

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

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

Eric Golden, for the Proposal Trustee

E. Patrick Shea, for the debtors

Andrew Lenz, for PR, creditor

Benjamin Blay for the DIP lenders

Barbara VanBunderen for the first mortgagee

**HEARD:** September 2, 2020

**CASE CONFERENCE ORDER AND DIRECTION**

[1] As directed following the case conference on August 19<sup>th</sup>, 2020, the Noteholders have served their appeal materials which consist of a brief affidavit and nine volumes of exhibits. The grounds of appealing the Trustee's disallowance or partial disallowance of Dominion's proofs of claim are as follows:

- (a) The Noteholders lent USD\$15million to the Debtors in two tranches evidenced by 10% Senior Secured Convertible Notes issued in February and March 2019;

(b) The Trustee disallowed the Noteholders' claims against Artiva, Livewell and Vitality in their entirety purportedly because the Trustee found that Guaranty of Obligations signed by Artiva, Livewell and Vitality only guaranteed the February Notes and because the Trustee found that the February Notes were paid off by the transfer of the New Mexico facility to the Noteholders pursuant to the Partial Payment Agreement dated December 18, 2019;

(c) The Guaranty of Obligations signed by Artiva, Livewell and Vitality guarantees future obligations of Eureka;

(d) The release of USD\$3million 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;

(e) The 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;

(f) 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;

(g) Section 135 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3;

(h) Rules 37 and 57.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and,

(i) Such further and other grounds as the lawyers may advise.

[2] One of the grounds is an allegation of bias against the Trustee and some of the material filed is directed towards that allegation.

[3] The Trustee will be filing responding material which may or may not include an affidavit.

[4] The Trustee and / or the debtors wish to cross-examine on the affidavit filed in support of the motion (Appeal) and the Noteholders wish to examine Mr. Poli in aid of the motion. There may also be a cross-examination of the Trustee's affiant if an affidavit is filed. No other party indicates a wish to file materials.

[5] All parties agree that the examinations and cross-examinations should proceed in writing.

[6] In light of the allegations that are made and the volume of materials, the Trustee seeks an order for security for costs. Rule 56.01 (1) permits such an order if an applicant is ordinarily resident outside of Ontario or if the applicant is a corporation with insufficient assets in Ontario to satisfy a costs award. It may be necessary to hear a motion on this point if the Noteholders wish to resist the motion but it will not be necessary if the noteholders voluntarily post security in the

amount of \$50,000.00 or alternatively provide proof that the noteholders have adequate eligible assets in Ontario to satisfy a costs award if such an order is made.

[7] I am advised that the votes on the proposals took place as scheduled. In the Eureka 93 proposal, the Noteholders were entitled to vote and the proposal was defeated. Accordingly, Eureka 93 is now in bankruptcy.

[8] On the other two proposals, the proposals passed but they would have been defeated had the noteholders votes been accepted. Consequently, the appeal will determine if those proposals have been approved or not.

[9] I am also advised that in accordance with my direction, the Trustee has provided an updated report concerning the operations of Artiva Inc. and the status of the financing.

[10] Time remains critical and all parties agree the hearing of the appeal should proceed expeditiously.

[11] **The court therefore orders and directs as follows:**

- a. A motion for security for costs may be brought in advance of the hearing unless security is posted voluntarily, or the Trustee is satisfied that the Noteholders have sufficient assets in Ontario that such an order is not necessary.
- b. The Trustee shall serve its responding material for the appeal by Wednesday, September 9<sup>th</sup>, 2020.
- c. Parties wishing to cross-examine or examine witnesses shall do so in writing and shall serve their written questions by Thursday, September 10<sup>th</sup>, 2020.
- d. Answers to questions shall be provided by Saturday, September 12<sup>th</sup>, 2020 unless otherwise agreed.
- e. The appeal will be returnable before me on September 18<sup>th</sup>, 2020 at 10:00 a.m.
- f. The matter may be spoken to on September 14<sup>th</sup>, 2020 at 10:00 a.m. If further direction is required. If necessary, the issue of security for costs may also be argued on that date.
- g. All material for use on the appeal, other than the material that has already been filed, shall be uploaded to Sync.com via a link which will be provided to counsel by my judicial assistant.
- h. Briefs of authorities are not to be uploaded. A party wishing to rely on jurisprudence shall either hyperlink the cases in the factum to the CanLII version of the case or provide a hyperlinked table of authorities.

- i. Material uploaded to the Sync folder shall be in pdf format and shall clearly indicate the nature of the document and on whose behalf it is filed.
- j. The parties shall adhere as closely as possible to the Commercial List file naming convention found on the court web site at the following link:  
[https://www.ontariocourts.ca/scj/practice/practice-directions/edelivery-scj/#D Sending the electronic copies to the judge](https://www.ontariocourts.ca/scj/practice/practice-directions/edelivery-scj/#D_Sending_the_electronic_copies_to_the_judge)

[12] This order is effective without further formality.

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Mr. Justice C. MacLeod

**Date:** September 3, 2020