

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS  
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF  
PLANET ORGANIC HEALTH CORP. AND  
DARWEN HOLDINGS LTD.

EIGHTH REPORT OF THE MONITOR  
DATED AUGUST 16, 2016

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**INTRODUCTION**

1. On April 29, 2010, Planet Organic Health Corp. ("**Planet**") and Darwen Holdings Ltd. ("**Darwen**") (collectively, the "**Applicants**") filed for and obtained protection under the *Companies' Creditors Arrangement Act* (the "**CCAA**") pursuant to the Order of the Court (the "**Court**") dated April 29, 2010 (the "**Initial Order**").
2. Pursuant to the Initial Order, Deloitte & Touche Inc. ("**Deloitte**") was appointed as the Monitor of the Applicants (the "**Monitor**") in the CCAA proceedings and a stay of proceedings was granted in favour of the Applicants. By further Orders of the Court, the stay of proceedings was extended until May 31, 2011 (the "**Stay Period**").
3. The Monitor has provided the Court with the following reports:
  - i. a pre-filing report of the Proposed Monitor dated April 29, 2010 (the "**Pre-Filing Report**") in connection with the Applicants' application for protection under the CCAA;
  - ii. a first report of the Monitor dated May 11, 2010 (the "**First Report**") in connection with the Applicants' motion to adjourn and postpone the Applicants' annual general meeting;

- iii. a second report of the Monitor dated May 19, 2010 (the “**Second Report**”) in connection with the Applicants’ motion to extend the Stay Period to June 18, 2010;
- iv. a third report of the Monitor dated May 28, 2010 (the “**Third Report**”) in connection with the Applicants’ motion for, among other things:
  - a. an Order approving the Acquisition Agreement dated May 19, 2010 between the Applicants and The Catalyst Capital Group Inc. on behalf of funds managed by it (“**Catalyst**”) that resulted from the sales process and pursuant to which an affiliate of Catalyst, 7562578 Canada Inc. (“**New Planet Organic**”), acquired substantially all of the assets of the Applicants, including the Tax Refunds discussed and defined below (the “**Acquisition**”); and
  - b. an Order approving the proposed Directors’ & Officers’ Claims Procedure (“the **D&O Claims Procedure**”);
- v. a fourth report of the Monitor dated June 16, 2010 (the “**Fourth Report**”) in connection with the Applicants’ motion to extend of the Stay Period to July 30, 2010 and to provide the Court with a report on:
  - a. the closing of the Acquisition; and
  - b. the status of the D&O Claims Procedure;
- vi. a fifth report of the Monitor dated July 22, 2010 (the “**Fifth Report**”) in connection with the Applicants’ motion to extend the Stay Period to November 30, 2010 and to provide the Court with a report on:
  - a. the status of obligations settled under the Cash Reserve (the “**Cash Reserve**”) established pursuant to the Approval and Vesting Order dated June 4, 2010 granted in connection with the Acquisition (the “**Approval and Vesting Order**”);
  - b. the completion of the D&O Claims Procedure;

- c. certain matters relating to the Vaughan store location lease and related dealings and disputes with the Vaughan landlord (the “**Vaughan Lease Matters**”); and
  - d. certain mandatory corporate income tax, sales tax and other applicable tax filing requirements of the Applicants to be completed by New Planet Organic on behalf of the Applicants (the “**Tax Filings**”) in connection with the acquisition of any associated refunds (the “**Tax Refunds**”) by New Planet Organic as part of the Acquisition;
- vii. a sixth report of the Monitor dated November 24, 2010 (the “**Sixth Report**”) in connection with the Monitor’s motion to extend the Stay Period (up to the time at which the Tax Refunds are received) and to provide the Court with a report on:
- a. the general status of obligations settled under the Cash Reserve established pursuant to the Approval and Vesting Order;
  - b. the resolution of the Vaughan Lease Matters; and
  - c. the completion of the Tax Filings and the status of the Tax Refunds.
- viii. a seventh report of the Monitor dated May 31, 2011 (the “**Seventh Report**”) in connection with the Monitor’s request for discharge and to provide the Court with a report on:
- a. the completion of the Tax Filings and the status of the Tax Refunds;
  - b. the general status of obligations settled under the Cash Reserve established pursuant to the Approval and Vesting Order, including:
    - i. the refund of \$500,000, the full amount of funds set aside in the Cash Reserve to cover claims covered by the D&O Charge, to New Planet Organic following the completion of the Court approved D&O Claims Process;

- ii. the refund of \$71,284, being the amount remaining of the \$75,000 set aside in the Cash Reserve to cover all claims under section 6(5)a of the CCAA in respect of excluded employees, to New Planet Organic subsequent to the Monitor obtaining adequate evidence that all claims were fully paid;
  - iii. the payment of \$1,207,502 from the Cash Reserve to Partnership Capital Growth LLC, Planet's financial advisor, in respect of the amount owing in accordance with the Acquisition Agreement and the Approval and Vesting Order; and
  - iv. the payment of \$185,966 from the Cash Reserve to settle fees and disbursements incurred to administer the CCAA proceedings since the Closing Date, being obligations secured by the Administration Charge .
4. Copies of the Initial Order, the Pre-Filing Report, the First Report, the Second Report, the Third Report, the Fourth Report, the Fifth Report, the Sixth Report, the Seventh Report, all motion records and orders in the CCAA proceedings, and certain other documents related to the CCAA proceedings have been posted and are available on the Monitor's website at [www.deloitte.com/ca/planet-organic](http://www.deloitte.com/ca/planet-organic).

## PURPOSE

5. The purpose of this eighth report of the Monitor (the "**Eighth Report**") is to provide the Court with information with respect to the following:
- i. an update on all remaining matters in the CCAA proceedings:
    - a. the status of the Cash Reserve; and,
    - b. the status of the Tax Refunds.
  - ii. the Monitor's motion (the "**Termination and Discharge Motion**") for an Order (the "**Termination and Discharge Order**"), *inter alia*:

- a. approving the Seventh Report and this Eighth Report and the activities of the Monitor described therein and herein;
  - b. approving the professional fees and disbursements of the Monitor and its legal counsel;
  - c. authorizing and directing the Monitor to distribute the funds remaining in the Cash Reserve to New Planet Organic;
  - d. authorizing and directing the Monitor and its counsel to distribute the retainers held by them, subject to the satisfaction of their professional fees, to New Planet Organic;
  - e. terminating the Directors' Charge and the Administration Charge (each as defined in the Initial Order);
  - f. discharging Deloitte as Monitor; and
  - g. terminating these CCAA Proceedings; and
- iii. the Monitor's conclusion and recommendations.

#### **TERMS OF REFERENCE**

6. Capitalized terms used in this Eighth Report but not defined are as defined in the Pre-Filing Report, the First Report, the Second Report, the Third Report, the Fourth Report, the Fifth Report, the Sixth Report, the Seventh Report and the Approval and Vesting Order.

#### **STATUS OF THE CASH RESERVE AND PROFESSIONAL RETAINERS**

7. As previously reported by the Monitor, the balance remaining in the Cash Reserve and held in trust by the Monitor as at the date of the Seventh Report was approximately \$114,000 in respect of the Administration Charge and the costs covered thereby.
8. Since the Closing Date, and with the approvals of New Planet Organic and the Applicants, the Monitor has paid fees and disbursements incurred in connection with the completion of these CCAA proceedings by the Monitor, its counsel, Goodmans LLP, and Heighington Law Firm

and Baker Mackenzie LLP. The balance remaining in the Cash Reserve at this time is approximately \$76,874 in respect of the Administration Charge and the costs covered thereby. A reconciliation of the Cash Reserve funds held in trust by the Monitor is attached as **Exhibit "A"**.

9. As described in further detail below, the Monitor is seeking approval by the Court of the professional fees and disbursements incurred by it and its legal counsel in connection with these CCAA Proceedings.
10. The Approval and Vesting Order provides that following the Closing Date, the Monitor shall reduce the amount of the Cash Reserve to the extent such funds are no longer needed to satisfy the Cash Reserve Costs by distributing such amounts to New Planet Organic, and that all right, title and interest in the funds in the Cash Reserve that are not used to pay the Cash Reserve Costs shall vest absolutely in New Planet Organic and shall be distributed to New Planet Organic.
11. Additionally, the Approval and Vesting Order provides that all right, title and interest in and to the Assets (as defined in the Acquisition Agreement), which include any unused portion of the retainers held by the Monitor, Goodmans LLP and Heighington Law Firm and at the conclusion of the CCAA Proceedings, vest absolutely in New Planet Organic.
12. Following the payment of the Monitor and its legal counsel's fees and disbursements (including any Additional Fees and Disbursements (defined below)), the Monitor is seeking authorization to distribute to New Planet Organic all funds remaining in the Cash Reserve and the remaining balances held as retainers by the Monitor and its counsel.

#### **STATUS OF TAX REFUNDS**

13. Pursuant to the Order of the Court dated July 28, 2010 (the "**July 28 Order**"), New Planet Organic was authorized to complete the Tax Filings on behalf of the Applicants given that (i) New Planet Organic had acquired all Tax Refunds, if any, due to the Applicants under the Acquisition Agreement, and (ii) post-Acquisition, as the Applicants did not (and do not) have any remaining officers, directors or employees who could have completed the Tax Filings.

14. As reported in the Seventh Report, New Planet Organic completed and filed the Tax Filings in a timely manner; however the Tax Refunds were being withheld by CRA pending receipt of certain missing corporate income tax returns and sales tax filings for one of the affiliates of the Applicants. Management of New Planet Organic was reviewing the books and records of the Applicants and continuing discussions with CRA in order to compile and file such tax returns as soon as possible. However, New Planet Organic was unable to provide an estimate as to when these matters would be resolved with CRA, and when the Tax Refunds would be received.
  
15. The Monitor understands that Management of Planet solicited the services of Grant Thornton, Heighington Law Firm, and Yvan Boutin, former CFO of Planet, primarily for the following services:
  - i. the audit of the consolidated financial statements of Planet for the years ended June 30, 2010 through June 30, 2012;
  - ii. the corporate tax filings for Planet for the years ended June 30, 2010 through June 30, 2012;
  - iii. the review of the corporate tax accounts transaction history and reconciliation of tax balances of Planet from fiscal years ended June 30, 2008 through June 30, 2011, and related notices of assessment issued by CRA; and
  - iv. the review and completion of outstanding GST returns of Planet.
  
16. The Monitor understands that Management of Planet incurred professional fees of \$168,222.50 for the above services. Management of Planet advised the Monitor that the professional fees were incurred to satisfy CRA's demand that all Planet and affiliated entity filings were up to date prior to the issuance of the Tax Refunds.
  
17. The information requested by the CRA was submitted in October 2012 and the CRA issued the Tax Refunds, in the amount of \$423,190, to Planet on or about December 5, 2012.

18. As per the Court Order dated November 29, 2010 (the “**November 29 Order**”), the Motion Record (returned November 29, 2010) authorized New Planet Organic to endorse on behalf of either Applicant (Planet or Darwen) any and all cheques to New Planet Organic as payee in respect of any refunds or other amounts that the Applicants receive in connection with the Tax Filings. However, the Monitor understands that the Tax Refunds were received by Planet.
19. Planet contacted New Planet Organic on or about January 14, 2013 and offered to forward the net refund amount, less professional fees incurred, of \$254,967.50 (“**Net Amount**”) to New Planet in exchange for a full release. Planet provided New Planet Organic with a reconciliation of the Net Amount and support for the costs incurred on behalf of Planet in responding to CRA’s requests and ultimately obtaining the Tax Refund. However, there was a dispute about whether the costs incurred were reasonable.
20. Planet and New Planet Organic were unable to come to terms and execute a release due to a disagreement on what was considered reasonable professional fees to file the necessary tax filings and obtain the Tax Refund.
21. Discussions ensued but the parties were unable to come to a resolution. Communications were eventually lost due to personnel changes and the passage of time. Although the Monitor was not involved in the Tax Filings or the collection of Tax Refunds, the Monitor followed up with representatives of Planet and New Planet Organic from time to time. The Net Amount continued to be held by Planet.
22. Concerned with the passage of time and the lack of resolution, in the fall of 2015 the Monitor encouraged the parties to resume discussions and asked Planet to transfer the Net Amount to the Monitor to be held in escrow, pending a resolution of the dispute.
23. The Net Amount, in the amount of \$254,967.50, was paid to the Monitor on January 11, 2016 to be held in trust.
24. Communications between the parties resumed in January of 2016. Ultimately, the dispute was resolved and an Agreement and Release dated as of May 16, 2016 (the “**Release**”), attached as



**Exhibit “B”**, was executed by Planet, New Planet Organic and The Catalyst Capital Group Inc.

25. In the Release the parties acknowledged that Planet had incurred costs of \$168,222.50 in order to obtain the Tax Refunds of \$423,190 and agreed that payment of the Net Amount of \$254,967.50 from the Monitor’s trust account to New Planet Organic would resolve all issues between the parties relating to the Tax Refunds.
26. Following receipt of a fully executed copy of the Release, the Monitor remitted the Net Amount of \$254,967.50 at the direction of New Planet Organic on July 12, 2016.

#### **APPROVAL OF FEES**

27. The Initial Order requires that the Monitor and its legal counsel pass their accounts and refer said accounts to a judge of this Court.
28. The Monitor’s motion includes a request that the Court approve the fees and disbursements of the Monitor and its legal counsel.
29. The Affidavit of Paul M. Casey sworn August 16, 2016 (the “**Casey Affidavit**”), attests to the fees and disbursements of the Monitor for the period from March 10, 2010 to August 2, 2016 in the amount of \$480,673, including GST/HST.
30. The Affidavit of Brendan D. O’Neill, a partner with the law firm Goodmans LLP (“**Goodmans**”) sworn August 9, 2016 (the “**O’Neill Affidavit**” and, together with the Casey Affidavit, the “**Fee Affidavits**”), attests to the fees and disbursements of Goodmans, acting as legal counsel to the Monitor, for the period from period from April 6, 2010 to July 27, 2016 in the amount of \$337,157.71, including GST/HST. The Monitor confirms that the fees and disbursements set out in the Goodmans’ invoices relate to advice sought by the Monitor and that, in the Monitor’s view, Goodmans’ fees and disbursements are reasonable.
31. In addition to the amounts set forth in the Fee Affidavits, the Monitor requests that the Court authorize and approve the fees and disbursements of the Monitor and Goodmans, respectively, that are not set out in the Fee Affidavits but have been or will be incurred in the performance of the duties of the Monitor up to a maximum amount of \$16,000 (the “**Maximum Remaining**

**Amount**”). The Maximum Remaining Amount is an estimate determined by the Monitor in consultation with Goodmans on the assumption that the Termination and Discharge Motion will proceed on an uncontested basis, and accounting for approximately \$4,200 in unbilled fees of Goodmans. Any further accounts for fees and disbursements actually incurred by the Monitor and Goodmans (the “**Additional Fees and Disbursements**”) will be submitted to New Planet Organic. In the event that the Additional Fees and Disbursements exceed the Maximum Remaining Amount, the additional accounts will be submitted to this Court for approval.

32. It is the Monitor’s view that its fees and disbursements described in the Casey Affidavit, as well as those of its legal counsel, as described in the O’Neill Affidavit, are fair and reasonable in the circumstances. The Monitor therefore requests that this Court approve its fees and disbursements and the fees and disbursements of its legal counsel.
33. To the extent the approved fees (including the Additional Fees and Disbursements up to the Maximum Remaining Amount) have not been paid, the Monitor and Goodmans intend to apply their respective retainers to such amounts, before paying the remainder of the retainers to New Planet Organic in accordance with the Termination and Discharge Order.

#### **TERMINATION OF THE CCAA PROCEEDINGS AND DISCHARGE AND RELEASE OF THE MONITOR**

34. Subject to the completion of the steps outlined herein, the Monitor is not aware of any outstanding matters relating to the CCAA Proceedings.
35. The Monitor has duly and properly discharged and performed its duties and obligations as Monitor in the CCAA Proceedings in compliance and in accordance with the CCAA and all Orders of this Honourable Court made in the CCAA Proceedings.
36. The Monitor does not anticipate any further role as this Court’s officer in the CCAA Proceedings.
37. Accordingly, the Monitor believes that it is appropriate that an order be issued discharging Deloitte as Monitor and terminating these CCAA Proceedings.

**CONCLUSIONS AND RECOMMENDATIONS**

38. For the reasons described above, the Monitor respectfully recommends that the Court grant the Termination and Discharge Order that provides for, *inter alia*, the discharge and release of the Monitor and the termination of the CCAA Proceedings.

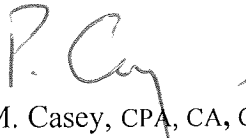
39. The Monitor also respectfully requests that the Court approve the Monitor's Seventh Report and Eighth Report, along with the activities described therein, as well as the fees and disbursements of the Monitor and its counsel.

All of which is respectfully submitted at Toronto, Ontario, this 16<sup>th</sup> day of August, 2016.

**DELOITTE & TOUCHE INC.**

**In its capacity as Monitor of Planet Organic Health Corp. and Darwen Holdings Ltd.**

Per:



Paul M. Casey, CPA, CA, CIRP  
Senior Vice-President

## EXHIBIT A

**CCAA Proceedings of Planet Organic Health Corp.  
Reconciliation of the Cash Reserve  
As at August 16, 2016**

<b>Proceeds from sale distributed to Monitor</b>	\$	2,082,502
Less: Payment to PCG, Financial Advisor, per Acquisition Agreement		(1,207,502)
Proceeds held by Monitor in trust to cover specific obligations and claims per the Approval and Vesting Order	\$	875,000
<b>Administration Charge</b>	<b>\$</b>	<b>300,000</b>
Less: Professional fees	(204,334)	(204,334)
Less: Publication costs	(18,438)	(18,438)
<b>Balance of Administration Charge</b>	<u><b>\$</b></u>	<u><b>77,228</b></u>
D&O Charge	<b>\$</b>	<b>500,000</b>
Less: Claims settled by D&O Charge	-	-
Less: Distribution to New Planet Organic	(500,000)	(500,000)
Balance of D&O Charge	<u><b>\$</b></u>	<u><b>-</b></u>
Charge for claims under subsection 6(5)(a) of the CCAA	<b>\$</b>	<b>75,000</b>
Less: Claims under subsection 6(5)(a) of the CCAA Applicant's Counsel	(3,716)	(3,716)
Less: Distribution to New Planet Organic	(71,284)	(71,284)
Balance of charge under subsection 6(5)(a) of the CCAA	<u><b>\$</b></u>	<u><b>-</b></u>
less: Misc Expenses		
Bank Charges		(354)
<b>Balance in Cash Reserve</b> (balance applicable to Administration Charge)	<u><b>\$</b></u>	<u><b>76,874</b></u>

**EXHIBIT B**

**[Attached]**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**EIGHTH REPORT OF THE MONITOR  
DATED AUGUST 16, 2016**

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