

THE HONOURABLE CALUM MACLEOD
REGIONAL SENIOR JUSTICE
SUPERIOR COURT OF JUSTICE



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

COURT HOUSE
161 ELGIN STREET
OTTAWA, ONTARIO K2P 2K1

PALAIS DE JUSTICE
161, RUE ELGIN
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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 reminded 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
