax: (613) 788-3637
Email: benoit.duchesne@gowlingwlg.com

Lawyers for the Debtors

**SUBMISSION RE DISPUTED CLAIMS OF NOTEHOLDERS**

## I. Introduction

1. These Proposal Proceedings were commenced on 14 February 2020. Proposals were filed on 12 June 2020. Since then, the progress has virtually ground to a halt as Dominion Capital ("**DC**"), as agent for the Noteholders, has engaged in a process to gather as much information as possible from as many sources as possible to determine how it will vote on the Debtors' Proposals and go down every possible path to evaluate its options. DC's latest effort sees the meetings to consider the Debtor's Proposals delayed by at least another 30 days while DC conducts investigations and examinations of multiple parties for its own benefit. This is, with respect to DC and its counsel, contrary to the principle that proceedings under Part III are to be carried out in a timely and cost-effective manner—this is "real time" not "forensic" litigation and the interest of stakeholders beyond DC are in issue**. [See *Casimir Capital (Re)*, 2015 ONSC 2819 (CanLII), para 30.]**.

2. The Noteholders and DC are highly sophisticated lenders and entered into complex securities transactions with Eureka 93 that involved the issuance of Notes and Warrants that would have provided the Noteholders with very valuable equity positions in Eureka 93, had the Eureka 93 Group's business been successful. It is unfortunate the business failed, but, along with many other companies in the cannabis space, it did and the Debtors' stakeholders, including DC, have to address the fall-out and, to the extent possible, preserve value for all stakeholders. DC, unfortunately, simply refuses to accept that it may have to make a decision with less-than-perfect information while, at the same time, not appreciating its obligations in terms of establishing its claims against the debtors as required by the BIA and attempting to keep from creditors the details of transactions between the Noteholders and Eureka 93 that might result in recoveries for Eureka 93's creditors.[1]

3. The meetings of creditors to consider the Proposals were initially scheduled for early July of 2020, but were adjourned by the Bankruptcy Court to 28 July 2020.

4. DC was aware of its obligation to file Proofs of Claim in advance of the meetings of creditors on 28 July 2020. DC was also aware that it was obliged to provide sufficient documentation to permit the

[1] The Proposals preserve the ability to attack transactions so these same transactions would be subject to attack whether or not the Eureka 93 Proposal is accepted, approved and implemented.

Proposal Trustee, the Debtors and all creditors who filed Proofs of Claim to evaluate the Noteholders' claims against the Debtors.

5. DC initially filed its Proofs of Claim without any supporting documentation, but, as noted below, DC provided copies of all of the documents it relies on to support its claims against the Debtors after the Debtor advised it that the Proofs of Claim it had delivered to the Proposal Trustee and the Service List were "materially deficient".

6. Based on the Proofs of Claim delivered by DC it is does not appear that the Noteholders have valid claims as against Artiva, LiveWell and Vitality or that DC was entitled to vote at the meetings of creditors called to consider the Joint Proposal filed by Artiva and LiveWell or the Proposal filed by Vitality.

7. There are two issues that must be resolved on an urgent basis:

1. The validity and quantum of the Noteholders' disputed claims for the purposes of voting at the meetings of creditors convened to consider the Proposals. If the Noteholders do not have valid claims against Artiva, LiveWell and Vitality, those Proposals will be accepted by creditors as required by the BIA. With respect to Eureka 93, once the quantum of its claim is determined, DC can vote its claim against the Proposal should it wish to do so and the matters that DC wishes to have investigated *vis-à-vis* Eureka 93, along with the transactions in favour of DC, can be investigated in the resulting bankruptcy of Eureka 93.

2. Assuming the Noteholders have valid claims against Artiva, LiveWell and Vitality, the propriety of the examinations and investigations that DC purported to direct by relying on its own disputed claim to move and pass resolutions under s. 52 of the BIA to adjourn each of the meetings of the creditors of those companies pursuant to s. 52 of the BIA needs to be determined.

8. The three meetings of creditors to consider the Debtors' Proposals convened on 28 July 2020 at 1000 (Artiva and LiveWell), 1400 (Eureka 93) and 1600 (Vitality).

9. On 26 July 2020, DC sent a letter to the Proposal Trustee (and the entire Service List) with respect to the Proposals and the investigations that DC wished to have undertaken. In that letter, DC basically

advised that it was looking to undertake the same investigations that it had requested on its Motion pursuant to s. 163(2) of the BIA. **[See Appendix [A].]**

10. At about 1515 on 27 July 2020, DC delivered Proofs of Claim in respect of the Noteholders' claims against the Debtors and Proxies appointing Philip Gross as its proxy. The Proofs of Claim were identical and asserted the following claim against each of the Debtors

| Total Outstanding: | |
|---|---|
| February Advance | USD$3,000,000 |
| March Advance | USD$12,000,000 |
| Less Escrow Release | (USD$3,600,000) |
| Los Cruces, New Mexico | (USD$300,000) |
| **Total** | **USD$11,100,000** |
| **Convert to CAD at 1.34** | **CAD$14,874,000** |

11. In Schedule A to its Proofs of Claim, DC relied on the following 10 documents to support the Noteholders claims against the Debtors:

1. Securities Purchase Agreement dated 14 February 2019 ("**February SPA**").
2. Guarantee of Obligations dated 14 February 2019 ("**February Guarantee**").
3. Livewell Canada Inc., Flow of Funds Closing Memo dated 14 February 2019.
4. Security Agreement dated 14 February 2019 ("**February Security Agreement**").
5. Additional Debtor Joinders dated 13 February 2019.
6. Securities Purchase Agreement dated 20 March 2019 ("**March SPA**").
7. Security Agreement dated 20 March 2019 ("**March Security Agreement**").
8. Charge registered as OC2085148 on 18 March 2019 ("**Debenture**").
9. Livewell Canada Inc. Flow of Funds Closing Memo dated 25 March 2019.
10. Eureka 93 Inc. (formerly LiveWell Canada Inc.) Escrow Release Memo 22 August 2019.

12. After reviewing DC's Proofs of Claim, the Debtors sent the following e-mail to DC:

*This is a "with prejudice" offer to try to resolve the issue of the adjournment of tomorrows meetings in the hopes that Mr. Birmboim's clients will see the benefit of moving this forward in a productive manner:*

*1. We've reviewed the Proofs of Claim filed by Dominion Capital and it is the Debtors position that they are materially deficient, not completed in accordance with the BIA and should be noted as "objected to" for the purposes of any resolutions at tomorrow's meetings. That being said, the Debtors will agree to provisionally admit Dominion Capital's claims as filed for the sole purpose of moving for and voting on motions to adjourn each of the meetings.*

*2. The Meetings will be adjourned for two (2) weeks for Dominion Capital to obtain an appraisal from Avison Young and consider its position on the Proposals.*

*3. Any investigations/ examinations to be conducted during the adjournment will be conducted by the Proposal Trustee and funded by Dominion Capital. Dominion Capital (or any creditor) may identify areas of inquiry, but the scope and conduct of the investigations/examinations will be determined by the Proposal Trustee. The results of any investigations/examinations, and the information obtained by Dominion Capital from the appraiser retained by the Debtors and any appraisal or valuation obtained by Dominion Capital, will be made available to creditors when the meetings are reconvened as is contemplated by s. 52.*

*If the terms set forth above are not acceptable, then Dominion Capital can, of course, put forward its own motions seeking adjournments of the meetings to permit it to conduct investigations/examinations no doubt as described in Mr. Birnboim's e-mails and there will be a de facto adjournment in the sense that the following issues arising out of any such motions will need to be determined by the Court: (a) whether Dominion Capital has properly proven claim(s) against each of the Debtors such that it can propose and vote on the motion(s); (b) whether Dominion Capital can vote any claim(s) it might have to cause examinations/investigations to be conducted by it's own counsel for its own purposes; (c) who should conduct the investigations/examinations and who should bear the cost; (d) the scope of the investigations/examinations to be conducted, for example can the investigations/examinations exclude transactions in favour of Dominion Capital; and (e) what information, for example the information from the appraiser retained by the Debtors that is being provided to Dominion Capital and any appraisal or valuation that is obtained by Dominion Capital, is to be put before the creditors when the meetings are reconvened.*

13. DC did not respond to the Debtor's offer and instead, at about 1840 on 27 July 2020, provided a link to a revised Schedule A that included copies of all of the documents that DC relies upon to support the Noteholders claims against each of the Debtors.

14. The Schedule A documents delivered by DC consists of 409 unnumbered pages and appears to be essentially a "data dump" that was not reviewed by anyone before being delivered to the Proposal Trustee and the Service List:

1. There are 3 separate copies of the February SPA (pp2-37, 105-140 and 203-237) none of which has the Exhibits or Schedules attached and none of which appears to be fully executed by the Noteholders[2].
2. There are 3 separate copies of the February Guarantee (pp38-52, 90-104 and 188-202).
3. There are 2 separate copies of the February Security Agreement (pp57-89 and 155-187).
4. There appear to be various "loose documents" in the package (pp145-154 and 243-252).
5. The March Closing Memo in the package is not signed by Eureka 93.

15. At about 0800 on 28 July 2020—two hours before the first meeting was scheduled to be convened—the Debtors sent an e-mail to DC disputing the claims filed by DC and identifying the following issues:

1. DC filed a secured claim notwithstanding the provisions of the BIA that require that it file an unsecured claim.

2. DC has unilaterally reduced the purchase price for the New Mexico Facility from USD$3MM to USD$300K. They assert this is because the Debtors misrepresented the value of the Facility. The Agreement in issue provides that the Noteholders were to conduct due diligence and close only once they were satisfied with their due diligence. USD$3MM was paid by DC to acquire the New Mexico Facility. The payment was then to be applied to reduce the obligation owing under the February Notes to $0.

3. DC's claim against Artiva, LiveWell and Vitality is based on a single guarantee signed in respect of the February Notes and there is no guarantee of the obligations owing by Eureka 93 to the Noteholders under the March Notes.

16. The Debtors advised both DC and the Proposal Trustee that it was their position that DC's claims should be allowed at $0 or marked as disputed pursuant to s. 108(3) of the BIA—this practice is sometimes referred to as "mark and park". DC should have produced all of the documents necessary to permit the Proposal Trustee to determine whether the Noteholders have claims and the quantum of those claims. It is simply not possible for the Proposal Trustee to assume a second guarantee exists.

17. At the meetings of creditors, the claims filed by DC were each marked as disputed pursuant to s. 108(3) of the BIA and DC was permitted to vote, subject to the validity of its claims being determined by the Bankruptcy Court. DC did not dispute the treatment of its claims or suggest that it had further

[2] The fact that the documents are not fully executed is not material, but somewhat ironic given the position taken by DC and its counsel with respect to other documents and the standard to which DC and its counsel appear to be putting other stakeholders.

documents or agreements available that could be produced to address the issues raised by the Debtors. Mr. Gross, DC's representative who has sworn each of the Affidavits filed by DC and DC's Proxy was in attendance at each of the meetings.

18. There is an issue as to whether the Bankruptcy Court should now consider additional documents from DC, but the Debtors requested on 28 July 2020 that DC provide any additional documents that it relied upon to support its claims against the Debtors. DC declined to even agree to a timeline to deliver any additional documents.

19. If the claims filed by DC on behalf of the Noteholders are not considered, there were sufficient voting letters delivered in favour of the Proposals that, when considered together with the proxy delivered in favour of an Officer of Artiva, each of the Proposals would have all been approved by the double majority of the creditors as required by the BIA.

20. There was not, however, a vote taken on any of the Proposals. DC moved, and relied on its disputed claims to pass, resolutions **at each meeting**[3] pursuant to s. 52 of the BIA to adjourn the meeting for a period of not less than 30 days to accomplish the following:

1. Receipt by DC of the documentation from the Appraiser.
2. DC to conduct examinations of Seann Poli, which examinations DC advised would require over 1.5 days to complete.
3. For the Proposal Trustee to obtain:
    (a) Details of and copies of any written agreements among the First Mortgagee, FamilyLending, the Interim (DIP) Lender and the Debtor respecting the consent to postpone to the Interim (DIP) Financing;
    (b) Details and evidence of any advances, payments and a discharge statement for the First Mortgage.
4. To permit DC, at its option, to examine the First Mortgagee.

21. In addition to objecting to DC's ability to bring and vote on the resolution, the Debtors objected to the substance of the motion proposed on the basis that the scope of the investigations/examinations that DC proposed to conduct were overly broad and that any investigations/examinations should be done

[3] It is not clear how some of these matters even relate to certain Debtors. DC seems intent on taking a "shotgun" approach in the hopes that it might, given enough time and after spending a fortune in professional fees, uncover something.

by the Proposal Trustee so that the transactions with DC could also be investigated and the results made available to all creditors.

22. The First Mortgagee and the Interim (DIP) Lenders disputed the right of DC to conduct investigations with respect to their agreements with the Debtors and to examine them.

## II. Validity of Noteholder Claims against Artiva, LiveWell and Vitality

23. Based on the Schedule A documents produced by DC, it does not appear that the Noteholders have valid claims against Artiva, LiveWell or Vitality.

24. The Noteholders claims are based on Notes issued by Eureka 93 in February and March of 2019. The Notes were not included in the Schedule A documents delivered by DC, but one of the Notes is attached as **Appendix [B]**. Artiva, LiveWell and Vitality are not liable to the Noteholders under the Notes and their liability, if any, to the Noteholders arises only through a guarantee of Eureka 93's obligations under the Notes.

25. To establish valid claims, DC must produce written guarantees signed by Artiva, LiveWell and Vitality. **[*Statute of Frauds*, s. 4. See *Steinberg* v. *King*, 2011 ONSC 3042 (CanLII), *Trio* v. *Premier Fitness*, 2014 ONSC 3422 (CanLII), *Deutsche Bank* v. *Mieszko Properties Inc.*, 2018 ONSC 3815 (CanLII) and *Wolseley Canada* v. *Caesar's Plumbing and Heating Ltd.*, 2018 ONSC 7159 (CanLII).]**

26. DC has produced, and relies on, only the February Guarantee. The February Guarantee was signed in connection with the sale of the February Notes and is limited to the obligations owing to the Noteholders under the February Notes—USD$3MM **[Art 8]**. Those obligations were paid in December of 2019 by application of the proceeds payable by the Noteholders to the New Mexico Facility.

27. The March SPA includes a reference to a "Subsidiary Guarantee", but no guarantee has ever been produced by DC and the form of the "Subsidiary Guarantee" appears to have been removed from the March SPA, or is at least not included in the March SPA that is included in the Schedule A documents[4]. The March SPA also specifically contemplates the waiver by the Noteholders of the requirement to deliver various documents, including a Subsidiary Guarantee **[Art 2.4.]** and there is no evidence that the

[4] The March SPA appears to include each of the other Schedules and Exhibits referenced in the body of the agreement, except there is no Exhibit D.

Noteholders ever asserted a default under the March SPA based on any failure by Artiva, LiveWell or Vitality to deliver a Subsidiary Guarantee.

28. The February Security Agreement is in "generic" form and secures only such obligations relating to the February Notes as are owed or owing by Eureka 93, Artiva, LiveWell and Vitality to the Noteholders "from time to time". **[Def'n of "Obligations".]** It does not give rise to any obligations owing to the Noteholders by Eureka 93, Artiva, LiveWell and Vitality.

29. The March Security Agreement is in "generic" form and secures only such obligations relating to the March Notes as are owed or owing by Eureka 93, Artiva, LiveWell and Vitality to the Noteholders "from time to time". **[Def'n of "Obligations".]** It does not give rise to any obligations owing to the Noteholders by Eureka 93, Artiva, LiveWell and Vitality

30. The Debenture, which was signed about the same time as the March SPA, refers specifically to only the February Guarantee. **[Def'n of "Guarantee".]** The definition of "Obligations" is potentially broad enough to incur other obligation assumed by Artiva "from time to time", but the Debenture itself does not give rise to any obligations. **[Def'n of "Obligations".]**

## III. Quantum of the Noteholders' Claims

31. DC asserts a claim of USD$11.1MM against each of the Debtors. The reason that the claim is reflected at USD$11.1MM as opposed USD$8.4MM is, according to DC:

> *The Debtors transferred the Los Cruces, New Mexico property to the Noteholders in return from (sic) a USD$3million reduction in the outstanding loan. The Noteholders have since learned that the valuation proffered by the Debtors was, at minimum, grossly misleading and that the New Mexico property is, generously, worth USD$300,000.* **[Schedule A]**

32. In December of 2019, at the same time as Vitality LLC was dealing with Surety and the Montana Facility, a transaction was completed with the Noteholders with respect to the New Mexico Facility. Subject to the satisfactory completion of due diligence by the Noteholders, the Noteholders agreed to buy the New Mexico Facility for USD$3MM and to apply the USD$3MM to reduce Eureka 93's obligations owing to the Noteholders in respect of the February Notes. There were no representations or warranties provided by the Debtors with respect to the New Mexico Facility or its value. There is no dispute that the Noteholders closed the transaction to acquire the New Mexico Facility.

33. In an apparent attempt to justify DC's position that it could unilaterally establish the purchase price to be paid for the New Mexico Facility, on 28 July 2020, DC's counsel raised the fact that a fully executed copy of the Partial Payment Agreement dated 18 December 2019 was not attached to the Affidavit of Seann Poli, sworn 9 July 2020, and implied that DC was not aware as to whether the Agreement had been signed by the Noteholders. Later in the day on 28 July 2020, the Debtors produced a copy of an e-mail from Mr. Gross attaching the Noteholders' signature pages for the Partial Payment Agreement and a fully executed copy of the Agreement is attached as **Appendix [C]**.

## IV. Guarantee Defenses

34. The validity of a guarantee can be an issue where the creditor has prejudiced the right of subrogation and thereby caused harm to the guarantor **[See *Pax Management Ltd.* v. *Canadian Imperial Bank of Commerce*, 1992 CanLII 27 (SCC).]**

35. Mr. Gross has raised the issue of the prejudice that has resulted from the fact that DC does not appear to have the full security package, contemplated by Article 2.4 of the Securities Purchase Agreements, such that its recourse is limited to the Ottawa Facility. There is, however, no evidence from DC as to why it does not have (or did not perfect/register) the security contemplated by Article 2.4.

36. The February Guarantee includes language that purports to exclude "standard" guarantee defenses. **[Art 3(a).]** The facts regarding how DC came to not have the security contemplated by Article 2.4 of the Securities Purchase Agreements are relevant to determining whether, or the extent to which, exclusionary provisions may be applicable to prevent Artiva, LiveWell and Vitality from raising guarantee defences based on the fact that DC does not appear to have taken or perfected/registered the security contemplated by Article 2.4.

## V. Additional Evidence not Admissible

37. It is apparent that DC was aware that it was required to put forward evidence to establish its claims. DC had the opportunity to put forward all of the documents upon which it relies to support its claims and did so.

38. DC was aware, prior to the meetings of creditors being convened, that there were issues with its claims and, in particular, the fact that the February Guarantee was a limited guarantee that secured only the USD$3MM owing under the February Notes that had been repaid in December of 2019. Mr. Gross

was in attendance at each of the meetings. At no time did DC indicate that it had another guarantee signed by Artiva, LiveWell and/or Vitality or request time to search for and deliver another guarantee. When given an opportunity to do so, DC refused to commit to a time to respond to the question of whether there is another written guarantee that it has failed to disclose[5].

39. Given the opportunity to indicate whether a second guarantee existed, DC refused. DC also refused to commit to any timeline to deliver additional documentation and effectively forced the matter to a Case Conference to schedule the immediate return of a Motion to have the validity of its claim determined.

40. The evidence that is to be before the Bankruptcy Court on the determination of DC's claim is the evidence that was delivered before the meetings of creditors. As noted in *Canadian Triton International Ltd. (Re)*, 1997 CanLII 12412 (ON SC):

> *[I]t would be inappropriate to go back after the meeting and attempt to cooper up any observed deficiency with the material filed for the purpose of voting. That is not to be confused with material then available to the Chair. If it were otherwise, then there could be a (never ending) string of attempts at bolstering the material so that it was objectively satisfactory and that the estate would continue to be in a state of uncertainty as to any vote taken…*

**[See also *Casimir Capital (Re)*, 2015 ONSC 2819 (CanLII), para 32.]**

## VI. DC Investigations/Examinations

41. DC did not ask a single question of the Proposal Trustee or the Debtor at the meetings of creditors. Aside from requesting clarification on a single statement made by the Proposal Trustee on its Report on the Joint Proposal, DC did not make any substantive inquiries of the Proposal Trustee on its Reports on the Proposal. DC's only objective at the meetings was moved and passed its resolutions under s. 52 of the BIA. There were no other creditors that voted in favour of DC's resolution or that expressed any concern with the issues raised by DC. The creditors were, however, aware of the futility of voting against DC's resolution because DC, subject to its claim being determined, controlled the outcome of the vote.

42. DC's resolution effectively grants to itself that right to conduct the examinations that it was denied by the Bankruptcy Court's Decision and Reasons dated 17 July 2020 in connection with DC's

[5] In the five months since the Proposal proceedings were commenced DC has only ever produced the February Guarantee.

Motion under s. 163(2) of the BIA. The expectation when DC's Motion under s. 163(2) was dismissed was that the body of creditors, as opposed to DC unilaterally, would determine if there would be an adjournment to conduct investigations and examinations and the Proposal Trustee, as opposed to DC, would conduct any investigations or examinations directed by the creditors. **[*Eureka 93 Inc. (Re)*, 2020 ONSC 4415 (CanLII), paras 24 and 25]**

43. The resolution under s. 52 that DC passed provides it with basically the same relief vis-à-vis the examination of Mr. Poli with respect to the transfer of a property owned by the non-debtor company Vitality LLC and DC's purported security over Vitality LLC and the examination of the First Mortgagee that was denied on DC's Motion under s. 163(2). **[See *Eureka 93 Inc. (Re)*, 2020 ONSC 4415 (CanLII), para 26.]**

44. In addition, DC's s. 52 resolution: (a) obliges the Proposal Trustee to incur costs to investigate and provide DC with information surrounding the negotiations that resulted in the Interim Lending Facility and why the First Mortgagee did not oppose the First Day Order; and (b) provides for DC with an option to examine the First Mortgagee.

45. Much of what DC seems to be seeking is only marginally relevant, if at all, to the question of whether DC will recover more under the Joint Proposal than in a receivership/bankruptcy. It is clear that other creditors are not interested in this information and have cast their votes either for or against the Proposals.

46. DC is clearly gathering information for its own use and not for the general benefit of creditors[6] and there is an issue as to whether DC is exercising its purported control over the meetings of creditors for an improper purpose—s. 52 is to be used for the general benefit of creditors and not by a creditor to pursue its own agenda—that will result in substantial injustice, particularly if the Debtors do not have valid claims against Artiva, LiveWell and Vitality. **[See *9354-9186 Québec inc.* v. *Callidus Capital Corp.*, 2020 SCC 10 (CanLII), para 71. See also *West Coast Logistics Ltd. (Re)*, 2017 BCSC 1970 (CanLII)]**

[6] DC has, for example, taken the position that the information provided by its appraiser with respect to the value of the Ottawa Facility is "privileged" until a formal valuation is produced by the appraiser as requested by DC and has provided no details with respect to the status of that appraisal.

47. The importance of having the Proposal Trustee conduct any investigations/examinations in this case is highlighted by the fact that DC, on its statement of account, indicates that it received a USD$3.6MM payment to reduce the obligations owing by Eureka 93. That is potentially attackable as preferences that, if recovered, would be available to repay the creditors of Eureka 93. **[See *Royal City Chrysler Plymouth Limited* v *Royal Bank of Canada*, 1998 CanLII 1337 (ONCA). See also *Eureka 93 Inc. (Re)*, 2020 ONSC 4415 (CanLII), para 26.]**

## Schedule A

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3**

50.1 (1) Subject to subsections (2) to (4), a secured creditor to whom a proposal has been made in respect of a particular secured claim may respond to the proposal by filing with the trustee a proof of secured claim in the prescribed form, and may vote, on all questions relating to the proposal, in respect of that entire claim, and sections 124 to 126 apply, in so far as they are applicable, with such modifications as the circumstances require, to proofs of secured claim.

(2) Where a proposal made to a secured creditor in respect of a claim includes a proposed assessed value of the security in respect of the claim, the secured creditor may file with the trustee a proof of secured claim in the prescribed form, and may vote as a secured creditor on all questions relating to the proposal in respect of an amount equal to the lesser of

(a) the amount of the claim, and

(b) the proposed assessed value of the security.

(3) Where the proposed assessed value is less than the amount of the secured creditor's claim, the secured creditor may file with the trustee a proof of claim in the prescribed form, and may vote as an unsecured creditor on all questions relating to the proposal in respect of an amount equal to the difference between the amount of the claim and the proposed assessed value.

(4) Where a secured creditor is dissatisfied with the proposed assessed value of his security, the secured creditor may apply to the court, within fifteen days after the proposal is sent to the creditors, to have the proposed assessed value revised, and the court may revise the proposed assessed value, in which case the revised value henceforth applies for the purposes of this Part.

52 Where the creditors by ordinary resolution at the meeting at which a proposal is being considered so require, the meeting shall be adjourned to such time and place as may be fixed by the chair

(a) to enable a further appraisal and investigation of the affairs and property of the debtor to be made; or

(b) for the examination under oath of the debtor or of such other person as may be believed to have knowledge of the affairs or property of the debtor, and the testimony of the debtor or such other person, if transcribed, shall be placed before the adjourned meeting or may be read in court on the application for the approval of the proposal.

108 (1) The chair of any meeting of creditors has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court.

(2) Notwithstanding anything in this Act, the chair may, for the purpose of voting, accept any letter or printed matter transmitted by any form or mode of telecommunication as proof of the claim of a creditor.

(3) Where the chair is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

109 (1) A person is not entitled to vote as a creditor at any meeting of creditors unless the person has duly proved a claim provable in bankruptcy and the proof of claim has been duly filed with the trustee before the time appointed for the meeting.

124 (1) Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.

(2) A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.

(3) The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.

(4) The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counter-claim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated.

135 (5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

***Statute of Frauds*, RSO 1990, c S.19**

4 No action shall be brought to charge any executor or administrator upon any special promise to answer damages out of the executor's or administrator's own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of any other person, or to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which the action is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some person thereunto lawfully authorized by the party.

# APPENDIX F

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**(IN BANKRUPTCY AND INSOLVENCY)**

Estate Number: **33-2618511**
Court File No.: **33-2618511**

**AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO**

**AND IN THE MATTER OF THREE RELATED INTENDED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., AND VITALITY CBD NATURAL HEALTH PRODUCTS INC.)**

**AND IN THE MATTER OF SECTION 192 OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED, AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF 12112744 CANADA LIMITED AND INVOLVING LIVEWELL FOODS CANADA INC. AND ARTIVA INC.**

# SUBMISSION TO PROPOSAL TRUSTEE RE NOTEHOLDER CLAIMS

Date: 9 August 2020

**GOWLING WLG (CANADA) LLP**
Barristers & Solicitors
1 First Canadian Place, Suite 1600
100 King Street West
Toronto, ON M5X 1G5

**E. PATRICK SHEA (LSO No. 39655K)**
Tel: (416) 369-7399 / Fax: (416) 862-7661
Email: patrick.shea@gowlingwlg.com

**BENOIT M. DUCHESNE (LSO No. 44922I)**
Tel: (613) 786-0142 / Fax: (613) 788-3637
Email: benoit.duchesne@gowlingwlg.com

Lawyers for the Debtors

**Submission to Proposal Trustee re Noteholder Claims**

## I. Obligations owing to Noteholders.

1. Dominion Capital LL ("**DC**") has suggested that it advanced loans to the Debtors totaling USD$15MM. This is not, strictly speaking, correct. The Noteholders purchased Notes from Eureka 93 pursuant to: (a) a Securities Purchase Agreement dated 14 February 2019 ("**February SPA**") pursuant to which USD$3MM in Notes ("**February Notes**") were sold to the Noteholders[1]; and (b) a Securities Purchase Agreement dated 20 March 2019 ("**March SPA**") pursuant to which USD$12MM in Notes were sold to the Noteholders ("**March Notes**"). In or about August of 2019, USD$3.6MM owing under the March Notes was repaid to the Noteholders **[Schedule A, pp 1 and 407]**, leaving USD$3MM owing under the February Notes and USD$8.4MM owing under the March Notes. In or about December of 2019, a further USD$3MM was applied and there is dispute as to whether the USD$3MM was applied against the February Notes or the March Notes.

2. DC has filed Proofs of Claim against Eureka 93, Artiva, LiveWell and Vitality asserting that each Debtor owes the Noteholders a total of USD$11.1MM. It is the Debtors' position that the Proof of Claim filed by DC against Eureka 93 should be allowed at USD$8.4MM[2] and the Proofs of Claim filed by DC against Artiva, LiveWell and Vitality should be allowed at $0. The basis for the Debtors assertions in this regard are set forth in the Submission dated 30 July 2020 and this document.

## II. February Guarantee

3. Each of the February and March Note transactions is a "stand alone" transaction. Each of the two SPAs provides for a separate security package to secure the obligations owing under each of the February Notes and the March Notes. **[February SPA, Art 2.4, Schedule A, p 9 and March SPA, Art 2.4, Schedule A, p 259]** There is no dispute that: (a) Artiva, LiveWell and Vitality are not directly obligated to the Noteholders under the February or March Notes; or (b) Artiva and LiveWell are not parties to the February or the March SPA[3]. Any debt obligation owing to the Noteholders by Artiva, LiveWell and Vitality must be based on a valid and enforceable written guarantee provided by Artiva, LiveWell and/or Vitality.

4. There is no dispute that Artiva, LiveWell and Vitality signed a guarantee in February of 2019 in connection with the sale by Eureka 93 of the February Notes (the "**February Guarantee**"). There also

---

[1] As noted below there are issues as to the identity of the Noteholders and DC has not included copies of the Notes with its Proofs of Claim.

[2] Mr. Birnboim has suggested that DC may seek to amend its Proofs of Claim to include interest and penalties. As at 18 December 2019, DC confirmed that the aggregate amount outstanding under the February Notes was USD$3MM and the aggregate amount outstanding under the March Notes was USD$8.4MM: See Partial Payment Agreement, para 2. The Proposal Proceedings were commenced on 14 February 2020 and the Noteholders are not entitled to claim interest after 14 February 2020: See BIA, s. 122() and *Nortel Networks Corporation (Re)*, 2015 ONCA 681 (CanLII). To the extent that DC seeks to now add penalties to its claims, the Debtors reserve the right to make additional submissions, but notes that the Noteholders claims were secured against land and, as a result, s. 8 of the *Interest Act*, RSC 1985, c. I-15 is applicable to prohibit DC from charging an increased or "penalty" rate of interest. Portions of the Noteholders' claims may also be "equity claims" that are fully postponed to other claims.

[3] LiveWell Canada Inc. is now Eureka 93. Vitality is a party to the SPAs because Vitality issued warrants to the Noteholders.

appears to be no dispute that there was no second guarantee signed in March of 2019 in connection with sale of the March Notes—DC takes the position that no second guarantee was signed.

5. **DC Position.** DC's position, as relayed to the Bankruptcy Court and the Proposal Trustee by Mr. Birnboim, is that the no additional guarantee was given in connection with the March Notes and that no additional guarantee is required because:

> *The February [G]uarantee covers all future debts on an unlimited basis. There is simply no second guarantee nor is one required.* **[Birnboim e-mail of 7 August 2020 at 0850]**[4]

6. **Scope of February Guarantee.** There is no support in the documentation for DC's assertion that the February Guarantee: (a) covers "future debts" in the sense that it secures obligation owing by Eureka 93 under the March Notes; or (b) is "unlimited". Pursuant to the February Guarantee, Artiva, LiveWell and Vitality guaranteed only those obligations, if any, owing under the February Notes and, in case there was any doubt, the February Guarantee includes a specific provision that limits the liability of Artiva, LiveWell and Vitality to obligations owing under the February Notes.

7. The preamble to the February Guarantee contains no reference to the March SPA or the March Notes. It provides:

> ***WHEREAS**, the Securities Purchase Agreement requires that each Guarantor execute and deliver to the Collateral Agent simultaneously with the execution of the Securities Purchase Agreement (i) a guaranty guaranteeing all of the obligations of the Companies under the Securities Purchase Agreement, and the other Transaction Documents (as defined below) and (ii) a Security and Pledge Agreement, dated as of the date hereof, granting the Collateral Agent for the benefit of the Noteholders a lien on and security interest in all of their assets and properties (the "Security Agreement")*

8. The February Guarantee refers to the following defined terms:

> **Companies**—Eureka 93 and Vitality.
>
> **Guaranteed Obligations**— the punctual payment, as and when due and payable, by stated maturity, acceleration or otherwise, of all Obligations including, without limitation, all interest, make-whole, redemption and other amounts that accrue after the commencement of any Insolvency Proceeding, of the Companies or Guarantor, whether or not the payment of such principal, interest, make-whole, redemption and/or other amounts are enforceable or are allowable in such Insolvency Proceeding, and all fees, late fees (as defined in the Notes), interest, premiums, penalties, causes of actions, costs, commissions, expense reimbursements, indemnifications and all other amounts **due or to become due under the Notes and the other Transaction Documents**.
>
> **Notes**—the February Notes.

[4] This position was also confirmed in an e-mail sent to DC on 31 July 2020.

**Obligations**[5]—all obligations, liabilities and indebtedness of Artiva, LiveWell or Vitality from time to time **owed or owing under or in respect of the February Security Agreement, the February SPA, the February Notes or any of the other Transaction Documents**.

**Securities Purchase Agreement**—the February SPA.

**Transaction Documents**[6]—the various documents to be delivered pursuant to the February SPA.

9. Pursuant to the February Guarantee, Artiva, LiveWell and Vitality guarantee only the Guaranteed Obligations and the definition of Guaranteed Obligations is limited to Obligations that are due or become due under the February Notes. [**February Guarantee, Art 2(a) Schedule A, p 40]** Once the obligations owing under the February Notes are satisfied, the February Guarantee is "spent" and only Eureka 93 is liable to the Noteholders for the obligations owing under the March Notes

10. In the event that the definition of Guaranteed Obligations is not sufficiently clear in terms of limiting the liability of Artiva, LiveWell and Vitality to the obligations, if any, owing under the February Notes, Section 8 of the February Guarantee is titled "Limitation of Guaranteed Obligations" and provides:

> *(a)* ***Notwithstanding any provision herein contained to the contrary, each Guarantor's liability hereunder shall be limited to an amount not to exceed*** *as of any date of determination the greater of:*
>
> *(i) the amount of all Guaranteed Obligations, plus interest thereon at the applicable interest rate as specified in the Notes, including Cash Interest and PIK Interest; and*
>
> *(ii) (ii) the amount which could be claimed by the Collateral Agent from the Guarantor under this Guaranty without rendering such claim voidable or avoidable under the Bankruptcy Code or under any applicable state Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act or similar statute or common law after taking into account, among other things, Guarantor's right of contribution and indemnification.* **[February Guarantee, Art 8(a), Schedule A, p 45]**

11. The Debenture registered against the Ottawa Facility on 18 March 2020 ("**Debenture**") assists in interpreting the scope of the February Guarantee. The Debenture defines the term "Guarantee" to mean the February Guarantee and describes it as the guarantee pursuant to which Artiva has guaranteed the obligations of the Eureka 93 and Vitality[7] under the February SPA. **[Debenture, Art I, Schedule A, pp 384 and 385]**

12. **Debenture secures on February Notes.** The Debenture was executed and registered at about the same time as the March SPA, but: (a) refers only to the February SPA; and (b) is limited to any direct obligations owing by Artiva to the Noteholders. The Debenture defines "Debtor" to mean only Artiva and defines "Obligations" to mean only those obligations owing directly by Artiva to the Noteholders.

---

[5] This def'n is incorporated by reference from the February Security Agreement and can be found at pages 58 and 59 of Schedule A.

[6] This def'n is incorporated by reference from the February Security Agreement and can be found at page 6 of Schedule A.

[7] Vitality's obligations under the February SPA relate to the issuance of warrants.

**[Debenture, Art I, Schedule A, pp 384 and 385]** There is no dispute that: (a) the only agreement that gives rise to any direct obligations owing by Artiva to the Noteholders is the February Guarantee; (b) no guarantee was signed in connection with the March SPA or the March Notes. It is only if the February Guarantee is sufficiently broad to include obligations owing under the March Note that DC has (subordinate) security against the Ottawa Facility. DC's position with respect to the scope of the February Guarantee is addressed above.

## III. Amount owing to Noteholders

13. **DC Position.** DC takes the position that Eureka 93 is entitled to only a USD$300K "credit" against the amount owing to the Noteholders notwithstanding the terms of the Partial Payment Agreement dated 18 December 2019 ("**Partial Payment Agreement**") that provided for the Noteholders to purchase the New Mexico Facility for USD$3MM and for that USD$3MM to be applied against the obligations owing by Eureka 93 to the Noteholders. **[Schedule A, p 1]**

14. DC also takes the position that the Noteholders have a unilateral right under the Partial Payment Agreement to apply the USD$3MM (or USD$300K) as against the obligations owing under either the February Notes or the March Notes such that, presumably, amounts remain owing under the February Notes in the event that the February Guarantee does not cover obligations owing under the March Notes.

15. **Debtor Position.** The position being taken by DC is a transparent attempt to avoid the Partial Payment Agreement and address the deficiencies in its security package for the March Notes.[8] It is the Debtors' position that the only obligation owing to the Noteholders is USD$8.4MM that is owing by Eureka 93 on the March Notes. The USD$3MM owing on the February Notes was repaid in December of 2019 in accordance with Partial Payment Agreement.

16. **USD$3MM vs USD$300K.** The basis for DC's assertion that it can now unilaterally reduce the purchase price payable for the New Mexico Facility is unclear. The Partial Payment Agreement provides that the Noteholders will, subject to "satisfactory due diligence" the Noteholders would pay USD$3MM for the New Mexico Facility. The Noteholders completed their due diligence, closed the transaction and are now the owners of the New Mexico Facility. At no time prior to DC delivering its Proofs of Claim did the Noteholders raise any issues with the Partial Payment Agreement. Messrs Crampton and Birnboim suggested that the Partial Payment Agreement might not have been fuly executed by the Noteholders, but the Debtors were able to provide an e-mail from Mr. Gross attaching the Noteholders executed signature pages.

17. **Payment of February Notes.** On the 7 August 2020 Conference Call, DC's counsel advised for the first time that it was their position that the Partial Payment Agreement provided the Noteholders with the unilateral right to apply the USD$3MM they paid for the New Mexico Facility to either the February Notes or the March Notes. At no time prior to realizing that there was a problem with their claims against Artiva, LiveWell and Vitality for amounts owing by Eureka 93 under the March Notes did the

[8] There are various other deficiencies in the security packages taken by DC, including the fact that DC appears to have not taken or failed to perfect material security contemplated by the February and March SPAs that would likely have seen it recover a significant amount of its what is owing. DC was, for example, to have security over Acenzia Inc.—a solvent non-debtor entity. DC may attempt to lay the deficiencies in its security package at the feet of the Debtors, but there is no dispute that the SPAs contemplate that DC may waive all or part of its security packages and at no time did DC ever deliver a notice of default based on the deficiencies in its security packages.

Noteholders advise Eureka 93 of any allocation of the USD$3MM that would see amounts remaining owing under the February Notes. DC has not provided any allocation or contemporaneous internal documentation from the Noteholders to establish how the USD$3MM was actually applied as against the February and March Notes. However, Schedule B to the Partial Payment Agreement provides that after the application of the USD$3MM there will be a total of $USD$8.4MM owing. This is the amount the parties agreed was owing under the March Notes and it is the Debtors' assumption that the USD$3MM was applied as intended—against the February Notes, which have priority over the March Notes.

18. The Partial Payment Agreement does not allow the Noteholders to allocate the USD$3MM as between the February and March Notes at their discretion.[9] The Partial Payment Agreement provides for the USD$3MM to be allocated by the Noteholders **in accordance with and as provided for in the Transaction Documents**. **[Partial Payment Agreement, pp 1 and 2, para 3 and Exhibit B]** The Transaction Documents do not give the Noteholders the right to apply payments as against the February or the March Notes in their sole discretion. The Transaction Documents provide for the February Notes to have priority over the March Notes and, taken as a whole, mandate the priority payment of the February Notes.

19. **February Notes have priority over March Notes.** The proceeds realized by Eureka 93 from the sale of the February Notes were to be used to fund the acquisition of the New Mexico Facility through a loan from Eureka 93 to Vitality. **[February SPA, Art 4.9, Schedule A, p 24]** DC was to have a "first priority" security interest in the New Mexico Facility to secure the amount owing under the February Notes. **[February SPA, Art 2.4(g) and 4.9, Schedule A, pp 10 and 24]** The Partial Payment Agreement refers to the fact that the security over the New Mexico Facility was never provided to DC. **[Partial Payment Agreement, p 1 para 3]** However, to support DC's position that it has first ranking security over the Montana Facility, Mr. Birnboim pointed the Bankruptcy Court to the Schedules to the Security Agreement dated 14 February 2019 ("**February Security Agreement**") that include both the Montana Facility and the New Mexico Facility in the collateral to be pledged to DC to secure the obligations owing by, *inter alia*, Vitality under the February Guarantee. **[See Schedule A, pp 7 and 87]** Mr. Birnboim's position, which the Debtors' accept, is that DC had and equitable first ranking charge over the New Mexico Facility to secure the obligations owing under the February Notes. While there are issues with the scope of the February Guarantee and, specifically, whether it includes the obligations owing under the March Notes, the March SPA is clear that any security over the New Mexico Facility that secured the March Notes would be "second ranking" and subordinate to DC's security for the February Notes. **[March SPA, Art 2.4(g), Schedule A, p 260]**[10] In this regard, the Transaction Documents clearly mandated the priority payment of the February Notes on the basis that they have priority over the March Notes. DC cannot unilaterally alter the priority of the Notes rom that established by the SPAs to the detriment of the other creditors.

20. **February Postponement.** There is also a Transaction Document executed by the parties in connection with the February SPA that is not included in the Schedule A provided to the Proposal Trustee by DC that addresses the fact that the February Notes are to be satisfied with the USD$3MM paid by the Noteholders for the New Mexico Facility.

[9] On 31 July 2020, the Debtors requested that DC provide the reference to the documentation that permitted the Noteholders to apply the USD$3MM payment in their sole discretion. DC did not respond.

[10] Art 2.4 of the March SPA is clear that the March Notes are to rank subordinate to the February Notes.

21. In connection with the issuance of the February Notes, Eureka 93, Vitality and DC entered into a Subordination and Postponement Agreement dated 14 February 2020 ("**February Postponement**") (attached)[11] that addresses the application of amounts paid to Eureka 93 by Vitality and the application of the funds realized by out-of-the-ordinary course asset sales by Vitality. The February Postponement provides for the application of all amounts payable by Vitality to Eureka and the proceeds realized from any out-of-the-ordinary-course sale transactions by Vitality to be applied to the payment of the February Notes. In this regard, the February Postponement is consistent with the February SPA in terms of the relative priority of the February Notes. Why the February Postponement was not included in DC's Schedule A documents is an issue that DC should address, but it appears that DC or its counsel were, at the very least, sloppy in terms of the preparation of Schedule A

22. To the extent necessary and in case there was any doubt based on the Partial Payment Agreement and the February Postponement that the USD$3MM payment was to be applied to the USD$3MM owing under the February Notes, Eureka 93 relies on the common law that a debtor may allocate payment as it wishes and, pursuant to its obligations under the February Postponement, allocates the USD$3MM to the payment of the February Notes.

## IV. Authenticity of Documents

23. The Debtors have raised issues with the quality of the Schedule A prepared by DC or its counsel, but there is also some reason to question the documents that DC has provided to support its Proofs of Claim. The signature pages for the executed February SPA that is included in Schedule A differs from the executed February SPA that was previously provided to the Debtors by Bennett Jones LLP ("**BJ**") in May of 2020 (attached). In the version provided by BJ, Hindsdale I LP ("**Hindsdale**")[12] is a signatory to the February SPA, but in the version provided by DC, Hindsdale is not a signatory, but Nomis Bay Ltd. and BPY Limited are signatories. **[See Schedule A pp 36 and 37, and 137 and 138]**[13]

## V. Summary

24. DC may have intentionally waived portions of its security packages or may have messed up its security packages and documentation. Which happened is not material in these proceedings. The validity and quantum of DC's claims against the Debtors must be determined based on the documentation that was executed in connection with the February Notes and the March Notes. To the extent that the documentation does not reflect the Noteholders intentions or DC's instructions to its lawyers, the Noteholders may have a claim against DC and/or DC may have a claim against its lawyers, but that is not relevant for the purposes of determining the validity and quantum of DC's claims against the Debtors. Based on that documentation, the Noteholders have a USD$8.4MM (unsecured) claim against Eureka 93 and a $0 claim against Artiva, LiveWell and Vitality.

[11] This agreement was found among the documents provided to the Debtors in May of 2020 and it is not clear why DC did not include it among the Schedule A documents.
[12] Hindsdale is also referenced in the February Postponement and BJ provided a Common Stock Purchase Warrants in favour of DC and Hindsdale.
[13] This highlights the fact that DC has not provided copies of the Notes in its Schedule A documents. On 31 July 2020, the Debtors requested that DC provide copies of the Notes. DC has not responded.

# APPENDIX G

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**(IN BANKRUPTCY AND INSOLVENCY)**

Estate Number: **33-2618511**
Court File No.: **33-2618511**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO**

**AND IN THE MATTER OF THREE RELATED INTENDED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., AND VITALITY CBD NATURAL HEALTH PRODUCTS INC.)**

**AND IN THE MATTER OF SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED, AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF 12112744 CANADA LIMITED AND INVOLVING LIVEWELL FOODS CANADA INC. AND ARTIVA INC.**

# CASE CONFERENCE BRIEF OF DOMINION CAPITAL LLC

**(Teleconference before Justice MacLeod; Friday, July 31, 2020, 4 p.m.)**

## Purpose of the Case Conference

1. The Noteholders requested this Case Conference in order to obtain an Order in accordance with the resolutions passed at the July 28, 2020 Creditors Meetings that:

> *…adjourn(s) the meetings to a date not less than 30 days hence to accomplish the following:*
>
> 1. *Receipt of the documentation ordered by Justice Macleod from Mr. Kouwenberg.*[1]
> 2. *Dominion to conduct examinations of Seann Poli.*
> 3. *For the trustee to obtain:*
>     a. *Details (and if written) all agreements among the first mortgagee, Family Lending, the DIP financier and the debtor respecting the consent to postpone to the DIP financing;*
>     b. *Details and evidence of any advances, payments and a discharge statement for the first mortgage.*

[1] Counsel for Mr. Kouwenberg was notified of this Case Conference and provided the letter from Mr. Kouwenberg dated July 30, 2020 and attached at **Tab 1**. Contrary to previous representations, Mr. Kouwenberg **confirms** he relied on additional documents to those listed in the reports and anticipates delivery in 7 to 10 days.

c. *For examination of the first mortgagee by Dominion, if so advised, by Dominion.*

*In order to ensure compliance by all parties , we will seek to have the foregoing incorporated into an Order of Justice MacLeod following the affirmative vote.*

2. The Debtor states that it intends to commence an application to challenge the Noteholders' Proofs of Claim). The Trustee has not yet delivered its Form 77 (allowing, disallowing or varying the Proofs of Claim).

3. It is clear the Debtors have no intention of complying with the successful resolution in the interim.

4. Accordingly, in *addition* to the above (voted upon) motion by the Noteholders, the Noteholders seek to establish timelines for:

(a) Delivery of the Trustee's Form 77 (which the Noteholders have 30 days to appeal); and,

(b) Delivery of the Debtors' Notice of Application (and a date to determine a suitable dispute resolution mechanism commensurate with that Notice).

5. The below summarizes the basis for these requests.

**The Creditors Meetings**

6. The Creditors Meetings in the Artiva Inc. ("**Artiva**") and Livewell Foods Canada Inc. ("**Livewell**") Joint Proposal, and the Eureka 93 Inc. and Vitality CBD Natural Health Products Inc. proposals were held on July 28, 2020.

7. The Noteholders *passed* their motion for examinations of Mr. Poli and other relief. A copy of the Trustee's Minutes has not yet been delivered at the time of delivery of this Case

Conference Memorandum.[2] Accordingly, the summary of the Noteholders' successful motion (as presented by the Noteholder's in writing beforehand) is as follows:

> *.....we will be seeking to adjourn the meetings to a date not less than 30 days hence to accomplish the following:*
>
> 4. *Receipt of the documentation ordered by Justice Macleod from Mr. Kouwenberg.* (Note: Mr. Kouwenberg appears to be actively working on producing this material, from communications with his counsel)
> 5. *Dominion to conduct examinations of Seann Poli.*
> 6. *For the trustee to obtain:*
>     a. *Details (and if written) all agreements among the first mortgagee, Family Lending, the DIP financier and the debtor respecting the consent to postpone to the DIP financing;*
>     b. *Details and evidence of any advances, payments and a discharge statement for the first mortgage.*
>     c. *For examination of the first mortgagee by Dominion, if so advised, by Dominion.*
>
> *In order to ensure compliance by all parties , we will seek to have the foregoing incorporated into an Order of Justice MacLeod following the affirmative vote.*

8. However, in an effort to "neuter" this readily predictable result, the Debtors have now disputed the claims in the Noteholders' Proofs of Claim. At least at this stage, this challenge to the claims is incomprehensible both from a *substantive* and *practical* perspective.

9. Substantively, it is directly inconsistent with:

(a) The clear contractual entitlements in multiple Transaction Documents and registration on title to the Ottawa Facility, summarized below; and,

---

[2] There were a number of heated exchanges, including with the Trustee's counsel. The absence of an opportunity to consider and respond to the Minutes may be problematic. Fearing distraction about recollection of what might be said, counsel for the Noteholders made the following request prior to the meeting: "*I also think it prudent that you ensure that there is a verbatim transcript for the meeting be available as a review of same may be required in due course.*" The Trustee declined to arrange for transcription.

(b) The *formal admissions* by the Debtors confirming the Noteholders' security in the Debtors' property, summarized at **Tab "2"** hereto, which operate as a legal bar to the Debtors asserting such a contrary position.

10. Not only is the objection at this stage without merit, it is grossly impractical:

(a) From a voting perspective, the challenge is irrelevant: the Noteholders would *still* carry the vote as the largest creditor in the Eureka 93 Inc. proposal. Thus, the examinations *will* occur.[3]

(b) Delaying the inevitable examinations will delay the vote on any Proposal. The only issue is whether the examinations occur *in advance of* or *after* judicial determination of the Noteholders' Proof of Claim. Clearly the former is more time effective.

(c) The Noteholders continue to be in active negotiation with the Debtors to try to find a workable Proposal, subject to such examinations and information. The Noteholders have repeatedly offered to attend a mediation with an experienced bankruptcy practitioner *or* a retired Judge to try to resolve their differences – a suggestion consistently refused by the Debtors. Thus, the dispute as to the claim *may* be resolved without recourse to a trial of the issues.

11. In the circumstances, the Court's direction is required.

**Directions Sought**

12. In simplest terms, it is in all parties' interests to resolve their differences if possible. While there is a prospect of this occurring, it cannot occur until the Noteholders, who invested

[3] *Note*: The Noteholders are mindful of Justice MacLeod's observation that issues on *both* sides respecting the Montana and New Mexico properties be addressed simultaneously. The Noteholders do not object, although no motion for such examinations was tabled by any party *except* the Noteholders.

USD$15million in this venture only to see it *almost entirely* dissipated, can satisfy themselves as to the *real* questions raised respecting, *inter alia*, the Debtors' dealings with security in Ottawa, Montana and New Mexico.

13. Accordingly, now that (per paragraph 25 of the July 20, 2020 Endorsement of Justice MacLeod, amended July 22, 2020), "*…..all creditors* [were] *able to attend the meeting, receive and review the proposal and to cast their votes including a vote on whether to request further investigation*", the Noteholders seek direction at the Case Conference requiring the Debtors to abide by the Creditors' vote passing the above noted resolution, which must pass *either* as a secured *or* as unsecured vote.

14. As noted above, being mindful of Justice MacLeod's comments about dealing with all issues at the same time, the New Mexico examinations should proceed as well, if they are being pursued.

15. *None* of this limits the Debtors' attack on the Artiva claim, which they are free to pursue. Once the full extent of this dispute is known, presumably through the Trustee's delivery of a Form 77, the regular procedures of the BIA can be invoked *by either side*. Assuming the Debtors do not wish to engage in mediation, the Noteholders are otherwise content to follow this approach. Through Ms. Duplessis, the Court invited counsel to consider two means to resolve the issue. Both are acceptable to the Noteholders:

(a) Appoint a person to "vet" the debts: Provided the cost of this (*de facto*) arbitration is paid for by the Debtor or Trustee in the first instance, *the Noteholders would agree* – subject to agreeing to a satisfactory arbitrator; or,

(b) Direct a trial of the issues: This is clearly appropriate – once the Trustee articulates its position formally. Only at that point would the Noteholders and Debtors have a clear picture of the documents and evidence to be produced. Whether the trial should proceed as an application, summarily or a full trial can be determined at that time.

16. Therefore, if the matter is not directed to an independent arbitrator, the following is proposed pursuant to the scheme of BIA, s 135 (attached as **Schedule "A"**):

(a) The *Trustee* will formally advise if the Noteholders' claims are accepted, disallowed or revalued in accordance with Form 77, with details of the *full* grounds,[4] by **August 5, 2020**.

(b) If the *Debtors* (rather than the Trustee) seek to reduce or expunge a proof of claim, *they* may do so under s 135(5) by bringing a motion to be scheduled at a case conference on **August 10, 2020** in the afternoon (counsel for the Noteholders is on vacation and without computer access until Thursday August 6, 2020).

(c) If the Trustee delivers a Form 77 disallowing or re-valuing the Noteholders' claims or security, the Noteholders will consider the reasons offered and determine whether they wish to appeal. They have thirty days pursuant to BIA, s 135(4).

(d) The examinations which were the subject of the affirmative vote (and the motion before Justice MacLeod) would proceed as follows:

(i) Seann Poli on **August 12, 2020**; and,

[4] This is critical so that the *audi alterem partem* rule is not offended – the Noteholders and Debtors must know full details of where they stand so that they can fully respond.

(ii) If so advised, Mr. Gross will attend his examination in respect of the New Mexico issue on **August 13, 2020.**

**The "Hail Mary" Challenge**

17. On the morning of the Creditors Meetings, July 28, 2020, Mr. Shea, counsel for the Debtors, summarized their objections to the Noteholders' claims. The Trustee has not documented *its* position, other than to request an additional document - although the Trustee seems to support the Debtors' challenge. A clear delineation of the Trustee's position is required by the BIA, s 135(3).

18. Notwithstanding the above, without providing an exhaustive response in this venue, several elements of the Debtors' allegations are particularly troubling, as noted below.

***(A) Continuing Claim of Fraudulent Preference by the Debtor***

19. At least since the Debtors' (now withdrawn) motion to remove the Noteholders' prior counsel and to examine Mr. Gross in respect *the Debtors'* transfer of the New Mexico property, the Court will have heard the Debtors' *repeated* reference to an alleged "fraudulent preference"[5] in favour of the Noteholders. This allegation bears careful attention.

20. Although the motion was "withdrawn without costs" by the Debtors, the New Mexico property was raised *again* in the context of disputing the Noteholders' claim. Given this re-emergence of the issue following the withdrawn motion, counsel for the Noteholders has now had an opportunity to do a deeper dive on the issue.

---

[5] See e.g. the Affidavit of Seann Poli (26 May 2020) at paras 12-13 and the heading "Potentially Attackable Transactions", Motion Record dated 26 May 2020.

21. The first and most glaring issue arises from the fact that the Partial Payment Agreement dated December 18, 2019 which is suggested to be a "fraudulent preference" is **signed by the same Seann Poli who *now* asserts the fraudulent preference**!

22. Lest Mr. Poli suggest "I didn't know the transaction was improper" (which impropriety is not conceded by the Noteholders) Mr. Poli had the advice of *current* insolvency counsel, Mr. Patrick Shea, at the time of the transaction. As illustrated below, Mr. Shea was retained *at least* since December 1, 2019 (and it is assumed prior):

> *From: Seann Poli <SPoli@eureka93.com>*
> *Date: **December 1, 2019** at 11:54:26 PM GMT*
> *To: Philip Gross <pg@templeasset.com>*
> *Cc: Willie Blocker <willie@canopy.com>, Owen Kenney <okenney@eureka93.com>, "Kent Hoggan (Yahoo)" <kenthoggan@yahoo.com>, Peter Ostapchuk <POstapchuk@eureka93.com>, **"Shea, Patrick" <Patrick.Shea@gowlingwlg.com>***
> *Subject: RE: Taking possession*
>
> *Hi Phil,*
>
> *I'll call you tomorrow to discuss.*
>
> *PRIVILEDGED AND CONFIDENTIAL*
>
> *Have a great day and live well,*
>
> *Seann Poli*
> *Co-CEO*
>
> …
>
> *From: Philip Gross <pg@templeasset.com>*
> *Sent: **December 1, 2019** 6:37 PM*
> *To: Seann Poli <SPoli@eureka93.com>*
> *Cc: Willie Blocker <willie@canopy.com>; Owen Kenney <okenney@eureka93.com>; Kent Hoggan (Yahoo) <kenthoggan@yahoo.com>; Peter Ostapchuk <POstapchuk@eureka93.com>; **Shea, Patrick <Patrick.Shea@gowlingwlg.com>***
> *Subject: Re: Taking possession*
>
> *Sean,*

*This correspondence comes as quite a surprise considering that you were aware of a prejudicial situation regarding the security of the note holders and sat on it for three days.*

*Additionally I note that you have now engaged bankruptcy counsel while last week you were unable to retain counsel for financial reasons.*

*As your email arrived on the weekend there was no opportunity to consult with the note holders or counsel so will revert with responses when available but trust you will act in the interests of all the stakeholders accordingly without prejudice.*

*Regards*

*Phil*

> *On Nov 29, 2019, at 9:11 PM, Seann Poli <SPoli@eureka93.com> wrote:*
>
> *Privileged & Confidential*
>
> *To the Secured Creditors of Eureka 93 Inc.*
>
> *Please be advised that **Surety Land Development LLC has given notice of their intent to act upon their security interests (attached below).***
>
> *On September 24, 2019, the former Eureka 93 Inc. (E93) executive management team and Board of Directors, except one member, resigned and abandoned the company. Since mid October 2019, a new E93 Board was appointed and Co-CEOs were established.*
>
> *Since then, the new management team and Board of E93 have undertaken due diligence to review all former documents and security agreements, and to reconcile the financial records on an unconsolidated basis to September 30, 2019, with accruals for additional liabilities and asset impairments that may have existed from June 30, 2019 to November 12, 2019. The Board has also had to deal with secured creditors that acted upon their security in relation to Acenzia Inc. that involved reversal of share transfers subject to a partial revocation of the cease trade order issued by the Ontario Securities Commission (OSC) on September 4, 2019.*
>
> *The E93 Board and Co-CEOs have also been considering options and alternatives for a viable restructuring. Given the recent issuance of the Health Canada Cannabis Licensed Producer license received on September 24, 2019 for the Artiva facility, the E93 Board and management team would like to call a meeting of the secured creditors to discuss restructuring options to secure a viable future for the company(s).*

***We believe that a restructured company or set of companies would provide a far greater value proposition for the secured creditors as opposed to simple asset disposal.***

*Please advise of your availability and we look forward to meeting with you.*

*Thank you,*

*Seann Poli and Owen Kenny,*

*Co-CEOs of Eureka 93 Inc.*

23. This allegation of a "fraudulent preference" cannot be asserted without implicating Mr. Poli and, indeed, turning Mr. Shea into a witness. None of this is desirable.[6] However, these background facts, not previously communicated to the Court, will no doubt put such contention in a new light.

***(B) Dispute as to Security in the Ottawa Facility***

24. The Debtors' attack on the Noteholders' claim in the Artiva proposal (and corresponding security in the Ottawa Facility), like their attack on what they assert be Mr. Poli's *own* fraudulent preference, should similarly leave the Court "scratching its head".

25. Leaving aside that this contention is inconsistent with the "formal admissions" by the Debtor listed in **Tab "A"** hereto such that the Debtor is estopped from such arguments, the voluminous submission in the Debtors' Case Conference Memorandum on this point only serves to obscure the fundamental gaps in their argument which are inconsistent with the plain language of the Guarantee and Security Documents:

---

[6] Including for the Debtors: the remedy *even if the transaction were void* would be recovery of the land and an increase in the debt in the amount of USD$3million – also undermining *another* specious argument that this USD$3million should somehow reduce only the *February* debt and thereby eliminate the Noteholders' security on the Ottawa Facility. An assertion directly contrary to the third paragraph of the letter which clearly indicated that *Noteholders* can allocate this credit to such obligations as the *Noteholders* deems fit.

(a) The "Guaranty of Obligations" dated February 14, 2019 is signed by Artiva (the owner of the Ottawa Facility) and the Guaranteed Obligations are defined with express reference to the February 14, 2019 "Security Agreement".

(b) Artiva signed that Security Agreement too, defining the scope of the Guarantee as:

> "*including, without limitation, the principal amount of all debts, claims and indebtedness, accrued and unpaid interest….heretofore, now and/or from time to time hereafter owing, due or payable…*".

(c) Indeed, the February Security Agreement expressly references Artiva's Ottawa Facility as secured property:

**SCHEDULE VIII**
**Real Property**

| COMPANY | LOCATION |
|---|---|
| LIVEWELL FOODS QUEBEC INC. | Civic number 211, Route 301, Litchfield, Quebec, Canada |
| ARTIVA INC. | 5130 & 5208 Ramsayville Road, Ottawa, Canada |
| VITALITY NATURAL HEALTH LLC | 254 Truss Road, Eureka, MT 59917, United States |
| | 9085 Advancement Avenue, Las Cruces, Dona Ana County, New Mexico, United States |

26. Any suggestion that a) Artiva's Ottawa Facility is not subject to the security; and, b) that Artiva is not liable for "*all obligations now and/or from time to time hereafter owing*" i.e., *the entire Noteholder debt* is, respectfully, *beyond* untenable.

27. Not only would the Debtors have to escape the clear operation of the above documents which contemplate such security, *their* argument requires the obtuse suggestion that the New Mexico deal (that *they* wish to set aside) somehow wiped out *only* the inescapable Artiva debt and none

other! This, of course, is directly inconsistent with the terms of the New Mexico agreement which provides the Noteholders can allocate the debt how *the Noteholders* wish:

> *You [the Debtors] have contacted us [the Noteholders] and requested that, instead of delivering a mortgage on the Property, we accept a full transfer (the "Transfer") of ownership in the Property to the Collateral Agent, which you represent you own, and can transfer freely, free and clear of all mortgages and liens, as partial payment under the Notes (which may be allocated to all amounts due under the Notes **as the Holders may each decide** in accordance with and as provided in the Transaction Documents)...*

28. Although it is unnecessary to reference the March Security Agreement to defeat the Debtors' argument, it too a) was signed by Artiva; and, b) contains the identical "Schedule VIII" reference to the Ottawa Facility.

29. It is not a surprise that the Trustee has not attached themselves to the Debtors' argument (although it remains to be seen should they provide their Form 77). However, if the *Debtors* wish to challenge the claim:

(a) The Trustee must deliver a Form 77;

(b) If the Debtors are dissatisfied with the Trustee's position they can commence an application;

(c) The Noteholders separately have 30 days to appeal; and,

(d) When the Debtors' application is provided, the Court can schedule a suitable procedure to resolve the application (given that the Debtors have rejected putting this forward to a third party to determine summarily as suggested by the Court).

30. Meanwhile, the Noteholders are entitled to proceed with the relief in their *passed* motion for, *inter alia*, examinations.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 31st day of July, 2020.

*Per*: "Elliot S. Birnboim"

**CHITIZ PATHAK LLP**
Barristers and Solicitors
77 King Street West, Suite 700
TD North Tower, P.O. Box 118
Toronto, Ontario M5K 1G8

**Elliot Birnboim** (LSUC# 32750M)
*ebirnboim@chitizpathak.com*

**Michael Crampton** (LSUC # 74512G)
*mcrampton@chitizpathak.com*

Tel: (416) 368-6200
Fax: (416) 368-0300

Lawyers for Dominion Capital LLC

**SCHEDULE "A"**

*Bankruptcy and Insolvency Act*, RSC 1985, c B-3:

Trustee shall examine proof

135 (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

Determination of provable claims

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

Disallowance by trustee

(2) The trustee may disallow, in whole or in part,

(a) any claim;

(b) any right to a priority under the applicable order of priority set out in this Act; or

(c) any security.

Notice of determination or disallowance

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination or disallowance final and conclusive

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

Expunge or reduce a proof

(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

# Tab 1

Date: July 30, 2020

**To:** Elliot Birnhoim

**RE: Eureka 93 Inc. et al**
**File: 004184**

Court File # 33-2618511

I, Rock Kouwenberg, am writing this letter with respect to the order that has been made against me regarding the two appraisals completed on the property located at 5130 & 5208 Ramsayville Road, Ottawa, Ontario. I intend to fully comply with this request.

a) Yes, I have consulted other documents other than listed in the reports and reliance letter. I am working on compiling all of the requested information. I have been in contact with Bill Weber from Valco Consultants regarding my files and he has been assisting me with my request.

b) The information is coming from multiple locations, as soon as these documents have been compiled they will be delivered. I understand the urgency of this request and I'm doing my best to do what has been requested of me. I expect to have everything compiled and sent in 7 to 10 days.

Sincerely,

**Rock Kouwenberg, Partner | AACI, P.App (ID# 907197)**
B.Comm in Real Estate & Housing (REH)
M: 519-614-6116
E: rock@agrecomm.com

# Tab 2

## Statements in Materials Filed by the Debtors

**Affidavit of Seann Poli sworn 18 February 2020:**

| **Page** | **Para** | **Description** |
|---|---|---|
| **12** | **41** | "Dominion Capital. Dominion Capital is currently owed no more than USD$8.4 million. The obligation owing to Dominion Capital relates to the issuance of USDS 11.4 million in convertible notes in 2019. The obligation owing under these notes is secured against all of the assets and property of each of the Debtors." |
| **13** | **48** | "Artiva has one secured creditor who has filed a financing statement: Dominion Capital. In addition, there are four secured creditors who have security against the Ottawa Facility: Olympia Trust Company ("Olympia Trust"), Dominion Capital, Lamarche Electric Inc. ("Lamarche") and Paladine Technologies Inc. ("Paladine")." |

**Affidavit of Sean Poli sworn 25 February 2020:**

| Page | Para. | Description |
|---|---|---|
| 5 | 12 | "I discussed how we could proceed on getting Artiva re-financed. More particularly:<br><br>(a) I informed Mr. Gross that the Ottawa Facility had to be re-financed imminently and that we had other lenders who appeared interested including the existing mortgage holder, but required additional funds to complete the Ottawa Facility;<br>(b) I asked Mr. Gross whether Dominion Capital would defer its position in order to permit the re-financing of the Ottawa Facility;<br>(c) I informed Mr. Gross that I was in possession of a $14 million as-built appraisal for the Ottawa Facility;<br>(d) I informed Mr. Gross that I intended to have the re-financing achieved as soon as possible; and<br>(e) Mr. Gross informed me that he would speak to people and expected to get back to me within a day or two." |

# APPENDIX H

Barristers and Solicitors **ChitizPathak** LLP

*Reply To:*
Elliot Birnboim
Phone extension: (416) 644-9970
ebirnboim@chitizpathak.com

77 King Street West, Suite 700
TD North Tower, P.O. Box 118
Toronto, Ontario M5K 1G8
phone 416.368.6200 fax 416.368.0300

*Partners*:
*Daniel Chitiz*
*Elliot Birnboim*
*Navin Khanna*
*Paul Pathak*
*Josh Arbuckle*

August 11, 2020

**BY EMAIL: egolden@blaney.com**

Eric Golden
Blaney McMurtry LLP
Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto, Ontario
M5C 3G7

Dear Mr. Golden:

**Re: In the matter of the Proposal of Eureka 93 Inc. et al - Our file no: 004184**

You have asked for our response to the (now amended) Submissions of the Debtors.

While we are delighted to answer any particular questions you may have, asking for our clients' response to the splatter-gun submissions of the Debtors does not do accomplish the intention of Justice MacLeod's directions. As repeatedly noted, Justice MacLeod did not contemplate a piecemeal process. Rather, the Trustee was to use its independent judgment to evaluate the security and quantum of the debt of each of the debtor entities and the Noteholders could then respond to any disallowance or Application.

However, to assist the Trustee, we have taken the time to address the two central issues raised in the Debtors "new wrinkle" Submissions:

1. Is the liability of Artiva Inc. ("**Artiva**") restricted to the first advance of USD$3mm evidenced by the February Notes?

2. Does the New Mexico transaction result in payment as against *only* the first advance in the amount of USD$3mm, eliminating the liability of Artiva?

In order to succeed in eliminating the Noteholders voting rights in the Artiva proposal, *both* propositions must be established by the Debtors.

The (in our view) tortured interpretation of the subject contractual documentation by Debtors flies in the face of every email communication between the parties and, more importantly, every affidavit, statement of affairs or other statement by Mr. Poli to the date of his raising this "new wrinkle" - *all* such statements by Mr. Poli confirm that all Debtors are obliged in the

total amount of the debt and that the Noteholders are secured in each entity. Indeed, Mr. Poli's statements on behalf of the Debtors were clearly made with the assistance of professionals and clearly reflect on the true *intention* of the Debtors.[1]

There can be no doubt that this about-face is the reason Justice MacLeod referred to the Debtors' assertion as a "new wrinkle". There is no explanation for this change nor has there been leave granted by the Court to withdraw these prior admissions.

However, while such binding statements should give some comfort to the Trustee, the assertions of the Debtors as to the above two questions are simply wrong on the face of the contractual regime even without resort to the formal admissions of the Debtors:

1. **"Guaranteed Obligations" are Defined by Security Agreements:** The "Guaranty of Obligations" dated February 14, 2019 [Schedule A, Tab 2] is signed by Artiva (the owner of the Ottawa Facility) and the "Guaranteed Obligations" are defined with express reference to "Obligations" as defined by the February 14, 2019 "Security Agreement".

2. **Security Agreements Reference All (and Future) Debts:** The Security Agreements which Artiva signed *both* define the scope of the Obligations to include present and future debts incurred:

In the "U.S." Security Agreement [Schedule A, Tab 4]:

> *"…including, without limitation, the principal amount of all debts, claims and indebtedness, accrued and unpaid interest….heretofore, now and/or from time to time hereafter owing, due or payable…*".

In the "Canadian" Security Agreement [Further Schedule A Documents, Tab 11] (to which Artiva signed a Joinder Agreement):

> *….all of the liabilities and obligations (primary, secondary, direct, contingent, sole, joint or several) due or to become due, or that are now or may be hereafter contracted or acquired, or owing to, of each Debtor to the Secured Parties, including, without limitation, all obligations under this Agreement, the Credit Agreements, and any other instruments, agreements or other documents executed and/or delivered in connection herewith or therewith, in each case, whether now or hereafter existing, voluntary or involuntary, direct or indirect, absolute or contingent, liquidated or unliquidated, whether or not jointly owed with others, and whether or not from time to time decreased or extinguished and later increased, created or incurred*

[1] The goal in interpreting a contract is to discover, objectively, the parties' intention at the time the contract was made. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para 47 and following is a salutary read which will assist the trustee in assessing the impact of such statements in assessing contractual intention.

While the foregoing should be sufficient to end the inquiry into the extent of Artiva's obligations, the following further contractual terms reinforce Artiva's liability on both the February and March advances:

3. **February *and* March Securities Agreements Both Identify Artiva Property as Security:** Consistent with the Obligation of Artiva including *all* future advances, not only does the February Security Agreement expressly reference Artiva's Ottawa Facility as secured property at Schedule VIII, but the *March* Security Agreement [Schedule A, Tab 7] (also signed by Artiva) contains the *identical* Schedule VIII reference to the Ottawa Facility:

**SCHEDULE VIII**
**Real Property**

| COMPANY | LOCATION |
|---|---|
| LIVEWELL FOODS QUEBEC INC. | Civic number 211, Route 301, Litchfield, Quebec, Canada |
| ARTIVA INC. | 5130 & 5208 Ramsayville Road, Ottawa, Canada |
| VITALITY NATURAL HEALTH LLC | 254 Truss Road, Eureka, MT 59917, United States |
| | 9085 Advancement Avenue, Las Cruces, Dona Ana County, New Mexico, United States |

4. **Artiva is defined as a Debtor, Not Merely Guarantor:** The Additional Debtor Joinder signed by Artiva [Schedule A, Tab 5; Further Schedule A Documents, Tab 12], again, expressly sets out that Artiva "*SPECIFICALLY GRANTS TO THE SECURED PARTY A SECURITY INTEREST IN THE COLLATERAL AS MORE FULLY SET FORTH IN THE SECURITY AGREEMENT…*"

5. **The Security Registered against Artiva's Ottawa Facility is for CAD$48mm:** The fact that Artiva signed a debenture registered on title to the Ottawa Facility for $48million [Schedule A, Tab 8] is wholly incongruous with the suggestion of an intention to secure a mere USD$3mm (February advance) limited encumbrance and again points to Artiva's clear understanding that the February 14, 2019 Guaranty of Obligations extended to the future advances which, as a point of fact, were already contemplated.

While the issue of the treatment of the New Mexico release is effectively moot as a result of Artiva's liability on the entire advance, this issue is simply addressed by examining the terms of the release itself:

6. **New Mexico Deal Allocates Debts as *Noteholders* Direct:** The Debtors argument must overcome not only the foregoing clear definition of the guaranteed obligations a *all* debts, but also must rely on a contorted treatment of the New Mexico forgiveness as relating *only* to the February advance. However, this is expressly contrary to the contractual right of the Noteholders to allocate the debt how the

*Noteholders* wish in the Partial Payment Agreement dated December 18, 2019 [Further Schedule A, Tab 13]:

> *You [the Debtors] have contacted us [the Noteholders] and requested that, instead of delivering a mortgage on the Property, we accept a full transfer (the "Transfer") of ownership in the Property to the Collateral Agent, which you represent you own, and can transfer freely, free and clear of all mortgages and liens, as partial payment under the Notes (which may be allocated to all amounts due under the Notes as the Holders may each decide in accordance with and as provided in the Transaction Documents)…*

Further, the allocation of the forgiveness in Schedule B to the Partial Payment Agreement treats the total "outstanding" to the Noteholders as USD$11,400,000 (i.e. the total under *both* advances) by *all* debtors.

There is nothing in the record which suggests that either the Debtors or the Noteholders expressed an intention to treat this solely as a repayment of the February advances. To the contrary – all admissions by Mr. Poli (until the "new wrinkle"), who is a signatory on the New Mexico transaction, suggest that it came "off the top" of all the debts.[2]

While the foregoing does not address the multiple micro-issues the Debtors raised in their Submissions, it is not incumbent on the Noteholders to do so at this stage pursuant to the process Justice Macleod contemplated. The Debtors have already succeeded in elevating the costs sufficiently to warrant any further response and costs will be sought on a full indemnity basis having regard to this bad-faith.

The Noteholders have no doubt that the Trustee does not require further submissions from the Noteholders to dispense with the Debtors' objections. However, if the Trustee requires any further documents or has particular questions we are happy to respond.

Yours very truly,
**Chitiz Pathak LLP**

*E. S. Birnboim*

Elliot Birnboim
EB:jv

[2] Given that the Debtors retained counsel to advise them on the New Mexico transaction and the Montana transaction (and have made that statement on the record – see Affidavit of Seann Poli sworn Feb. 25, 2020 at para 4), it should be straightforward for the Trustee to get to the bottom of the "intention" of the New Mexico allocation through discussions with that counsel who could then testify.

# APPENDIX I

**SECURITIES PURCHASE AGREEMENT**

This Securities Purchase Agreement (this "Agreement") is dated as of February 14, 2019, between LiveWell Canada Inc., a Canadian corporation ("LiveWell"), Vitality CBD Natural Health Products Inc., a Canadian corporation ("Vitality", and, together with LiveWell, the "Companies"), and each of the individuals and/or entities that execute a signature page hereto (each a "Purchaser" and collectively the "Purchasers") and Dominion Capital LLC, as collateral agent.

WHEREAS, subject to the terms and conditions set forth in this Agreement and pursuant to Section 4(a)(2) of the Securities Act of 1933, as amended (the "Securities Act"), and Rule 506 promulgated thereunder, the Companies desire to issue and sell to the Purchasers, and the Purchasers desires to purchase from the Companies, securities of the Companies as more fully described in this Agreement.

NOW, THEREFORE, IN CONSIDERATION of the mutual covenants contained in this Agreement, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Companies and the Purchasers agree as follows:

## ARTICLE I
## DEFINITIONS

1.1 Definitions. In addition to the terms defined elsewhere in this Agreement: (a) capitalized terms that are not otherwise defined herein have the meanings given to such terms in the Note (as defined herein), and (b) the following terms have the meanings set forth in this Section 1.1:

"Acquiring Person" shall have the meaning ascribed to such term in Section 4.7.

"Action" shall have the meaning ascribed to such term in Section 3.1(j).

"Affiliate" means any Person that, directly or indirectly through one or more intermediaries, controls or is controlled by or is under common control with a Person, as such terms are used in and construed under Rule 405 under the Securities Act.

"Artiva Property" means the real property owned by Artiva Inc., a Subsidiary of LiveWell, located at 5130 and 5208 Ramsayville Road, Ottawa, Ontario, Canada.

"Board of Directors" means the boards of directors of the Companies.

"Business Day" means any day except any Saturday, any Sunday, any day which is a federal legal holiday in the United States or Canada or any day on which commercial banking institutions in the State of New York or the Province of Ontario are authorized or required by law or other governmental action to close.

"Canadian AML Laws" means all laws, rules and regulations of Canada generally known to concern bribery of government officials or public corruption including, without limitation, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (Canada); Part II.1 of the *Criminal Code* (Canada); the *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism* (Canada); the *United Nations Al-Quaida and Taliban Regulations* (Canada) and any similar laws or regulations currently in force or hereafter enacted.

"Canadian Pension Plan" means any pension, retirement, savings, profit sharing, health, medical, dental, disability, life insurance, welfare or other employee benefit plan, program, policy or practice, whether written or oral, funded or unfunded, registered or unregistered, including, without limitation, a "registered pension plan," as that term is defined in subsection 248(1) of the *Canadian Tax Act*, which is or was sponsored, administered or contributed to, or required to be contributed to by, the Companies or under which the Companies have any actual or potential liability.

"Canadian Sanction Laws" means all economic or financial sanctions or trade embargoes or restrictive measures enacted, imposed, administered or enforced from time to time by the Canadian government including,

without limitation, any sanctions imposed by the *Special Economic Measures Act* (Canada), the *United Nations Act* (Canada) or any Canadian AML Laws.

"Canadian Securities Authorities" means, collectively, the securities commissions or similar securities regulatory authorities in each of the provinces or territories of Canada, including the OSC, and the Toronto Stock Exchange, the TSX Venture Exchange, the NEO Exchange and the Canadian Securities Exchange.

"Canadian Securities Laws" means, collectively, and as the context may require, the applicable securities legislation of each of the provinces and territories of Canada, and the rules, regulations, instruments, orders and policies published and/or promulgated thereunder.

"Closing" means the closing of the purchase and sale of the Securities pursuant to Section 2.1.

"Closing Date" means the Trading Day on which all of the Transaction Documents have been executed and delivered by the applicable parties thereto, and all conditions precedent to (i) the Purchaser's obligations to pay the Subscription Amount and (ii) the Companies' obligations to deliver the Securities, in each case, have been satisfied or waived.

"Commission" means the United States Securities and Exchange Commission.

"Vitality Common Stock" means the common stock of Vitality and any other class of securities into which such securities may hereafter be reclassified or changed.

"LiveWell Common Stock" means the common stock of LiveWell and any other class of securities into which such securities may hereafter be reclassified or changed.

"Collateral Agent" shall have the meaning set forth in Article VI.

"Common Stock Equivalents" means any securities of the Companies or the Subsidiaries which would entitle the holder thereof to acquire at any time Common Stock, including, without limitation, any debt, preferred stock, right, option, warrant or other instrument that is at any time convertible into or exercisable or exchangeable for, or otherwise entitles the holder thereof to receive, Common Stock.

"Conversion Price" shall have the meaning ascribed to such term in the Note.

"Conversion Shares" shall have the meaning ascribed to such term in the Note.

"Disclosure Schedules" shall have the meaning ascribed to such term in Section 3.1.

"Disclosure Time" means, (i) if this Agreement is signed prior to midnight on any Trading Day, 8:00 a.m. (New York City time) on the Trading Day immediately following the date hereof, and (ii) if this Agreement is signed after midnight on any Trading Day, 8:00 a.m. (New York City time) on the date hereof.

"Dominion" shall mean Dominion Capital LLC.

"Exchange Act" means the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder.

"Exempt Issuance" means the issuance of (a) shares of Common Stock or options to employees, officers, service providers such as attorneys or bona-fide independent contractors of the Companies, or directors of the Companies pursuant to any stock or option plan duly adopted for such purpose, by a majority of the non-employee members of the Board of Directors or a majority of the members of a committee of non-employee directors established for such purpose for services rendered to the Companies, or approved by a majority of shareholders of the Companies, (b) securities upon the exercise or exchange of or conversion of any Securities issued hereunder and/or other securities exercisable or exchangeable for or convertible into shares of Common Stock issued and outstanding on the date of this Agreement, provided that such securities have not

been amended since the date of this Agreement to increase the number of such securities or to decrease the exercise price, exchange price or conversion price of such securities (other than in connection with stock splits or combinations) or to extend the term of such securities, and (c) securities issued pursuant to acquisitions or strategic transactions approved by a majority of the disinterested directors of the Companies, provided that such securities are issued as "restricted securities" (as defined in Rule 144) and carry no registration rights that require or permit the filing of any registration statement in connection therewith during the prohibition period in Section 4.13(a) herein, and provided that any such issuance shall only be to a Person (or to the equityholders of a Person) which is, itself or through its subsidiaries, an operating company or an owner of an asset in a business synergistic with the business of the Companies and shall provide to the Companies additional benefits in addition to the investment of funds, but shall not include a transaction in which the Companies is issuing securities primarily for the purpose of raising capital or to an entity whose primary business is investing in securities.

"FCPA" means the Foreign Corrupt Practices Act of 1977, as amended.

"Hindsdale" means Hindsdale I, LP.

"Hypothec" means the movable hypothec, among LiveWell and its Quebec Subsidiary, as grantors, and Dominion, as hypothecary representative for the Purchasers (including Hindsdale), charging all movable (personal) property, present and future, of LiveWell and its Quebec Subsidiary, in the form substantially similar to Exhibit E attached hereto.

"Indebtedness" shall have the meaning ascribed to such term in Section 3.1(bb).

"Intellectual Property Rights" shall have the meaning ascribed to such term in Section 3.1(p).

"Legend Removal Date" shall have the meaning ascribed to such term in Section 4.1(c).

"Liens" means a lien, charge, pledge, security interest, encumbrance, right of first refusal, preemptive right or other restriction.

"Litchfield Property" means the real property owned by LiveWell Foods Québec Inc., a Subsidiary of LiveWell, located at 211, Route 301, Litchfield, Québec, Canada.

"Material Adverse Effect" shall have the meaning assigned to such term in Section 3.1(b).

"Material Permits" shall have the meaning ascribed to such term in Section 3.1(n).

"Mortgage and Assignment of Leases and Rents" means the mortgage and assignment of leases and rents, among Artiva Inc., a Subsidiary of LiveWell, as grantors, and Dominion, as collateral agent for the Purchasers (including Hindsdale), in connection with the Artiva Property in the form substantially similar to Exhibit E attached hereto.

"Montana Property" means the real property known municipally as 254 Truss Road, Eureka, Montana 59917, and the specific equipment located therein.

"New Mexico Property" means the real property known municipally as 9085 Advancement Ave., Las Cruces, New Mexico, and the specific equipment located therein.

"Notes" means the 10% Senior Secured Convertible Notes in the aggregate principal amount of $3,000,000 due, subject to the terms therein, twelve (12) months from its date of issuance, issued by LiveWell to each Purchaser hereunder, in the form of Exhibit A attached hereto.

"OSC" means the Ontario Securities Commission.

"Person" means an individual or corporation, partnership, trust, incorporated or unincorporated association, joint venture, limited liability company, joint stock company, government (or an agency or subdivision thereof) or other entity of any kind.

"Proceeding" means an action, claim, suit, investigation or proceeding (including, without limitation, an informal investigation or partial proceeding, such as a deposition), whether commenced or threatened.

"Public Information Failure" shall have the meaning ascribed to such term in Section 4.3(b).

"Public Information Failure Payments" shall have the meaning ascribed to such term in Section 4.3(b).

"Purchaser Party" shall have the meaning ascribed to such term in Section 4.10.

"Registration Rights Agreement" means the Registration Rights Agreement, dated on or about the date hereof, among the Companies and the Purchaser, in the form of Exhibit B attached hereto.

"Registration Statement" means a registration statement meeting the requirements set forth in the Registration Rights Agreement and covering the resale of the Underlying Shares by the Purchaser as provided for in the Registration Rights Agreement.

"Required Approvals" shall have the meaning ascribed to such term in Section 3.1(e).

"Required Minimum" means, as of any date, 200% of the maximum aggregate number of shares of Common Stock then issued or potentially issuable in the future pursuant to the Transaction Documents, including any Underlying Shares issuable upon exercise in full of all Warrants or conversion in full of all Notes (including Underlying Shares issuable as payment of interest on the Note), ignoring any conversion or exercise limits set forth therein, and assuming that the Conversion Price is at all times on and after the date of determination 75% of the then Conversion Price on the Trading Day immediately prior to the date of determination.

"Rule 144" means Rule 144 promulgated by the Commission pursuant to the Securities Act, as such Rule may be amended from time to time, or any similar rule or regulation hereafter adopted by the Commission having substantially the same effect as such Rule.

"Rule 424" means Rule 424 promulgated by the Commission pursuant to the Securities Act, as such Rule may be amended or interpreted from time to time, or any similar rule or regulation hereafter adopted by the Commission having substantially the same purpose and effect as such Rule.

"SEC Reports" shall have the meaning ascribed to such term in Section 3.1(h).

"Securities" means the Note, the Warrants, the Warrant Shares and the Underlying Shares.

"Securities Act" means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

"Security Agreements" means collectively, (i) the Security Agreement governed by the laws of Ontario, and (ii) the Security Agreement governed by the laws of New York, among the Companies and their Subsidiaries, as grantors, and Dominion, as collateral agent, each in the form substantially similar to Exhibit E attached hereto.

"Security Documents" means collectively, the Security Agreements, the Hypothec, the Subsidiary Guarantee and the Mortgage and Assignment of Leases and Rents.

"Short Sales" means all "short sales" as defined in Rule 200 of Regulation SHO under the Exchange Act (but shall not be deemed to include locating and/or borrowing shares of Common Stock).

"Subscription Amount" means, as to the Purchaser, the aggregate amount to be paid for Notes and Warrants purchased hereunder as specified below the Purchaser's name on the signature page of this Agreement and next to the heading "Subscription Amount," in United States dollars and in immediately available funds.

"Subsequent Financing" shall have the meaning ascribed to such term in Section 4.16.

"Subsidiary" means any subsidiary of the Companies as set forth on Schedule 3.1(a) and shall, where applicable, also include any direct or indirect subsidiary of the Companies formed or acquired after the date hereof.

"Subsidiary Guarantee" means the Guarantee Agreement governed by the laws of New York, among the Subsidiaries and Vitality, as guarantors, and Dominion, as collateral agent for the Purchasers (including Hindsdale), as beneficiaries, in the form substantially similar to Exhibit D attached hereto.

"Trading Day" means a day on which the principal Trading Market is open for trading.

"Trading Market" means any of the following markets or exchanges on which the Common Stock is listed or quoted for trading on the date in question: the NYSE American, the Nasdaq Capital Market, the Nasdaq Global Market, the Nasdaq Global Select Market, the Toronto Stock Exchange, the TSX Venture Exchange, the NEO Exchange, the Canadian Securities Exchange, or the New York Stock Exchange (or any successors to any of the foregoing).

"Transaction Documents" means this Agreement, the Notes, the Warrants, the Registration Rights Agreement, the Security Documents, all exhibits and schedules thereto and hereto and any other documents or agreements executed in connection with the transactions contemplated hereunder.

"Transfer Agent" means TSX Trust, the current transfer agent of LiveWell, and any successor transfer agent of LiveWell.

"Underlying Shares" means the Warrant Shares and shares of Common Stock issued and issuable pursuant to the terms of the Notes, including without limitation, shares of Common Stock issued and issuable in lieu of the cash payment of interest on the Notes in accordance with the terms of the Notes, in each case without respect to any limitation or restriction on the conversion of the Notes or the exercise of the Warrants.

"Variable Rate Transaction" shall have the meaning ascribed to such term in Section 4.17

"VWAP" means, for any date, the price determined by the first of the following clauses that applies: (a) if the Common Stock is then listed or quoted on a Trading Market, the daily volume weighted average price of the Common Stock for such date (or the nearest preceding date) on the Trading Market on which the Common Stock is then listed or quoted as reported by Bloomberg L.P. (based on a Trading Day from 9:30 a.m. (New York City time) to 4:02 p.m. (New York City time); provided, however, that if the Common Stock is then listed or quoted on more than one Trading Market, then the Trading Market for purposes of any calculations to be made pursuant to the terms of this Note shall be the Trading Market selected by the Holder in its sole discretion), (b) if OTCQB or OTCQX is not a Trading Market, the volume weighted average price of the Common Stock for such date (or the nearest preceding date) on OTCQB or OTCQX as applicable, (c) if the Common Stock is not then listed or quoted for trading on OTCQB or OTCQX and if prices for the Common Stock are then reported in the "Pink Sheets" published by OTC Markets Group, Inc. (or a similar organization or agency succeeding to its functions of reporting prices), the most recent bid price per share of the Common Stock so reported, or (d) in all other cases, the fair market value of a share of Common Stock as determined by an independent appraiser selected in good faith by the Purchaser of a majority in interest of the Securities then outstanding and reasonably acceptable to the Companies, the fees and expenses of which shall be paid by the Companies.

"Warrants" means the Vitality Common Stock purchase warrants delivered to the Purchaser at the Closing in accordance with Section 2.2(a) hereof, in the form of Exhibit C attached hereto.

"Warrant Shares" means the shares of Vitality Common Stock issuable upon exercise of the Warrants.

## ARTICLE II
## PURCHASE AND SALE

2.1 Closing. (a) On the Initial Closing Date, upon the terms and subject to the conditions set forth herein, substantially concurrent with the execution and delivery of this Agreement by the parties hereto, the Companies agree to sell, and the Purchasers agree to purchase, the Notes and the Warrants. The Purchasers shall deliver to LiveWell's counsel in trust, Perley-Robertson, Hill & McDougall LLP/s.r.l, via wire transfer, the Subscription Amount set forth opposite such Purchasers name on the signature page hereto (which Subscription Amounts shall aggregate USD $3,000,000)in immediately available funds, and the Livewell shall deliver to the Purchasers the Notes and Warrants, and the Companies and the Purchaser shall deliver the other items set forth in Section 2.2 deliverable at the Initial Closing. Upon satisfaction of the covenants and conditions set forth in Sections 2.2 and 2.3, the Closing shall occur by electronic exchange of documents.

(b) Subsequent to the execution and delivery of this Purchase Agreement and prior to the second anniversary of the Initial Closing, Hindsdale may request, and Livewell in its sole discretion may permit Hindsdale and certain Purchasers designated by Hindsdale to purchase second notes in the aggregate principal amount of up to $15,000,000 (the "Second Notes') and second warrants (the "Second Warrants") to purchase up to an additional aggregate 15,000,000 shares of Common Stock of Livewell or any successor entity by providing Hindsdale with notice within ten (10) days of the Livewell's receipt of the request from Hindsdale. The Second Note and the Second Warrant will have such terms and conditions as Hindsdale and the Company agree. For the avoidance of doubt, the issuance of the Second Notes and the Second Warrants shall be subject to the Company's approval upon the request of Hindsdale.

2.2 Deliveries.

(a) On or prior to the Initial Closing Date, the Companies shall deliver or cause to be delivered to the Purchasers the following:

(i) this Agreement duly executed by the Companies;

(ii) the Notes with an aggregate principal amount of $2,000,000 registered in the name of the Purchasers;

(iii) the Warrants registered in the name of the Purchaser to purchase 2,000,000 shares of Vitality Common Stock;

(iv) LiveWell shall have provided the Purchaser with its wire instructions;

(v) to the extent that the Security Documents are in a final settled form, duly executed copies of the Security Documents by the Companies, and their Subsidiaries, as applicable;

(vi) an IP Security Agreement;

(vi) the Registration Rights Agreement duly executed by the Companies;

(vii) a duly certified copy of the constating documents and by-laws of each of the Companies and their Subsidiaries certified by a senior officer of the relevant entity, accompanied by good standing or equivalent certificates issued by the appropriate governmental body of each entity's jurisdiction of incorporation and principal place of business;

(viii) a duly certified copy of a resolution or resolutions of the board of directors of each of the Companies and their Subsidiaries relating to the authority of each entity to execute and deliver and perform its obligations under the Transaction Documents to which it is a party and all other instruments, agreements, certificates and other documents provided for or contemplated by the said

Transaction Documents and the manner in which and by whom the foregoing documents are to be executed and delivered, certified by a senior officer of the relevant entity; and

(ix) legal opinions from counsel to the Companies and their Subsidiaries relating to such matters as the Purchasers may reasonably require.

(b) On or prior to the Initial Closing Date, the Purchasers shall deliver or cause to be delivered to the Companies the following:

(i) this Agreement duly executed by each Purchaser;

(ii) the Purchaser's Subscription Amount by wire transfer to Perley-Robertson, Hill & McDougall LLP/s.r.l in trust in the account specified in Schedule 2.2(b);

(iii) to the extent that the Security Documents are in a final settled form, duly executed copies of the Security Documents in favor of Hindsdale, as secured party; and

(iv) the Registration Rights Agreement duly executed by the Purchaser.

(c) In the event the Purchasers elect to purchase the Second Notes and Second Warrants, and the Company approves such purchase, on or prior to the Second Closing Date, the Companies shall deliver or cause to be delivered to the Purchasers the following

(i)the Second Notes

(ii) the Second Warrants

(iii) an officer's certificate certifying that the representations and warranties are true and correct as of such date and that all conditions set forth in Section 2.3 have been met.

(d) In the event the Purchasers elect to purchase the Second Notes and Second Warrants, and the Company approves such purchase, on or prior to the Second Closing Date, the Purchasers shall deliver or cause to be delivered to the Companies the following:

(i) the Purchaser's Subscription Amount by wire transfer to Perley-Robertson, Hill & McDougall LLP/s.r.l in trust in the account specified in Schedule 2.2(b);

2.3 Closing Conditions.

(a) The obligations of the Companies hereunder in connection with the Initial Closing are subject to the following conditions being met:

(i) the accuracy in all material respects on (or, to the extent representations or warranties are qualified by materiality or Material Adverse Effect, in all respects) the Initial Closing Date of the representations and warranties of the Purchaser contained herein (unless as of a specific date therein in which case they shall be accurate as of such date);

(ii) all obligations, covenants and agreements of the Purchaser required to be performed at or prior to the Initial Closing Date shall have been performed; and

(iii) the delivery by the Purchaser of the items set forth in Section 2.2(b) of this Agreement.

(b) The respective obligations of the Purchaser hereunder in connection with the Initial Closing are subject to the following conditions being met:

(i) the accuracy in all material respects (or, to the extent representations or warranties are qualified by materiality or Material Adverse Effect, in all respects) when made and on the Initial Closing Date of the representations and warranties of the Companies contained herein (unless as of a specific date therein in which case they shall be accurate as of such date);

(ii) all obligations, covenants and agreements of the Companies required to be performed at or prior to the Initial Closing Date shall have been performed;

(iii) the delivery by the Companies of the items set forth in Section 2.2(a) of this Agreement; and

(iv) there shall have been no Material Adverse Effect with respect to the Companies since the date hereof.

(c) The obligations of the Companies hereunder in connection with the Second Closing are subject to the following conditions being met:

(i) the accuracy in all material respects when made and on the Second Closing Date of the representations and warranties of the Purchasers contained herein (unless as of a specific date therein in which case they shall be accurate as of such date);

(ii) all obligations, covenants and agreements of the Purchasers required to be performed at or prior to the Second Closing Date shall have been performed; and

(iii) the delivery by the Purchasers of the items set forth in Section 2.2(d) of this Agreement.

(b) The respective obligations of the Purchasers hereunder in connection with the Second Closing are subject to the following conditions being met:

(i) the accuracy in all material respects (or, to the extent representations or warranties are qualified by materiality or Material Adverse Effect, in all respects) when made and on the Second Closing Date of the representations and warranties of the Companies contained herein (unless as of a specific date therein in which case they shall be accurate as of such date);

(ii) all obligations, covenants and agreements of the Companies required to be performed at or prior to the Second Closing Date shall have been performed;

(iii) the delivery by the Companies of the items set forth in Section 2.2(a) of this Agreement; and

(iv) there shall have been no Material Adverse Effect with respect to the Companies since the date hereof.

2.4 <u>Post-closing undertakings</u>

(a) To the extent that any of the Security Documents is not in a final settled form on the Closing Date, the Companies agree to negotiate in good faith and to settle, execute and deliver such Security Documents by no later than ten (10) Business Days following the Closing Date.

(b) Immediately following the execution of the Security Documents referenced in paragraph (a) above but no later than five (5) Business Days thereafter, the Companies shall (i) ensure that all Security Documents will have been registered, recorded or otherwise perfected or published wherever and however necessary to enforce and set up the rights thereunder against third persons; (ii) deliver to Dominion, as collateral agent for

the Purchasers (including Hindsdale), legal opinions from counsel to the Companies and their Subsidiaries relating to the perfection, recordation, registration and/or publication of the Security Documents.

(c) Immediately but no later than 30 days following the execution of this Agreement, LiveWell shall cause its Subsidiary, Artiva Inc., to use its best efforts to obtain the consent of the first ranking mortgagee of Artiva Property.

(d) Immediately but no later than 30 days following the execution of this Agreement, LiveWell shall use its best efforts to obtain a landlord waiver in favour of Dominion, as collateral agent for the Purchasers (including Hindsdale), as secured party, in respect of each leased premises.

(e) LiveWell shall use its best efforts to complete the purchase of all issued and outstanding shares of Acenzia Inc., and forthwith the completion of such share purchase transaction but no later than 60 days thereafter, cause Acenzia Inc. to execute and deliver the additional debtor joinder under the applicable Security Agreement, and create a security interest in favour of Dominion, as collateral agent for the Purchasers (including Hindsdale), as secured party, on all personal and real property owned by Acenzia Inc. to be registered, recorded or otherwise perfected or published wherever and however necessary to enforce and set up the rights thereunder against third persons, together with legal opinions from counsel to LiveWell relating to the perfection, recordation, registration and/or publication of the security documents.

(f) Immediately but no later than 30 days following the execution of this Agreement, the Companies shall use their best effort to ensure that Vitality complete the subdivision of the New Mexico Property.

(g) By no later than 60 days following the execution of this Agreement, the Companies shall ensure that Vitality (i) grant in favour of Dominion, as collateral agent, a first priority mortgage and security interest on such New Mexico Property and ensure that such mortgage and security interest have been registered, recorded or otherwise perfected or published wherever and however necessary to enforce and set up the rights thereunder against third persons; (ii) execute all documents necessary to ensure that Dominion, as collateral agent, has access to the New Mexico Property in order to access all personal property located thereon in the Event of a Default under the Note; and (iii) deliver to the Purchasers legal opinions from counsel to Vitality relating to the ranking, perfection, recordation, registration and/or publication of mortgage and security interest on such New Mexico Property.

(h) By no later than 60 days following the execution of this Agreement, the Companies shall ensure that Vitality (i) grant in favour of Dominion, as collateral agent, a first priority mortgage and security interest on the Montana Property and ensure that such mortgage and security interest have been registered, recorded or otherwise perfected or published wherever and however necessary to enforce and set up the rights thereunder against third persons; (ii) execute all documents necessary to ensure that Dominion, as collateral agent, has access to the Montana Property in order to access all personal property located thereon in the Event of a Default under the Note; and (iii) deliver to the Purchasers legal opinions from counsel to Vitality relating to the ranking, perfection, recordation, registration and/or publication of mortgage and security interest on such Montana Property.

(i) By no later than 60 days following the execution of this Agreement, the Companies shall deliver a legal opinion from counsel to the Companies and their Subsidiaries, in form and substance reasonably acceptable to Hindsdale and its counsel, relating to the due execution, authorization and enforceability of the Security Agreement governed by the laws of New York, among the Companies and their Subsidiaries, as grantors, and Hindsdale, as secured party.

Any failure to satisfy any of these post-closing undertakings within such applicable time period, unless otherwise waived by Hindsdale or an additional time period is granted by Hindsdale, will constitute an Event of Default.

## ARTICLE III
## REPRESENTATIONS AND WARRANTIES

3.1 Representations and Warranties of the Companies. Except as set forth in the Disclosure Schedules, which Disclosure Schedules shall be deemed a part hereof and shall qualify any representation or otherwise made herein to the extent of the disclosure contained in the corresponding section of the Disclosure Schedules, the Companies hereby make the following representations and warranties to the Purchasers:

(a) Subsidiaries. All of the direct and indirect subsidiaries of the Companies are set forth on Schedule 3.1(a). The Companies own, directly or indirectly, all of the capital stock or other equity interests of each Subsidiary free and clear of any Liens, and all of the issued and outstanding shares of capital stock of each Subsidiary are validly issued and are fully paid, non-assessable and free of pre-emptive and similar rights to subscribe for or purchase securities.

(b) Organization and Qualification. Each of the Companies and each of the Subsidiaries is an entity duly incorporated or otherwise organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation or organization, with the requisite power and authority to own and use its properties and assets and to carry on its business as currently conducted. Neither the Companies nor any Subsidiary is in violation nor default of any of the provisions of its respective certificate or articles of incorporation, bylaws or other organizational or charter documents. Each of the Companies and the Subsidiaries is duly qualified to conduct business and is in good standing as a foreign corporation or other entity in each jurisdiction in which the nature of the business conducted or property owned by it makes such qualification necessary, except where the failure to be so qualified or in good standing, as the case may be, could not have or reasonably be expected to result in: (i) a material adverse effect on the legality, validity or enforceability of any Transaction Document, (ii) a material adverse effect on the results of operations, assets, business, prospects or condition (financial or otherwise) of the Companies and the Subsidiaries, taken as a whole, or (iii) a material adverse effect on either of the Companies' ability to perform in any material respect on a timely basis its obligations under any Transaction Document (any of (i), (ii) or (iii), a "Material Adverse Effect") and no Proceeding has been instituted in any such jurisdiction revoking, limiting or curtailing or seeking to revoke, limit or curtail such power and authority or qualification.

(c) Authorization; Enforcement.

(i) The Companies have the requisite corporate power and authority to enter into and to consummate the transactions contemplated by this Agreement and each of the other Transaction Documents and otherwise to carry out their obligations hereunder and thereunder. The execution and delivery of this Agreement and each of the other Transaction Documents by the Companies and the consummation by it of the transactions contemplated hereby and thereby have been duly authorized by all necessary action on the part of the Companies and no further action is required by the Companies, the Board of Directors or the Companies' stockholders in connection herewith or therewith other than in connection with the Required Approvals. This Agreement and each other Transaction Document to which it is a party has been (or upon delivery will have been) duly executed by the Companies and, when delivered in accordance with the terms hereof and thereof, will constitute the valid and binding obligation of the Companies enforceable against the Companies in accordance with its terms, except (i) as limited by general equitable principles and applicable bankruptcy, insolvency, reorganization, moratorium and other laws of general application affecting enforcement of creditors' rights generally, (ii) as limited by laws relating to the availability of specific performance, injunctive relief or other equitable remedies and (iii) insofar as indemnification and contribution provisions may be limited by applicable law.

(d) No Conflicts. The execution, delivery and performance by the Companies of this Agreement and the other Transaction Documents to which it is a party, the issuance and sale of the Securities and the consummation by it of the transactions contemplated hereby and thereby do not and will not: (i) conflict with or violate any provision of the Companies' or any Subsidiary's certificate or articles of incorporation, bylaws or other organizational or charter documents, (ii) conflict with, or constitute a default (or an event that with notice or lapse of time or both would become a default) under, result in the creation of any Lien upon any of the properties or assets of the Companies or any Subsidiary, or give to others any rights of termination, amendment, acceleration or cancellation (with or without notice, lapse of time or both) of, any agreement, credit facility, debt or other instrument (evidencing a Companies or Subsidiary debt or otherwise) or other understanding to which the Companies or any Subsidiary is a party or by which any property or asset of the Companies or any Subsidiary is bound or affected, or (iii) subject to the Required Approvals, conflict with or

result in a violation of any law, rule, regulation, order, judgment, injunction, decree or other restriction of any court or governmental authority to which the Companies or a Subsidiary is subject (including federal and state securities laws and regulations), or by which any property or asset of the Companies or a Subsidiary is bound or affected; except in the case of each of clauses (ii) and (iii), such as could not have or reasonably be expected to result in a Material Adverse Effect.

(e) Filings, Consents and Approvals. Except for the filing of a form 72-503F *Report of distributions outside Canada* with the OSC, the Companies are not required to obtain any consent, waiver, authorization or order of, give any notice to, or make any filing or registration with, any court or other federal, state, local or other governmental authority or other Person in connection with the execution, delivery and performance by the Companies of the Transaction Documents, other than: (i) the filings required pursuant to Section 4.6 of this Agreement, (ii) the filing with the Commission pursuant to the Registration Rights Agreement, (iii) the notice and/or application(s) to each applicable Trading Market for the issuance and sale of the Securities and the listing of the Conversion Shares and Warrant Shares for trading thereon in the time and manner required thereby, (iv) the filing of Form D with the Commission and such filings as are required to be made under applicable state securities laws and (v) Shareholder Approval (collectively, the "Required Approvals").

(f) Issuance of the Securities. The Securities are duly authorized and, when issued and paid for in accordance with the applicable Transaction Documents, will be duly and validly issued, fully paid and nonassessable, free and clear of all Liens imposed by the Companies other than restrictions on transfer provided for in the Transaction Documents. The Underlying Shares, when issued in accordance with the terms of the Transaction Documents, will be validly issued, fully paid and nonassessable, free and clear of all Liens imposed by the Companies other than restrictions on transfer provided for in the Transaction Documents. LiveWell has reserved from its duly authorized capital stock a number of shares of Common Stock for issuance of the Underlying Shares at least equal to the Required Minimum on the date hereof.

(g) Capitalization. The capitalization of the Companies as of the date hereof is as set forth on Schedule 3.1(g), which Schedule 3.1(g) shall also include the number of shares of Common Stock owned beneficially, and of record, by Affiliates of the Companies as of the date hereof. No Person has any right of first refusal, preemptive right, right of participation, or any similar right to participate in the transactions contemplated by the Transaction Documents. Except as a result of the purchase and sale of the Securities, there are no outstanding options, warrants, scrip rights to subscribe to, calls or commitments of any character whatsoever relating to, or securities, rights or obligations convertible into or exercisable or exchangeable for, or giving any Person any right to subscribe for or acquire any shares of Common Stock or the capital stock of any Subsidiary, or contracts, commitments, understandings or arrangements by which the Companies or any Subsidiary is or may become bound to issue additional shares of Common Stock or Common Stock Equivalents or capital stock of any Subsidiary. The issuance and sale of the Securities will not obligate the Companies or any Subsidiary to issue shares of Common Stock or other securities to any Person (other than the Purchaser) and will not result in a right of any holder of Companies securities to adjust the exercise, conversion, exchange or reset price under any of such securities. There are no outstanding securities or instruments of the Companies or any Subsidiary that contain any redemption or similar provisions, and there are no contracts, commitments, understandings or arrangements by which the Companies or any Subsidiary is or may become bound to redeem a security of the Companies or such Subsidiary. The Companies do not have any stock appreciation rights or "phantom stock" plans or agreements or any similar plan or agreement. All of the outstanding shares of capital stock of the Companies are duly authorized, validly issued, fully paid and nonassessable, have been issued in compliance with all federal and state securities laws, and none of such outstanding shares was issued in violation of any preemptive rights or similar rights to subscribe for or purchase securities. No further approval or authorization of any stockholder, the Board of Directors or others is required for the issuance and sale of the Securities. There are no stockholders agreements, voting agreements or other similar agreements with respect to the Companies' capital stock to which the Companies are a party or, to the knowledge of the Companies, between or among any of the Companies' stockholders.

(h) The financial statements set forth on Schedule 3.1 (h) fairly present in all material respects the financial condition and operating results of the Companies as of the dates, and for the periods, indicated therein. Except for the liabilities as set forth in such financial statements, the Companies have no material liabilities or obligations, contingent or otherwise. The financial statements fairly present the consolidated financial position of the Companies in accordance with International Financial Reporting Standards.

(i) Material Changes; Undisclosed Events, Liabilities or Developments. Since the date of the latest audited financial statements filed on SEDAR, except as set forth on Schedule 3.1(i), (i) there has been no event, occurrence or development that has had or that could reasonably be expected to result in a Material Adverse Effect, (ii) LiveWell has not incurred any liabilities (contingent or otherwise) other than (A) trade payables and accrued expenses incurred in the ordinary course of business consistent with past practice and (B) liabilities not required to be reflected in LiveWell's financial statements pursuant to GAAP or disclosed in filings made with the Commission, (iii) LiveWell has not altered its method of accounting, (iv) LiveWell has not declared or made any dividend or distribution of cash or other property to its stockholders or purchased, redeemed or made any agreements to purchase or redeem any shares of its capital stock and (v) LiveWell has not issued any equity securities to any officer, director or Affiliate, except pursuant to existing LiveWell stock option plans. LiveWell does not have pending before the Commission any request for confidential treatment of information. Except for the issuance of the Securities contemplated by this Agreement or as set forth on Schedule 3.1(i), no event, liability, fact, circumstance, occurrence or development has occurred or exists or is reasonably expected to occur or exist with respect to LiveWell or their Subsidiaries or their respective businesses, prospects, properties, operations, assets or financial condition, that would be required to be disclosed by LiveWell under applicable securities laws at the time this representation is made or deemed made that has not been publicly disclosed at least 1 Trading Day prior to the date that this representation is made.

(j) Litigation. Except as disclosed in Schedule 3.1(j), there is no action, suit, inquiry, notice of violation, proceeding or investigation pending or, to the knowledge of the Companies, threatened against or affecting the Companies, any Subsidiary or any of their respective properties before or by any court, arbitrator, governmental or administrative agency or regulatory authority (federal, state, county, local or foreign) (collectively, an "Action") which (i) adversely affects or challenges the legality, validity or enforceability of any of the Transaction Documents or the Securities or (ii) could, if there were an unfavourable decision, have or reasonably be expected to result in a Material Adverse Effect. Neither the Companies nor any Subsidiary, nor any director or officer thereof, is or has been the subject of any Action involving a claim of violation of or liability under federal or state securities laws or a claim of breach of fiduciary duty. There has not been, and to the knowledge of the Companies, there is not pending or contemplated, any investigation by the Commission involving the Companies or any current or former director or officer of the Companies. The Commission has not issued any stop order or other order suspending the effectiveness of any registration statement filed by the Companies or any Subsidiary under the Exchange Act or the Securities Act. No delisting of, suspension of trading in or cease trading order with respect to any securities of the Companies and, to the knowledge of the Companies, no inquiry or investigation (formal or informal) of any Canadian Securities Authority, or any enforcement action by any Canadian Securities Authority, is in effect or ongoing or, to the knowledge of the Companies, expected to be implemented or undertaken against the Companies, other than LiveWell's current trading halt pending fundamental change that was issued upon the announcement of the Vitality Combination.

(k) Labour Relations. No labour dispute exists or, to the knowledge of the Companies, is imminent with respect to any of the employees of the Companies, which could reasonably be expected to result in a Material Adverse Effect. None of the Companies' or their Subsidiaries' employees are a member of a union that relates to such employee's relationship with the Companies or such Subsidiary, and neither the Companies nor any of their Subsidiaries are a party to a collective bargaining agreement, and the Companies and their Subsidiaries believe that their relationships with their employees are good. To the knowledge of the Companies, no executive officer of the Companies or any Subsidiary, is, or is now expected to be, in violation of any material term of any employment contract, confidentiality, disclosure or proprietary information agreement or non-competition agreement, or any other contract or agreement or any restrictive covenant in favour of any third party, and the continued employment of each such executive officer does not subject the Companies or any of their Subsidiaries to any liability with respect to any of the foregoing matters. The Companies and their Subsidiaries are in compliance with all U.S. federal, state, local and foreign laws and regulations relating to employment and employment practices, terms and conditions of employment and wages and hours, including without limitation, the Canadian Pension Plan, except where the failure to be in compliance could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(l) Compliance. Neither the Companies nor any Subsidiary: (i) are in default under or in violation of (and no event has occurred that has not been waived that, with notice or lapse of time or both, would result in a default by the Companies or any Subsidiary under), nor have the Companies or any Subsidiary received notice of a claim that it is in default under or that it is in violation of, any indenture, loan or credit agreement or any

other agreement or instrument to which it is a party or by which it or any of its properties is bound (whether or not such default or violation has been waived), (ii) is in violation of any judgment, decree or order of any court, arbitrator or other governmental authority or (iii) is or has been in violation of any statute, rule, ordinance or regulation of any governmental authority, including without limitation all foreign, federal, state and local laws relating to taxes, environmental protection, occupational health and safety, product quality and safety and employment and labour matters, except in each case as could not have or reasonably be expected to result in a Material Adverse Effect.

(m) Environmental Laws. The Companies and their Subsidiaries (i) are in compliance with all federal, state, local and foreign laws relating to pollution or protection of human health or the environment (including ambient air, surface water, groundwater, land surface or subsurface strata), including laws relating to emissions, discharges, releases or threatened releases of chemicals, pollutants, contaminants, or toxic or hazardous substances or wastes (collectively, "Hazardous Materials") into the environment, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of Hazardous Materials, as well as all authorizations, codes, decrees, demands, or demand letters, injunctions, judgments, licenses, notices or notice letters, orders, permits, plans or regulations, issued, entered, promulgated or approved thereunder ("Environmental Laws"); (ii) have received all permits licenses or other approvals required of them under applicable Environmental Laws to conduct their respective businesses; and (iii) are in compliance with all terms and conditions of any such permit, license or approval where in each clause (i), (ii) and (iii), the failure to so comply could be reasonably expected to have, individually or in the aggregate, a Material Adverse Effect.

(n) Regulatory Permits. The Companies and the Subsidiaries possess all certificates, authorizations and permits issued by the appropriate federal, state, local or foreign regulatory authorities necessary to conduct their respective businesses as described in the SEC Reports and in Sedar, except where the failure to possess such permits could not reasonably be expected to result in a Material Adverse Effect ("Material Permits"), and neither the Companies nor any Subsidiary has received any notice of proceedings relating to the revocation or modification of any Material Permit.

(o) Title to Assets. The Companies and the Subsidiaries have good and marketable title in fee simple to all real property owned by them and good and marketable title in all personal property owned by them that is material to the business of the Companies and the Subsidiaries, in each case free and clear of all Liens, except for (i) Liens as do not materially affect the value of such property and do not materially interfere with the use made and proposed to be made of such property by the Companies and the Subsidiaries and (ii) Liens for the payment of federal, state or other taxes, for which appropriate reserves have been made therefor in accordance with GAAP and, the payment of which is neither delinquent nor subject to penalties. Any real property and facilities held under lease by the Companies and the Subsidiaries are held by them under valid, subsisting and enforceable leases with which the Companies and the Subsidiaries are in compliance. As of the date hereof, LiveWell Foods Canada Inc., a Subsidiary of LiveWell, has minimum assets and operations in the province of Quebec. To the extent that is no longer the case, LiveWell Foods Canada Inc. will be obligated to grant to the holders of the Notes, within (5) five days, a first ranking lien on all personal (movable) and real (immoveable) property of LiveWell Foods Canada Inc. located in the province of Quebec.

(p) Intellectual Property. The Companies and the Subsidiaries have, or have rights to use, all patents, patent applications, trademarks, trademark applications, service marks, trade names, trade secrets, inventions, copyrights, licenses and other intellectual property rights and similar rights necessary or required for use in connection with their respective businesses as described in the SEC Reports and in Sedar which the failure to so have could have a Material Adverse Effect (collectively, the "Intellectual Property Rights"). None of, and neither the Companies nor any Subsidiary has received a notice (written or otherwise) that any of, the Intellectual Property Rights has expired, terminated or been abandoned, or is expected to expire or terminate or be abandoned, within two (2) years from the date of this Agreement. Neither the Companies nor any Subsidiary has received, since the date of the latest audited financial statements included within the SEC Reports and Sedar, a written notice of a claim or otherwise has any knowledge that the Intellectual Property Rights violate or infringe upon the rights of any Person, except as could not have or reasonably be expected to not have a Material Adverse Effect. To the knowledge of the Companies, all such Intellectual Property Rights are enforceable and there is no existing infringement by another Person of any of the Intellectual Property Rights. The Companies and their Subsidiaries have taken reasonable security measures to protect the secrecy,

confidentiality and value of all of their intellectual properties, except where failure to do so could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(q) Insurance. The Companies and the Subsidiaries are insured by insurers of recognized financial responsibility against such losses and risks and in such amounts as are prudent and customary in the businesses in which the Companies and the Subsidiaries are engaged, including, but not limited to, directors and officers insurance coverage at least equal to the aggregate Subscription Amount. Neither the Companies nor any Subsidiary has any reason to believe that it will not be able to renew its existing insurance coverage as and when such coverage expires or to obtain similar coverage from similar insurers as may be necessary to continue its business without a significant increase in cost.

(r) Transactions with Affiliates and Employees. Except as set forth on Schedule 3.1(r), none of the officers or directors of the Companies or any Subsidiary and, to the knowledge of the Companies, none of the employees of the Companies or any Subsidiary is presently a party to any transaction with the Companies or any Subsidiary (other than for services as employees, officers and directors), including any contract, agreement or other arrangement providing for the furnishing of services to or by, providing for rental of real or personal property to or from providing for the borrowing of money from or lending of money to, or otherwise requiring payments to or from any officer, director or such employee or, to the knowledge of the Companies, any entity in which any officer, director, or any such employee has a substantial interest or is an officer, director, trustee, stockholder, member or partner, in each case in excess of $120,000 other than for (i) payment of salary or consulting fees for services rendered, (ii) reimbursement for expenses incurred on behalf of the Companies and (iii) other employee benefits, including stock option agreements under any stock option plan of the Companies.

(s) [RESERVED].

(t) Certain Fees. There are no brokerage or finder's fees or commissions are or will be payable by the Companies or any Subsidiaries to any broker, financial advisor or consultant, finder, placement agent, investment banker, bank or other Person with respect to the transactions contemplated by the Transaction Documents. The Purchaser shall have no obligation with respect to any fees or with respect to any claims made by or on behalf of other Persons for fees of a type contemplated in this Section that may be due in connection with the transactions contemplated by the Transaction Documents.

(u) Private Placement. Assuming the accuracy of the Purchaser's representations and warranties set forth in Section 3.2, no registration under the Securities Act is required for the offer and sale of the Securities by the Companies to the Purchaser as contemplated hereby. Assuming the accuracy of the Purchaser's representations and warranties set forth in Section 3.2, the offer and sale of the Securities by the Companies to the Purchaser as contemplated hereby is exempt from the prospectus requirement under Canadian Securities Laws. The issuance and sale of the Securities hereunder does not contravene the rules and regulations of the Trading Market.

(v) Investment Companies. The Companies are not, and are not an Affiliate of, and immediately after receipt of payment for the Securities, will not be or be an Affiliate of, an "investment company" within the meaning of the Investment Companies Act of 1940, as amended. The Companies shall conduct their business in a manner so that it will not become an "investment company" subject to registration under the Investment Companies Act of 1940, as amended.

(w) Registration Rights. Other than the Purchaser, no Person has any right to cause the Companies or any Subsidiary to effect the registration under the Securities Act of any securities of the Companies or any Subsidiaries.

(x) [RESERVED].

(y) [RESERVED].

(z) Disclosure. Except with respect to the material terms and conditions of the transactions contemplated by the Transaction Documents, the Companies confirm that neither they nor any other Person acting on their behalf has provided the Purchaser or their agents or counsel with any information that it believes

constitutes or might constitute material, non-public information. The Companies understand and confirm that the Purchaser will rely on the foregoing representation in effecting transactions in securities of the Companies. All of the disclosure furnished by or on behalf of the Companies to the Purchaser regarding the Companies and their Subsidiaries, their respective businesses and the transactions contemplated hereby, including the Disclosure Schedules to this Agreement, is true and correct and does not contain any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made therein, in the light of the circumstances under which they were made, not misleading. The press releases disseminated by the Companies during the twelve months preceding the date of this Agreement taken as a whole do not contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they were made and when made, not misleading. The Companies acknowledge and agree that the Purchaser does not make or has not made any representations or warranties with respect to the transactions contemplated hereby other than those specifically set forth in Section 3.2 hereof.

(aa) No Integrated Offering. Assuming the accuracy of the Purchaser's representations and warranties set forth in Section 3.2, neither the Companies, nor any of their Affiliates, nor any Person acting on their behalf has, directly or indirectly, made any offers or sales of any security or solicited any offers to buy any security, under circumstances that would cause this offering of the Securities to be integrated with prior offerings by the Companies for purposes of (i) the Securities Act which would require the registration of any such securities under the Securities Act, or (ii) any applicable shareholder approval provisions of any Trading Market on which any of the securities of the Companies are listed or designated.

(bb) Solvency. Based on the consolidated financial condition of the Companies as of the Closing Date, after giving effect to the receipt by the Companies of the proceeds from the sale of the Securities hereunder, (i) the fair saleable value of the Companies' assets exceed the amount that will be required to be paid on or in respect of the Companies' existing debts and other liabilities (including known contingent liabilities) as they mature, (ii) the Companies' assets do not constitute unreasonably small capital to carry on its business as now conducted and as proposed to be conducted including its capital needs taking into account the particular capital requirements of the business conducted by the Companies, consolidated and projected capital requirements and capital availability thereof, and (iii) the current cash flow of the Companies, together with the proceeds the Companies would receive, were it to liquidate all of its assets, after taking into account all anticipated uses of the cash, would be sufficient to pay all amounts on or in respect of its liabilities when such amounts are required to be paid. The Companies do not intend to incur debts beyond its ability to pay such debts as they mature (taking into account the timing and amounts of cash to be payable on or in respect of its debt). The Companies have no knowledge of any facts or circumstances which lead it to believe that it will file for reorganization or liquidation under the bankruptcy or reorganization laws of any jurisdiction within one year from the Closing Date. Schedule 3.1(bb) sets forth as of the date hereof all outstanding secured and unsecured Indebtedness of the Companies or any Subsidiary, or for which the Companies or any Subsidiary has commitments. For the purposes of this Agreement, "Indebtedness" means (x) any liabilities for borrowed money or amounts owed in excess of $50,000 (other than trade accounts payable incurred in the ordinary course of business), (y) all guaranties, endorsements and other contingent obligations in respect of indebtedness of others, whether or not the same are or should be reflected in the Companies' consolidated balance sheet (or the notes thereto), except guaranties by endorsement of negotiable instruments for deposit or collection or similar transactions in the ordinary course of business; and (z) the present value of any lease payments in excess of $50,000 due under leases required to be capitalized in accordance with GAAP. Neither the Companies nor any Subsidiary is in default with respect to any Indebtedness.

(cc) Tax Status. Except for matters that would not, individually or in the aggregate, have or reasonably be expected to result in a Material Adverse Effect, the Companies and their Subsidiaries each (i) has made or filed all United States federal, state and local income and all foreign income and franchise tax returns, reports and declarations required by any jurisdiction to which it is subject, (ii) has paid all taxes and other governmental assessments and charges that are material in amount, shown or determined to be due on such returns, reports and declarations and (iii) has set aside on its books provision reasonably adequate for the payment of all material taxes for periods subsequent to the periods to which such returns, reports or declarations apply. There are no unpaid taxes in any material amount claimed to be due by the taxing authority of any jurisdiction, and the officers of the Companies or of any Subsidiary know of no basis for any such claim.

(dd) No General Solicitation. Neither the Companies nor any Person acting on behalf of the Companies has offered or sold any of the Securities by any form of general solicitation or general advertising. The Companies have offered the Securities for sale only to the Purchaser and certain other "accredited investors" within the meaning of Rule 501 under the Securities Act.

(ee) Foreign Corrupt Practices. Neither the Companies nor any Subsidiary, nor to the knowledge of the Companies or any Subsidiary, any agent or other person acting on behalf of the Companies or any Subsidiary, has (i) directly or indirectly, used any funds for unlawful contributions, gifts, entertainment or other unlawful expenses related to foreign or domestic political activity, (ii) made any unlawful payment to foreign or domestic government officials or employees or to any foreign or domestic political parties or campaigns from corporate funds, (iii) failed to disclose fully any contribution made by the Companies or any Subsidiary (or made by any person acting on its behalf of which the Companies is aware) which is in violation of law or (iv) violated in any material respect any provision of FCPA, the Canadian AML Laws or the Canadian Sanction Laws.

(ff) Accountants. The Companies' accounting firms are set forth on Schedule 3.1(ff) of the Disclosure Schedules. To the knowledge and belief of the Companies, such accounting firm (i) is a registered public accounting firm as required by the Exchange Act and (ii) shall express its opinion with respect to the financial statements to be included in the Companies' Annual Report for the fiscal years ending [*].

(gg) Seniority. As of the Closing Date, no Indebtedness or other claim against the Companies is senior to the Note in right of payment, whether with respect to interest or upon liquidation or dissolution, or otherwise, other than indebtedness secured by purchase money security interests (which is senior only as to underlying assets covered thereby) and capital lease obligations (which is senior only as to the property covered thereby).

(hh) No Disagreements with Accountants and Lawyers. There are no disagreements of any kind presently existing, or reasonably anticipated by the Companies to arise, between the Companies and the accountants and lawyers formerly or presently employed by the Companies and the Companies are current with respect to any fees owed to its accountants and lawyers which could affect the Companies' ability to perform any of its obligations under any of the Transaction Documents.

(ii) Acknowledgment Regarding Purchaser's Purchase of Securities. The Companies acknowledge and agree that the Purchaser is acting solely in the capacity of an arm's length purchaser with respect to the Transaction Documents and the transactions contemplated thereby. The Companies further acknowledge that the Purchaser is not acting as a financial advisor or fiduciary of the Companies (or in any similar capacity) with respect to the Transaction Documents and the transactions contemplated thereby and any advice given by the Purchaser or any of its respective representatives or agents in connection with the Transaction Documents and the transactions contemplated thereby is merely incidental to the Purchaser's purchase of the Securities. The Companies further represent to the Purchaser that the Companies' decisions to enter into this Agreement and the other Transaction Documents have been based solely on the independent evaluation of the transactions contemplated hereby by the Companies and its representatives.

(jj) Acknowledgment Regarding Purchaser's Trading Activity. Anything in this Agreement or elsewhere herein to the contrary notwithstanding (except for Sections 3.2(f) and 4.15 hereof), it is understood and acknowledged by the Companies that: (i) the Purchaser has not been asked by the Companies to agree, nor has the Purchaser agreed, to desist from purchasing or selling, long and/or short, securities of the Companies, or "derivative" securities based on securities issued by the Companies or to hold the Securities for any specified term, (ii) past or future open market or other transactions by the Purchaser, specifically including, without limitation, Short Sales or "derivative" transactions, before or after the closing of this or future private placement transactions, may negatively impact the market price of the Companies' publicly-traded securities, (iii) the Purchaser, and counter-parties in "derivative" transactions to which the Purchaser is a party, directly or indirectly, may presently have a "short" position in the Common Stock and (iv) the Purchaser shall not be deemed to have any affiliation with or control over any arm's length counter-party in any "derivative" transaction. The Companies further understand and acknowledge that (y) the Purchaser may engage in hedging activities at various times during the period that the Securities are outstanding, including, without limitation, during the periods that the value of the Underlying Shares deliverable with respect to Securities are being determined, and (z) such hedging activities (if any) could reduce the value of the existing stockholders' equity

interests in the Companies at and after the time that the hedging activities are being conducted. The Companies acknowledge that such aforementioned hedging activities do not constitute a breach of any of the Transaction Documents.

(kk) [RESERVED].

(ll) [RESERVED].

(mm) Stock Option Plans. Each stock option granted by the Companies under the Companies' stock option plans were granted (i) in accordance with the terms of the Companies' stock option plan and (ii) with an exercise price at least equal to the fair market value of the Common Stock on the date such stock option would be considered granted under GAAP and applicable law. No stock option granted under the Companies' stock option plan has been backdated. The Companies have not knowingly granted, and there is no and has been no Companies policy or practice to knowingly grant, stock options prior to, or otherwise knowingly coordinate the grant of stock options with, the release or other public announcement of material information regarding the Companies or their Subsidiaries or their financial results or prospects.

(nn) Office of Foreign Assets Control. Neither the Companies nor any Subsidiary nor, to the Companies' knowledge, any director, officer, agent, employee or affiliate of the Companies or any Subsidiary is currently subject to any U.S. sanctions administered by the Office of Foreign Assets Control of the U.S. Treasury Department ("OFAC").

(oo) U.S. Real Property Holding Corporation. The Companies are not and have never been a U.S. real property holding corporation within the meaning of Section 897 of the Internal Revenue Code of 1986, as amended, and the Companies shall so certify upon Purchaser's request.

(pp) Bank Holding Companies Act. Neither the Companies nor any of their Subsidiaries or Affiliates are subject to the Bank Holding Companies Act of 1956, as amended (the "BHCA") and to regulation by the Board of Governors of the Federal Reserve System (the "Federal Reserve"). Neither the Companies nor any of their Subsidiaries or Affiliates owns or controls, directly or indirectly, five percent (5%) or more of the outstanding shares of any class of voting securities or twenty-five percent or more of the total equity of a bank or any entity that is subject to the BHCA and to regulation by the Federal Reserve. Neither the Companies nor any of their Subsidiaries or Affiliates exercises a controlling influence over the management or policies of a bank or any entity that is subject to the BHCA and to regulation by the Federal Reserve.

(qq) Money Laundering. The operations of the Companies and their Subsidiaries are and have been conducted at all times in compliance with applicable financial record-keeping and reporting requirements of the Currency and Foreign Transactions Reporting Act of 1970, as amended, applicable money laundering statutes and applicable rules and regulations thereunder (collectively, the "Money Laundering Laws") and the Canadian Sanction Laws, and no Action or Proceeding by or before any court or governmental agency, authority or body or any arbitrator involving the Companies or any Subsidiary with respect to the Money Laundering Laws or the Canadian Sanction Laws is pending or, to the knowledge of the Companies or any Subsidiary, threatened.

(rr) No Disqualification Events. With respect to the Securities to be offered and sold hereunder in reliance on Rule 506 under the Securities Act, none of the Companies, any of their predecessors, any affiliated issuer, any director, executive officer, other officer of the Companies participating in the offering hereunder, any beneficial owner of 20% or more of the Companies' outstanding voting equity securities, calculated on the basis of voting power, nor any promoter (as that term is defined in Rule 405 under the Securities Act) connected with the Companies in any capacity at the time of sale (each, an "Issuer Covered Person" and, together, "Issuer Covered Persons") is subject to any of the "Bad Actor" disqualifications described in Rule 506(d)(1)(i) to (viii) under the Securities Act (a "Disqualification Event"), except for a Disqualification Event covered by Rule 506(d)(2) or (d)(3). The Companies have exercised reasonable care to determine whether any Issuer Covered Person is subject to a Disqualification Event. The Companies have complied, to the extent applicable, with their disclosure obligations under Rule 506(e), and have furnished to the Purchaser a copy of any disclosures provided thereunder.

(ss) Other Covered Persons. The Companies are not aware of any person (other than any Issuer Covered Person) that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with the sale of any Securities.

(tt) Notice of Disqualification Events. The Companies will notify the Purchaser in writing, prior to the Closing Date of (i) any Disqualification Event relating to any Issuer Covered Person and (ii) any event that would, with the passage of time, become a Disqualification Event relating to any Issuer Covered Person.

(uu) Promotional Stock Activities. Neither the Companies, their officers, their directors, nor any affiliates or agents of the Companies have engaged in any stock promotional activity that could give rise to a complaint, inquiry, or trading suspension by the Securities and Exchange Commission alleging (i) a violation of the anti-fraud provisions of the federal securities laws, (ii) violations of the anti-touting provisions, (iii) improper "gun-jumping; or (iv) promotion without proper disclosure of compensation.

(vv) Payments of Cash. Except as disclosed on Schedule 3.1(vv), neither the Companies, their officers, or any affiliates or agents of the Companies have withdrawn or paid cash (not including a check or other similar negotiable instrument) to any vendor in an aggregate amount that exceeds Five Thousand Dollars ($5,000) for any purpose.

3.2 Representations and Warranties of the Purchaser. The Purchaser hereby represents and warrants as of the date hereof and as of the Closing Date to the Companies as follows (unless as of a specific date therein, in which case they shall be accurate as of such date):

(a) Organization; Authority. Such Purchaser is either an individual or an entity duly incorporated or formed, validly existing and in good standing under the laws of the jurisdiction of its incorporation or formation with full right, corporate, partnership, limited liability company or similar power and authority to enter into and to consummate the transactions contemplated by the Transaction Documents and otherwise to carry out its obligations hereunder and thereunder. The execution and delivery of the Transaction Documents and performance by the Purchaser of the transactions contemplated by the Transaction Documents have been duly authorized by all necessary corporate, partnership, limited liability company or similar action, as applicable, on the part of the Purchaser. Each Transaction Document to which it is a party has been duly executed by the Purchaser, and when delivered by the Purchaser in accordance with the terms hereof, will constitute the valid and legally binding obligation of the Purchaser, enforceable against it in accordance with its terms, except (i) as limited by general equitable principles and applicable bankruptcy, insolvency, reorganization, moratorium and other laws of general application affecting enforcement of creditors' rights generally, (ii) as limited by laws relating to the availability of specific performance, injunctive relief or other equitable remedies and (iii) insofar as indemnification and contribution provisions may be limited by applicable law.

(b) Own Account. Such Purchaser understands that the Securities are "restricted securities" and have not been registered under the Securities Act or any applicable state securities law and is acquiring the Securities as principal for its own account and not with a view to or for distributing or reselling such Securities or any part thereof in violation of the Securities Act or any applicable state securities law, has no present intention of distributing any of such Securities in violation of the Securities Act or any applicable state securities law and has no direct or indirect arrangement or understandings with any other persons to distribute or regarding the distribution of such Securities in violation of the Securities Act or any applicable state securities law (this representation and warranty not limiting the Purchaser's right to sell the Securities pursuant to the Registration Statement or otherwise in compliance with applicable federal and state securities laws). Such Purchaser is acquiring the Securities hereunder in the ordinary course of its business.

(c) Purchaser Status. At the time the Purchaser was offered the Securities, it was, and as of the date hereof it is, and on each date on which it exercises any Warrants or converts any Notes it will be an "accredited investor" as defined in Rule 501(a)(1), (a)(2), (a)(3), (a)(7) or (a)(8) under the Securities Act.

(d) Experience of Such Purchaser. Such Purchaser, either alone or together with its representatives, has such knowledge, sophistication and experience in business and financial matters so as to be capable of evaluating the merits and risks of the prospective investment in the Securities, and has so evaluated the merits

and risks of such investment. Such Purchaser is able to bear the economic risk of an investment in the Securities and, at the present time, is able to afford a complete loss of such investment.

(e) General Solicitation. Such Purchaser is not, to the Purchaser's knowledge, purchasing the Securities as a result of any advertisement, article, notice or other communication regarding the Securities published in any newspaper, magazine or similar media or broadcast over television or radio or presented at any seminar or, to the knowledge of the Purchaser, any other general solicitation or general advertisement.

(f) Certain Transactions and Confidentiality. Other than consummating the transactions contemplated hereunder, the Purchaser has not, nor has any Person acting on behalf of or pursuant to any understanding with the Purchaser, directly or indirectly executed any purchases or sales, including Short Sales, of the securities of the Companies during the period commencing as of the time that the Purchaser first received a term sheet (written or oral) from the Companies or any other Person representing the Companies setting forth the material terms of the transactions contemplated hereunder and ending immediately prior to the execution hereof. The Purchaser covenants and agrees that neither it, nor any Affiliate acting on its behalf or pursuant to any understanding with it will execute any Short Sales (as such term is defined in Rule 200 of Regulation SHO of the Exchange Act) of the Common Stock or hedging transaction, which establishes a net short position with respect to the Companies' Common Stock during the period commencing with the execution of this Agreement and ending on the earlier Maturity Date (as defined in the Note) of the Note or the full repayment or conversion of the Note; provided that this provision shall not prohibit any sales made where a corresponding Notice of Conversion is tendered to the Companies and the shares received upon such conversion or exercise are used to close out such sale (a "Prohibited Short Sale"); provided, further that this provision shall not operate to restrict a Purchaser's trading under any prior securities purchase agreement containing contractual rights that explicitly protects such trading in respect of the previously issued securities.

## ARTICLE IV.
## OTHER AGREEMENTS OF THE PARTIES

4.1 Transfer Restrictions.

(a) The Securities may only be disposed of in compliance with state and federal securities laws. In connection with any transfer of Securities other than pursuant to an effective registration statement or Rule 144, to the Companies or to an Affiliate of a Purchaser or in connection with a pledge as contemplated in Section 4.1(b), the Companies may require the transferor thereof to provide to the Companies an opinion of counsel selected by the transferor and reasonably acceptable to the Companies, the form and substance of which opinion shall be reasonably satisfactory to the Companies, to the effect that such transfer does not require registration of such transferred Securities under the Securities Act. As a condition of transfer, any such transferee shall agree in writing to be bound by the terms of this Agreement and the Registration Rights Agreement and shall have the rights and obligations of a Purchaser under this Agreement and the Registration Rights Agreement.

(b) The Purchaser agrees to the imprinting, so long as is required by this Section 4.1, of a legend on any of the Securities in the following form:

[NEITHER] THIS SECURITY [NOR THE SECURITIES INTO WHICH THIS SECURITY IS [EXERCISABLE] [CONVERTIBLE]] HAS [NOT] BEEN REGISTERED WITH THE SECURITIES AND EXCHANGE COMMISSION OR THE SECURITIES COMMISSION OF ANY STATE IN RELIANCE UPON AN EXEMPTION FROM REGISTRATION UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), AND, ACCORDINGLY, MAY NOT BE OFFERED OR SOLD EXCEPT PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER THE SECURITIES ACT OR PURSUANT TO AN AVAILABLE EXEMPTION FROM, OR IN A TRANSACTION NOT SUBJECT TO, THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT AND IN ACCORDANCE WITH APPLICABLE STATE SECURITIES LAWS. THIS SECURITY [AND THE SECURITIES ISSUABLE UPON [EXERCISE] [CONVERSION] OF THIS SECURITY] MAY BE PLEDGED IN CONNECTION WITH A BONA FIDE MARGIN ACCOUNT WITH A REGISTERED BROKER-DEALER OR OTHER LOAN WITH A FINANCIAL INSTITUTION THAT IS AN "ACCREDITED INVESTOR" AS DEFINED IN RULE 501(a) UNDER THE SECURITIES ACT OR OTHER LOAN SECURED BY SUCH SECURITIES.

UNLESS PERMITTED UNDER SECURITIES LEGISLATION, THE HOLDER OF THIS SECURITY MUST NOT TRADE THE SECURITY BEFORE [***FOUR MONTHS AND A DAY AFTER THE DISTRIBUTION DATE***]. / [THE DATE THAT IS FOUR (4) MONTHS AND ONE (1) DAY AFTER THE LATER OF (I) **[THE DISTRIBUTION DATE]** AND (II) THE DATE THE ISSUER BECAME A REPORTING ISSUER IN ANY PROVINCE OR TERRITORY.

The Companies acknowledge and agree that a Purchaser may from time to time pledge pursuant to a bona fide margin agreement with a registered broker-dealer or grant a security interest in some or all of the Securities to a financial institution that is an "accredited investor" as defined in Rule 501(a) under the Securities Act and, if required under the terms of such arrangement, the Purchaser may transfer pledged or secured Securities to the pledgees or secured parties. Such a pledge or transfer would not be subject to approval of the Companies and no legal opinion of legal counsel of the pledgee, secured party or pledgor shall be required in connection therewith. Further, no notice shall be required of such pledge. At the appropriate Purchaser's expense, the Companies will execute and deliver such reasonable documentation as a pledgee or secured party of Securities may reasonably request in connection with a pledge or transfer of the Securities, including, if the Securities are subject to registration pursuant to the Registration Rights Agreement, the preparation and filing of any required prospectus supplement under Rule 424(b)(3) under the Securities Act or other applicable provision of the Securities Act to appropriately amend the list of Selling Stockholders (as defined in the Registration Rights Agreement) thereunder.

(c) Certificates evidencing the Underlying Shares shall not contain any legend (including the legend set forth in Section 4.1(b) hereof): (i) while a registration statement (including the Registration Statement) covering the resale of such security is effective under the Securities Act, (ii) following any sale of such Underlying Shares pursuant to Rule 144 (assuming cashless exercise of the Warrants), (iii) if such Underlying Shares are eligible for sale under Rule 144 (assuming cashless exercise of the Warrants) or (iv) if such legend is not required under applicable requirements of the Securities Act (including judicial interpretations and pronouncements issued by the staff of the Commission). The Companies shall cause their counsel to issue a legal opinion to the Transfer Agent or the Purchaser promptly if required by the Transfer Agent to effect the removal of the legend hereunder, or if requested by the Purchaser, respectively. If all or any portion of a Note is converted or Warrant is exercised at a time when there is an effective registration statement to cover the resale of the Underlying Shares, or if such Underlying Shares may be sold under Rule 144 without the requirement for the Companies to be in compliance with the current public information required under Rule 144 (assuming cashless exercise of the Warrants) as to such Underlying Shares and without volume or manner-of-sale restrictions or if such legend is not otherwise required under applicable requirements of the Securities Act (including judicial interpretations and pronouncements issued by the staff of the Commission) then such Underlying Shares shall be issued free of all legends. The Companies agree that following such time as such legend is no longer required under this Section 4.1(c), it will, no later than the earlier of (i) two (2) Trading Days and (ii) the number of Trading Days comprising the Standard Settlement Period (as defined below) following the delivery by a Purchaser to the Companies or the Transfer Agent of a certificate representing Underlying Shares, as applicable, issued with a restrictive legend (such date, the "Legend Removal Date"), deliver or cause to be delivered to the Purchaser a certificate representing such shares that is free from all restrictive and other legends; *provided that* the Purchaser shall have previously delivered to the Companies all documents required by the Companies' Transfer Agent and/or Counsel to deliver Shares that are free of restrictive legends. The Companies may not make any notation on its records or give instructions to the Transfer Agent that enlarge the restrictions on transfer set forth in this Section 4. Certificates for Underlying Shares subject to legend removal hereunder shall be transmitted by the Transfer Agent to the Purchaser by crediting the account of the Purchaser's prime broker with the Depository Trust Companies System as directed by the Purchaser. As used herein, "Standard Settlement Period" means the standard settlement period, expressed in a number of Trading Days, on the Companies' primary Trading Market with respect to the Common Stock as in effect on the date of delivery of a certificate representing Underlying Shares, as applicable, issued with a restrictive legend.

(d) In addition to the Purchaser's other available remedies, the Companies shall pay to a Purchaser, in cash, (i) as partial liquidated damages and not as a penalty, for each $1,000 of Underlying Shares (based on the VWAP of the Common Stock on the date such Securities are submitted to the Transfer Agent) delivered for removal of the restrictive legend and subject to Section 4.1(c), $10 per Trading Day (increasing to $20 per

Trading Day five (5) Trading Days after such damages have begun to accrue) for each Trading Day after the Legend Removal Date until such certificate is delivered without a legend and (ii) if the Companies fail to (a) issue and deliver (or cause to be delivered) to a Purchaser by the Legend Removal Date a certificate representing the Securities so delivered to the Companies by the Purchaser that is free from all restrictive and other legends and (b) if after the Legend Removal Date the Purchaser purchases (in an open market transaction or otherwise) shares of Common Stock to deliver in satisfaction of a sale by the Purchaser of all or any portion of the number of shares of Common Stock, or a sale of a number of shares of Common Stock equal to all or any portion of the number of shares of Common Stock that the Purchaser anticipated receiving from the Companies without any restrictive legend, then, an amount equal to the excess of the Purchaser's total purchase price (including brokerage commissions and other out-of-pocket expenses, if any) for the shares of Common Stock so purchased (including brokerage commissions and other out-of-pocket expenses, if any) (the "Buy-In Price") over the product of (A) such number of Underlying Shares that the Companies was required to deliver to the Purchaser by the Legend Removal Date multiplied by (B) the lowest closing sale price of the Common Stock on any Trading Day during the period commencing on the date of the delivery by the Purchaser to the Companies of the applicable Underlying Shares (as the case may be) and ending on the date of such delivery and payment under this clause (ii).

(e) The Purchaser agrees with the Companies that the Purchaser will sell any Securities pursuant to either the registration requirements of the Securities Act, including any applicable prospectus delivery requirements, or an exemption therefrom, and that if Securities are sold pursuant to a Registration Statement, they will be sold in compliance with the plan of distribution set forth therein, and acknowledges that the removal of the restrictive legend from certificates representing Securities as set forth in this Section 4.1 is predicated upon the Companies' reliance upon this understanding.

4.2 Acknowledgment of Dilution. The Companies acknowledge that the issuance of the Securities may result in dilution of the outstanding shares of Common Stock, which dilution may be substantial under certain market conditions. The Companies further acknowledge that their obligations under the Transaction Documents, including, without limitation, its obligation to issue the Underlying Shares pursuant to the Transaction Documents, are unconditional and absolute and not subject to any right of set off, counterclaim, delay or reduction, regardless of the effect of any such dilution or any claim the Companies may have against the Purchaser and regardless of the dilutive effect that such issuance may have on the ownership of the other stockholders of the Companies.

4.3 Furnishing of Information; Public Information.

(a) Until the earliest of the time that (i) the Purchaser does not own Securities or (ii) the Warrants have expired, the Companies covenant to maintain the registration of the Common Stock under Section 12(b) or 12(g) of the Exchange Act and to timely file (or obtain extensions in respect thereof and file within the applicable grace period) all reports required to be filed by the Companies after the date hereof pursuant to the Exchange Act even if the Companies are not then subject to the reporting requirements of the Exchange Act.

(b) At any time during the period commencing from the six (6) month anniversary of the date hereof and ending at such time that all of the Securities may be sold without the requirement for the Companies to be in compliance with Rule 144(c)(1) and otherwise without restriction or limitation pursuant to Rule 144, if the Companies (i) shall fail for any reason to satisfy the current public information requirement under Rule 144(c) or (ii) have ever been an issuer described in Rule 144 (i)(1)(i) or becomes an issuer in the future, and the Companies shall fail to satisfy any condition set forth in Rule 144(i)(2) (a "Public Information Failure") then, in addition to the Purchaser's other available remedies, the Companies shall pay to a Purchaser, in cash, as partial liquidated damages and not as a penalty, by reason of any such delay in or reduction of its ability to sell the Securities, an amount in cash equal to two percent (2.0%) of the aggregate Subscription Amount of the Purchaser's Securities on the day of a Public Information Failure and on every thirtieth ($30^{th}$) day (pro rated for periods totaling less than thirty days) thereafter until the earlier of (a) the date such Public Information Failure is cured and (b) such time that such public information is no longer required for the Purchaser to transfer the Underlying Shares pursuant to Rule 144. The payments to which a Purchaser shall be entitled pursuant to this Section 4.3(b) are referred to herein as "Public Information Failure Payments." Public Information Failure Payments shall be paid on the earlier of (i) the last day of the calendar month during which such Public Information Failure Payments are incurred and (ii) the third ($3^{rd}$) Business Day after the event or failure giving rise to the Public Information Failure Payments is cured. In the event the Companies fails to make Public

Information Failure Payments in a timely manner, such Public Information Failure Payments shall bear interest at the rate of 1.5% per month (prorated for partial months) until paid in full. Nothing herein shall limit the Purchaser's right to pursue actual damages for the Public Information Failure, and the Purchaser shall have the right to pursue all remedies available to it at law or in equity including, without limitation, a decree of specific performance and/or injunctive relief.

4.4 Integration. The Companies shall not sell, offer for sale or solicit offers to buy or otherwise negotiate in respect of any security (as defined in Section 2 of the Securities Act) that would be integrated with the offer or sale of the Securities in a manner that would require the registration under the Securities Act of the sale of the Securities or that would be integrated with the offer or sale of the Securities for purposes of the rules and regulations of any Trading Market such that it would require shareholder approval prior to the closing of such other transaction unless shareholder approval is obtained before the closing of such subsequent transaction.

4.5 Conversion and Exercise Procedures. Each of the form of Notice of Exercise included in the Warrant and the form of Notice of Conversion included in the Note set forth the totality of the procedures required of the Purchaser in order to exercise the Warrants or convert the Note. Without limiting the preceding sentences, no ink-original Notice of Exercise or Notice of Conversion shall be required, nor shall any medallion guarantee (or other type of guarantee or notarization) of any Notice of Exercise or Notice of Conversion form be required in order to exercise the Warrant or convert the Note. No additional legal opinion, other information or instructions shall be required of the Purchaser to exercise the Warrants or convert the Note. The Companies shall honour exercises of the Warrants and conversions of the Note and shall deliver Underlying Shares in accordance with the terms, conditions and time periods set forth in the Transaction Documents.

4.6 Securities Laws Disclosure; Publicity. The Companies shall by the Disclosure Time, issue a press release disclosing the material terms of the transactions contemplated hereby. From and after the issuance of such press release, the Companies represent to the Purchaser that they shall have publicly disclosed all material, non-public information delivered to the Purchaser by the Companies or any of their Subsidiaries, or any of their respective officers, directors, employees or agents in connection with the transactions contemplated by the Transaction Documents. In addition, effective upon the issuance of such press release, the Companies acknowledge and agree that any and all confidentiality or similar obligations under any agreement, whether written or oral, between the Companies, any of their Subsidiaries or any of their respective officers, directors, agents, employees or Affiliates on the one hand, and the Purchaser or any of their Affiliates on the other hand, shall terminate. The Companies and the Purchaser shall consult with each other in issuing any other press releases with respect to the transactions contemplated hereby, and neither the Companies nor the Purchaser shall issue any such press release nor otherwise make any such public statement without the prior consent of the Companies, with respect to any press release of the Purchaser, or without the prior consent of the Purchaser, with respect to any press release of the Companies, which consent shall not unreasonably be withheld or delayed, except if such disclosure is required by law, in which case the disclosing party shall promptly provide the other party with prior notice of such public statement or communication. Notwithstanding the foregoing, the Companies shall not publicly disclose the name of the Purchaser, or include the name of the Purchaser in any filing with the Commission or any regulatory agency or Trading Market, without the prior written consent of the Purchaser, except (a) as required by federal securities law in connection with (i) any registration statement contemplated by the Registration Rights Agreement and (ii) the filing of final Transaction Documents with the Commission and (b) to the extent such disclosure is required by law or Trading Market regulations, in which case the Companies shall provide the Purchaser with prior notice of such disclosure permitted under this clause (b).

4.7 Shareholder Rights Plan. No claim will be made or enforced by the Companies or, with the consent of the Companies, any other Person, that the Purchaser is an "Acquiring Person" under any control share acquisition, business combination, poison pill (including any distribution under a rights agreement) or similar anti-takeover plan or arrangement in effect or hereafter adopted by the Companies, or that the Purchaser could be deemed to trigger the provisions of any such plan or arrangement, by virtue of receiving Securities under the Transaction Documents or under any other agreement between the Companies and the Purchaser.

4.8 Non-Public Information. Except with respect to the material terms and conditions of the transactions contemplated by the Transaction Documents, which shall be disclosed pursuant to Section 4.6, the Companies covenant and agree that neither they, nor any other Person acting on their behalf will provide the Purchaser or its agents or counsel with any information that constitutes, or the Companies reasonably believe constitutes, material non-public information, unless prior thereto the Purchaser shall have consented to the receipt of such information and agreed with

the Companies to keep such information confidential. The Companies understand and confirm that the Purchaser shall be relying on the foregoing covenant in effecting transactions in securities of the Companies. To the extent that the Companies deliver any material, non-public information to the Purchaser without the Purchaser's consent, the Companies hereby covenant and agree that the Purchaser shall not have any duty of confidentiality to the Companies, any of their Subsidiaries, or any of their respective officers, directors, agents, employees or Affiliates, or a duty to the Companies, any of their Subsidiaries or any of their respective officers, directors, agents, employees or Affiliates not to trade on the basis of, such material, non-public information, provided that the Purchaser shall remain subject to applicable law. The Companies understand and confirm that the Purchaser shall be relying on the foregoing covenant in effecting transactions in securities of the Companies.

4.9 Use of Proceeds. Except as set forth on Schedule 4.9 attached hereto, Livewell shall use the net proceeds from the sale of the Notes hereunder for the purpose of making a loan to Vitality to be used by Vitality to purchase the New Mexico facility for which the Purchasers shall have a first priority security interest. Vitality hereby covenants and agrees that it will not repay more than fifty (50%) of the principal amount of the loan at any time prior to the Vitality Combination. In addition, Livewell agrees not to accept any such repayment of the loan in excess of fifty percent (50%) of its original principal amount at any time prior to the Vitality Combination.

4.10 Indemnification of Purchaser. Subject to the provisions of this Section 4.10, the Companies will indemnify and hold the Purchaser and its directors, officers, shareholders, members, partners, employees and agents (and any other Persons with a functionally equivalent role of a Person holding such titles notwithstanding a lack of such title or any other title), each Person who controls the Purchaser (within the meaning of Section 15 of the Securities Act and Section 20 of the Exchange Act), and the directors, officers, shareholders, agents, members, partners or employees (and any other Persons with a functionally equivalent role of a Person holding such titles notwithstanding a lack of such title or any other title) of such controlling persons (each, a "Purchaser Party") harmless from any and all losses, liabilities, obligations, claims, contingencies, damages, costs and expenses, including all judgments, amounts paid in settlements, court costs and reasonable attorneys' fees and costs of investigation that any the Purchaser Party may suffer or incur as a result of or relating to (a) any breach of any of the representations, warranties, covenants or agreements made by the Companies in this Agreement or in the other Transaction Documents or (b) any action instituted against the Purchaser Parties in any capacity, or any of them or their respective Affiliates, by any stockholder of the Companies who is not an Affiliate of the Purchaser Party, with respect to any of the transactions contemplated by the Transaction Documents (unless such action is solely based upon a material breach of the Purchaser Party's representations, warranties or covenants under the Transaction Documents or any agreements or understandings the Purchaser Party may have with any such stockholder or any violations by the Purchaser Party of state or federal securities laws or any conduct by the Purchaser Party which is finally judicially determined to constitute fraud, gross negligence or willful misconduct). If any action shall be brought against the Purchaser Party in respect of which indemnity may be sought pursuant to this Agreement, the Purchaser Party shall promptly notify the Companies in writing, and the Companies shall have the right to assume the defense thereof with counsel of its own choosing reasonably acceptable to the Purchaser Party. Any Purchaser Party shall have the right to employ separate counsel in any such action and participate in the defense thereof, but the fees and expenses of such counsel shall be at the expense of the Purchaser Party except to the extent that (i) the employment thereof has been specifically authorized by the Companies in writing, (ii) the Companies have failed after a reasonable period of time to assume such defense and to employ counsel or (iii) in such action there is, in the reasonable opinion of counsel, a material conflict on any material issue between the position of the Companies and the position of the Purchaser Party, in which case the Companies shall be responsible for the reasonable fees and expenses of no more than one such separate counsel. The Companies will not be liable to the Purchaser under this Agreement (y) for any settlement by a Purchaser Party effected without the Companies' prior written consent, which shall not be unreasonably withheld or delayed; or (z) to the extent, but only to the extent that a loss, claim, damage or liability is attributable to the Purchaser Party's breach of any of the representations, warranties, covenants or agreements made by the Purchaser Party in this Agreement or in the other Transaction Documents. The indemnification required by this Section 4.10 shall be made by periodic payments of the amount thereof during the course of the investigation or defense, as and when bills are received or are incurred. The indemnity agreements contained herein shall be in addition to any cause of action or similar right of the Purchaser Party against the Companies or others and any liabilities the Companies may be subject to pursuant to law.

4.11 Reservation and Listing of Securities.

(a) The Companies shall maintain a reserve of the Required Minimum from its duly authorized shares of Common Stock for issuance pursuant to the Transaction Documents in such amount as may then be required to fulfill its obligations in full under the Transaction Documents.

(b) If, on any date, the number of authorized but unissued (and otherwise unreserved) shares of Common Stock is less than the Required Minimum on such date, then the Board of Directors shall use commercially reasonable efforts to amend the Companies' certificate or articles of incorporation to increase the number of authorized but unissued shares of Common Stock to at least the Required Minimum at such time, as soon as possible and in any event not later than the 75th day after such date.

(c) The Companies shall, if applicable: (i) in the time and manner required by the principal Trading Market, prepare and file with such Trading Market an additional shares listing application covering a number of shares of Common Stock at least equal to the Required Minimum on the date of such application, (ii) take all steps necessary to cause such shares of Common Stock to be approved for listing or quotation on such Trading Market as soon as possible thereafter, (iii) provide to the Purchaser evidence of such listing or quotation and (iv) maintain the listing or quotation of such Common Stock on any date at least equal to the Required Minimum on such date on such Trading Market or another Trading Market. The Companies agrees to maintain the eligibility of the Common Stock for electronic transfer through the Depository Trust Companies or another established clearing corporation, including, without limitation, by timely payment of fees to the Depository Trust Companies or such other established clearing corporation in connection with such electronic transfer.

4.12 [RESERVED].

4.13 [RESERVED].

4.14 [RESERVED].

4.15 Certain Transactions and Confidentiality. The Purchaser covenants that neither it, nor any Affiliate acting on its behalf or pursuant to any understanding with it will execute any purchases or sales, including Short Sales, of any of the Companies' securities during the period commencing with the execution of this Agreement and ending at such time that the transactions contemplated by this Agreement are first publicly announced pursuant to the initial press release as described in Section 4.6. The Purchaser covenants that until such time as the transactions contemplated by this Agreement are publicly disclosed by the Companies pursuant to the initial press release as described in Section 4.6, the Purchaser will maintain the confidentiality of the existence and terms of this transaction and the information included in the Disclosure Schedules. Notwithstanding the foregoing, and notwithstanding anything contained in this Agreement to the contrary, the Companies expressly acknowledge and agree that (i) no Purchaser makes any representation, warranty or covenant hereby that it will not engage in effecting transactions in any securities of the Companies after the time that the transactions contemplated by this Agreement are first publicly announced pursuant to the initial press release as described in Section 4.6, (ii) no Purchaser shall be restricted or prohibited from effecting any transactions in any securities of the Companies in accordance with applicable securities laws from and after the time that the transactions contemplated by this Agreement are first publicly announced pursuant to the initial press release as described in Section 4.6 and (iii) no Purchaser shall have any duty of confidentiality or duty not to trade in the securities of the Companies to the Companies or their Subsidiaries after the issuance of the initial press release as described in Section 4.6.

4.16 Participation Right in Future Financings. From and after the date hereof until the twenty four months anniversary of the Effective Date, upon any issuance by the Companies or any of their Subsidiaries of any debt or equity securities for cash consideration ( a "Subsequent Financing"), the Purchasers shall in the aggregate have the right to participate in up to an amount of the Subsequent Financing equal to twenty percent (20%) of the amount of the Subsequent Financing on the same terms, conditions and price provided for in the Subsequent Financing.

4.17 Variable Rate Transactions; Other. So long as the Notes remains outstanding or the Holder holds any Securities, the Company and each of its Subsidiaries shall be prohibited from effecting or entering into (or publicly announcing or recommending to its stockholders the approval or adoption thereof by such stockholders) any agreement, plan, arrangement or transaction to effect, directly or indirectly, any issuance by the Company or any of its Subsidiaries of Common Stock or Common Stock Equivalents (or a combination of units thereof) involving a Variable Rate Transaction, without the prior written consent of the Holder (which consent may be withheld, delayed or conditioned in the sole

discretion of such Holder). "Variable Rate Transaction" means a transaction in which the Company (i) issues or sells any debt or equity securities that are convertible into, exchangeable or exercisable for, or include the right to receive, additional shares of Common Stock either (A) at a conversion price, exercise price or exchange rate or other price that is based upon, and/or varies with, the trading prices of or quotations for the shares of Common Stock at any time after the initial issuance of such debt or equity securities or (B) with a conversion, exercise or exchange price that is subject to being reset at some future date after the initial issuance of such debt or equity security or upon the occurrence of specified or contingent events directly or indirectly related to the business of the Company or the market for the Common Stock or (ii) enters into, or effects a transaction under, any agreement, including, but not limited to, an equity line of credit, an at-the-market offering (as defined in SEC Rule 415) or a similarly structured transaction, whereby the Company may issue securities at a future determined price. Notwithstanding the foregoing, the restrictions contained in this Section 4.17 shall not apply to (i) an Exempt Issuance.

## ARTICLE V.
## MISCELLANEOUS

5.1 Termination. This Agreement may be terminated by the Purchaser by written notice to the other parties, if the Closing has not been consummated on or before the fifth (5th) Trading Day following the date hereof, provided, however, that no such termination will affect the right of any party to sue for any breach by any other party (or parties).

5.2 Fees and Expenses. Except as expressly set forth in the Transaction Documents to the contrary, each party shall pay the fees and expenses of its advisers, counsel, accountants and other experts, if any, and all other expenses incurred by such party incident to the negotiation, preparation, execution, delivery and performance of this Agreement. The Companies shall pay all Transfer Agent fees (including, without limitation, any fees required for same-day processing of any instruction letter delivered by the Companies and any conversion or exercise notice delivered by a Purchaser), stamp taxes and other taxes and duties levied in connection with the delivery of any Securities to the Purchaser.

5.3 Entire Agreement. The Transaction Documents, together with the exhibits and schedules thereto, contain the entire understanding of the parties with respect to the subject matter hereof and thereof and supersede all prior agreements and understandings, oral or written, with respect to such matters, which the parties acknowledge have been merged into such documents, exhibits and schedules.

5.4 Notices. Any and all notices or other communications or deliveries required or permitted to be provided hereunder shall be in writing and shall be deemed given and effective on the earliest of: (a) the date of transmission, if such notice or communication is delivered via facsimile at the facsimile number or email attachment at the email address as set forth on the signature pages attached hereto at or prior to 5:30 p.m. (New York City time) on a Trading Day, (b) the next Trading Day after the date of transmission, if such notice or communication is delivered via facsimile at the facsimile number or email attachment as set forth on the signature pages attached hereto on a day that is not a Trading Day or later than 5:30 p.m. (New York City time) on any Trading Day, (c) the second (2nd) Trading Day following the date of mailing, if sent by U.S. nationally recognized overnight courier service or (d) upon actual receipt by the party to whom such notice is required to be given. The address for such notices and communications shall be as set forth on the signature pages attached hereto.

5.5 Amendments; Waivers. No provision of this Agreement may be waived, modified, supplemented or amended except in a written instrument signed, in the case of an amendment, by the Companies and the Purchaser, or, in the case of a waiver, by the party against whom enforcement of any such waived provision is sought. No waiver of any default with respect to any provision, condition or requirement of this Agreement shall be deemed to be a continuing waiver in the future or a waiver of any subsequent default or a waiver of any other provision, condition or requirement hereof, nor shall any delay or omission of any party to exercise any right hereunder in any manner impair the exercise of any such right. Any amendment effected in accordance with this Section 5.5 shall be binding upon the Purchaser and holder of Securities and the Companies.

5.6 Headings. The headings herein are for convenience only, do not constitute a part of this Agreement and shall not be deemed to limit or affect any of the provisions hereof.

5.7 Successors and Assigns. This Agreement shall be binding upon and enure to the benefit of the parties and their successors and permitted assigns. The Companies may not assign this Agreement or any rights or obligations hereunder without the prior written consent of the Purchaser (other than by merger). The Purchaser may assign any or all of its rights under this Agreement to any Person to whom the Purchaser assigns or transfers any Securities, provided that such transferee agrees in writing to be bound, with respect to the transferred Securities, by the provisions of the Transaction Documents that apply to the "Purchaser."

5.8 No Third-Party Beneficiaries. This Agreement is intended for the benefit of the parties hereto and their respective successors and permitted assigns and is not for the benefit of, nor may any provision hereof be enforced by, any other Person, except as otherwise set forth in Section 4.10.

5.9 Governing Law. All questions concerning the construction, validity, enforcement and interpretation of the Transaction Documents shall be governed by and construed and enforced in accordance with the internal laws of the State of New York, without regard to the principles of conflicts of law thereof. Each party agrees that all legal Proceedings concerning the interpretations, enforcement and defense of the transactions contemplated by this Agreement and any other Transaction Documents (whether brought against a party hereto or its respective affiliates, directors, officers, shareholders, partners, members, employees or agents) shall be commenced exclusively in the state and federal courts sitting in the City of New York. Each party hereby irrevocably submits to the exclusive jurisdiction of the state and federal courts sitting in the City of New York, Borough of Manhattan for the adjudication of any dispute hereunder or in connection herewith or with any transaction contemplated hereby or discussed herein (including with respect to the enforcement of any of the Transaction Documents), and hereby irrevocably waives, and agrees not to assert in any Action or Proceeding, any claim that it is not personally subject to the jurisdiction of any such court, that such Action or Proceeding is improper or is an inconvenient venue for such Proceeding. Each party hereby irrevocably waives personal service of process and consents to process being served in any such Action or Proceeding by mailing a copy thereof via registered or certified mail or overnight delivery (with evidence of delivery) to such party at the address in effect for notices to it under this Agreement and agrees that such service shall constitute good and sufficient service of process and notice thereof. Nothing contained herein shall be deemed to limit in any way any right to serve process in any other manner permitted by law. If any party shall commence an Action or Proceeding to enforce any provisions of the Transaction Documents, then, in addition to the obligations of the Companies under Section 4.10, the prevailing party in such Action or Proceeding shall be reimbursed by the non-prevailing party for its reasonable attorneys' fees and other costs and expenses incurred with the investigation, preparation and prosecution of such Action or Proceeding.

5.10 Survival. The representations and warranties contained herein shall survive the Closing and the delivery of the Securities.

5.11 Execution. This Agreement may be executed in two or more counterparts, all of which when taken together shall be considered one and the same agreement and shall become effective when counterparts have been signed by each party and delivered to each other party, it being understood that the parties need not sign the same counterpart. In the event that any signature is delivered by facsimile transmission or by e-mail delivery of a ".pdf" format data file, such signature shall create a valid and binding obligation of the party executing (or on whose behalf such signature is executed) with the same force and effect as if such facsimile or ".pdf" signature page were an original thereof.

5.12 Severability. If any term, provision, covenant or restriction of this Agreement is held by a court of competent jurisdiction to be invalid, illegal, void or unenforceable, the remainder of the terms, provisions, covenants and restrictions set forth herein shall remain in full force and effect and shall in no way be affected, impaired or invalidated, and the parties hereto shall use their commercially reasonable efforts to find and employ an alternative means to achieve the same or substantially the same result as that contemplated by such term, provision, covenant or restriction. It is hereby stipulated and declared to be the intention of the parties that they would have executed the remaining terms, provisions, covenants and restrictions without including any of such that may be hereafter declared invalid, illegal, void or unenforceable.

5.13 Rescission and Withdrawal Right. Notwithstanding anything to the contrary contained in (and without limiting any similar provisions of) any of the other Transaction Documents, whenever the Purchaser exercises a right, election, demand or option under a Transaction Document and the Companies do not timely perform its related obligations within the periods therein provided, then the Purchaser may rescind or withdraw, in its sole discretion from

time to time upon written notice to the Companies, any relevant notice, demand or election in whole or in part without prejudice to its future actions and rights; provided, however, that, in the case of a rescission of a conversion of a Note or exercise of a Warrant, the Purchaser shall be required to return any shares of Common Stock subject to any such rescinded conversion or exercise notice concurrently with the return to the Purchaser of the aggregate exercise price paid to the Companies for such shares and the restoration of the Purchaser's right to acquire such shares pursuant to the Purchaser's Warrant (including, issuance of a replacement warrant certificate evidencing such restored right).

5.14 Replacement of Securities. If any certificate or instrument evidencing any Securities is mutilated, lost, stolen or destroyed, the Companies shall issue or cause to be issued in exchange and substitution for and upon cancellation thereof (in the case of mutilation), or in lieu of and substitution therefor, a new certificate or instrument, but only upon receipt of evidence reasonably satisfactory to the Companies of such loss, theft or destruction. The applicant for a new certificate or instrument under such circumstances shall also pay any reasonable third-party costs (including customary indemnity) associated with the issuance of such replacement Securities.

5.15 Remedies. In addition to being entitled to exercise all rights provided herein or granted by law, including recovery of damages, each of the Purchaser and the Companies will be entitled to specific performance under the Transaction Documents. The parties agree that monetary damages may not be adequate compensation for any loss incurred by reason of any breach of obligations contained in the Transaction Documents and hereby agree to waive and not to assert in any Action for specific performance of any such obligation the defense that a remedy at law would be adequate.

5.16 Payment Set Aside. To the extent that the Companies make a payment or payments to the Purchaser pursuant to any Transaction Document or the Purchaser enforces or exercises its rights thereunder, and such payment or payments or the proceeds of such enforcement or exercise or any part thereof are subsequently invalidated, declared to be fraudulent or preferential, set aside, recovered from, disgorged by or are required to be refunded, repaid or otherwise restored to the Companies, a trustee, receiver or any other Person under any law (including, without limitation, any bankruptcy law, state or federal law, common law or equitable cause of action), then to the extent of any such restoration the obligation or part thereof originally intended to be satisfied shall be revived and continued in full force and effect as if such payment had not been made or such enforcement or setoff had not occurred.

5.17 [RESERVED].

5.18 [RESERVED].

5.19 Liquidated Damages. The Companies' obligations to pay any partial liquidated damages or other amounts owing under the Transaction Documents is a continuing obligation of the Companies and shall not terminate until all unpaid partial liquidated damages and other amounts have been paid notwithstanding the fact that the instrument or security pursuant to which such partial liquidated damages or other amounts are due and payable shall have been canceled.

5.20 Saturdays, Sundays, Holidays, etc. If the last or appointed day for the taking of any action or the expiration of any right required or granted herein shall not be a Business Day, then such action may be taken or such right may be exercised on the next succeeding Business Day.

5.21 Construction. The parties agree that each of them and/or their respective counsel have reviewed and had an opportunity to revise the Transaction Documents and, therefore, the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of the Transaction Documents or any amendments thereto. In addition, each and every reference to share prices and shares of Common Stock in any Transaction Document shall be subject to adjustment for reverse and forward stock splits, stock dividends, stock combinations and other similar transactions of the Common Stock that occur after the date of this Agreement.

For purposes of any assets, liabilities or entities located in any Canadian province or territory, including the Province of Québec, and for all other purposes pursuant to which the interpretation or construction of this Agreement may be subject to the laws of any Canadian province or territory, including the Province of Quebec, or a court or tribunal exercising jurisdiction in any Canadian province or territory, including the Province of Quebec, (i) "personal property" shall include "movable property", (ii) "real property" or "real estate" shall include "immovable property", (iii) "security interest", "mortgage" and "lien" shall include a "hypothec", "right of retention", "prior claim" and a resolutory

clause, (iv) all references to filing, perfection, priority, remedies, registering or recording under the UCC shall include publication under the applicable *Personal Property Security Ac*t or, for the Province of Quebec, the *Civil Code of Quebec*, (v) all references to "perfection" of or "perfected" liens or security interest shall include a reference to an "opposable" or "set up" lien or security interest as against third parties, (vi) an "agent" shall include a "mandatary", (viii) "gross negligence or willful misconduct" shall be deemed to be "intentional or gross fault", (ix) "priority" shall include "prior claim", (x) "state" shall include "province", (xi) "accounts" shall include "claims", and (xii) "guarantee" or "guarantor" shall include "suretyship" or "surety". For Quebec law purposes, the parties hereto confirm that it is their wish that this Agreement and any other document executed in connection with the transactions contemplated herein be drawn up in the English language only and that all other documents contemplated thereunder or relating thereto, including notices, may also be drawn up in the English language only. *Les parties aux présentes confirment que c'est leur volonté que cette convention et les autres documents de crédit soient rédigés en langue anglaise seulement et que tous les documents, y compris tous avis, envisagés par cette convention et les autres documents peuvent être rédigés en langue anglaise seulement.*

5.22 **WAIVER OF JURY TRIAL. IN ANY ACTION, SUIT, OR PROCEEDING IN ANY JURISDICTION BROUGHT BY ANY PARTY AGAINST ANY OTHER PARTY, THE PARTIES EACH KNOWINGLY AND INTENTIONALLY, TO THE GREATEST EXTENT PERMITTED BY APPLICABLE LAW, HEREBY ABSOLUTELY, UNCONDITIONALLY, IRREVOCABLY AND EXPRESSLY WAIVES FOREVER TRIAL BY JURY.**

## ARTICLE VI

## COLLATERAL AGENT.

6.1 Appointment. Hindsdale hereby irrevocably appoints Dominion, to act on its behalf as the Collateral Agent hereunder and under the other Transaction Documents and authorizes the Collateral Agent to take such actions on its behalf and to exercise such powers as are delegated to the Collateral Agent by the terms hereof or thereof, together with such actions and powers as are reasonably incidental thereto. The provisions of this Article VI are solely for the benefit of the Collateral Agent and the Purchasers, and the Companies will have no rights as a third-party beneficiary of any of such provisions. It is understood and agreed that the use of the term "agent" herein or in any other Transaction Documents (or any other similar term) with reference to the Collateral Agent is not intended to connote any fiduciary or other implied (or express) obligations arising under agency doctrine of any Applicable Law. Instead, such term is used as a matter of market custom, and is intended to create or reflect only an administrative relationship between contracting parties.

6.2 Rights as a Lender. The Person serving as the Collateral Agent hereunder will have the same rights and powers in its capacity as a Purchaser as any other Purchaser and may exercise the same as though it were not the Collateral Agent, and the term "Purchaser" or "Purchasers" will, unless otherwise expressly indicated or unless the context otherwise requires, include the person serving as the Collateral Agent hereunder in its individual capacity to the extent such Person is a Purchaser. Such Person and its Affiliates may accept deposits from, lend money to, own securities of, act as the financial advisor or in any other advisory capacity for, and generally engage in any kind of business with, the Company or any other Subsidiaries or Affiliates of the Company as if such Person were not the Collateral Agent hereunder and without any duty to account therefor to the Purchasers.

6.3 Exculpatory Provisions.

(a) The Collateral Agent will not have any duties or obligations except those expressly set forth herein and in the other Transaction Documents, and its duties hereunder are administrative in nature. Without limiting the generality of the foregoing, the Collateral Agent:

(i) will not be subject to any fiduciary or other implied duties, regardless of whether an Event of Default under the Notes has occurred and is continuing;

(ii) will not have any duty to take any discretionary action or exercise any discretionary powers, except discretionary rights and powers expressly contemplated hereby or by the other Transaction Documents that the Collateral Agent is required to exercise as directed in writing by the holders of a majority in outstanding principal amount under the Notes ( the "Majority Purchasers") (or such other number or percentage of the Purchasers as will be expressly provided for herein or in the other Transaction Documents); *provided* that the

Collateral Agent will not be required to take any action that, in its opinion or the opinion of its counsel, may expose the Collateral Agent to liability or that is contrary to any Transaction Document or any applicable statutes, rules, ordinances, regulations guidance documents, contract terms, and other requirements of all applicable governmental authorities, including any action that may be in violation of the automatic stay under any bankruptcy or insolvency; and

(iii) will not, except as expressly set forth herein and in the other Transaction Documents, have any duty to disclose, and will not be liable for the failure to disclose, any information relating to the Companies or any of its Subsidiaries or Affiliates that is communicated to or obtained by the Person serving as the Collateral Agent or any of its Affiliates in any capacity.

(b) The Collateral Agent will not be liable for any action taken or not taken by it (i) with the consent or at the request of the Majority Purchasers (or such other number or percentage of the Purchasers as will be necessary, or as the Collateral Agent believes in good faith will be necessary, under the circumstances), or (ii) in the absence of its own gross negligence or willful misconduct as determined by a court of competent jurisdiction by final and nonappealable judgment. The Collateral Agent will be deemed not to have knowledge of any Event of Default unless and until notice describing such Event of Default is given to the Collateral Agent in writing by the Companies or a Purchaser.

(c) The Collateral Agent will not be responsible for or have any duty to ascertain or inquire into (i) any statement, warranty or representation made in or in connection with this Agreement or any other Transaction Document, (ii) the contents of any certificate, report or other document delivered hereunder or thereunder or in connection herewith or therewith, (iii) the performance or observance of any of the covenants, agreements or other terms or conditions set forth herein or therein or the occurrence of any Event of Default, (iv) the validity, enforceability, effectiveness or genuineness of this Agreement, any other Transaction Document or any other agreement, instrument or document or (v) the satisfaction of any condition set forth herein, other than to confirm receipt of items expressly required to be delivered to the Collateral Agent.

6.4 Reliance by Collateral Agent. The Collateral Agent will be entitled to rely upon, and will not incur any liability for relying upon, any notice, request, certificate, consent, statement, instrument, document or other writing (including any electronic message, Internet or intranet website posting or other distribution) believed by it to be genuine and to have been signed, sent or otherwise authenticated by the proper Person. The Collateral Agent also may rely upon any statement made to it orally or by telephone and believed by it to have been made by the proper Person, and will not incur any liability for relying thereon. In determining compliance with any condition hereunder to the making of the loan evidenced by the Notes that by its terms must be fulfilled to the satisfaction of a Purchaser, the Collateral Agent may presume that such condition is satisfactory to such Purchaser unless the Collateral Agent has received notice to the contrary from such Lender prior to the making of such loan. The Collateral Agent may consult with legal counsel (who may be counsel for the Companies), independent accountants and other experts selected by it, and will not be liable for any action taken or not taken by it in accordance with the advice of any such counsel, accountants or experts.

6.5 Delegation of Duties. The Collateral Agent may perform any and all of its duties and exercise its rights and powers hereunder or under any other Transaction Document by or through any one or more sub-agents appointed by the Collateral Agent. The Collateral Agent and any such sub-agent may perform any and all of its duties and exercise its rights and powers by or through their respective Affiliates. The exculpatory provisions of this Section will apply to any such sub-agent and to the Affiliates of the Collateral Agent and any such sub-agent, and will apply to their respective activities in connection with the syndication of the facility as well as activities as Collateral Agent. The Collateral Agent will not be responsible for the negligence or misconduct of any sub-agents except to the extent that a court of competent jurisdiction determines in a final and nonappealable judgment that the Collateral Agent acted with gross negligence or willful misconduct in the selection of such sub-agents.

6.6 Resignation of Agent

(a) The Collateral Agent may at any time give notice of its resignation to the Purchasers and the Companies, which notice shall set forth the effective date of such resignation (the *"Resignation Effective Date"*), such date not to be earlier than the thirtieth (30th) day following the date of such notice. The Majority Purchasers and the Companies shall mutually agree upon a successor to the Collateral Agent. If the Majority Purchasers and the Companies are unable to so mutually agree and no successor shall have been appointed within twenty-five (25) days after the retiring Collateral Agent gives notice of its resignation, then the retiring Collateral Agent may (but will not be obligated to), on behalf of the

Purchasers, appoint a successor Collateral Agent it shall designate (in its reasonable discretion after consultation with the Companies and the Majority Purchasers). Whether or not a successor has been appointed, such resignation will become effective in accordance with such notice on the Resignation Effective Date.

(b) With effect from the Resignation Effective Date (i) the retiring Collateral Agent will be discharged from its duties and obligations hereunder and under the other Transaction Purchasers under any of the Transaction Documents, the retiring Collateral Agent will continue to hold such Collateral until such time as a successor Collateral Agent is appointed) and (ii) except for any indemnity payments owed to the retiring Collateral Agent, all payments, communications and determinations provided to be made by, to or through the Collateral Agent will instead be made by or to each Lender directly, until such time, if any, as the Majority Purchasers appoint a successor Collateral Agent as provided for above. Upon the acceptance of a successor's appointment as Collateral Agent hereunder, such successor will succeed to and become vested with all of the rights, powers, privileges and duties of the retiring Collateral Agent (other than any rights to indemnity payments owed to the retiring Collateral Agent), and the retiring Collateral Agent will be discharged from all of its duties and obligations hereunder or under the other Transaction Documents. The fees payable by the Company to a successor Collateral Agent will be the same as those payable to its predecessor unless otherwise agreed between the Companies and such successor. After the retiring Collateral Agent's resignation hereunder and under the other Transaction Documents, the provisions of this Article VI will continue in effect for the benefit of such retiring Collateral Agent, its sub-agents and their respective Affiliates in respect of any actions taken or omitted to be taken by any of them while the retiring Collateral Agent was acting as Collateral Agent.

6.7. Non-Reliance on Collateral Agent and Other Purchasers. Each Purchaser acknowledges that it has, independently and without reliance upon the Collateral Agent or any other Purchaser or any of their Affiliates and based on such documents and information as it has deemed appropriate, made its own credit analysis and decision to enter into this Agreement. Each Purchaser also acknowledges that it will, independently and without reliance upon the Collateral Agent or any other Purchaser or any of their Affiliates and based on such documents and information as it will from time to time deem appropriate, continue to make its own decisions in taking or not taking action under or based upon this Agreement, any other Transaction Document or any related agreement or any document furnished hereunder or thereunder.

6.8. Collateral Agent May File Proofs of Claim. In case of the pendency of any bankruptcy or insolvency proceeding or any other judicial proceeding relative to the Company, the Collateral Agent (irrespective of whether the principal of the Notes will then be due and payable as herein expressed or by declaration or otherwise and irrespective of whether the Collateral Agent has made any demand on the Company) will be entitled and empowered (but not obligated), by intervention in such proceeding or otherwise:

(a) to file and prove a claim for the whole amount of the principal and interest owing and unpaid in respect of the Notes and all other obligations that are owing and unpaid hereunder or under any other Transaction Document and to file such other documents as may be necessary or advisable in order to have the claims of the Purchasers and the Collateral Agent (including any claim for the reasonable compensation, expenses, disbursements and advances of the Purchasers and the Collateral Agent and their respective agents and counsel and all other amounts due the Purchasers and the Collateral Agent under this Agreement or any other Transaction Document) allowed in such judicial proceeding; and

(b) to collect and receive any monies or other property payable or deliverable on any such claims and to distribute the same.

Any custodian, receiver, assignee, trustee, liquidator, sequestrator or other similar official in any such judicial proceeding is hereby authorized by each Purchaser to make any payments of the type described above in this Section 6.8 to the Collateral Agent and, in the event that the Collateral Agent consents to the making of such payments directly to the Purchasers, to pay to the Collateral Agent any amount due for the reasonable compensation, expenses, disbursements and advances of the Collateral Agent and its agents and counsel, and any other amounts due the Collateral Agent under this Agreement or any other Transaction Document.

6.9 Collateral and Guaranty Matters; Appointment of Collateral Agent.

(a) Without limiting the provisions of Section 6.8, the Purchasers irrevocably agree as follows:

(i) the Collateral Agent is authorized, at its option and in its discretion, to release any Lien on any property granted to or held by the Collateral Agent under any Transaction Document (A) on the date when all obligations have been satisfied in full in cash (other than obligations under the Warrant and contingent obligations as to which no claims have been asserted), (B) that is sold or otherwise disposed of or to be sold or otherwise disposed of as part of or in connection with any sale or other disposition permitted under the Transaction Documents, and

(ii) Upon request by the Collateral Agent at any time, each Purchaser will confirm in writing the Collateral Agent's authority to release or subordinate its interest in particular types or items of Collateral.

(b) The Collateral Agent will not be responsible for or have a duty to ascertain or inquire into any representation or warranty regarding the existence, value or collectability of the Collateral, the existence, priority or perfection of the Collateral Agent's lien thereon, or any certificate prepared by any Obligor in connection therewith, nor will the Collateral Agent be responsible or liable to the Purchasers for any failure to monitor or maintain any portion of the Collateral.

(c) Each Purchaser hereby appoints the Collateral Agent as its collateral agent under each of the Transaction Documents and agrees that, in so acting, the Collateral Agent will have all of the rights, protections, exculpations, indemnities and other benefits provided to the Collateral Agent under this Agreement, and hereby authorizes and directs the Collateral Agent, on behalf of such Purchaser and all Purchasers, without the necessity of any notice to or further consent from any of the Purchaser, from time to time to (i) take any action with respect to any collateral or any Transaction Document which may be necessary to perfect and maintain perfected the liens on the collateral granted pursuant to any such Transaction Document or protect and preserve the Collateral Agent's ability to enforce the liens or realize upon the collateral, (ii) act as collateral agent for each Purchaser that is a secured party for purposes of acquiring, holding, enforcing and perfecting all Liens created by the Loan Documents and all other purposes stated therein, (iii) enter into non-disturbance or similar agreements in connection with licensing agreements and arrangements permitted by this Agreement and the other Transaction Documents and (iv) otherwise to take or refrain from taking any and all action that the Collateral Agent shall deem necessary or advisable in fulfilling its role as collateral agent under any of the Transaction Documents.

**[SIGNATURE PAGE TO FOLLOW]**

IN WITNESS WHEREOF, the parties hereto have caused this Securities Purchase Agreement to be duly executed by their respective authorized signatories as of the date first indicated above.

**LIVEWELL CANADA INC.**

By: ______________________________
Name: Steven Archambault
Title: CFO + CHO
Facsimile:
Email: sarchambault@livewellfoods.ca
Address: 179 Promenade du Portage, Suite 300
Gatineau, QC, J8X 2K5
Canada

**VITALITY CBD NATURAL HEALTH PRODUCTS INC.**

By: ______________________________
Name: Steven Archambault
Title: CFO
Facsimile:
Email: sarchambault@livewellfoods.ca
Address: 254 Truss Rd.
Eureka, MO, 59917
United States

**DOMINION CAPITAL LLC, as Collateral Agent**

By: ______________________________
Name: Mikhail Gurevich
Title: Managing Member
Facsimile:
Email: mikhail@domcapllc.com
Address:

**HINDSDALE I, LP, as Purchaser**

By: ______________________________
Name:
Title:
Facsimile:
Email:
Address:

**Schedule 2.2(b)**

PERLEY-ROBERTSON, HILL & McDOUGALL LLP/s.r.l.

## DO NOT CHANGE THIS FORM IN ANY WAY

PLEASE SEND A COPY OF THE TRANSFER RECEIPT TO

**PERLEY-ROBERTSON, HILL & McDOUGALL LLP**/s.r.l.

EITHER

BY FAX TO 613.238.8775

OR

BY E-MAIL TO TRUST@PERLAW.CA

AS SOON AS POSSIBLE AFTER A TRANSFER HAS BEEN INITIATED.
THIS WILL HELP TO EXPEDITE THE PROPER ALLOCATION OF ALL INCOMING TRANSFERS.

**NOTE:**
PLEASE ENSURE THAT WHEN FUNDS ARE WIRED THE NAME OF THE REMITTER AND YOUR FILE NUMBER (i.e. ABCD001) IS SPECIFICALLY IDENTIFIED IN THE TELEX MESSAGE FROM THE SENDING BANK.

**Wire transfers are only accepted if the Beneficiary Name, Address, and Account information are specified.**

**U.S. $ WIRING INSTRUCTIONS**

**Bank Name**: Royal Bank of Canada
**Bank Address**: 90 Sparks Street, Ottawa, ON K1P 5B4

**Bank#**: 003
**Transit#**: 00006
**Swift #**: ROYCCAT2 (from outside Canada only)
**Account Number**: 00006-4006748

**Beneficiary Name**: Perley-Robertson, Hill & McDougall LLP/s.r.l. in Trust
**Beneficiary Address**: 1400 – 340 Albert Street, Ottawa, ON K1R 0A5

# APPENDIX J

**SUBORDINATION AND POSTPONEMENT AGREEMENT**

WHEREAS Vitality CBD Natural Health Products Inc. (the "Debtor") is indebted and may become further indebted to Hindsdale I, LP ("Hindsdale") and other Purchasers (as such term is defined in the Guarantee Agreement) pursuant to a guarantee agreement (as amended, restated, extended, replaced or otherwise modified from time to time the "Guarantee Agreement") entered into on or about the date hereof by, among others, the Debtor, in favour of Dominion Capital LLC ("Dominion"), as collateral agent for the Purchasers (including Hindsdale) and with respect to other indebtedness, liabilities and obligations of the Debtor to the Purchasers (including Hindsdale) under a securities purchase agreement dated on or about the date hereof (as amended, restated, extended, replaced or otherwise modified from time to time the "Securities Purchase Agreement") and the other Transaction Documents (as such term is defined in the Securities Purchase Agreement) (such past, present and future indebtedness, liabilities and obligations are collectively called the "Senior Obligations");

AND WHEREAS the Senior Obligations are and may in the future be secured by certain security documents and related documents executed or to be executed in favour of the Purchasers by the Debtor (such past, present and future security documents and related documents are collectively called the "Senior Security");

AND WHEREAS the Debtor is liable and obligated or will become liable and obligated to LiveWell Canada Inc. ("LiveWell") with respect to certain monies advanced or to be advanced by LiveWell (the "Subordinated Loan"), and with respect to indebtedness, liabilities and obligations of the Debtor to LiveWell (such past, present and future indebtedness, liabilities and obligations are collectively called the "Subordinated Obligations");

AND WHEREAS the Subordinated Obligations are secured by certain security documents and related documents executed in favour of LiveWell by the Debtor, including, without limitation, a general security agreement registered in the Personal Property Security Registry of Ontario under registration number 748220841 and may be further secured by certain security documents and related documents to be executed in favour of LiveWell by the Debtor (such past, present and future security documents and related documents are collectively called the "Subordinated Security");

AND WHEREAS LiveWell has agreed to postpone and subordinate the Subordinated Loan and the Subordinated Security in favour of the Senior Obligations and the Senior Security ;

NOW THEREFORE for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the parties hereto, the parties hereto hereby acknowledge, covenant and agree as follows:

1. LiveWell hereby acknowledges and agrees that, so long as any portion of the Senior Obligations are outstanding and until all of the Senior Obligations have been paid in full, the payments of all or any portion of the Subordinated Loan, unless otherwise permitted under the Securities Purchase Agreement or other Transaction Documents, shall be postponed and subordinated to the payment in full of all of the Senior Obligations. LiveWell hereby further acknowledges and agrees that, unless otherwise permitted under the Securities Purchase Agreement or other Transaction Documents, if LiveWell receives any payments of all or any portion of the Subordinated Loan before all of the Senior Obligations have been indefeasibly paid in full, then such payments shall be received and held by LiveWell in trust for the Purchasers and LiveWell shall promptly pay such payments to Dominion for application against the Senior Obligations until all of the Senior Obligations have been indefeasibly paid in full.

2. LiveWell hereby acknowledges and agrees that, so long as any portion of the Senior Obligations are outstanding and until all of the Senior Obligations have been paid in full, the rights, interests and entitlements that LiveWell has or may have as a holder of the Subordinated Security shall be postponed and subordinated to the rights, interests and entitlements that the Purchasers have or may have as the holder of the Senior Security . For greater certainty, notwithstanding anything contained herein or in any other agreement to the contrary, LiveWell hereby acknowledges and agrees that the Senior Security shall rank and be enforceable in priority to the Subordinated Security .

3. LiveWell hereby acknowledges and agrees that, upon any distribution of any of the assets of the Debtor to any of its creditors upon any dissolution, winding-up, total or partial liquidation, readjustment of debt, reorganization, compromise, arrangement with creditors or similar proceedings of the Debtor or any of its assets, or in any bankruptcy, insolvency or receivership, assignment for the benefit of creditors, marshalling of assets and liabilities or similar proceedings, or in the event of any bulk sale of any of the assets of the Debtor within the bulk transfer provisions of any applicable laws or similar proceedings in relation thereto, whether any of the foregoing is voluntary or involuntary, partial or complete, all of the Senior Obligations shall be paid in full before LiveWell shall be entitled to retain or receive any payment or distribution from the Debtor in respect of the Subordinated Loan.

4. LiveWell hereby acknowledges and agrees that, upon any dissolution, winding-up, liquidation, readjustment, reorganization, compromise, adjustment of debt, arrangement with creditors or similar proceedings involving the Debtor, any payment or distribution of assets or securities of the Debtor of any kind or character, whether in cash, property or securities, received by LiveWell before all of the Senior Obligations have been indefeasibly paid in full, shall be received and held in trust by LiveWell for the benefit of, and shall promptly be paid over, in the form received (duly endorsed, if necessary) to Dominion for application against the Senior Obligations until all of the Senior Obligations have been indefeasibly paid in full.

5. LiveWell hereby acknowledges and agrees that, unless such payment is otherwise permitted under the Securities Purchase Agreement or other Transaction Documents, it shall not make demand for payment of the Subordinated Loan without providing prior written notice of such demand to Dominion. LiveWell hereby further acknowledges and agrees that it shall not accelerate, nor take any actions, steps or proceedings to otherwise enforce or realize upon or in respect of the Subordinated Loan or the Subordinated Security without the prior written consent of Dominion. LiveWell hereby further acknowledges and agrees that any and all rights which LiveWell may have to appoint a receiver or receiver and manager or other agent or to seek the appointment by any court of a receiver or receiver and manager or other agent to enforce all or any part of the Subordinated Security shall be postponed and subordinated to any and all rights of Dominion to appoint a receiver or receiver and manager or other agent or to seek the appointment by any court of a receiver or receiver and manager or other agent to enforce all or any part of the Senior Security. If Dominion decides to make any demand for all or any portion of the Senior Obligations or to enforce the Senior Security, then LiveWell shall, in good faith and as may be reasonably required, cooperate with Dominion in order to implement such decisions in an efficient and business-like manner. LiveWell hereby agrees that, in the event of a private appointment of a receiver or receiver and manager or agent in respect of the Debtor, such person shall, unless otherwise agreed in writing by Dominion, act only in respect of the enforcement of the Senior Security.

6. LiveWell hereby acknowledges and agrees that, so long as any portion of the Senior Obligations are outstanding and until all of the Senior Obligations have been paid in full, LiveWell shall not assign or transfer all or any part of the Subordinated Loan or the Subordinated Security or any interest therein without obtaining the prior written consent of Dominion thereto unless the transferee or assignee thereof shall have assumed, by instrument in form and substance acceptable to Dominion, all of the obligations and covenants of LiveWell hereunder.

7. LiveWell hereby acknowledges and agrees that the postponements and subordinations contained in this subordination agreement shall apply in all events and circumstances regardless of:

(a) the date of execution, attachment, registration, perfection or re-perfection of any security interest held by the Purchasers or LiveWell or either of them;

(b) the date of any advance or advances made by the Purchasers or LiveWell or either of them to the Debtor;

(c) the date of default by the Debtor under the Senior Obligations , the Senior Security , the Subordinated Obligations or the Subordinated Security;

(d) the timing of crystallization of any floating charges granted under the Senior Security or the Subordinated Security or any other action or proceedings taken to enforce the Senior Security or the Subordinated Security; or

(e) any priority granted by any principle of law or any statute, regulation or bylaw including, without limitation, any personal property statute, regulation or bylaw.

8. LiveWell hereby covenants and agrees that it shall not at any time challenge, dispute or contest the validity or enforceability of the Senior Obligations or the Senior Security nor the priorities applicable to the Senior Obligations or the Senior Security, as provided herein.

9. LiveWell hereby authorizes Dominion to register one or more financing change statements or similar statements at the appropriate registries in connection with any registrations applicable to the Subordinated Security in order to state that the Subordinated Loan and the Subordinated Security have been postponed and subordinated in favour of the Senior Obligations and the Senior Security.

10. This subordination and postponement agreement may not be amended except in writing with the prior written consent of Dominion and LiveWell.

11. This subordination and postponement agreement shall be governed by the laws of the Province of Ontario.

12. This subordination and postponement agreement shall be binding upon the parties hereto and their successors and permitted assigns.

13. This subordination and postponement agreement may be executed in one or more counterparts, each of which counterparts when executed shall constitute an original and all of which counterparts when so executed shall constitute one and the same subordination and postponement agreement.

14. A fax copy or an electronic copy of an executed copy of this subordination and postponement agreement shall have the same force and effect as an originally executed copy of this subordination and postponement agreement.

*[Signature page follows]*

DocuSign Envelope ID: B0D7AF86-67C4-4E59-8ABF-2F658655F8CB



This subordination agreement has been executed by Dominion and LiveWell as of the 14th day of February 2019.

**Dominion Capital LLC**, as collateral agent for the Purchasers
By: Dominion Capital Holdings, LLC, its manager

By:
Name: Mikhail Gurevich
Title: Managing Member

**LiveWell CANADA INC.**

By: ______________________________
Name: Steven Archambault
Title: CFO

Acknowledged and agreed by the Debtor.

**VITALITY CBD NATURAL HEALTH PRODUCTS INC.**

By: ______________________________
Name: Steven Archambault
Title: CFO

*[Signature page – Subordination and Postponement Agreement]*

This subordination agreement has been executed by Dominion and LiveWell as of the 14th day of February 2019.

**Dominion Capital LLC,** as collateral agent for the Purchasers

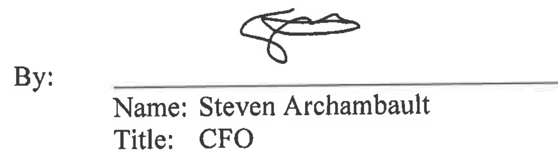
By: ______________________
Name:
Title:

**LiveWell CANADA INC.**

By: ______________________
Name: Steven Archambault
Title: CFO

Acknowledged and agreed by the Debtor.

**VITALITY CBD NATURAL HEALTH PRODUCTS INC.**



By: ______________________
Name: Steven Archambault
Title: CFO

# APPENDIX K

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**(IN BANKRUPTCY AND INSOLVENCY)**

Estate Number: **33-2618511**
Court File No.: **33-2618511**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO**

**AND IN THE MATTER OF THREE RELATED INTENDED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., AND VITALITY CBD NATURAL HEALTH PRODUCTS INC.)**

**AND IN THE MATTER OF SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED, AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF 12112744 CANADA LIMITED AND INVOLVING LIVEWELL FOODS CANADA INC. AND ARTIVA INC.**

# CASE CONFERENCE MEMORANDUM OF DOMINION CAPITAL LLC

**(Zoom Videoconference before Justice MacLeod; Wednesday, August 19, 2020, 3 p.m.)**

## Overview

1. These submissions are filed by the creditor, Dominion Capital LLC ("**Dominion**") for the Zoom Case Conference scheduled for August 19, 2020.

2. The matters raised herein are serious and Dominion views it as incumbent upon itself to put them squarely before the Court in at least some detail. This Memorandum is therefore, with apologies, lengthy.

3. Since the release of the Order & Direction of Justice MacLeod dated August 5, 2020 (the "**Direction**"):

(a) The Trustee issued its Form 77 *dis*-allowing all of the Noteholders' claims, except for a reduced claim in the Eureka 93 Inc. ("**Eureka**") proposal; and,

(b) The Trustee has not conducted the examination of Seann Poli, ordered completed by August 18, 2020, while still insisting that they alone retain the right to do so.

4. In light of these events (and non-events), Dominion requests the following scheduling relief:

(a) An Order scheduling the expeditious Appeal pursuant to subsection 135(4) of the *Bankruptcy and Insolvency Act*[1] of the Trustee's disallowances of the Noteholders' claims (and any necessary adjustment to the schedule for further Creditor's Meetings);

(b) An Order that Seann Poli attend on August 27, 2020 for a one-day examination by Dominion's counsel to answer all relevant and proper questions in respect the issues identified at paragraph 6 of the Direction; and,

(c) That the Debtors produce the documents set out in the letter of August 10, 2020 at **Tab A**, as available, within 7 days.

5. With some regret, Dominion *also* requests the expeditious scheduling of:

(d) A motion for the removal of the Trustee under section 14.04 of the *BIA* and an Order setting aside such actions of the Trustee pursuant to section 37 of the *BIA* as referenced herein.

6. As detailed below, the events that give rise to this latter request have not only had an enormously detrimental impact on Dominion, but engage the important values of:

> *maintain[ing] the high standards of administration of estates and to promote confidence in the bankruptcy process in the public interest.*[2]

---

[1] RSC 1985, c B-3 [*BIA*].
[2] *Nelson, Re*, 2006 CanLII 23396 (Ont Sup Ct) at para 15, <http://canlii.ca/t/1nx4g>.

7. To be clear, this request is not a removal for cause "*synonymous with dishonest conduct*"[3]. Rather, Dominion seeks the Trustee's removal with reference to the established criteria for removal under section 14.04:

> *(d) if circumstances prevent the creditors from working in harmony with the trustee;*
>
> *(e) if the trustee cannot act impartially;*
>
> *(f) if there has been an excess or abuse of power by the trustee;*
>
> *(h) if there has been unreasonable conduct by the trustee in relation to the estate.*[4]

8. Virtually all the communications with the Trustee have been with the Trustee's counsel, Eric Golden. Mr. Bricks, the Trustee, is presumed to have knowledge and authorized the steps Mr. Golden has taken, including his counsel's tenor, positions and correspondence, and certainly the untenable Form 77, which form the basis of this request. In fairness, Dominion has had only minimal *direct* communication with the Trustee himself, Hartley Bricks (of Deloitte) whose brief communications have been professional and courteous, despite the untenable Form 77.

9. To summarize (in accordance with the sequence of this Brief) :

(a) The Trustee's Form 77 is *prima facie* untenable on a plain reading of the contracts; and inconsistent with the demonstrable "intention" of the parties;

(b) The Trustee's has breached the Order of Justice MacLeod dated August 5, 2020, including the "Dispute Process" at paragraph 12(a); and in his failure to examine Mr. Poli per paragraph 12(b), imposing unreasonable and improper "conditions" for compliance with that Order

(c) The Trustee's communication clearly demonstrate a lack of impartiality;

(d) The Trustee's has failed to deliver Minutes of the Creditors Meetings contrary to Subsection 26(1) of the *BIA* and has failed to deliver continuing bi-weekly reports (or other updating information) since June 1, 2020; and,

(e) The Trustee's (in retrospect) uncritical support of DIP financing

---

[3] *Terry (Re)*, 2009 CanLII 56300 (Ont Sup Ct) at para 23, <http://canlii.ca/t/26698>.

[4] *Ibid* at para 24.

10. The foregoing is detailed below in support of the relief sought today.

**The Trustee's Form 77 Is *Prima Facie* Untenable**

11. The Form 77s delivered Friday, August 14, 2020 are attached at **Tab B**.

12. The Trustee rejected the Noteholders' claims in 3 of the 4 proposals (Artiva Inc. ("**Artiva**"), Livewell Foods Canada Inc. and Vitality CBD Natural Health Products Inc.) and significantly reduced the Noteholders' claim in the fourth (Eureka). In so doing, the Trustee appears to *uncritically* adopt the Debtors' tortured interpretation of the parties' contracts set out in the Debtors "Submissions"..

13. The two "spindles"' upon which the Debtors (and the Trustee) balance their arguments are that::

(a) Artiva did not guarantee the Noteholders' USD$12million March 2019 advances, but only the USD$3million February 2019 "bridge loan" advances; and,

(b) The *February* advances (and *only* the February advances!) were paid off by the December 2019 "New Mexico" transaction overseen by Mr. Poli (and by which time Mr. Shea was counsel for the Debtors).

14. Neither of these are tenable.

15. To sustain the complete disallowance of the Noteholders' Artiva claim and to find that Dominion did not have full security over Artiva's assets (including the Ottawa Facility), *both* of these allegations must be sustained.

16. Dominion's intended Appeals are not simply "sour grapes". *Neither* suggestion is tenable on a plain reading of the contracts and is patently unreasonable on the face of the Transaction

Documents. With any diligence, the Trustee would have observed that such a finding flies in the face of the obvious intent of the parties - and call into question the impartiality of the Trustee. The foregoing, taken together with the Trustee's *breach* of Justice MacLeod's Direction as to *process* (as detailed below), justify additional relief under sections 14.04 and 37 of the *BIA*.

***Form 77 Ignores a Plain Reading of the Subject Contracts***

17. The answers to the Debtors' argument are clear on the face of the contractual documents, filed as part of the Dominion's Proofs of Claim.

18. **Artiva Liable for *All* Debts:** Per the contracts, Artiva is liable for all present and future debts, including the March advances:

(a) It is uncontested that Artiva signed a "Guaranty of Obligations" dated February 14, 2019. These "Obligations" are explicitly defined by the companion document, the "Security Agreement".

(b) *Per* The "U.S." Security Agreement, to which Artiva is a signatory directly, the Obligations (of Artiva and the other Debtors) are noted to be:

> *…**all obligations**, liabilities and indebtedness of every nature of the Debtors from time to time owed or owing under or in respect of this Agreement, the Purchase Agreement, the Notes, any of the other Security Documents and any of the other Transaction Documents, **and any other secured obligations**, liabilities and indebtedness of every nature of the Debtors **from time to time owed or owing** to the Secured Parties, as the case may be including, without limitation, the principal amount of all debts, claims and indebtedness, accrued and unpaid interest….heretofore, **now and/or from time to time hereafter owing**, due or payable…*

(c) Similarly, the "Canadian" Security Agreement (to which Artiva signed a Joinder Agreement) also provides that Obligations:

> *… means **all of the liabilities and obligations** (primary, secondary, direct, contingent, sole, joint or several) **due or to become due, or that are now***

> ***or may be hereafter contracted or acquired**, or owing to, of each Debtor to the Secured Parties, including, without limitation, all obligations under this Agreement, the Credit Agreements, and any other instruments, agreements or other documents executed and/or delivered in connection herewith or therewith, in each case, **whether now or hereafter existing**, voluntary or involuntary, direct or indirect, absolute or contingent, liquidated or unliquidated, whether or not jointly owed with others, and **whether or not from time to time decreased or extinguished and later increased, created or incurred**...*

19. It is crystal clear from the documents themselves that Artiva assumed liability not only for all present debts but all *future* debts of the Debtors to the Noteholders, including the then contemplated March advances (note: the smaller February Loan was termed a "bridge loan" to the March financing).

20. Indeed, the *collateral* transaction documents would be commercially nonsensical if they were not intended to attract liability for Artiva for all future debts:

(a) First, the February *and* March Securities Agreements (securing the *totality* of the debt) both identify **Artiva's property** as security**:** they both expressly reference Artiva's Ottawa Facility as secured property at Schedule VIII:

**SCHEDULE VIII**
**Real Property**

| COMPANY | LOCATION |
|---|---|
| LIVEWELL FOODS QUEBEC INC. | Civic number 211, Route 301, Litchfield, Quebec, Canada |
| ARTIVA INC. | 5130 & 5208 Ramsayville Road, Ottawa, Canada |
| VITALITY NATURAL HEALTH LLC | 254 Truss Road, Eureka, MT 59917, United States |
| | 9085 Advancement Avenue, Las Cruces, Dona Ana County, New Mexico, United States |

(b) Second**,** the fact that Artiva signed a debenture registered on title to the Ottawa Facility for **$48million** is wholly incongruous with the belated suggestion of an

intention to secure a mere USD$3mm (February advance) limited encumbrance. This emphasizes Artiva's clear understanding that the February 14, 2019 Guaranty of Obligations extended to the future advances which, as a point of fact, were already contemplated.

21. From the foregoing, there can be no denying that *all* the Debtors (including Artiva) contracted for liability on *all* of Eureka's debts.

22. **New Mexico Transaction Reduces *Aggregate* Debt (not February Debt):** While it should be obvious that Artiva is liable for the *entire* outstanding debt, the Debtor still would have to establish *both* its arguments to sustain its objections.

23. The claim that the New Mexico release is effectively a "release" of the entirety of Artiva's liability is also entirely untenable.

(a) *Per* the "Partial Payment Agreement" dated December 18, 2019 which sets out the New Mexico transaction and is signed by Mr. Poli:

> *You [the Debtors] have contacted us [Dominion] and requested that, instead of delivering a mortgage on the Property, we accept a full transfer (the "Transfer") of ownership in the Property to the Collateral Agent, which you represent you own, and can transfer freely, free and clear of all mortgages and liens, as partial payment under the Notes (which may be* ***allocated to all amounts due under the Notes as the Holders may each decide*** *in accordance with and as provided in the Transaction Documents)...*

(b) There is *nothing* which suggests the Noteholders agreed to allocate *all* of the forgiveness to the February notes (why would they?). Indeed, such an intention is directly contrary to Schedule B to the above Partial Payment Agreement which treats the total "outstanding" of *all the Debtors* to the Noteholders as USD$11,400,000 (i.e. the total under *both* advances).

24. The New Mexico transaction documents are directly contrary to the argued position that they reduced only the February advances.  This tortured intention is even more untenable in the face of the collateral factual matrix of *stated intention* by Dominion and the Debtors.

***The Plainly Demonstrable "Intention" of the Parties***

25. The Court must have (and the Trustee should have had) pause in considering the Debtors' tortured contractual analysis which flies in the face of every email communication between the parties and, more importantly, every affidavit, statement of affairs or other statement by Mr. Poli to the date of his raising this "new wrinkle".[5] The Court has already noted the inconsistency between *all* the Debtors' prior statements, all apparently made with the advice of counsel, and this "new wrinkle".  These statements speak volumes about the Debtors' intention.

26. In order to respond to the Form 77 disallowance and in contemplation of the Appeal, Dominion has begun to gather the additional extraneous evidence showing that the intention of the parties.  Had the Trustee turned its mind to these inconsistencies as it ought to have, a *wealth* of collateral documentation would have been available to the Trustee in order to speak to the parties' contractual intent. This evidence (at **Tab C** hereto) is *conclusive*:

(a) The Term Sheets that served as letters of intent ("**LOI**") for the February (bridge loan) advance and the March advance *both* specifically state that "*Security*" includes: "*2nd on Artiva and 2nd on New Mexico facility*".  Indeed, the January 31, 2019 LOI is even more explicit that the Noteholders were "*2nd on Artiva at time of Larger Deal*" – i.e., the March advance!

[5] For the import of such evidence, see Calina Ritchie, New Contract Lenses: Contract Interpretation Revisited (*Sattva Capital Corp. v. Creston Moly Corp*, 2014 SCC 53), 2014 34th *Annual Civil Litigation Conference Conference* 17, 2014 CanLIIDocs 33410 at 7, <http://www.canlii.org/t/stln>.

(b) The emails between Dominion's *and the Debtors'* counsel are express in this regard:

***From:*** *Zeng, Bin [mailto:bin.zeng@dentons.com]*
***Sent:*** *March 13, 2019 6:34 PM*
***To:*** *Dirk Bouwer* **[Note: this counsel is at Perley-Roberson, was acting for the Debtor and is now a creditor]**
***Cc:*** *Hank Gracin; Leslie Marlow; Brian Kells; Cabelli, Joel; Werner, Sara R.; Mikhail Gurevich; Rowniak, Jacqueline*
***Subject:*** *RE: Next Tranche of LiveWell Financing*

*Hi Dirk,*

*We just received our client's instruction to assist the second tranche of the financing.*

*Based on the term sheet, we understand that the Canadian side of work would consist of*

***(1) taking a 2nd ranking security on the Artiva's real estate*** *– please see attached hereto the draft Debenture for your review and comments, subject to our client further comments;*

*(2) preparing a Put Right agreement – we will prepare and send a draft in due course.*

*Please let us know if you would like to have a call to kick off the process. Thanks.*

*Regards,*

27. The failure of the Trustee (or, for that matter, Debtors) to investigate the matter with Perley-Robertson, (who is present as a creditor in this matter) speaks to a basic lack of diligence.

28. Even *after* the New Mexico transaction, there is *nothing* in the record suggesting that either the Debtors or Dominion expressed an intention to treat this reduction solely as a repayment of the February advances. To the contrary, until the belated emergence of the "new wrinkle", all admissions by Mr. Poli, a signatory on the New Mexico transaction, suggest that the repayment

came "off the top" of all the debts.[6] It is a patently unreasonable act given the transparent intention of the parties which is clearly and *independently* identifiable.

29. Lest the Trustee advance a "parole evidence" argument, the written form of a contract is merely the evidence of the *intention* of the parties. In *Sattva Capital Corp v Creston Moly Corp*,[7] the Supreme Court of Canada set out the proper approach to contractual interpretation. Justice Rothstein's reasons explained that:

> *the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" ... To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:*
>
> > *No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.*
>
> *(Reardon Smith Line, at p. 574, per Lord Wilberforce)*
>
> *[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement... As stated by Lord Hoffmann in Investors Compensation Scheme Ltd. v. West Bromwich Building Society, [1998] 1 All E.R. 98 (H.L.):*
>
> > *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning*

---

[6] Given that the Debtors retained counsel to advise them on the New Mexico transaction and the Montana transaction (and have made that statement on the record, see Affidavit of Seann Poli sworn Feb. 25, 2020 at para 4), it should be straightforward for the Trustee to get to the bottom of the "intention" of the New Mexico allocation through discussions with that counsel who could then testify.

[7] 2014 SCC 53 at paras 47-48, [2014] 2 SCR 633, <http://canlii.ca/t/g88q1>.

> *of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]*

30. It is unnecessary for Dominion to exhaust all the evidence in the context of this Memorandum – these references simply identify that the Trustee had a wealth of corroborating evidence for the contractual intent, should it have seen fit to request it. Any other "intent" would be commercially absurd. The Trustee appears to have decided to imprudently *ignore* the factual matrix, to the extent there was any doubt about the plain meaning of the contracts.

31. It appears that they simply have adopted the Debtors submissions without any independent judgment. However, in the context of acts of the Trustee, these matters transcend the narrow issue of the Trustee's Form 77.

**Significance of Non-Compliance with August 5, 2020 Order**

32. The Trustee has not only refused to exercise independent judgment in respect of the Form 77, but ignored the clear direction from Justice MacLeod as to the process for review of Dominion's Proof of Claim.

33. As detailed below, the Trustee is in (non-trivial) breach of such order both in respect of the Form 77 *and* the conduct of the examinations of Mr. Poli. To be clear, these are not trivial matters:

> *In a case management context, the process orders of the court are orders of the court to be obeyed. Schedules are to be met out of fairness to the opposing party and to one's own client. Court efficiency requires scheduling and adherence to schedules.…Counsel cannot unilaterally ignore a court ordered schedule and trust that the court will understand and indulge him or her.*[8]

---

[8] *Saleh v Nebel*, 2015 ONSC 3680 at para 104, <http://canlii.ca/t/gjg80>.

**Breach #1 – End-Run Around the Court's Process for Form 77**

34. As the Court will recall, a contentious telephone call proceeded on the afternoon of July 31, 2020, the Friday preceding delivery of the Direction on August 5, 2020. There were well in excess of one hour of submissions on this call.

35. While the Trustee said little, one of the main points of contention was the *process* for determination of Dominion's rights and the impact of that determination on future voting and claims:

(a) The **Debtors** insisted that (as they had delivered their formal "Submissions" on July 30, 2020) Dominion should formally "Respond" to their Submissions for the purpose of a *BIA* s. 108(3) determination as the next step.

(b) On the other hand, **Dominion** proposed that, rather than a *sequential* series of attacks – first on voting rights, second on substantive rights – that the *next step* should be that the Trustee should deliver their Form 77s and identify its concerns so that Dominion could provide a focussed response for determination in a single hearing.

36. Justice MacLeod's Direction favoured Dominion's approach on this issue and ordered that:

> *The Trustee is to forthwith assess and value the proofs of claim submitted by the noteholders and to issue its Form 77 no later than August 14, 2020. The noteholders and the debtors are to fully cooperate with the Trustee.*

37. However, once the Direction was rendered, and despite repeated inquiries from Dominion of the Trustee (through Mr. Golden) to determine if *"the Trustee requires any further documents or has particular questions [to which] we are happy to respond*", <u>the Trustee never gave any indication of any inquiries or questions that may have assisted with properly evaluating Dominion's Proofs of Claim</u>.

38. Rather, in a complete *end-run* around the Justice MacLeod's Direction (and with the apparent support of the Debtors), the Trustee (through Mr. Golden) demanded that Dominion deliver a "response" to the Debtors' "Submission" – the very approach *sought* by the Debtors and *rejected* by the Court! Indeed, in the email dated August 7, 2020 attached at **Tab D**, counsel for the Trustee (Mr. Golden) immediately imposed a deadline for Dominion's compliance with this *judicially rejected* process:

> *Please also provide your response to the Gowlings (i.e., the Debtors) POC submission (due tomorrow) by the requested deadline.*

39. Not wishing to be "uncooperative" in accordance with the Court's specific directive, but without any direction from the Trustee as to *which* of the many "scatter-shot" complaints the Debtors raised the Trustee considered to be in issue, Dominion delivered a letter to the Trustee (through Mr. Golden) on August 11, 2020 (attached at **Tab E**) detailing Dominion's response to the Debtors' two core submissions.

40. In addition to detailing Dominion's response on the core issue, Dominion's above letter (to Mr. Golden) also noted the Trustee's inconsistency with the Justice MacLeod's Direction:

> *While we are delighted to answer any particular questions you may have, asking for our clients' response to the splatter-gun submissions of the Debtors does not do accomplish the intention of Justice MacLeod's directions.*
>
> *As repeatedly noted, Justice MacLeod did not contemplate a piecemeal process. Rather, the Trustee was to use its independent judgment to evaluate the security and quantum of the debt of each of the debtor entities and the Noteholders could then respond to any disallowance or Application.*

41. The fact is that the Trustee (through Mr. Golden or otherwise) *never* asked any substantive question of its own of Dominion (nor, to its knowledge of Perley-Robertson, or other counsel who would have had knowledge of these transactions), The Trustee (through Mr. Golden) simply insisted on a response to the *Debtors'* Submissions.

42. The foregoing suggests either that the Trustee was either unwilling to display independent judgment *or* impartiality – and in doing so, run roughshod of over the process ordered by Justice MacLeod. However, this conduct is far milder than the clear and unequivocal "partiality" from the clear and unequivocal breach of the directive to examine Mr. Poli.

**Breach #2 – Failure to Examine Mr. Poli by August 18, 2020 and Trustee's "Conditions"**

43. Justice MacLeod *further* heard extensive submissions during the telephone conference on July 31, 2020 as to the conduct of the examinations of Mr. Poli. Again, while the Trustee said little:

(a) The **Debtor** argued that it was "premature" to conduct examinations until the issue of Dominion's claims and security had been determined and that it was not "urgent".

(b) **Dominion** noted that, given the issues raised and votes already conducted, examinations were inevitable and should proceed immediately.

44. Again, Justice MacLeod's Direction favoured Dominion's approach and ordered that:

> *The examination of Mr. Poli and others as approved by the meeting of creditors in the Eureka 93 proposal shall proceed **and shall be completed** by August 18, 2020. If the Trustee wishes to conduct the examinations, the Trustee shall do so. If not, then the noteholders may do so.*

45. No other conditions or terms were imposed by Justice MacLeod on this binary result: *either* the Trustee examines *or* Dominion could by August 18, 2020.

46. However, within *hours* of the release of the Direction (in an email at **Tab F** on August 5, 2020 at 9:53 p.m.), the Trustee (through Mr. Golden) imposed **two (of its ultimately three) conditions** *for* compliance with the Order:

(a) **Condition 1:** "*Chitiz to advise the Proposal Trustee in* <u>*writing*</u> *by 5:00 pm on Monday Aug. 10 of* <u>*what it wishes to explore*</u> *on the Poli examination, and to* <u>*provide a list of questions*</u>*.*"

(b) **Condition 2:** "*The Proposal Trustee will then provide DC by Aug 12 with an* <u>*estimate of its cost*</u> *to conduct the examination (**<u>to be paid by DC</u> to Deloittes by Aug 14).***"

47. Leaving for the moment that Trustee (through Mr. Golden) had no right to impose *any* conditions on the Noteholders for compliance with the Order, the conditions were unreasonable and display clear partiality.

***Condition 1: Trustee Insists on Being the Examiner but Refuses to do the Exam "Prep"***

48. The Trustee (through Mr. Golden or otherwise) made no submission on July 31, 2020 about the Dominion "doing the leg work" if the Trustee was required to examine and <u>no requirement was imposed upon Dominion to provide written questions</u>.

49. It is entirely odd that the Trustee wanted to do *none* of the preparation (and indeed, appears to have done none) but insists that Dominion *not* conduct the examination. It is absurd to suggest that the Trustee was going to simply "parrot" a list of questions prepared by Dominion, particularly when Justice MacLeod had already taken the time to identify the *issues* in paragraph 6 of the Direction. If the Trustee was not going to engage its independent judgment to prepare questions it thought appropriate for the examination, then it clearly should have stepped aside (which it expressly and specifically has refused to do) – or suggested a written examination based upon Dominion's questions! The request was unreasonable.

50. Notwithstanding that the Trustee (and Mr. Golden) had no right to impose conditions, not wishing to be uncooperative, Dominion *did* provide a detailed list of <u>*suggested* relevant documents</u> which it believed would assist in the inquiry. That list of documents and cover letter is attached at **Tab A**. For the assistance of the Trustee, these were very clearly identified by

reference to issues identified by Justice MacLeod in "paragraph 6" *and with significant further explanation.*

51. However, the Trustee's request (through Mr. Golden) for input was not merely a "speed-bump". As detailed further below, it constitute a self-created "road-block" which the Trustee has now used to justify its failure to examine the Debtor "and complete" (or to permit Dominion to do so) by August 18, 2020 per the Direction. This is a flagrant breach of the Order – as were the further "conditions" improperly posed by the Trustee.

***Condition 2: Payment of Trustees Costs***

52. If the foregoing leaves the court "scratching its head" about why the Trustee does not simply step aside and let Dominion conduct the examination, the *next* condition will leave the Court positively perplexed: Not only does the Trustee seem to wish to download the *work* onto Dominion, the Trustee apparently wishes to have Dominion effectively "pay per question".

53. This is was first raised *prior* to the Justice MacLeod's Direction. On the day prior to the creditors meeting (anticipating that the vote to examine would pass) the Trustee (and the Debtors) insisted that Dominion should pay the Trustee's costs of any such examination. In Mr. Golden's email of July 27, 2020, 10:22 a.m., he wrote:

> *Should you still intend to proceed in that manner (ie., seek to examine), we will provide you with the amount of the retainer from your client that will be required for the Proposal Trustee to proceed.* ***Based on your positions to date and the apparent scope of the examinations, that retainer will be likely be in the range of between 25K and 50K, plus HST (an indemnity from your client will not be sufficient).***

54. In the submissions made on the teleconference, the Trustee said *nothing* about this embarrassing (for the Trustee) request – and in particular nothing about this the egregious amount)for Mr. Golden's fees.

55. Justice MacLeod's Direction made no order that Dominion pay these costs (let alone in advance). Indeed, implicit in the Direction is that such examinations are justifiable not solely for Dominion's benefit and form part of the Court's *own* concerns.

56. Notwithstanding, within *hours* of the release of the Direction the Trustee (through Mr. Golden) similarly reasserted its demand for payment as a *condition* of the examinations. In the Trustee's email (from Mr. Golden) of August 5, 2020 at 9:53 p.m., the Trustee (through Mr. Golden) demanded that:

> *Chitiz to advise the Proposal Trustee in writing by 5:00 pm on Monday Aug. 10 of what it wishes to explore on the Poli examination, and to provide a list of questions. The Proposal Trustee will then provide DC by Aug 12 with an estimate of its cost to conduct the examination **(to be paid by DC to Deloittes by Aug 14).***

57. Neither of the Trustee's requests (through Mr. Golden) for a) a "list of questions"; or, b) "costs in advance" to be quantified by "a list of questions"; were conditions of the Direction – nor are they reasonable.

58. The imposition of these "conditions" for compliance with the Order is a clear breach by the Trustee. However, the Trustee then imposed *further* conditions.

***Condition 3: That Dominion Provide Documents Requested by the Debtors***

59. In its email to Dominion rejecting the Noteholders' Proofs of Claim on August 12, 2020, the Trustee (through Mr. Golden) continued with its prior conditions but imposed a **further** conditions for compliance with the Order upon Dominion

60. The Trustee, through Mr. Golden, demanded:

> *1. Area of questioning DC's counsel wishes the Proposal Trustee to cover with Seann Poli;*
>
> [Note: these were identified by Justice MacLeod at paragraph 6 of his Direction.]

2. *Confirmation that DC requires no further Debtor Documents from Eureka over and above the attached CP letter dated August 10, 2020, or provide a schedule of any additional Debtor Documents sought;*

[Note: Dominion's letter requesting "available documents" specifically notes that cross-examination *could* yield further unknown documents.]

3. *The basis for DC's request for production of each Debtor Document in (2) above (or by grouping of Debtor Documents if they are related), so that the Proposal Trustee can evaluate relevance; and*

[Note: Dominion's letter requesting "available documents" specifically identified the documents by reference to paragraph 6 of the Direction and provided additional explanation.]

4. ***The date by which DC will be able to comply with the Debtors' request for production (see below)***

61. While points 1 to 3 are addressed above, **point 4** only reinforces the Trustee's partiality: The Trustee (through Mr. Golden) imposed as a *further* condition that Dominion answer a request for documentation from the Debtor! No such order was made by Justice MacLeod nor is it a reasonable condition that Dominion provide the (clearly uncooperative) Debtors with documents.

**The Trustee Refuses to Conduct Examination Concluding that "No Longer Urgency"**

62. While the Trustee's imposition of these conditions speaks volumes, the clearest breach of the Order occurred when the Trustee decided it will not examine.

63. Ironically, the Trustee (per Mr. Golden) uses the very fact that there is a detailed document list which *they requested* as a reason for *not* complying with the clear order to examine! In the Trustee's email (through Mr. Golden) dated August 12, 2020, the Trustee specifically states that:

> *With respect to the examination of Seann Poli, practically* ***it would be impossible for it to proceed by August 18, 2020 (or even September 18, 2020[9]) because of the scope of documentary disclosure demanded by Chitiz Pathak*** *in its attached letter of August 10, 2020 (the "Debtor Documents").*

[9] Here Mr. Golden is actually *speaking for the Debtors' production!*

64. This email is particularly galling as, not only was this list *responsive to the Trustee's own request*, Dominion's counsel's August 10, 2020 cover letter (at **Tab A**) specifically advised that production was not a pre-condition to examination, but only "as available". *Per* Dominion's counsel's notation:

> *To assist everyone in preparing for the cross-examinations, ensuring they are concise, and to minimize the likelihood of delay or re-attendance, we have prepared a list of preliminary productions required from the Debtors/Mr. Poli. This documentation should be produced in advance and, for this reason, we are giving this list to all parties, including Debtor's counsel, in advance of the examinations.*
>
> *I am optimistic that, given that the issues have been in play for some time, the Debtors and the Trustee (who has a right to expect cooperation from the Debtors) will have already commenced assembling these relevant documents from the Debtors for the purpose of formulating positions on the various contentious matters identified by Justice MacLeod.*
>
> *We trust that these documents will be provided in advance of the examinations,* ***where available.***

65. The Trustee's (through Mr. Golden) misstatement of the foregoing request is problematic – but far more telling is that the Trustee now reprises the very same arguments of the Debtors which had been *rejected* by Justice MacLeod.

66. In an email dated August 12, 2020, the Trustee (through Mr. Golden) confirmed it would not comply with the Order for examinations "to be completed by August 18") even on the basis of the *approved* Eureka claim, as (in the Trustee's opinion):

> *…there is also* ***no longer urgency*** *to that Poli examination given that DC no longer has a role to play in the Artiva/Livewell and Vitality Proposals (pending DC's anticipated appeals of its disallowed claims, and unless those appeals are successful).*

67. This entirely disregards the fact that these were matters that Justice MacLeod had specifically ruled upon:

(a) The **Debtors** make the specific submissions on July 31, 2020 that: a) examination should not proceed until Dominion *responded* to the Debtors' submissions; b) the Trustee *may* disallow the Claims; c) a hearing by the Court on Dominion's Proofs of Claim had to be scheduled; and, d) there was no "urgency" to the examinations. The Trustee largely stayed silent.

(b) **Dominion** requested that the examination proceed forthwith.

68. Having *heard* these submissions by the Debtors, and knowing full well that the Trustee *might* disallow *some or all of the Proofs* (or that the Debtor might dispute them), Justice MacLeod specifically ordered the completion of the examination by August 18, 2020, going so far as to identify the issues in paragraph 6 of the Direction.

69. The Trustee, through Mr. Golden, simply ignored the decision and re-asserted the (judicially rejected) "no urgency" argument by the Debtors.

70. In an effort to salvage compliance, *Dominion* notified the Debtors and the Trustee of its intention to examine by Zoom through ASAP Court Reporters on the final day, August 18, 2020. Both the Trustee and the Debtor refused to attend.

71. This is a flagrant breach of the Order of Justice MacLeod by the Trustee. Pursuant to section 37 of the *BIA:*

> *Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.*

Dominion relies on this to require Mr. Poli's attendance at the examination, now by the Dominion. Further, in light of the above, the Debtors and Trustee cannot now be seen to object

to Dominion's (requested) Order for production of these documents, as they have chosen to adjourn the examination for that very purpose. An Order for production should be granted for such documentation.

**Loss of "Impartiality" of the Trustee**

72. While counsel for Dominion would much prefer to keep such seemingly petty matters from being before the Court, it is only because the Court must consider the *context* of the decision by the Trustee in a) the disallowance; and, b) the failure to examine in breach of the Direction; that the *flavour* of the discourse between the Trustee (properly, Mr. Golden) and Dominion has unfortunately become relevant.

73. With the greatest respect to all counsel, while litigation is not a "tea-party", the Trustee's duty of neutrality is paramount even in an adversarial system.

74. While the role of both counsel may need to be evaluated on a full record, it does not lie with the Trustee (or their counsel), to demonstrate partiality merely because counsel may "agree to disagree". The Trustee (or Mr. Golden) appears apt to confuse disagreement with "rudeness" or "personal attacks". The discourse from the Trustee's counsel's office suggests a lack of impartiality. This concerning alignment can be seen *ab initio.*

***Trustee Accuses Dominion of "Delay and Obfuscation" Even Prior to Retainer***

75. As the Court will recall, the Debtors brought a motion for removal of former counsel for Dominion. Current counsel was appointed by Notice of Change dated **June 25, 2020**. This email was sent to the Trustee two days prior:

> ***From:*** *Elliot Birnboim [mailto:EBirnboim@ChitizPathak.com]*
> ***Sent:*** *Tuesday,* ***June 23, 2020 3:04 PM***
> ***To:*** *Eric Golden <egolden@blaney.com>; Sean Zweig (zweigs@bennettjones.com) <zweigs@bennettjones.com>*
> ***Cc:*** *'Duchesne, Benoit' <benoit.duchesne@gowlingwlg.com>; Aiden Nelms*

*<NelmsA@bennettjones.com>; Andrew J. Lenz <alenz@perlaw.ca>; Hartley Bricks <hbricks@deloitte.ca>; Shea, Patrick <Patrick.Shea@gowlingwlg.com>; Stephen Brown-Okruhlik <Stephen.Brown-Okruhlik@mcmillan.ca>*
***Subject:*** *RE: In the matter of Eureka 93 Inc. - Bennett Jones removal/withdrawal*

*Thank you, Eric.*

***Sean and I remain in discussion on our part of what will be a tri-partite deal with Patrick.*** *BJ is considering a proposal from us. We will let you know as soon as we have more details.*

*However, one of the issues is going to be ensuring that, if BJ are not counsel, new counsel has the chance to get up to speed. How much time that will take will be, in part:*

*a. a function of the position they take on the issues, but, the position they will take will be, in part*

*b. a function of the economics behind the proposal.*

*So, back to you on Lenz's question on the call: Can you or perhaps Hartley advise as to when will we have the supporting docs to critically examine the proposal? Surely that must be imminently available, no?*

*Look forward to hearing from you shortly*

76. This provoked a visceral *responding* email (attached at **Tab G**) from the Trustee (through Mr. Golden) who concludes with the following serious accusation by the Trustee (from Mr. Golden):

*…, your email below comes across as an attempt to obfuscate and conflate issues, for the purpose of delay.*

77. This turned out to be merely an opening salvo that appears even before current counsel came on board. The Trustee (again, through Mr. Golden) appears to have already made up its mind about Dominion's (or their counsel's) suggested sinister objective.

***Trustee Refuses to Speak to Dominion's Counsel,* Ab Initio**

78. Shortly thereafter, in an effort to better "get up to speed", Michael Crampton (an associate of Mr. Birnboim's), wrote to the Trustee as follows:

***From:*** *Michael Crampton [mailto:MCrampton@chitizpathak.com]*
***Sent:*** *Tuesday, July 21, 2020 4:46 PM*
***To:*** *hbricks@deloitte.ca*
***Cc:*** *Eric Golden <egolden@blaney.com>*
***Subject:*** *In re Eureka 93 Proposals - Ottawa facility debt stack*

*Mr. Bricks,*

*As you know, Mr. Birnboim and I represent Dominion Capital in the Eureka 93 matter. Our clients are still having a difficult time understanding the debt stack on the Ramsayville Road, Ottawa facility. Would you be prepared to speak to us so we can confirm our understanding?*

*Best,*

*Michael*

79. The response (and explanation) *from Mr. Golden* was shocking:

***From:*** *Eric Golden <egolden@blaney.com>*
***Sent:*** *July 21, 2020 7:31 PM*
***To:*** *Michael Crampton <MCrampton@chitizpathak.com>*
***Cc:*** *hbricks@deloitte.ca; Elliot Birnboim <EBirnboim@ChitizPathak.com>*
***Subject:*** *RE: In re Eureka 93 Proposals - Ottawa facility debt stack*

*Hi Michael,*

*Thanks for your email.*

*In light of the number of disagreements between your firm and Gowlings* [counsel for the Debtors!!!] *over the last few weeks over what appeared from my perspective to mostly be some pretty straightforward issues (I'm not allocating blame to either side – just commenting from observing from 20,000 feet above), at this stage with the meeting of creditors so close at hand I believe it would be prudent if you set out your questions in writing so that there are no misunderstandings between the Proposal Trustee on one hand, and your firm and/or Gowlings on the other hand, about what was asked, and what was answered.*

*If a written format becomes too cumbersome, we can revisit.*

*Eric Golden*

80. The Trustee (that is, Mr. Golden) decided that, because of the “number of disagreements” between Dominion’s counsel and Mr. Shea, he *chose not to speak to Dominion’s counsel*. He professed that he had not yet “allocated blame” – a role which, respectfully, was not his.

81. By contrast, Mr. Golden has since confirmed that *of course* he speaks to Gowlings!

### ***Trustee Admits Loss of Impartiality***

82. On July 26, 2020, Mr. Birnboim had the “temerity” to correspond with Mr. Golden, setting out Dominion’s position on the Debtors’ Proposals to date. This letter sought to adjourn the pending Creditor’s Meetings for three reasons, including the lack of sufficient time. It is attached hereto at **Tab H** for the Court’s review and to gauge the again visceral response by the Trustee, is set out in full below, this time *acknowledging* an (unjustified) loss of impartiality:

> ***From:*** *Eric Golden <egolden@blaney.com>*
> ***Sent:*** *July 27, 2020 10:22 AM*
> ***To:*** *Elliot Birnboim <EBirnboim@ChitizPathak.com>*
> ***Cc:*** *Duchesne, Benoit <benoit.duchesne@gowlingwlg.com>; Sasso, Fiorella <fiorella.sasso@gowlingwlg.com>; Jdutrizac@dsavocats.ca; chris.burr@blakes.com; Shea, Patrick <Patrick.Shea@gowlingwlg.com>; Andrew J. Lenz <ALenz@perlaw.ca>; eduard.popov@blakes.com; dburke@kellysantini.com; fsimard@rpgl.ca; fraser.mackinnon.blair@dentons.com; sidney.elbaz@mcmillan.ca; simon.paransky@mcmillan.ca; simon.paransky@mcmillan.ca; Michael Crampton <MCrampton@chitizpathak.com>; 'Bricks, Hartley' <hbricks@deloitte.ca>*
> ***Subject:*** *FW: In the matter of the Notice of Intention to Make a Proposal of Eureka 93 Inc. et al., CFN - 33-2618511 et al. [Perlaw-PERU-1048]*
>
> *Elliot,*
>
> *Needless to say, I am extremely disappointed in your letter, which appears to be nothing more than a last-second attempt to obfuscate and delay. It also taints many of your previous positions in your communications with Gowlings. As per my email below to your firm of July 21, 2020*, ***I was keeping an impartial open mind from 20,000 feet above about the positions taken by your firm and Gowlings, but I am now required to re-evaluate your previous positions*** *in light of your attached letter.* [!!!]
>
> *I address your allegations in your attached letter below. If you have a productive reply, I would welcome it. If instead you are going to continue down the same path as your*

*attached letter, you have the Proposal Trustee's position and I will not engage in further debate with you.*

1. *First and foremost, the email record reveals that you respond to Gowlings emails almost instantaneously (the speed at which you respond to Gowlings is actually quite impressive). Yet your firm waited 5 days after the July 16 motion date to first write to me to advise you had questions about the "debt stack", and when I asked you later that day to advise of your questions in writing to avoid any misunderstandings, incredibly you waited another 5 days to respond until 2:59 pm on a Sunday.*

*Based on the contents of your attached letter, my instincts to request your questions in writing were prudent and sound.*

2. *You will recall that at the Case Conference on June 22, 2020, the Proposal Trustee advised the parties that it would hold off on sending out the proposal materials to all stakeholders as a result of the pending further case conference and motions, as it did not want to incur the fees and costs of the mailing only to find that, as a result of what may transpire at the Case Conference and hearings, that the debtors would need to file amended proposals, requiring further fees and costs. Justice MacLeod acknowledged and agreed with the Proposal Trustee's position.*

   *The Proposal Trustee advised on our last hearing before Justice MacLeod on Thursday July 16, 2020, that the Proposal packages would be mailed out forthwith. They were posted on the Deloittes website 2 business days later on Monday July 20 (the first business day after Justice MacLeod advised of his Decision). At no time prior to your email to me on Sunday July 26, 2020 at 2:59 pm did you request a copy of the Proposal documents.*

3. *In any event, your client's former lawyer has been in receipt of the Proposal documents since on or about June 15, 2020 (see Patrick Shea's email of June 15, 2020, attached), and your client has been negotiating its position with Gowlings for weeks.*

   *<u>Your allegation that the Proposal Trustee has created a situation of "de facto insufficient notice" for your client is a **de jure fabrication.**</u>*

4. *You appear to wish to conduct examinations in advance of the First Meeting of Creditors, based on your statement that "The outcome of these examinations, like the above information, will materially impact on our position on the Proposal or any potential amended proposal".*

   *Your client is now attempting to do indirectly before the First Meeting of Creditors, what Justice MacLeod advised it could not do directly. While <u>**your request for examinations under section 52 appears to be an abuse of process**</u> at*

*this stage that is also res judicata until after the Proposal is voted on, should there be a successful vote at the meeting of creditors to adjourn the meeting for the Proposal Trustee to conduct such examinations, it is standard practice for the party requesting such examinations to put the Proposal Trustee in funds to cover the fees and related costs that will be incurred to complete the examinations. Should you still intend to proceed in that manner, we will provide you with the amount of the retainer from your client that will be required for the Proposal Trustee to proceed.* ***Based on your positions to date and the apparent scope of the examinations, that retainer will be likely be in the range of between 25K and 50K, plus HST (an indemnity from your client will not be sufficient).***

5. *The insinuation behind your request that I "advise whether or not [Blaneys] has any calls with Gowlings and in respect of this file*[10] *and, if so, when" is offensive, and* ***you are treading very close to the line where costs would be sought against you personally because of such allegations if you continue down this path.***

   *As you should know, it is a requirement under the BIA that the Proposal Trustee monitor the affairs of the bankrupt (section 50.4(7)), which would include discussions with debtors' counsel, as well as be involved in the preparation of the Proposals (section 50.5).* ***So of course the Proposal Trustee and Blaneys have had communications with Gowlings.***

6. *You request "a full breakdown of the quantum of the outstanding Olympia First Mortgage, including fees and other charges that may be included; and (b). Details of any agreements with the First Mortgagee or its related and the Debtors and/or other secured/unsecured creditors or any shareholders of these entities personally. Needless to say, we are all scratching our heads (as was the Court) as to why the First Mortgagee supported the DIP financing, to its own (now rather obvious) detriment".*

   *Again, you are much more that inferring something nefarious, this time against the first mortgagee and the DIP Lender, when everyone but you seems to be aware that the combination of the Covid-19 pandemic and a crash in the Cannabis market has greatly impacted property valuations in the sector we are dealing with. There is nothing head scratching about that.*

   *I leave it to you to pursue this vexatious allegation against Olympia at the DIP lender. The Proposal Trustee's opinion on the mortgage security is based on the usual assumption that the advances were made.*

7. *To the extent I can make heads or tails of your final allegations (under the heading "'Better Off' Statement"), your assertion that the Proposal Trustee has defined the Noteholders as a secured creditor is incorrect and you are misreading the Proposal Trustee's report. Under the terms of the Joint Proposal of Artiva*

[10] In light of the Trustee's refusal to speak to Dominion's counsel, the inquiry was made to confirm they were speaking to *Debtors'* counsel.

*and LiveWell, the Noteholders are classified as Unsecured Creditors, and the report advises that the Unsecured Creditors would be better off accepting the Proposal than under a bankruptcy. The report goes on to estimate the net proceeds that would be required to satisfy the claims of the Secured Creditors and those secured creditors (note lowercase) whose security has been valued at $Nil under the Proposal (i.e., Lamarche, Paladin, the Noteholders and Perley-Robertson) before the ordinary unsecured creditors could receive any distribution.*

8. *With respect to the appraiser, why didn't you take immediate steps to enforce the Order and advised me of status early on* [Note: this was a mere one week following the delivery of the Order to Mr. Kouwenberg], *instead of waiting until yesterday to tell me "We do not yet have the information which was Ordered by Justice MacLeod in his revised endorsement of July 20, 2020 from Mr. Kouwenberg". On July 17, Justice MacLeod advised you that:*

*"Conclusion*

*[1] In conclusion there will be an order that the appraiser retained by the debtor and responsible for the two appraisals now in evidence confirm if he consulted any documents or relied on any information other than listed in the reports. The appraiser is also to produce copies of all documents he reviewed if they are not already appended to the appraisal reports".*

*Again, there is only one conclusion to be drawn by your delay on this issue.*

*Eric Golden*

54. The accusation of "de jure fabrication" is extremely serious. However, what is particularly troubling is that Dominion was part of a *chorus* of other creditors who adverted to the insufficient notice from the Trustee:

***From:*** *Andrew J. Lenz <ALenz@perlaw.ca>*
***Sent:*** *July 21, 2020 9:29 AM*
***….***

*I'm wondering if you could advise whether it is your understanding that the meeting of creditors will proceed next Tuesday, July 28. If so, do you know when we might expect to receive the proposals with the reports. If not, can you advise when the meeting of creditors will be scheduled?*

*Thanks.*

*Andrew*

---

***From:*** *Mackinnon Blair, Fraser <fraser.mackinnon.blair@dentons.com>*
***Sent:*** *Wednesday, July 22, 2020 10:00 PM*
***To:*** *Eric Golden <egolden@blaney.com>; 'Andrew J. Lenz' <ALenz@perlaw.ca>*
***---***

*Eric,*

*I have yet to receive any materials from Deloitte, and* ***but for Mr. Lenz's email below and your subsequent response, I would have had no reason to have thought that a proof of claim was required*** *by July 28, 2020 or that the creditors' meeting was proceeding at that time. Please advise precisely how Deloitte actually issued these materials. If it was by email, as it should have been given the current pandemic and the limited amount of time that is being afforded to submit claims, I did not receive a copy.*

*Thanks*
*Fraser*

And further,

***From:*** *Mackinnon Blair, Fraser <fraser.mackinnon.blair@dentons.com>*
***Sent:*** *July 24, 2020 1:59 PM*
***To:*** *Michael Crampton <MCrampton@chitizpathak.com>*
***Cc:*** *Elliot Birnboim <EBirnboim@ChitizPathak.com>; Andrew J. Lenz <ALenz@perlaw.ca>*
***Subject:*** *RE: In the matter of the Notice of Intention to Make a Proposal of Eureka 93 Inc. et al., CFN - 33-2618511 et al. [Perlaw-PERU-1048]*

*I probably will not be instructed to take any position with respect to any proposed adjournment given the size of my client's claim. That said,* ***I agree that the trustee has not been forthcoming with developments related to this matter, and that so far no explanation has been provided for their failure to alert the creditors to (a) the deadline and (b) the location of the proof of claim forms until Andrew prompted them to do so.***

83. No such visceral, accusatory response was forthcoming from the Trustee (via Mr. Golden) to these. Such acerbic accusation are reserved for Dominion's counsel (who fortunately has rather thick skin).

84. In the circumstances, the Trustee (through Mr. Golden) must be taken at their word:

> *I was keeping an impartial open mind from 20,000 feet above about the positions taken by your firm and Gowlings, but I am now required to re-evaluate your previous positions…*

**Trustee's Continued Snipes Over *Trivial* Matters – Trustee Refuses to "Bury the Hatchet"**

85. The above "sniping" appears to be irresistible in even the most trivial of emails – and the Trustee (through Mr. Golden) seems immune to any attempt to defuse the situation.

86. In response to the correction of a typographical error from Mr. Crampton (Mr. Birnboim's associate):

> ***From:*** *Michael Crampton [mailto:MCrampton@chitizpathak.com]*
> ***Sent:*** *Tuesday, July 28, 2020 8:20 PM*
> ***To:*** *Hartley Bricks <hbricks@deloitte.ca>*
> ***Cc:*** *Elliot Birnboim <EBirnboim@ChitizPathak.com>; Eric Golden <egolden@blaney.com>*
> ***Subject:*** *RE: Dominion: Email to Bricks FOR REVIEW*
>
> *Apologies on the all caps in the subject line gentlemen. That's what happens when you don't change the subject line you saved to draft. And of course I meant, Thursday, July 30 below.*

Mr. Golden could not help himself from taking the following "shot":

> ***From:*** *Eric Golden <egolden@blaney.com>*
> ***Sent:*** *July 28, 2020 8:47 PM*
> ***To:*** *Michael Crampton <MCrampton@chitizpathak.com>*
> ***Cc:*** *Elliot Birnboim <EBirnboim@ChitizPathak.com>; Hartley Bricks <hbricks@deloitte.ca>*
> ***Subject:*** *RE: Dominion: Email to Bricks FOR REVIEW*
>
> ***No problem.  I just figured it was Elliot being nasty again ☺***
>
> *….*
>
> *Eric Golden*

87. Leaving aside the impropriety of such communications to an associate, (even if the emoji is to be interpreted as jest) in an effort to make the best of the Mr. Golden's "smiley face" and perhaps develop a "new and improved" relationship (despite being called "nasty"), Mr. Birnboim took the initiative with some humour to try to achieve the *"3C's*" of the Commercial Court with a *personal* email to counsel, responsive to the insult:

> ***From:*** *Elliot Birnboim*
> ***Sent:*** *July 29, 2020 10:31 AM*
> ***To:*** *Eric Golden <egolden@blaney.com>; Michael Crampton <MCrampton@ChitizPathak.com>*
> ***Cc:*** *Hartley Bricks <hbricks@deloitte.ca>*
> ***Subject:*** *RE: Dominion: Email to Bricks FOR REVIEW*
>
> *Eric:*
>
> *One more note before I disappear for much of the day: Thank you for the below – including the emoji "smiley face". I assume that was meant to convey your comments are in jest. I do apologize if you feel the communications with you were unduly personalized. They were not so intended and should be construed retrospectively as containing a similar emoji. We have clients who may disagree and we both have job to do – let's get on with it and neither of us should be personalizing this. This file is likely to go on for some time and, while we may be trading barbs from time to time (with or without emojis) I am prepared to make an extra effort to ensure our communications are rather more measured, if you will do likewise. Your response (in the form perhaps of a handshake emoji) is requested.*

88. It is now three weeks later, Mr. Golden has still chosen *not* to respond to, even in the cursory form of "hand shake emoji" invited (although he mentions it sarcastically in one email), even after being reminded of it. This non-response to counsel's efforts to improve communication is clear in its message.

89. Perhaps on a fulsome review of the correspondence in its entirety, the Court will conclude that *both* counsel had a role to play. However, it is very much doubted that counsel for the Trustee can point to improper communication directed to it by Dominion. Furthermore, even if there had been, the record is clear that the Trustee (through Mr. Golden) has remained unwilling

to pick up the gauntlet of rapprochement when offered, the Court's best advice[11] for the Trustee in the circumstances.

**No Minutes of Creditors Meetings or Further Reports**

90. Although it may be a small matter in and of itself, the Creditor's Meetings were similarly visceral despite all three, non-consecutive, meetings lasting about 2 hours (by estimation). Fearing this possibility, particularly because the Trustee had earlier refused all oral communication, counsel for Dominion wrote to the Trustee on July 27, 2020 11:46 a.m., *inter alia*, as follows:

> *Given the concerns you express as to "oral communications", I also think it prudent that you ensure that there is a verbatim transcript for the meeting be available as a review of same may be required in due course.*

91. This too received no answer. However, at the meetings it was confirmed by the Trustee that no transcription was being made and, more troubling *no Minutes have ever been delivered from the Creditors Meetings over 3 weeks ago.* Subsection 26(1) of the *BIA* requires that:

> *Books to be kept by trustee*
>
> ***26 (1)*** *A trustee shall keep proper books and records of the administration of each estate to which the trustee is appointed, in which shall be entered a record of all moneys received or disbursed by the trustee, a list of all creditors filing claims, the amount and disposition of those claims, a copy of all notices sent out, a signed copy of all minutes, proceedings had, and resolutions passed at any meeting of creditors or inspectors, court orders and all other matters or proceedings as may be necessary to give a complete account of the trustee's administration of the estate.*

92. At this point, given the time that has elapsed and the partiality demonstrated, Dominion reserves its rights in respect of any subsequently delivered Minutes.

---

[11] *Hall-Chem Inc v Vulcan Packaging Inc* (1994), 21 OR (3d) 89, 1994 CanLII 1384 (CA), <http://canlii.ca/t/6k9m>, (second last paragraph).

93. On a related note, the March 9, 2020 Order granting the DIP financing required the Trustee to provide the following:

> *During the extension period, the court will require a bi-weekly status report confirming the interim funding is in place, verifying progress of construction, the continued validity of the cultivation licence and progress towards production of a first crop.*

94. The last report from the Trustee was provided on June 1, 2020.

95. In fairness, this is not, *technically*, a breach of the March 9, 2020 Order which was to run until the Proposals were made. However, it has now been well over 60 days without such reporting on whether "*the interim funding is in place, verifying progress of construction, the continued validity of the cultivation licence and progress towards production of a first crop*".

96. Much has happened on all these fronts but the Trustee continues (it seems) to support the original Proposal. It is surprising that there has been no circulation of *anything* which updates the Creditors as to these matters despite the broad duties of the Trustee to the Creditors. It is respectfully submitted that while changes in circumstances have made the Trustee's support for the Proposals even *more* implausible, this reinforces that the Trustee's *original* support for the Debtors' plan was uncritical.

**Revisiting the Trustee's Position on the DIP Financing Motion**

97. As noted at paragraph 11 of the Order of Justice MacLeod dated March 9, 2020, there were certain assumptions which were relied on in the plan that justified granting the DIP financing.

98. Two of critical assumptions were a) the value of Artiva's Ottawa Facility as complete presented by the Debtors; and, b) the prospect of future revenue. Neither appear to have given the Trustee any pause at the time (or apparently now). Further, at the time, apparently, neither

did c): the complete absence of any prior history of "income", *or* the d) SEDAR-documented chronic instability of management and strategy.

99. Admittedly, in the adversarial process, Dominion was represented by former counsel who *also* could have raised these issues. However, there was truly no critical analysis of these issues by the Trustee. In sifting through the positions of the parties, the Court is entitled to look to the Trustee for an objective and impartial view of a proposal. The Trustee's duties in a proposal are set out in *BIA*, s 50(5):

> *The trustee shall make or cause to be made such an appraisal and investigation of the affairs and property of the Debtor as to enable the trustee to estimate with reasonable accuracy the financial situation of the Debtor and the cause of the Debtor's financial difficulties or insolvency and report the result thereof to the meeting of the creditors*.[12]

100. Furthermore, a Trustee has a duty to assist in the construction of a *viable* proposal.[13]

101. The Trustee has no crystal ball and is entitled to be "wrong". But there is no indication of *any* critical assessment of the Debtors' assertions on the various matters referenced above, even supporting the continuing the spend once the impact of COVID-19 became clear, virtually contemporaneously with the DIP Order. This should be viewed in the context of other events which would tend to speak to partiality.

102. For example, some cursory due diligence (available to the Trustee, not Dominion) would have raised questions about the Kouwenberg "reliance" letter of October 29, 2019 presented to the Court in support of DIP financing.

---

[12] While this is a lower standard than applied to a Trustee in bankruptcy, it still requires investigation sufficient for reasonable accuracy. For further elaboration, see also *Saran (Re)*, 2018 ONSC 2998 at paras 36-42, <http://canlii.ca/t/hs0kg> .

[13] *BIA*, s 50.5.

103. From the file received from Mr. Kouwenberg, the following constituted the retainer instructions *from Mr. Poli*:

**From:** Seann Poli <SPoli@eureka93.com>
**Sent:** October 10, 2019 12:39 PM
**To:** Rock Kouwenberg <rkouwenberg@valcoconsultants.com>
**Subject:** reminder

Hey Rock,
Just a reminder that you were going to get back to me on the valuation on our property and the land value.
I don't need a full valuation, just an update saying the value is either the same (considering nothing has changed since a year ago) or higher because of the land value.
Even just a new cover page would suffice.

Have a great day and live well,

**Seann Poli**
Co-CEO

104. While clearly telling Mr. Kouwenberg what Mr. Poli expected (and got), Mr. Kouwenberg's "back-up analysis of sales" as at October 2019 bears comment:

Vom

| List date | Price (list) | Sale price | Market time (months) | Status |
|---|---|---|---|---|
| Nov 26, 2018 | 8,000,000 | 7.3 m | 2 | S |
| Aug 18, 2019 | 5.6 m | 5,815,000 | 2 | S |
| July 9, 2018 | 7.5 m | | 6 | E |
| Sept 28, 2018 | 4.95 m | | 11 | E |
| Aug 10, 2018 | 9,888,000 | 8.6 | 3 | S |
| Dec 7, 2018 | 5.3 | | 7 | E |
| Nov 23, 2018 | 2.1 | | 8 | S |
| April 18, 2019 | 6.5 | | 6 | E |

105. This analysis shows *only 2 cannabis facilities had been listed in 2019 and they had sold/listed for less than half the price ascribed to the Ottawa Facility.* Indeed, the highest price for *any* property (as sold, and if not sold, as listed) is a mere $8.6million dollars - about 60% of the as complete $15millin value asserted for the Ottawa Facility! Put another way, Mr. Kouwenberg's view as of October 2019 seems to be that, in accordance with his instructions and despite the fact that the factory was incomplete, *this is by far the best cannabis property by almost 2x that has been on the market in Ontario by far in the past 1.5 years (at least)!*

106. While Dominion is unlikely to complete its own report as at the *current* date (it does not believe that a valuation will, at present, yield materially different values as at May 2020, i.e., approximately $9.5million), it is presently considering how to deal with the what it believes to have been a materially overstated value to the Court at the motion for DIP financing and, indeed, at the time of the Noteholders' investment.

107. A further area of inquiry (and which the Trustee has not reported on as noted above) is the (then) basis of Mr. Poli's revenue projections, endorsed by the Trustee, and how it is that Artiva has failed to generate *any* revenue to the date of the last report (June 1, 2020) – and there has been no report (including of income) since. The Debtors have confirmed that there never were *any* contracts for revenue, only prospects.

108. In fairness to the Trustee, Dominion has no *actual* idea as to what support or due diligence the Trustee has undertaken to evaluate whether this is or was a viable Proposal and to properly discharge its duties. However, the items identified herein are material to the "factual matrix" of the motion for removal. No doubt the Trustee will explain its efforts in this regard if it chooses to oppose the motion for removal.

109. For now (and frankly since June) there is nothing to be done about the DIP financing. The money has been advanced and spent and is unlikely ever to be recovered.

**Orders Sought**

110. Dominion seeks an Order scheduling:

(a) the expeditious appeal of the Trustee's disallowances of the Noteholders' claims (and any necessary adjustment to the schedule for further Creditor's Meetings);

(b) a motion for the removal of the Trustee under section 14.04 of the *BIA* and for an Order reversing the decisions of the Proposal Trustee pursuant to Section 37 of the *BIA*.

111. Dominion further seeks an Order that the Debtors produce the documents set out in the letter at **Tab A**, *as available*, within 7 days and that Seann Poli attend on August 27, 2020 for one day for examination *by Dominion's counsel* and answer all relevant and proper question in respect the issues identified at paragraph 6 of the August 5, 2020 Order and Direction of Justice MacLeod.

**All of which is respectfully submitted, this 19th day of August, 2020**

Per: "Elliot S. Birnboim"
**CHITIZ PATHAK LLP**
Barristers and Solicitors
77 King Street West, Suite 700
TD North Tower, P.O. Box 118
Toronto, Ontario M5K 1G8

**Elliot Birnboim** (LSUC# 32750M)
*ebirnboim@chitizpathak.com*
**Michael Crampton** (LSUC # 74512G)
*mcrampton@chitizpathak.com*

Tel: (416) 368-6200; Fax: (416) 368-0300
Lawyers for Dominion Capital LLC

# Tab A

Barristers and Solicitors **ChitizPathak** LLP

*Reply To:*
Elliot Birnboim
Phone extension: (416) 644-9970
ebirnboim@chitizpathak.com

77 King Street West, Suite 700
TD North Tower, P.O. Box 118
Toronto, Ontario M5K 1G8
phone 416.368.6200 fax 416.368.0300

*Partners*:
*Daniel Chitiz*
*Elliot Birnboim*
*Navin Khanna*
*Paul Pathak*
*Josh Arbuckle*

August 10, 2020

**BY EMAIL: egolden@blaney.com**

Eric Golden
Blaney McMurtry LLP
Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto, Ontario
M5C 3G7

Dear Mr. Golden:

**Re: In the matter of the Proposal of Eureka 93 Inc. et al - Our file no: 004184**

To assist everyone in preparing for the cross-examinations, ensuring they are concise, and to minimize the likelihood of delay or re-attendance, we have prepared a list of preliminary productions required from the Debtors/Mr. Poli.

This documentation should be produced in advance and, for this reason, we are giving this list to all parties, including Debtor's counsel, in advance of the examinations.

I am optimistic that, given that the issues have been in play for some time, the Debtors and the Trustee (who has a right to expect cooperation from the Debtors) will have already commenced assembling these relevant documents from the Debtors for the purpose of formulating positions on the various contentious matters identified by Justice MacLeod.

Naturally, this is a preliminary list and no doubt cross-examination will reveal further production requests. For ease of reference, we have identified the issues that these documents relate to, identified by relevance (although other grounds of relevance may be relied on).

To be clear, these are not intended to replace proper examination and cross-examination but represent some of the core documentary record which would be relevant to the issues identified.

**General Background Documents**

***Relevance*:** To identify Mr. Poli's sources of knowledge and responsibilities, the relationship between the Debtors and their subsidiaries, and the stated position of each of the Debtors on the quantum and security in respect of the Noteholders' (and others) debts. These will be relevant to each of the issues identified in Justice MacLeod's most recent endorsement.

| # | Document |
|---|---|
| 1. | Most current CV for Mr. Poli. |
| 2. | A list of all positions that Mr. Poli has held with the debtors and their related parties, including dates and copies of any contracts/appointment to the positions. |
| 3. | All Corporate Organization charts or other documents showing the relationship between any of the debtors and any related corporations or subsidiaries prepared at any time by or on behalf of the Debtors or otherwise in their possession or control. This should include an identification any common shareholders, officers or directors from time to time. |
| 4. | The most current financial statements (and tax returns for any Canadian entities) of each of the debtors up to the most current date and a detailed GL thereafter, including identification of debtors with amounts. |
| 5. | Any and all communications by or on behalf of the Debtors with the Trustee respecting a) preparation of the Statements of Affairs; and, b) relating to the amount of debt of the Noteholders by each corporation and the security the Noteholders have. |

**Quantum/Security in Artiva by Noteholders (and other Debtors) and the Artiva Valuations (Real Estate and Going Concern)**

***Relevance:*** See paragraphs 6a, 6b, 6d and 6e of Case Conference Order of MacLeod, J dated August 5, 2020.

| # | Document |
|---|---|
| 1. | Any and all communications between the Debtors and the Noteholders (including as between their respective agents, solicitors or other 3rd parties) prior to February 19, 2020, including emails, tapes and prepared transcripts, which the Debtors state reflect on the parties' intentions with respect to the Noteholders' security or lack thereof in Artiva's assets in the course of the negotiation of the February and March security documents or subsequently. |
| 2. | Copies of all communications with Valco Consultants Inc, Agrecomm Appraisal Group and Kouwenberg re: valuation including any retainer letter. Communications with the contracting party for the appraisals. |
| 3. | Any documentation (including any covering emails or recorded calls/transcripts) provided by the Debtors to the Noteholders <u>or other third parties</u> (whether directly or through their respective agents) prior to February 19, 2020 with respect to the value or valuation of Artiva land (including as a going concern). |
| 4. | Any and all communications between the Debtors and the DIP lenders and the first mortgagees (or their respective agents) with respect to the value or valuation of Artiva land (including as a going concern) at any time, including with respect to the value as a going concern and the value of the Health Canada licence. |
| 5. | Any and all communications between the Debtors (or their agents) and any appraisers with respect to the value or valuation of Artiva land (including as a |

| | |
|---|---|
| | going concern) at any time. |
| 6. | Any internal memoranda or communications of the Debtors (or their related parties) with respect to the value of the Artiva lands, including as a going concern. |
| 7. | Any and all contracts, letters of intent, or communications between Artiva or its related parties and prospective customers for the sale of clones, including in respect of the "*deposit for a proposed sale of clones that was recently cancelled by the purchaser*" referred to in the Sixth Report of the Proposal Trustee. |
| 8. | Any and all communications between the Debtors (or their agents) and FamilyLending Group/Olympia Trust/the DIP Lenders (or their brokers/agents), including any formal or informal loan applications and supporting information. |
| 9. | Any opinions or information that the Debtors have in their power, possession or control with respect to the value of the Artiva facility including the Health Canada cannabis licence and/or of the business as a going concern. |
| 10. | From Poli affidavit of February 18, 2020:<br>Paragraph 20:<br>All written communications with "potential purchasers".<br>All documents relied on in the assertion that "Artiva will be able to generate cash flow through the sale of clones by about April or May 2020."<br>Paragraph 28:<br>The identity of the secured creditors "who have already taken steps to enforce their security over the assets and property of VNH" as well as the evidence of such steps and documents supporting their claims.<br>Paragraph 38:<br>Documents reflecting on the "residual value" in USA Biofuels and VNH which may flow up to Vitality. |
| 11. | From Poli affidavit dated Feb 25, 2020:<br>Paragraph 36:<br>Any documentary basis which Mr. Poli had for his statements in this paragraph.<br>Paragraph 41:<br>The names and communications of licenced producers referenced. The names of the parties and evidence of commitments to purchasing clones |
| 12. | From Poli affidavit dated March 2, 2020:<br>Paragraph 14:<br>All communications with Mr. Nelson in respect of extending the first ranking charge and a copy of any agreement reached in this regard. |
| 13. | From Poli affidavit dated April 17, 2020:<br>Paragraph 7:<br>The identity of the licenced cannabis cultivators and any communications with them with respect to the sale of clones. |

**The Montana Transaction**

***Relevance:*** See paragraphs 6.c of Case Conference Order of MacLeod, J dated August 5, 2020 (such issues referenced herein as the "Montana Transaction").

| # | **Document** |
|---|---|
| 1. | Any contractual documents, including any agreements or correspondence among the parties liable thereunder, related to the Montana Transaction to the extent not attached to the affidavit dated July 9, 2020 of Seann Poli, including with respect to the liability of Kent Hoggan, Owen Kenney and Frostwood 6 LLC |
| 2. | A complete loan continuity schedule for the debts in favour of Surety Land Development LLC ("Surety LLC") including a schedule of advances/payments. |
| 3. | Any documentation provided by the Debtors to the Noteholders (whether directly or through their respective agents) prior to February 19, 2020 with respect to the value and the security position of Surety LLC (or any other prior encumbrancer) relative of the Noteholders. |
| 4. | Any correspondence, transcripts or audio recordings with Surety LLC by or on behalf of the Debtors with respect to the Montana Transaction including any negotiations, demands, disputes, or litigation documents. |
| 5. | Any internal memoranda or communications of the Debtors (or their related parties) with respect to the Montana Transaction. |
| 6. | All documents reviewed by the Debtors (and Mr. Poli) in respect of the Montana Transaction to satisfy itself respecting the claims both in amount and as to security. |
| 7. | Any letters of opinion relied on by the Debtors with respect to propriety of the Montana Transaction, including with respect to its impact upon the interests of the Noteholders. |
| 8. | The identity of all the Debtors counsel in respect of the Montana Transaction. |
| 9. | The date of first contact with insolvency counsel ultimately retained by the Debtors. |
| 10. | A copy of the corporate minute book for all Debtors as at the date of the Montana Transaction. |
| 11. | All communications and negotiations with Surety LLC (or their principles/agents or anyone) with respect to the Montana Transaction. |
| 12. | All drafts and correspondence with respect to the preparation of the Debtors' SEDAR reports which reflect on the Montana Transaction which are internal, which are with 3rd parties and which are with SEDAR. |
| 13. | All documents reviewed by the Debtors management in the course of their "*due diligence to review all former documents, asset impairments, and security agreements (to the extent that the information was available) with a view to undertake a comprehensive restructuring of the company*" as set out in the December |

| | |
|---|---|
| | 4, 2019 news release. |
| 14. | All requests for information (and any answers therefrom) for " *assistance, nor transition knowledge transfer, in financial reporting matters, disclosures, asset impairments, and securities matters from the former CEO, CFO, and COO"* as set out in the December 4, 2019 news release. |
| 15. | The "reconciliation" referenced in: "*The new management team was able to reconcile the unconsolidated financial statements for all companies within the E93 group for Q2 ended June 30, 2019 in CAD, and for Q3 ended September 30, 2019 in CAD (with the exception of Vitality LLC that is recorded in USD). This reconciliation included accruals for additional liabilities and asset impairments that may have subsequently existed from June 30, 2019 to December 4, 2019. At that time, a material caveat for such disclosures was that the complex capitalization table was not effectively reconciled beyond September 30, 2019*" as set out in the December 4, 2019 news release. |
| 16. | The following documents referenced in the December 4, 2019 news release (under the reference to November 29, 2019):<br>• The notice by Surety LLC of its perfected security interest (and any response thereto by the Debtors);<br>• The formal written notice of default (and any response thereto by the Debtors);<br>• The Loan Agreements (and any amendments);<br>• The written notice of Surety LLC's intent to take possession.<br>• Any documents which were referenced for the "verification" of whether the release is partial or full. |
| 17. | The <*Equipment List-Surety Land Security Interest.pdf*> document attached to the email from David 0. Cowan to, *inter alia,* Seann Poli dated November 26, 2019 at 8:41pm. |
| 18. | The Corporate Minute book of "Vitality Natural Health LLC" (formed in the State of Utah) including a list of all shareholders, officers and directors of this entity from its inception. |
| 19. | The Corporate Minute book of "USA Biofuels LLC" (formed in the State of Utah, a subsidiary of Vitality CBD Natural Health Products Inc.) including a list of all shareholders, officers and directors of this entity from its inception. |
| 20. | Full particulars (with supporting documents) of the Reverse Take Over transaction completed in April 2019 involving Vitality. |
| 21. | Any waiver of conflict executed by Vitality with respect to law office of David Steffensen acting for Vitality Natural Health LLC and Surety LLC from time to time. |
| 22. | All supporting documents for the "*Notes Payable – Related Parties (see note 20)"* which address the Loan arrangements between Vitality and Surety in Schedule 3.1(bb) to the March Securities Purchase Agreement including but not limited to the "final settlement" as at November 29, 2018 between Surety LLC and Vitality. |
| 23. | Any documents suggesting that the Noteholders acquiesced or agreed to the Montana |

| | |
|---|---|
| | Transactions. |
| 24. | From Poli affidavit dated Feb 25, 2020:<br>Paragraph 4:<br>All communications with insolvency counsel which "related to the enforcement by a prior-ranking secured creditor in the United States."<br>Paragraph 10 and 11 (and subsequent):<br>All documents (electronic or written) related to telephone conversations with Mr. Gross whether recorded or otherwise. |

**The New Mexico Transaction**

***Relevance:*** See paragraphs 6a, 6b, 6d and 6e of Case Conference Order of MacLeod, J dated August 5, 2020.

| # | **Document** |
|---|---|
| 1. | Any and all communications between the Debtors and the Noteholders (including as between their respective agents, solicitors or other 3rd parties) prior to February 19, 2020, including emails, tapes and prepared transcripts, which the Debtors state reflect on the parties' intentions with respect to the allocation of the $3million payment in respect of New Mexico. |
| 2. | Any documentation (including any covering emails or recorded calls/transcripts) provided by the Debtors to the Noteholders (whether directly or through there respective agents) prior to February 19, 2020 with respect to the value of New Mexico facility at any time. |
| 3. | Any documentation in the Debtors' power, possession or control as at December 20, 2019 or prior (from January 2019) which reflects upon the value of the New Mexico facility. |
| 4. | Any internal memoranda or communications of the Debtors (or their related parties) with any party with respect to the release of the New Mexico facility, including how the reduction would be applied. |

We trust that these documents will be provided in advance of the examinations, where available.

Yours very truly,
**Chitiz Pathak LLP**

E. S. Birnboim

Elliot Birnboim
EB:jv

# Tab B

District of: Ontario
Division No. 12 - Ottawa
Court No. 33-2618511
Estate No. 33-2618510

FORM 77

Notice of Disallowance of Claim, Right to Priority or Security or Notice of Valuation of Claim
(Subsection 135(3) of the Act)

In the matter of the proposal of
Artiva Inc.
of the City of Ottawa, in the Province of Ontario

Dominion Capital LLC, BPY Limited, Nomis Bay Ltd. & MMCAP
International Inc. SPC
C/O Chitiz Pathak LLP - Attn: E Birnboim
77 King St., W., Ste 700, TD North Twr PO Box 118
Toronto ON M5K1G8

Take notice that:

As trustee acting in the matter of the proposal of Artiva Inc., we have disallowed your claim (or your right to a priority or your security on the property) in whole, pursuant to subsection 135(2) of the Act, for the following reasons:

1. The underlying Eureka 93 Inc. debt to Dominion Capital LLC ("DC"), as collateral agent, in respect the February 2019 Securities Purchase Agreement, guaranteed by Artiva Inc. ("Artiva"), Livewell Foods Canada Inc. and Vitality CBD Natural Health Products Inc., among others, in the Guarantee of Obligations dated February 14, 2019 under the 10% Senior Secured Convertible Notes Due February 20, 2020 (the "Feb 2019 Guarantee"), has been paid out in full following the closing of the transaction under the Partial Payment Agreement dated December 18, 2019. As a result, the Feb 2019 Guarantee was extinguished. The DC mortgage registered against title to the Artiva real property municipally known as 5208 Ramsayville Road, Ottawa (the "Real Property"), secures the obligations owing by Artiva to Dominion Capital from time to time, and specifically references the Feb 2019 Guarantee. Since Artiva did not guarantee the 10% Senior Secured Convertible Notes Due April 20, 2020 (the "March Notes"), the DC mortgage does not secure the March Notes.

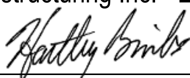
2. As noted above, Artiva did not guarantee the Eureka 93 Inc. debt to DC in respect the March Notes. With respect to the security agreements executed by Artiva in February and March, 2019, charging all property, including real property, of Artiva to secure the indebtedness of Eureka 93 Inc. and others, including Artiva, to DC from time to time, this constitutes only an unregistered mortgage that is "third party security", which means it constitutes a guarantee of the obligations only to the extent of the value of the equity in the property charged. Since this is an unregistered mortgage, it is behind all other registered mortgages and encumbrances on the Real Property, which means there is no equity to be charged in the Real Property. With respect to any personal property of the Debtor, it has no realizable value as third party security (which would also rank behind the Administrative Charge in any event). Accordingly, such unregistered charge/third party security is valued at $Nil, and thus the claim of DC is disallowed in its entirety.

3. The Director Claims are not provable under the Proposal. Furthermore, we note that over and above paragraphs 1 and 2 above (as grounds for also disallowing the Director Claims), the Director Claims are simply based on bald allegations in the Amended Proof of Claim that are not corroborated by the documents attached as a Schedule to the Amended Proof of Claim.

And further take notice that if you are dissatisfied with our decision in disallowing your claim in whole (or a right to rank or your security or valuation of your claim), you may appeal to the court within the 30-day period after the day on which this notice is served, or within any other period that the court may, on application made within the same 30-day period, allow.

Dated at the City of Toronto in the Province of Ontario, this 14th day of August 2020.

Deloitte Restructuring Inc. - Licensed Insolvency Trustee



Bay Adelaide East
8 Adelaide Street West, Suite 200
Toronto ON M5H 0A9
Phone: (416) 601-6072 Fax: (416) 601-6690

District of: Ontario
Division No. 12 - Ottawa
Court No. 33-2618511
Estate No. 33-2618511

FORM 77

Notice of Disallowance of Claim, Right to Priority or Security or Notice of Valuation of Claim
(Subsection 135(3) of the Act)

In the matter of the proposal of
Eureka 93 Inc.
of the City of Ottawa, in the Province of Ontario

Dominion Capital LLC, BPY Limited., Nomis Bay Ltd and MMCAP
International Inc. SPC
C/O Chitiz Pathak LLP - Attn: E Birnboim
77 King St., W., Ste 700, TD North Twr, PO Box 118
Toronto ON M5K 1G8

Take notice that:

As trustee acting in the matter of the proposal of Eureka 93 Inc., pursuant to subsection 135(2) of the Act, we have disallowed your secured claim in whole and allowed a unsecured claim in the amount of $11,129,160 (USD $8,400,000), for the following reasons:

1. Your secured claim has been valued at $Nil as there are no assets of any value;

2. Your unsecured claim has been adjusted down by USD$2,700,000 to reflect the Agreed Amount of USD$3,000,000 for the transaction under the Partial Payment Agreement dated December 18, 2019 and the Bill of Sale dated February 6, 2020;

3. Furthermore, your unsecured claim has also been adjusted down for the Mandatory Default Amount of USD$3,420,000 and Default Interest of USD$1,571,400 as you have not provided any calculations for how these two portions of your claim were determined such that it cannot determined what is being claimed for prior to the date of filing, and whether these two portions of your claim are penalties and/or contraventions of the Interest Act; and

4. The Director Claims are not provable under the Proposal. Furthermore, even if they were, the Director Claims are based on bald allegations in the Amended Proof of Claim that are not corroborated by the documents attached as a Schedule to the Amended Proof of Claim.

And further take notice that if you are dissatisfied with our decision in disallowing your claim in whole (or a right to rank or your security or valuation of your claim), you may appeal to the court within the 30-day period after the day on which this notice is served, or within any other period that the court may, on application made within the same 30-day period, allow.

Dated at the City of Toronto in the Province of Ontario, this 14th day of August 2020.

Deloitte Restructuring Inc. - Licensed Insolvency Trustee

Bay Adelaide East
8 Adelaide Street West, Suite 200
Toronto ON M5H 0A9
Phone: (416) 601-6072     Fax: (416) 601-6690

District of: Ontario
Division No. 12 - Ottawa
Court No. 33-2618511
Estate No. 33-2618512

FORM 77

Notice of Disallowance of Claim, Right to Priority or Security or Notice of Valuation of Claim
(Subsection 135(3) of the Act)

In the matter of the proposal of
LiveWell Foods Canada Inc.
of the City of Ottawa, in the Province of Ontario

Dominion Capital LLC, BPY Limited, Nomis Bay Ltd. and
MMCAP International Inc. SPC
C/O Chitiz Pathak LLP - Attn: E. Birnboim
77 King ST., W., Ste 700, TD Twr, PO Box 118
Toronto ON M5K 1G8

Take notice that:

As trustee acting in the matter of the proposal of LiveWell Foods Canada Inc., we have disallowed your claim (or your right to a priority or your security on the property) in whole, pursuant to subsection 135(2) of the Act, for the following reasons:

1. The underlying Eureka 93 Inc. debt to Dominion Capital LLC ("DC"), as collateral agent, in respect the February 2019 Securities Purchase Agreement, guaranteed by Artiva Inc. ("Artiva"), LiveWell Foods Canada Inc.("LiveWell") and Vitality CBD Natural Health Products Inc., among others, in the Guarantee of Obligations dated February 14, 2019 under the 10% Senior Secured Convertible Notes Due February 20, 2020 (the "Feb 2019 Guarantee"), has been paid out in full following the closing of the transaction under the Partial Payment Agreement dated December 18, 2019. As a result, the Feb 2019 Guarantee was extinguished. LiveWell did not guarantee the 10% Senior Secured Convertible Notes Due April 20, 2020 (the "March Notes").

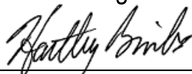
2. As noted above, LiveWell did not guarantee the Eureka 93 Inc. debt to DC in respect the March Notes. With respect to the security agreements executed by LiveWell in February and March, 2019, charging all property of LiveWell to secure the indebtedness of Eureka 93 Inc. and others, including LiveWell, to DC from time to time, this constitutes only "third party security", which means it constitutes a guarantee of the obligations only to the extent of the value of the equity in the property charged. Any personal property of the Debtor has no value as third party security (which would also rank behind the Administrative Charge in any event). Accordingly, such third party security is valued at $Nil, and thus the claim of DC is disallowed in its entirety.

3. The Director Claims are not provable under the Proposal. Furthermore, we note that over and above paragraphs 1 and 2 above (as grounds for also disallowing the Director Claims), the Director Claims are simply based on bald allegations in the Amended Proof of Claim that are not corroborated by the documents attached as a Schedule to the Amended Proof of Claim.

And further take notice that if you are dissatisfied with our decision in disallowing your claim in whole (or a right to rank or your security or valuation of your claim), you may appeal to the court within the 30-day period after the day on which this notice is served, or within any other period that the court may, on application made within the same 30-day period, allow.

Dated at the City of Toronto in the Province of Ontario, this 14th day of August 2020.

Deloitte Restructuring Inc. - Licensed Insolvency Trustee



Bay Adelaide East
8 Adelaide Street West, Suite 200
Toronto ON M5H 0A9
Phone: (416) 601-6072 Fax: (416) 601-6690

| | |
|---|---|
| District of: | Ontario |
| Division No. | 12 - Ottawa |
| Court No. | 33-2618511 |
| Estate No. | 33-2618513 |

FORM 77

Notice of Disallowance of Claim, Right to Priority or Security or Notice of Valuation of Claim
(Subsection 135(3) of the Act)

In the matter of the proposal of
Vitality CBD Natural Health Products Inc.
of the City of Ottawa, in the Province of Ontario

Dominion Capital LLC, BPY Limited, Nomis Bay Ltd. and
MMCAP International Inc. SPC
C/O Chitiz Pathak LLP - Attn: E. Birnboim
77 King St., W., Ste 700, TD North Twr, PO Box 118
Toronto ON M5K 1G8

Take notice that:

As trustee acting in the matter of the proposal of Vitality CBD Natural Health Products Inc., we have disallowed your claim (or your right to a priority or your security on the property) in whole, pursuant to subsection 135(2) of the Act, for the following reasons:

1. The underlying Eureka 93 Inc. debt to Dominion Capital LLC ("DC"), as collateral agent, in respect the February 2019 Securities Purchase Agreement, guaranteed by Artiva Inc., LiveWell Foods Canada Inc. and Vitality CBD Natural Health Products Inc. ("Vitality"), among others, in the Guarantee of Obligations dated February 14, 2019 under the 10% Senior Secured Convertible Notes Due February 20, 2020 (the "Feb 2019 Guarantee"), has been paid out in full following the closing of the transaction under the Partial Payment Agreement dated December 18, 2019. As a result, the Feb 2019 Guarantee was extinguished. Vitality did not guarantee the 10% Senior Secured Convertible Notes Due April 20, 2020 (the "March Notes").

2. As noted above, Vitality did not guarantee the Eureka 93 Inc. debt to DC in respect the March Notes. With respect to the security agreements executed by Vitality in February and March, 2019, charging all property of Vitality to secure the indebtedness of Eureka 93 Inc. and others, including Vitality to DC from time to time, this constitutes only "third party security", which means it constitutes a guarantee of the obligations only to the extent of the value of the equity in the property charged. Any personal property of the Debtor has no value as third party security (which would also rank behind the Administrative Charge in any event). Accordingly, such third party security is valued at $Nil, and thus the claim of DC is disallowed in its entirety.

3. The Director Claims are not provable under the Proposal. Furthermore, we note that over and above paragraphs 1 and 2 above (as grounds for also disallowing the Director Claims), the Director Claims are simply based on bald allegations in the Amended Proof of Claim that are not corroborated by the documents attached as a Schedule to the Amended Proof of Claim.

And further take notice that if you are dissatisfied with our decision in disallowing your claim in whole (or a right to rank or your security or valuation of your claim), you may appeal to the court within the 30-day period after the day on which this notice is served, or within any other period that the court may, on application made within the same 30-day period, allow.

Dated at the City of Toronto in the Province of Ontario, this 14th day of August 2020.

Deloitte Restructuring Inc. - Licensed Insolvency Trustee

Bay Adelaide East
8 Adelaide Street West, Suite 200
Toronto ON M5H 0A9
Phone: (416) 601-6072 Fax: (416) 601-6690

# Tab C

**Term Sheet**

January 31, 2019

The following is a summary of the basic terms and conditions in which Dominion Capital LLC (the "Investor" or "Holder") will purchase up to $2,000,000 of Securities issued by LiveWell Canada Inc. This term sheet is for discussion purposes only and is not binding to any party, nor is any party obligated to consummate the financing until definitive documents have been agreed to and executed.

| | |
|---|---|
| **Issuer:** | LiveWell Canada Inc. (CSE: LVWL, OTC: LXLLF the "Issuer" or "Company"). |
| **Securities:** | Senior Secured Convertible Notes. |
| **Amount:** | USD $2,000,000. |
| **Price:** | Par. |
| **Coupon:** | 10% payable monthly in cash or stock subject to equity conditions. 12 months guaranteed interest. |
| **Conversion Price:** | Convertible at C$0.74 |
| **Term:** | 12 months. |
| **Prepayment Penalty:** | Optional Prepayment by Company with 10 trading day notice (once stock is free trading US for 30 trading days) at 103% of amount due provided that note is not in default and equity conditions met or default/equity conditions waived by majority of investors (as a class). |
| **Security:** | Secured by all unencumbered assets of the Company and 2nd on Artiva and 1st mortgage on New Mexico subject to release of unencumbered assets and 2nd on Artiva at time of Larger Deal pending diligence of New Mexico equipment and appraisal |
| **Mandatory Payments:** | No amortizations for 6 months then equal monthly amortization thereafter for 6 months. Payable in stock or cash at the option of the Company as follows:<br><br>-If in cash, payable at a 3% redemption premium to the invested value;<br>-If in stock, subject to the equity conditions being met<br><br>Investor can amortize the payments over multiple conversions. If equity conditions met, Investor may accelerate up to 3 amortizations in each month but must be agreed to by the Company, unless the stock is trading over C$3.00, and 30-day |

average volume of C$1,000,000 per day (excluding two highest days). Equity Conditions will need to be outlined to include minimum share price, volume, free trading and company in good standing.

| | |
|---|---|
| **Use of Proceeds:** | To complete the purchase of the New Mexico facility. |
| **Warrants:** | 2,000,000 warrants of Vitality at $1.00 price ($180 million valuation). Dominion can put back these Vitality warrants to LiveWell at a cost of $400,000 in 6 months. The Company can force exercise of the Warrants at a C$3.00 price and 30-day average volume of C$1,000,000 per day (excluding two highest days), up to C$1,000,000 per week. |
| **Registration Rights:** | The shares will be restricted and have registration rights on the shares underlying the Note and Warrants in Canada or US (at Investor's option), with a requirement to have a registration statement filed within 60 days from the deal announcement, effective within 90 days (120 days in the event of a review). |
| **Closing Condition:** | Signed purchase order with Tilray to deliver 50kg of CBD at $6,500/kg. Deliver 100kg to Perfecta at $4,600/kg. |
| **Other Terms:** | Target closing is February 1, 2019. Issuer to pay non-refundable legal deposit of USD $5,000 to the Investor's counsel to start review of the documents on January 30, 2019. |
| **Sole Placement Agent:** | Alliance Global Partners ("A.G.P.") |

Agreed and accepted this 31st day of January 2019 by

**LIVEWELL CANADA INC.**

By:________________________________

Name: Steven Archambault

Title: CFO & CAO

Agreed and accepted this 4th day of February 2019 by

**DOMINION CAPITAL LLC**

By:________________________________

Name: Mikhail Gurevich

Title: Managing Member

**Term Sheet**

March 4, 2019

*This term sheet is for discussion purposes only and does not constitute an offer to sell or a solicitation of an offer to buy any interests in LiveWell Canada, Inc. ("LiveWell"). Any such offer will be made only pursuant to a Private Placement Memorandum prepared and provided by LiveWell. This term sheet is not intended as a recommendation, offer, or solicitation with respect to the sale or purchase of a security by Alliance Global Partners ("A.G.P.") and A.G.P. makes no representation or warranty with respect to the accuracy or completeness of any information contained in any Private Placement Memorandum provided by LiveWell.. The term sheet is not binding to any party, nor is any party obligated to consummate the financing referred to herein unless and until definitive documents have been agreed to and executed.*

| | |
|---|---|
| **Issuer:** | LiveWell Canada Inc. (CSE: LVWL, "LiveWell", the "Issuer" or "Company"). |
| **Securities:** | Senior Secured Convertible Notes. |
| **Amount:** | $12,000,000, up to $15,000,000. |
| **Price:** | Par. |
| **Coupon:** | 10% payable monthly in cash or stock subject to equity conditions. 12 months guaranteed interest. |
| **Conversion Price:** | Convertible at the lower of but not below the floor of C$0.74:<br>a) Lowest daily VWAP in the previous 10 trading days, after trading resumes on CSE;<br>b) Trading day prior to the stock being free trading in the US (NASDAQ) or CSE, at 75% of the lowest daily VWAP in the previous 10 trading days. |
| **Term:** | 13 months. |
| **Warrants:** | 50% warrant coverage of Vitality warrants at a $1.00 exercise price. The Company can force exercise of the Warrants at a C$3.00 price and 30-day average volume of C$1,000,000 per day (excluding two highest days), up to C$1,000,000 per week. |
| **Prepayment Penalty:** | Optional Prepayment by Company with 10 trading day notice (once stock is free trading US for 30 trading days) at 125% of amount due provided that note is not in default and equity conditions met or default/equity conditions waived by majority of investors (as a class). |

| | |
|---|---|
| **Security:** | Secured by all unencumbered assets of the Company and 2nd on Artiva and 2nd on New Mexico facility. |
| **Mandatory Payments:** | No amortization (principal repayments by the Issuer) for 4 months then equal scheduled monthly principal repayments from month 5 through month 13. Payable in stock or cash at the option of the Company as follows:<br><br>-If in cash, payable at a 5% redemption premium to the invested value;<br>-If in stock, subject to the equity conditions being met.<br><br>Investor can amortize the payments over multiple conversions. If equity conditions met, Investor may accelerate up to 3 amortizations in each month but must be agreed to by the Company, unless the stock is trading over C$3.00, and 30-day average volume of C$1,000,000 per day (excluding two highest days). Equity Conditions will need to be outlined to include minimum share price, volume, free trading and company in good standing. |
| **Use of Proceeds:** | Growth capital for existing business and the newly announced Vitality acquisition. |
| **Minimum Cash Reserve:** | Minimum cash reserve of $6mm reduced to $3.6mm upon closing of the RTO with Vitality and trading on the CSE. The balance of the $3.6mm reserve will be released if the Company reports through a press release USD $30,000,000 in unaudited (but verified) revenue and positive EBTDA over a consecutive three (3)-month period. If not reached, this cash reserve can be used for interest and principal at maturity. Cash reserve shall be adjusted proportionally based on deal size. |
| **Registration Rights:** | The shares will be restricted and have registration rights, with a requirement to have a registration statement filed within 60 days from the deal announcement, effective within 90 days (120 days in the event of a review). |
| **Put Right:** | The Investor has the right to put the whole principal and interest in full back to LiveWell, in the event the merger is not completed by June 1, 2019. |
| **Other terms:** | Right of first refusal for 50% of future rounds for 12 months; pro rata to investment amount in this round. No hedging or shorting. Company to take required steps to uplist to NASDAQ within 90 days of funding (best efforts). |

**Joint Placement Agents:** Alliance Global Partners and Industrial Alliance Securities.

# Tab D

## Michael Crampton

**From:** Eric Golden <egolden@blaney.com>
**Sent:** Friday, August 07, 2020 3:35 PM
**To:** Elliot Birnboim
**Cc:** Michael Crampton; Hartley Bricks; barbara.vanbunderen@siskinds.com; blay@cohenhighley.com; Chad Kopach; 'Andrew J. Lenz'; 'Shea, Patrick'; Chad Kopach
**Subject:** RE: Eureka et al - Case Conference Order of RSJ McLeod Aug 5, 2020
**Attachments:** Case Conference Order & Direction RSJ MacLeod Aug 5 2020.pdf

Elliot,

With respect to your email today of 2:06 pm, I direct you to the following Direction of RSJ MacLeod to you and Mr. Shea in subparagraph 12(a) of His Honour's attached Order & Direction, and urge you to now only respond with that Direction in mind: "The noteholders and the debtors are to fully cooperate with the Trustee". That means properly responding to the Proposal Trustee's email of August 5, 2020, and, for example, not implicitly threatening the Proposal Trustee as follows "I would urge the Trustee to consider whether or not it really wishes to deny the Proof and incur/expose costs of the Appeal when it is clear that the debtor is going to commence the Application per his Submission regardless".

With respect to your email today of 1:52pm, that Direction to fully co-operate also means your response should not contain any more insults (see your points 2 and 3 below). I will respond to your email of 1:52 pm, *seriatim*.

1. Just to clarify, are you confirming that DC will pay the proposal trustee's costs relating to the Poli examination, if DC conducts the examination?

2. You are mistaken. There is absolutely no basis for your allegation that there is any antipathy at all towards your client from the Proposal Trustee or its counsel, that the proposal trustee would conduct a "milquetoast" examination of Poli, or that the proposal trustee's review would be "cursory". You do not appear to have any appreciation for how serious your allegations are.

3. You are again mistaken. Your repeated allegation of my alleged "antipathy", this time to support your allegation that it would be "difficult" for you to "imagine" that "I could be adequately briefed" on this file is based on my not responding to a specific email of yours, so I am setting out your email below for the record.

   Your email was sent on a date that I was preparing for trial the next two days (you'll recall I arrived late to join my colleague Chad Kopach for the July 31 Case Conference, and I advised upon my arrival that I was late because I was in Court on another matter). That trial was followed by the August long weekend, and discoveries for me this week (which just ended), no less on a week that you advised us at the July 31 Case Conference you would be away on holiday (I think you said in the bush or the brush), and as a result incommunicado and unreachable until today.

   So further to your threat below that "If the occasion arises, I intend to specifically point to your non-response to mine of: July 29, 2020 10:31 AM and the communications prior", to prove your allegations above, I urge you to reconsider, and instead focus on simply responding to my email of August 5, 2020 (and my follow-up in (1) above and (4) and (5) below), in accordance with RSJ MacLeod's Direction to you and Mr. Shea.

**From:** Elliot Birnboim [mailto:EBirnboim@ChitizPathak.com]
**Sent:** Wednesday, July 29, 2020 10:31 AM
**To:** Eric Golden <egolden@blaney.com>; Michael Crampton <MCrampton@chitizpathak.com>

**Cc:** Hartley Bricks <hbricks@deloitte.ca>
**Subject:** RE: Dominion: Email to Bricks FOR REVIEW

Eric:

One more note before I disappear for much of the day: Thank you for the below – including the emoji "smiley face". I assume that was meant to convey your comments are in jest. I do apologize if you feel the communications with you were unduly personalized. They were not so intended and should be construed retrospectively as containing a similar emoji. We have clients who may disagree and we both have job to do – let's get on with it and neither of us should be personalizing this. This file is likely to go on for some time and, while we may be trading barbs from time to time (with or without emojis) I am prepared to make an *extra* effort to ensure our communications are rather more measured, if you will do likewise. Your response (in the form perhaps of a handshake emoji) is requested.

My position on your request is noted in the companion correspondence.


**Elliot Birnboim**
Phone: 416.644.9970
Fax: 416.368.0300
**ebirnboim@chitizpathak.com**

77 King Street West, TD North Tower
Suite 700, P.O. Box 118
Toronto ON M5K 1G8
**www.chitizpathak.com**


4. Whether the proposal trustee or DC's counsel examines Sean Poli, you will surely prepare questions. Please provide them by the requested deadline. That will allow the proposal trustee to determine costs, and whether it is prepared to allow DC's counsel to proceed with the examination. The examination is for the benefit of all creditors, not only DC.

5. Please also provide your response to the Gowlings POC submission (due tomorrow) by the requested deadline.

I look forward to your response in accordance with subparagraph 12(a) of RSJ's MacLeod's attached Order and Direction.


Eric Golden
Partner - Co-chair, Business Reorganization & Insolvency Group
egolden@blaney.com
416-593-3927 | 416-596-2049


**From:** Elliot Birnboim [mailto:EBirnboim@ChitizPathak.com]
**Sent:** Friday, August 7, 2020 2:06 PM
**To:** Eric Golden <egolden@blaney.com>; 'Shea, Patrick' <Patrick.Shea@gowlingwlg.com>
**Cc:** Michael Crampton <MCrampton@chitizpathak.com>; Hartley Bricks <hbricks@deloitte.ca>; barbara.vanbunderen@siskinds.com; blay@cohenhighley.com
**Subject:** RE: Eureka et al - Case Conference Order of RSJ McLeod Aug 5, 2020 EMAIL #2

Eric:

In addition to my email below which addresses the cross-examination process, I respond to your suggestions respecting the Form 77 process. Justice M was clear in setting up a process whereby it is the Trustee's "first move". Then:

a. If we are unhappy the Form 77 we can appeal;
b. If we are content with the Form 77 but others (including the debtor) wish to challenge our Proof, they can commence an Application.

While we are happy to cooperate with reasonable questions from the Trustee on our Proof of Claim and discuss any narrow points (and there may be a few items we will send on the weekend, including addressing interest and penalties) the next step is for the Trustee to take a position on these matters.

However and more substantively, I particularly reference the comments of Justice MacLeod on the "*new wrinkle*" - his observation that "*In the original motion materials, Mr. Poli deposed that the debtors were indebted to the noteholders in the amount of up to $8.5 million*". I would urge the Trustee to consider whether or not it really wishes to deny the Proof and incur/expose costs of the Appeal when it is clear that the debtor is going to commence the Application per his Submission regardless. Obviously, the Trustee must still use its independent judgment and, no doubt, will do so regardless of the debtors stated intent.

We look forward to any reasonable specific questions the Trustee may have to help satisfy the Trustee and, in due course, its Form 77.

Best regards, ESB

**Elliot Birnboim**
Phone: 416.644.9970
Fax: 416.368.0300
ebirnboim@chitizpathak.com

77 King Street West, TD North Tower
Suite 700, P.O. Box 118
Toronto ON M5K 1G8
www.chitizpathak.com

*If you have received this e-mail in error or are not the named recipient, please immediately notify the sender and delete or destroy all electronic or hard copies of this e-mail. This e-mail is intended only for the receipt and use of the named recipient(s). It may contain information that is privileged, confidential or protected from disclosure under applicable law.*

---

**From:** Elliot Birnboim [mailto:EBirnboim@ChitizPathak.com]
**Sent:** Friday, August 7, 2020 1:52 PM
**To:** Eric Golden <egolden@blaney.com>; 'Shea, Patrick' <Patrick.Shea@gowlingwlg.com>
**Cc:** Michael Crampton <MCrampton@chitizpathak.com>; Hartley Bricks <hbricks@deloitte.ca>; barbara.vanbunderen@siskinds.com; blay@cohenhighley.com
**Subject:** RE: Eureka et al - Case Conference Order of RSJ McLeod Aug 5, 2020

Eric:

I refer to the endorsement of Justice M respecting the Trustee's conduct of the examinations of Mr. Poli, if it wishes to (failing which it is up to the Noteholders to do so). I observe the following:

1. You previously (and again below) insisted on costs for doing the examinations. My client is not agreeable to funding those costs for your examination nor were those costs ordered - but the noteholders *will* fund if they proceed to do the examinations themselves.

2. Perhaps I am mistaken, but I sense some antipathy from you to the concerns my client has raised, despite the comments of Justice M. My client will not be content with a milquetoast examination and the matter will not end with a cursory review rather than the "cross-examination" contemplated by Justice M.

3. I am *not,* however, mistaken about the antipathy towards counsel from the communications between us. If the occasion arises, I intend to specifically point to your non-response to mine of: July 29, 2020 10:31 AM and the communications prior. Frankly, any response at *this time* to that email of a week+ ago will be taken only as an attempt to side-step the issue. It is seems difficult to imagine that, given the issues that my client has raised and considers to be of some importance, you could be adequately briefed given your refusal to even *speak* to me, as documented in our prior emails.

4. Your below email asks that we provide you *our* list of questions in any event.

With all this in mind, it seems to me that the Trustee should give some serious thought to "stepping aside" and letting the Noteholders examine, as contemplated by Justice M. May we hear from you? In any event, please ensure that any examination is coordinated with my office.

If the Trustee does insist that you (rather than I) conduct the examinations, will we obviously provide you with such information / questions as we think will assist as best we can in the circumstances.

In the interim, **we would ask that the Mr. Poli (or his counsel) carefully review the issues noted by Justice M and ensure that he has the complete set of documents and communications which touch on these issues available to him. In the circumstances, they should be provided to the Trustee (and to our client) in advance of such cross-examinations.**

Have a pleasant weekend, ESB

**Elliot Birnboim**
Phone: 416.644.9970
Fax: 416.368.0300
**ebirnboim@chitizpathak.com**

77 King Street West, TD North Tower
Suite 700, P.O. Box 118
Toronto ON M5K 1G8
**www.chitizpathak.com**

*If you have received this e-mail in error or are not the named recipient, please immediately notify the sender and delete or destroy all electronic or hard copies of this e-mail. This e-mail is intended only for the receipt and use of the named recipient(s). It may contain information that is privileged, confidential or protected from disclosure under applicable law.*

---

**From:** Eric Golden <egolden@blaney.com>
**Sent:** August 6, 2020 7:38 AM
**To:** 'Shea, Patrick' <Patrick.Shea@gowlingwlg.com>; Elliot Birnboim <EBirnboim@ChitizPathak.com>
**Cc:** Elliot Birnboim <EBirnboim@ChitizPathak.com>; Michael Crampton <MCrampton@chitizpathak.com>; Hartley Bricks <hbricks@deloitte.ca>; barbara.vanbunderen@siskinds.com; blay@cohenhighley.com
**Subject:** RE: Eureka et al - Case Conference Order of RSJ McLeod Aug 5, 2020

Thx

Let's then move Chitiz deadline to 5:00 pm Tuesday. That still gives the Proposal Trustee enough time to the 14th.

Eric Golden
Partner - Co-chair, Business Reorganization & Insolvency Group
egolden@blaney.com
416-593-3927 | 416-596-2049

**From:** Shea, Patrick [mailto:Patrick.Shea@gowlingwlg.com]
**Sent:** Thursday, August 6, 2020 5:27 AM
**To:** Eric Golden <egolden@blaney.com>
**Cc:** Elliot Birnboim <EBirnboim@ChitizPathak.com>; Michael Crampton <MCrampton@chitizpathak.com>; Hartley Bricks <hbricks@deloitte.ca>; barbara.vanbunderen@siskinds.com; blay@cohenhighley.com
**Subject:** Re: Eureka et al - Case Conference Order of RSJ McLeod Aug 5, 2020

Thanks. I have provided our submission re the claims and will be able to expand on the points/issues by noon on Saturday....I'm traveling on Friday.

E. Patrick Shea, LSM, CS
416-369-7399
Sent from my iPad. Please excuse any errors caused by autocorrect.

On Aug 5, 2020, at 21:53, Eric Golden <egolden@blaney.com> wrote:

**This message originated from outside of Gowling WLG. | Ce message provient de l'extérieur de Gowling WLG.**

---

Patrick/Elliot,

I am writing further to the attached Case Conference Order & Direction, and specifically the following terms ordered by RSJ MacLeod:

12(a). The Trustee is to forthwith assess and value the proofs of claim submitted by the noteholders and to issue its Form 77 no later than August 14, 2020. The noteholders and the debtors are to fully cooperate with the Trustee.

12(b). The examination of Mr. Poli and others as approved by the meeting of creditors in the Eureka 93 proposal shall proceed and shall be completed by August 18th, 2020. If the Trustee wishes to conduct the examinations, the Trustee shall do so. If not, then the noteholders may do so.

As you know, DC delivered its POCs the night before the General Meetings of Creditors for the three proposals, with over 400 pages of supporting documentation. Gowlings advised that the documentation did not include a second guarantee to support the security given over Artiva and LiveWell, and we have subsequently been advised by DC counsel there is no such guarantee (or "no such guarantee could be located").

Further to the terms of the Case Management Order, and to allow the Proposal Trustee to carry out its terms, I am requesting the following:

1. Gowlings to advise the Proposal Trustee and opposing counsel in writing by 5:00 pm on Friday Aug. 7 of its position on why it is challenging the DC POC submitted in the each of the Proposals, and that Chitiz provide its written reply by 5:00 pm on Monday Aug 10; and

2. Chitiz to advise the Proposal Trustee in writing by 5:00 pm on Monday Aug. 10 of what it wishes to explore on the Poli examination, and to provide a list of questions. The Proposal Trustee will then provide DC by Aug 12 with an estimate of its cost to conduct the examination (to be paid by DC to Deloittes by Aug 14).

Let me know if you have questions.

Eric Golden
Partner - Co-chair, Business Reorganization & Insolvency Group

egolden@blaney.com
<image001.png> 416-593-3927 | <image002.png> 416-596-2049

---

**From:** Duplessis, Megan (JUD) [mailto:Megan.Duplessis@ontario.ca]
**Sent:** Wednesday, August 5, 2020 10:02 AM
**To:** Shea, Patrick <Patrick.Shea@gowlingwlg.com>; Elliot Birnboim <EBirnboim@ChitizPathak.com>; Michael Crampton <MCrampton@chitizpathak.com>; Hartley Bricks <hbricks@deloitte.ca>; Eric Golden <egolden@blaney.com>; barbara.vanbunderen@siskinds.com; blay@cohenhighley.com
**Subject:** Eureka 93 Inc. et al. CC July 31, 2020

Good morning,

Please find attached Regional Senior Justice MacLeod's Case Conference Order and Directions. Thank you.

Best regards,

**Megan Duplessis**
Administrative Assistant to Regional Senior Justice MacLeod
Superior Court of Justice | 161 Elgin Street | 5th Floor
Ottawa, ON K2P 2K1 | 613-239-1527

# Tab E

Barristers and Solicitors **ChitizPathak** LLP

*Reply To:*
Elliot Birnboim
Phone extension: (416) 644-9970
ebirnboim@chitizpathak.com

77 King Street West, Suite 700
TD North Tower, P.O. Box 118
Toronto, Ontario M5K 1G8
phone 416.368.6200 fax 416.368.0300

*Partners*:
*Daniel Chitiz*
*Elliot Birnboim*
*Navin Khanna*
*Paul Pathak*
*Josh Arbuckle*

August 11, 2020

**BY EMAIL: egolden@blaney.com**

Eric Golden
Blaney McMurtry LLP
Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto, Ontario
M5C 3G7

Dear Mr. Golden:

**Re: In the matter of the Proposal of Eureka 93 Inc. et al - Our file no: 004184**

You have asked for our response to the (now amended) Submissions of the Debtors.

While we are delighted to answer any particular questions you may have, asking for our clients' response to the splatter-gun submissions of the Debtors does not do accomplish the intention of Justice MacLeod's directions. As repeatedly noted, Justice MacLeod did not contemplate a piecemeal process. Rather, the Trustee was to use its independent judgment to evaluate the security and quantum of the debt of each of the debtor entities and the Noteholders could then respond to any disallowance or Application.

However, to assist the Trustee, we have taken the time to address the two central issues raised in the Debtors "new wrinkle" Submissions:

1. Is the liability of Artiva Inc. ("**Artiva**") restricted to the first advance of USD$3mm evidenced by the February Notes?

2. Does the New Mexico transaction result in payment as against *only* the first advance in the amount of USD$3mm, eliminating the liability of Artiva?

In order to succeed in eliminating the Noteholders voting rights in the Artiva proposal, *both* propositions must be established by the Debtors.

The (in our view) tortured interpretation of the subject contractual documentation by Debtors flies in the face of every email communication between the parties and, more importantly, every affidavit, statement of affairs or other statement by Mr. Poli to the date of his raising this "new wrinkle" - *all* such statements by Mr. Poli confirm that all Debtors are obliged in the

total amount of the debt and that the Noteholders are secured in each entity. Indeed, Mr. Poli's statements on behalf of the Debtors were clearly made with the assistance of professionals and clearly reflect on the true *intention* of the Debtors.[1]

There can be no doubt that this about-face is the reason Justice MacLeod referred to the Debtors' assertion as a "new wrinkle". There is no explanation for this change nor has there been leave granted by the Court to withdraw these prior admissions.

However, while such binding statements should give some comfort to the Trustee, the assertions of the Debtors as to the above two questions are simply wrong on the face of the contractual regime even without resort to the formal admissions of the Debtors:

1. **"Guaranteed Obligations" are Defined by Security Agreements:** The "Guaranty of Obligations" dated February 14, 2019 [Schedule A, Tab 2] is signed by Artiva (the owner of the Ottawa Facility) and the "Guaranteed Obligations" are defined with express reference to "Obligations" as defined by the February 14, 2019 "Security Agreement".

2. **Security Agreements Reference All (and Future) Debts:** The Security Agreements which Artiva signed *both* define the scope of the Obligations to include present and future debts incurred:

   In the "U.S." Security Agreement [Schedule A, Tab 4]:

   > *"…including, without limitation, the principal amount of all debts, claims and indebtedness, accrued and unpaid interest….heretofore, now and/or from time to time hereafter owing, due or payable…*".

   In the "Canadian" Security Agreement [Further Schedule A Documents, Tab 11] (to which Artiva signed a Joinder Agreement):

   > *….all of the liabilities and obligations (primary, secondary, direct, contingent, sole, joint or several) due or to become due, or that are now or may be hereafter contracted or acquired, or owing to, of each Debtor to the Secured Parties, including, without limitation, all obligations under this Agreement, the Credit Agreements, and any other instruments, agreements or other documents executed and/or delivered in connection herewith or therewith, in each case, whether now or hereafter existing, voluntary or involuntary, direct or indirect, absolute or contingent, liquidated or unliquidated, whether or not jointly owed with others, and whether or not from time to time decreased or extinguished and later increased, created or incurred*

[1] The goal in interpreting a contract is to discover, objectively, the parties' intention at the time the contract was made. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para 47 and following is a salutary read which will assist the trustee in assessing the impact of such statements in assessing contractual intention.

While the foregoing should be sufficient to end the inquiry into the extent of Artiva's obligations, the following further contractual terms reinforce Artiva's liability on both the February and March advances:

3. **February *and* March Securities Agreements Both Identify Artiva Property as Security:** Consistent with the Obligation of Artiva including *all* future advances, not only does the February Security Agreement expressly reference Artiva's Ottawa Facility as secured property at Schedule VIII, but the *March* Security Agreement [Schedule A, Tab 7] (also signed by Artiva) contains the *identical* Schedule VIII reference to the Ottawa Facility:

**SCHEDULE VIII**
**Real Property**

| COMPANY | LOCATION |
|---|---|
| LIVEWELL FOODS QUEBEC INC. | Civic number 211, Route 301, Litchfield, Quebec, Canada |
| ARTIVA INC. | 5130 & 5208 Ramsayville Road, Ottawa, Canada |
| VITALITY NATURAL HEALTH LLC | 254 Truss Road, Eureka, MT 59917, United States |
| | 9085 Advancement Avenue, Las Cruces, Dona Ana County, New Mexico, United States |

4. **Artiva is defined as a Debtor, Not Merely Guarantor:** The Additional Debtor Joinder signed by Artiva [Schedule A, Tab 5; Further Schedule A Documents, Tab 12], again, expressly sets out that Artiva "*SPECIFICALLY GRANTS TO THE SECURED PARTY A SECURITY INTEREST IN THE COLLATERAL AS MORE FULLY SET FORTH IN THE SECURITY AGREEMENT…*"

5. **The Security Registered against Artiva's Ottawa Facility is for CAD$48mm:** The fact that Artiva signed a debenture registered on title to the Ottawa Facility for $48million [Schedule A, Tab 8] is wholly incongruous with the suggestion of an intention to secure a mere USD$3mm (February advance) limited encumbrance and again points to Artiva's clear understanding that the February 14, 2019 Guaranty of Obligations extended to the future advances which, as a point of fact, were already contemplated.

While the issue of the treatment of the New Mexico release is effectively moot as a result of Artiva's liability on the entire advance, this issue is simply addressed by examining the terms of the release itself:

6. **New Mexico Deal Allocates Debts as *Noteholders* Direct:** The Debtors argument must overcome not only the foregoing clear definition of the guaranteed obligations a *all* debts, but also must rely on a contorted treatment of the New Mexico forgiveness as relating *only* to the February advance. However, this is expressly contrary to the contractual right of the Noteholders to allocate the debt how the

*Noteholders* wish in the Partial Payment Agreement dated December 18, 2019 [Further Schedule A, Tab 13]:

> *You [the Debtors] have contacted us [the Noteholders] and requested that, instead of delivering a mortgage on the Property, we accept a full transfer (the "Transfer") of ownership in the Property to the Collateral Agent, which you represent you own, and can transfer freely, free and clear of all mortgages and liens, as partial payment under the Notes (which may be allocated to all amounts due under the Notes as the Holders may each decide in accordance with and as provided in the Transaction Documents)…*

Further, the allocation of the forgiveness in Schedule B to the Partial Payment Agreement treats the total "outstanding" to the Noteholders as USD$11,400,000 (i.e. the total under *both* advances) by *all* debtors.

There is nothing in the record which suggests that either the Debtors or the Noteholders expressed an intention to treat this solely as a repayment of the February advances. To the contrary – all admissions by Mr. Poli (until the "new wrinkle"), who is a signatory on the New Mexico transaction, suggest that it came "off the top" of all the debts.[2]

While the foregoing does not address the multiple micro-issues the Debtors raised in their Submissions, it is not incumbent on the Noteholders to do so at this stage pursuant to the process Justice Macleod contemplated. The Debtors have already succeeded in elevating the costs sufficiently to warrant any further response and costs will be sought on a full indemnity basis having regard to this bad-faith.

The Noteholders have no doubt that the Trustee does not require further submissions from the Noteholders to dispense with the Debtors' objections. However, if the Trustee requires any further documents or has particular questions we are happy to respond.

Yours very truly,
**Chitiz Pathak LLP**

*E. S. Birnboim*

Elliot Birnboim
EB:jv

[2] Given that the Debtors retained counsel to advise them on the New Mexico transaction and the Montana transaction (and have made that statement on the record – see Affidavit of Seann Poli sworn Feb. 25, 2020 at para 4), it should be straightforward for the Trustee to get to the bottom of the "intention" of the New Mexico allocation through discussions with that counsel who could then testify.

# Tab F

## Michael Crampton

**From:** Eric Golden <egolden@blaney.com>
**Sent:** Wednesday, August 05, 2020 9:53 PM
**To:** 'Shea, Patrick'; Elliot Birnboim
**Cc:** Michael Crampton; Hartley Bricks; barbara.vanbunderen@siskinds.com; blay@cohenhighley.com
**Subject:** Eureka et al - Case Conference Order of RSJ McLeod Aug 5, 2020
**Attachments:** Case Conference Order & Direction RSJ McLeod Aug 5 2020.pdf

**Follow Up Flag:** Copied to Worldox (Client Files\003366\004184\00409663.MSG)

Patrick/Elliot,

I am writing further to the attached Case Conference Order & Direction, and specifically the following terms ordered by RSJ MacLeod:

12(a). The Trustee is to forthwith assess and value the proofs of claim submitted by the noteholders and to issue its Form 77 no later than August 14, 2020. The noteholders and the debtors are to fully cooperate with the Trustee.

12(b). The examination of Mr. Poli and others as approved by the meeting of creditors in the Eureka 93 proposal shall proceed and shall be completed by August 18th, 2020. If the Trustee wishes to conduct the examinations, the Trustee shall do so. If not, then the noteholders may do so.

As you know, DC delivered its POCs the night before the General Meetings of Creditors for the three proposals, with over 400 pages of supporting documentation. Gowlings advised that the documentation did not include a second guarantee to support the security given over Artiva and LiveWell, and we have subsequently been advised by DC counsel there is no such guarantee (or "no such guarantee could be located").

Further to the terms of the Case Management Order, and to allow the Proposal Trustee to carry out its terms, I am requesting the following:

1. Gowlings to advise the Proposal Trustee and opposing counsel in writing by 5:00 pm on Friday Aug. 7 of its position on why it is challenging the DC POC submitted in the each of the Proposals, and that Chitiz provide its written reply by 5:00 pm on Monday Aug 10; and

2. Chitiz to advise the Proposal Trustee in writing by 5:00 pm on Monday Aug. 10 of what it wishes to explore on the Poli examination, and to provide a list of questions. The Proposal Trustee will then provide DC by Aug 12 with an estimate of its cost to conduct the examination (to be paid by DC to Deloittes by Aug 14).

Let me know if you have questions.

Eric Golden
Partner - Co-chair, Business Reorganization & Insolvency Group

egolden@blaney.com
416-593-3927 | 416-596-2049

---

**From:** Duplessis, Megan (JUD) [mailto:Megan.Duplessis@ontario.ca]
**Sent:** Wednesday, August 5, 2020 10:02 AM
**To:** Shea, Patrick <Patrick.Shea@gowlingwlg.com>; Elliot Birnboim <EBirnboim@ChitizPathak.com>; Michael Crampton <MCrampton@chitizpathak.com>; Hartley Bricks <hbricks@deloitte.ca>; Eric Golden <egolden@blaney.com>; barbara.vanbunderen@siskinds.com; blay@cohenhighley.com
**Subject:** Eureka 93 Inc. et al. CC July 31, 2020

Good morning,

Please find attached Regional Senior Justice MacLeod's Case Conference Order and Directions. Thank you.

Best regards,

**Megan Duplessis**
Administrative Assistant to Regional Senior Justice MacLeod
Superior Court of Justice | 161 Elgin Street | 5th Floor
Ottawa, ON K2P 2K1 | 613-239-1527

# Tab G

# Michael Crampton

**From:** Eric Golden <egolden@blaney.com>
**Sent:** Tuesday, June 23, 2020 3:45 PM
**To:** Elliot Birnboim
**Cc:** 'Duchesne, Benoit'; Aiden Nelms; Andrew J. Lenz; Hartley Bricks; Shea, Patrick; Stephen Brown-Okruhlik; Sean Zweig (zweigs@bennettjones.com)
**Subject:** RE: In the matter of Eureka 93 Inc. - Bennett Jones removal/withdrawal

Elliot,

The issue of BJ acting as counsel, or not, should be straightforward. I have never encountered a situation where an adverse party moves to get opposing counsel off the record, opposing counsel agrees, and a motion is required by opposing counsel to get off the record. If BJ is required to bring that motion, I expect the Order will issue immediately, so from my perspective the clock for the Noteholders to retain alternate counsel started ticking yesterday regardless of when that motion is heard and cannot be used as a basis for further delay. The Noteholders should not expect any additional indulgence from the Proposal Trustee to retain new counsel following a BJ motion to withdraw.

Are you that new counsel for the Noteholders? If so, please deliver a Notice of Appearance forthwith. If not what exactly is your role now? Agent for a firm that wants to get off the record?

With respect to getting up to speed, you are mixing up apples and oranges and bananas by tying together the BJ issue, the opportunity of new counsel to ramp up, and the Proposal Reports. As per above, new counsel for the Noteholders should be ramping up already, and I don't see how it would take him or her more than one or two days at most. If you cannot ramp up anytime soon, with all due respect the Noteholders should seek new counsel, as your availability should have been a factor in accepting this retainer given timelines (if you have in fact accepted the retainer).

Assuming you are new counsel for the Noteholders, you have the Proposals. My understanding is that the debtors provided the appraisal for the Artiva greenhouse to your clients and/or BJ, and my understanding is also that the Noteholders are carrying out their own appraisal. You have original Statement of Affairs for each debtor, and I have asked Deloittes to provide you with updated copies today. You also have the Deloittes first report, and the five bi-weekly reports, which contain much disclosure and financial information.

As per the BIA, the Deloittes Proposal Reports will be delivered no later than 10 days prior to the first meeting of creditors, which is now scheduled for July 28, 2020. As I advised yesterday on the Case Conference, and as repeated by Justice MacLeod, those Reports cannot be finalized until the CBCA motion is heard. We are not prepared to circulate draft Proposal Reports.

So please advise who is the Noteholders' new counsel, and exactly what other information and/or documentation you or that counsel requires based on review of the Proposals, and the six reports delivered to date by the Proposal Trustee.

Otherwise, quite frankly, your email below comes across as an attempt to obfuscate and conflate issues, for the purpose of delay.

Eric Golden
Partner - Co-chair, Business Reorganization & Insolvency Group

egolden@blaney.com
416-593-3927 | 416-596-2049

---

**From:** Elliot Birnboim [mailto:EBirnboim@ChitizPathak.com]
**Sent:** Tuesday, June 23, 2020 3:04 PM
**To:** Eric Golden <egolden@blaney.com>; Sean Zweig (zweigs@bennettjones.com) <zweigs@bennettjones.com>
**Cc:** 'Duchesne, Benoit' <benoit.duchesne@gowlingwlg.com>; Aiden Nelms <NelmsA@bennettjones.com>; Andrew J. Lenz <alenz@perlaw.ca>; Hartley Bricks <hbricks@deloitte.ca>; Shea, Patrick <Patrick.Shea@gowlingwlg.com>; Stephen

Brown-Okruhlik <Stephen.Brown-Okruhlik@mcmillan.ca>
**Subject:** RE: In the matter of Eureka 93 Inc. - Bennett Jones removal/withdrawal

Thank you, Eric.
Sean and I remain in discussion on our part of what will be a tri-partite deal with Patrick. BJ is considering a proposal from us. We will let you know as soon as we have more details.

However, one of the issues is going to be ensuring that, if BJ are not counsel, new counsel has the chance to get up to speed. How much time *that* will take will be, in part:

a. a function of the position they take on the issues, but, the position they will take will be, in part
b. a function of the economics behind the proposal.

So, back to you on Lenz's question on the call: Can you or perhaps Hartley advise as to when will we have the supporting docs to critically examine the proposal? Surely that must be imminently available, no?

Look forward to hearing from you shortly,

**Elliot Birnboim**
Phone: 416.644.9970
Fax: 416.368.0300
**ebirnboim@chitizpathak.com**

77 King Street West, TD North Tower
Suite 700, P.O. Box 118
Toronto ON M5K 1G8
**www.chitizpathak.com**

*If you have received this e-mail in error or are not the named recipient, please immediately notify the sender and delete or destroy all electronic or hard copies of this e-mail. This e-mail is intended only for the receipt and use of the named recipient(s). It may contain information that is privileged, confidential or protected from disclosure under applicable law.*

---

**From:** Eric Golden <egolden@blaney.com>
**Sent:** June 23, 2020 2:38 PM
**To:** Sean Zweig (zweigs@bennettjones.com) <zweigs@bennettjones.com>; Elliot Birnboim <EBirnboim@ChitizPathak.com>
**Cc:** 'Duchesne, Benoit' <benoit.duchesne@gowlingwlg.com>; Aiden Nelms <NelmsA@bennettjones.com>; Andrew J. Lenz <alenz@perlaw.ca>; Hartley Bricks <hbricks@deloitte.ca>; Shea, Patrick <Patrick.Shea@gowlingwlg.com>; Stephen Brown-Okruhlik <Stephen.Brown-Okruhlik@mcmillan.ca>
**Subject:** RE: In the matter of Eureka 93 Inc. - Bennett Jones removal/withdrawal

Sean/Elliot,

Further to the case conference yesterday, how has the BJ firm issue been resolved? Is a new firm being appointed for the Noteholders, or does BJ have to bring a motion to get off the record?

Ps. limiting distribution list to counsel who attended yesterday, and the proposal trustee.

Eric Golden
Partner - Co-chair, Business Reorganization & Insolvency Group

egolden@blaney.com
416-593-3927 | 416-596-2049

---

**From:** Duchesne, Benoit [mailto:benoit.duchesne@gowlingwlg.com]
**Sent:** Monday, June 22, 2020 8:35 PM

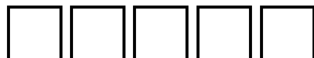
**To:** Aiden Nelms <NelmsA@bennettjones.com>; Andrew J. Lenz <alenz@perlaw.ca>; Chris Burr <chris.burr@blakes.com>; Donald Burke (dburke@kellysantini.com) <dburke@kellysantini.com>; Eduard Popov <eduard.popov@blakes.com>; Eric Golden <egolden@blaney.com>; Francois Simard (fsimard@rpgl.ca) <fsimard@rpgl.ca>; Fraser Mackinnon Blair <fraser.mackinnon.blair@dentons.com>; Hartley Bricks <hbricks@deloitte.ca>; Jason Dutrizac <jdutrizac@dsavocats.ca>; Me Simon Paransky <simon.paransky@mcmillan.ca>; Shea, Patrick <Patrick.Shea@gowlingwlg.com>; Robb Nelson <robb@agriroots.ca>; Sean Zweig (zweigs@bennettjones.com) <zweigs@bennettjones.com>; Sidney Elbaz <sidney.elbaz@mcmillan.ca>; Stephen Brown-Okruhlik <Stephen.Brown-Okruhlik@mcmillan.ca>; Elliot Birnboim <EBirnboim@ChitizPathak.com>
**Subject:** In the matter of Eureka 93 Inc.

Dear All;

Attached is a copy of RSJ MacLeod's endorsement following today's case conference for your records.


Benoit Duchesne
*Partner – Associé*
**T** +1 613 786 0142
benoit.duchesne@gowlingwlg.com

Gowling WLG (Canada) LLP
Suite 2600, 160 Elgin Street
Ottawa ON  K1P 1C3
Canada



**gowlingwlg.com**

Gowling WLG | 1,400+ legal professionals | 18 offices worldwide



The information in this email is intended only for the named recipient and may be privileged or confidential. If you are not the intended recipient please notify us immediately and do not copy, distribute or take action based on this email. If this email is marked 'personal' Gowling WLG is not liable in any way for its content. E-mails are susceptible to alteration. Gowling WLG shall not be liable for the message if altered, changed or falsified.

Gowling WLG (Canada) LLP is a member of Gowling WLG, an international law firm which consists of independent and autonomous entities providing services around the world. Our structure is explained in more detail at www.gowlingwlg.com/legal.

References to 'Gowling WLG' mean one or more members of Gowling WLG International Limited and/or any of their affiliated businesses as the context requires. Gowling WLG (Canada) LLP has offices in Montréal, Ottawa, Toronto, Hamilton, Waterloo Region, Calgary and Vancouver.

# Tab H

Barristers and Solicitors **ChitizPathak** LLP

*Reply To:*
Elliot Birnboim
Phone extension: (416) 644-9970
ebirnboim@chitizpathak.com

77 King Street West, Suite 700
TD North Tower, P.O. Box 118
Toronto, Ontario M5K 1G8
phone 416.368.6200 fax 416.368.0300

*Partners*:
*Daniel Chitiz*
*Elliot Birnboim*
*Navin Khanna*
*Paul Pathak*
*Josh Arbuckle*

July 26, 2020

**BY EMAIL: Eric Golden <egolden@blaney.com>**

**BLANEY MCMURTRY LLP**
2 Queen Street East, Suite 1500
Toronto, Ontario MSC 3O5

**Attn: Eric Golden**

Dear Mr. Golden:

**Re: In the matter of the Notice of Intention to Make a Proposal of Eureka 93 Inc. et al**
**Our file no: 004184**

We have now had a chance to review the Creditor Package supporting the Debtor's proposal ("the Proposal"). I would ask that you provide your response forthwith on the below matters.

***De Facto* Insufficient Notice**

As Mr. Mackinnon similarly noted in his email of Wednesday, July 22, 2020 at 10:00 pm, but for your response at 4:58 p.m. to Mr. Lenz's inquiry (of 9:30am on Tuesday, July 21, 2020, we would have no reason to know that the Creditor's Package had been mailed to creditors – and we *still* have not received same by mail. We would have expected at least *some* email communication to the creditors advising that it had been sent (apparently only on Friday July 17, 2020).

Indeed, I note that the Creditor's Package was not uploaded to the Trustee's website until sometime *after 4:30pm* on July 22, 2020 - less than 30 minutes after Mr. Lenz's above inquiry. As such, **none of the creditors will have had access to the Creditor's Package for this contentious Proposal for more than 2 business days**.

While I am not suggesting that this was intentional, this situation where all the creditors are jammed could have been avoided with some better communication and without relying on the minimum notice periods under the *Act* - particularly in this COVID-19 challenged environment. It is hoped that, despite this short notice we will have the Noteholder's Proof of Claim delivered before the meeting.

**Adjournment for Further Information**

While we are working in tandem on potential amendments to the proposal which *might* be satisfactory subject to the information below, it our position that this meeting will need to be adjourned to obtain the following relevant information:

1. **Valuation Issues:** We do not yet have the information which was Ordered by Justice MacLeod in his revised endorsement of July 20, 2020 from Mr. Kouwenberg. Justice MacLeod noted that the valuation issues were of concern both to the creditors *and* to the Court. At this point, we can only state, out of an abundance of caution, that we *intend* to challenge the valuation of such security, but may determine otherwise on review once we have consulted with our appraiser and have Mr. Kouwneberg's documents. We are advised Mr. Kouwenberg is working on production but have no indication as to when his response will be available.

2. **First Mortgagee:** I note your surprising refusal to speak with us by telephone to canvass some of these issues prior to the meeting, as confirmed in your email of July 21, 2020. You justified this on the basis of the "*number of disagreements between your firm and Gowlings over the last few weeks*". I would ask that you advise whether or not your office has any calls with Gowlings and in respect of this file and, if so, when. Our *initial* written request (which you insist on being in writing) is that:

    a. You provide a full breakdown of the quantum of the outstanding Olympia First Mortgage, including fees and other charges that may be included; and,

    b. Details of any agreements with the First Mortgagee or its related and the Debtors and/or other secured/unsecured creditors or any shareholders of these entities personally. Needless to say, we are all scratching our heads (as was the Court) as to why the First Mortgagee supported the DIP financing, to its own (now rather obvious) detriment.

    I am hopeful that this information can be cooperatively obtained from the First Mortgagee in short order, if not already in the hands of the Trustee.

3. **Examinations:** Examinations are contemplated under ss 52 & 163 of the BIA. We agree that such examinations must proceed including on the issues:

    a. Relating to the valuation (and circumstances) of the New Mexico transfer to Dominion;

    b. Relating to the valuation, security (and circumstances) of the transfer of the Montana property to Surety LLC, a related party; and,

    c. The usage of the proceeds of the Noteholders advances.

This may not be an exhaustive list of issues to be examined and other examinations may be required based upon information flowing from the above. The outcome of these examinations, like the above information, will materially impact on our position on the Proposal or any potential amended proposal.

**"Better Off" Statement**

Finally, without commenting on the entirety of the Creditor's Package or the Proposal, in "section M" of the Trustee's Report, the Trustee notes (as required by the BIA) that unsecured creditors would be "better off" than in a bankruptcy. However, this statement, *excludes* our client since the statement also defines our client is a secured creditor and therefore excludes it. This is puzzling and must be dealt with. I would ask that the Trustee immediately advise its position on this issue, with some explanation, so that the Noteholders can consider the position of the Trustee on this matter.

Given the above issues, we will be seeking to adjourn the creditors meeting on terms which address the foregoing. We welcome *early* feedback on the issue so that a full day is not taken dealing with these meetings. While other issue may emerge, your feed-back on the foregoing is appreciated.

Thank you in advance for your prompt attention,

Yours very truly,
**Chitiz Pathak LLP**
E. S. Birnboim

Elliot Birnboim
EB:jv