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

Estate Number: 33-2618512
Court File No.: 33-2618512

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF LIVEWELL FOODS CANADA INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number: 33-2618510
Court File No.: 33-2618510

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

Estate Number: 33-2618513
Court File No.: 33-2618513

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF VITALITY CBD NATURAL HEALTH PRODUCTS INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

FACTUM OF DOMINION CAPITAL LLC

(Motion returnable March 4, 2020)

March 2, 2020

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PART I: INTRODUCTION

1. On or about February 14, 2020, Eureka 93 Inc. ("**Eureka**"), Livewell Foods Canada Inc., Artiva Inc. ("**Artiva**"), and Vitality CBD Natural Health Products Inc. (together, the "**NOI Companies**" and each a "**NOI Company**") commenced proposal proceedings (the "**Proposal Proceedings**") by filing a Notice of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (the "**BIA**").

2. In connection with the Proposal Proceedings, the NOI Companies are seeking an Order: (i) granting charges over the NOI Companies' assets, property and undertakings (the "**Property**") in an amount up to $500,000 to secure the fees and expenses of Deloitte Restructuring Inc. ("**Deloitte**") as proposal trustee (in such capacity, the "**Proposal Trustee**"), Blaney McMurtry LLP as counsel to the Proposal Trustee, and Gowling WLG (Canada) LLP as counsel to the NOI Companies (the "**Administration Charge**"); (ii) approving CAD$2.3 million of interim financing with an effective annual rate of interest of 58% (the "**DIP Financing**") and a corresponding super priority charge over the Property (the "**DIP Charge**"); and (iii) extending the time to file proposals (the "**Proposal Extension**").

3. The Proposal Proceedings, and the relief sought in connection therewith, are purportedly necessary to reorganize the Eureka Group (as defined below) – all of which have no active business operations – and repay creditors by completing construction and commencing production at the Ottawa Facility (as defined below).

4. The Proposal Proceedings are not consistent with the rehabilitative purpose of the BIA's proposal provisions. The Proposal Proceedings have no rehabilitative purpose and will not end in a viable proposal that maximizes creditor recovery. There is no business to rehabilitate, no air of reality to the NOI Companies' business plan, no significant assets apart from the Ottawa Facility, and no hope of satisfying the claims of creditors through the Proposal Proceedings.

5. The Proposal Proceedings are merely an obstacle course for creditors whose claims should not be eroded for the sake of giving the NOI Companies' an opportunity to take their last hopeless gasp. For this reason, Dominion Capital LLC ("**Dominion**"), acting as collateral agent for itself, and certain other noteholders (together, the "**Noteholders**"), opposes the Proposal Extension and the granting of the Administration Charge and the DIP Charge.

6. Alternatively, if this Honourable Court grants the Proposal Extension, then the Noteholders submit that this is not an appropriate case to grant the DIP Financing, DIP Charge, and Administration Charge. In any event, the DIP Charge and Administration Charge should not prime the Noteholders' Security (as defined below).

7. While Dominion intends to seek further relief appointing a receiver, that relief is not being sought at this time.

PART II: FACTS

8. The facts with respect to this motion are more fully set out in the affidavit of Philip Gross sworn February 28, 2020 (the "**Affidavit**").[1] Capitalized terms not defined herein have the meaning ascribed to them in the Affidavit.

A. The Parties

The NOI Companies

9. Eureka is the ultimate parent of the NOI Companies and their affiliates (together, the "**Eureka Group**"). The Eureka Group was intended to be a vertically integrated hemp and cannabis company focused on CBD and other cannabinoids.[2]

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[1] Affidavit of Philip Gross sworn February 28, 2020 [Affidavit].

[2] *Ibid* at para 9.

10. With the exception of Artiva, which owns property located at 5130 and 5208 Ramsayville Road in Ottawa, Ontario (the "**Ottawa Facility**"), the NOI Companies have no business operations and no tangible assets or property. The only assets of the NOI Companies, apart from the Ottawa Facility, are the shares of related companies and certain Eureka Group inter-company accounts receivable which have no realizable value.[3]

11. The Ottawa Facility, was acquired by Artiva in December, 2017, for the stated purpose of cultivating, processing and distributing cannabis. However, more than two years later, the Ottawa Facility remains unfinished and Artiva's business remains an idea.[4] Artiva does not currently generate any revenue. No evidence has been provided by the NOI Companies as to when they will have a license allowing them to sell their products.

12. Artiva has a cultivation license from Health Canada, but it does not have a license to sell any product. It is therefore currently unable to generate any revenue.

13. The NOI Companies have a total of five employees.[5]

The Noteholders

14. The Noteholders are secured creditors of the NOI Companies. They have a second-ranking charge on the Ottawa Facility.

15. On or about February 14, 2019, the Noteholders advanced monies to the NOI Companies pursuant to a Security Purchase Agreement dated February 14, 2019 (the "**February Purchase Agreement**"). The obligations under the February Purchase Agreement were secured by a Security Agreement dated February 14, 2019, by and among the Noteholders, the NOI Companies and certain affiliated companies (the "**February Security Agreement**").[6]

[3] *Ibid* at para 12.
[4] *Ibid* at para 13.
[5] Affidavit of Seann Poli sworn February 18, 2020, at paras 13, 15, 21, 22 [Poli Affidavit].
[6] Affidavit, *supra* note 1 at para 6.

16. On or about March 20, 2019, the Noteholders advanced additional monies to the NOI Companies pursuant to a Security Purchase Agreement dated March 20, 2019 (the "**March Purchase Agreement**", and together with the February Purchase Agreement, the "**Noteholder Financing**"). The obligations under the March Purchase Agreement were secured by a Security Agreement dated March 20, 2019, by and among the Noteholders, the NOI Companies and certain affiliated companies (together with the February Security Agreement, the "**Noteholders' Security**").[7]

17. Despite numerous requests to the Eureka Group, a satisfactory accounting of how or where the Noteholder Financing was spent has never been provided.[8]

18. Since October 2019, the Noteholders have engaged with the Eureka Group to, among other things, discuss its financial issues. At all material times leading up to the Proposal Proceedings, the Noteholders expressed interest in working cooperatively with the NOI Companies to address their obvious financial issues.[9] This included the prospect of further financing from the Noteholders on receipt of a compelling business plan from the Eureka Group. No such business plan has ever been provided to the Noteholders by the Eureka Group.[10]

19. After learning that the Eureka Group had engaged Deloitte in December 2019, regarding a potential restructuring, the Noteholders reiterated their willingness to assist the Eureka Group to develop a business plan.[11]

20. From January 2020, until the Proposal Proceedings were filed on February 14, 2020, the Noteholders made repeated requests for certain documents and a potential business plan. To date, nothing has been provided.[12]

[7] *Ibid* at para 7.
[8] *Ibid* at para 8.
[9] *Ibid* at para 24.
[10] *Ibid* at para 24.
[11] *Ibid* at para 25.
[12] *Ibid* at para 26.

21. In the absence of transparency from the Eureka Group and a lack of faith in management, the Noteholders instructed their legal counsel to prepare demand letters (the "**Demands**") and Notices of Intention to Enforce Security pursuant to section 244(1) of the BIA (the "**Notices**") on or about February 18, 2020.[13] The Demands and Notices were not issued because the Noteholders learned of the Proposal Proceedings (and the automatic stay of proceedings) prior to their finalization.[14]

B. The Proposal Proceedings and Plan

22. Seann Poli, a member of the NOI Companies' present management, cites a lack of liquidity and a highly leveraged balance sheet left by Eureka Group's former management (the "**Past Management**") as the impetus for the Proposal Proceedings. Mr. Poli is a member of the Past Management.

23. The purpose of the Proposal Proceedings, according to Mr. Poli, is to reorganize the Eureka Group and to repay creditors by completing construction and commencing production at the Ottawa Facility (the "**Plan**").[15]

24. To this end, as part of the Proposal Proceedings, the NOI Companies seek to:

(a) immediately borrow $2.3 million under the DIP Financing to complete certain capital expenditures with the intention of being able to begin production at the Ottawa Facility;

(b) develop a "basket" or "cash flow" proposal to the unsecured creditors of the NOI Companies;

(c) re-finance or renegotiate the obligations owing to the Noteholders; and

(d) simplify the NOI Companies' capital structure.[16]

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[13] *Ibid* at para 28.
[14] *Ibid*.
[15] *Ibid* at para 29.
[16] *Ibid* at para 30.

25. The Plan relies on DIP Financing in the amount of $2.3 million, which financing comes with a 58% effective rate of interest, to fund the completion of the Ottawa Facility.[17] Further, the Plan assumes that:

(a) the Ottawa Facility will be completed in advance of May, 2020, and at that time, Artiva will become cash flow positive, notwithstanding that Artiva does not even have a license allowing it to sell and generate revenue;

(b) the NOI Companies will be able to refinance the DIP Financing by June 30, 2020, failing which the NOI Companies will presumably be seeking further expensive super-priority financing;

(c) the NOI Companies will be able to refinance the first mortgage on the Ottawa Facility; and

(d) the NOI Companies will be able to refinance the Noteholders.[18]

26. The Noteholders seriously doubt these assumptions and have lost all confidence in the Eureka Group's management.[19] The Noteholders believe that the Plan is laden with speculative assumptions, is doomed to fail and will erode any existing value in the NOI Companies' only tangible asset, the Ottawa Facility.[20]

27. There are very few companies generating positive cash flow in the cannabis sector at this time. The Noteholders have not been provided with any business plan that would lead them to believe that the NOI Companies will be able to achieve profitability in this sector in a matter of weeks (let alone thereafter), when the vast majority of the companies in the cannabis sector have not been able to do so. The Noteholders also question the NOI Companies' ability to achieve their cash flow assumptions in

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[17] *Ibid* at paras 36, 38-39.
[18] *Ibid* at para 32.
[19] *Ibid* at para 28.
[20] *Ibid* at paras 31, 34.

light of their track record and the fact that they do not yet even have the license necessary to sell and generate revenue.

PART III: ISSUES

28. The issues to be decided on this motion are:

    (a) whether the Court should grant the Proposal Extension;

    (b) whether the DIP Financing and DIP Charge should be granted and, if granted, rank in priority to the Noteholders' Security; and

    (c) whether the Administration Charge should be granted and, if granted, rank in priority to the Noteholder's security.

PART IV: LAW & ARGUMENT

A. The Proposal Extension Should not be Granted

29. In *Cumberland Trading Inc., Re,* Farley J. held that the BIA does "not allow debtors absolute immunity and impunity from their creditors".[21] Read together, subsections 50.4(9) and 50.4(11) of the BIA codify this principle by placing the onus on the insolvent person to establish the need for an extension of time to file a proposal and providing creditors with a means of keeping "the playing field level and dry".[22]

30. Pursuant to subsection 50.4(9) of the BIA, a court may grant an extension of the thirty-day period to file a proposal only if satisfied that:

> (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.[23]

[21] *Cumberland Trading Inc*, Re, [1994] OJ No. 132 at para 5 [*Cumberland*], Book of Authorities of Dominion Capital LLC Tab 1 [BOA].
[22] *Ibid*, BOA Tab 1.
[23] *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 s 50.4(9) [BIA].

31. The requirements in subsection 50.4(9) are conjunctive and the NOI Companies bear the onus of satisfying the Court that each has been met.[24] The NOI Companies have failed to meet this onus.

The NOI Companies have not Acted and are not Acting in Good Faith and With Due Diligence

32. The plain text of subsection 50.4(9)(a) and case law make clear that this Court is entitled to evaluate the past and present conduct of the NOI Companies in determining whether they have and are acting in good faith and with due diligence.[25] The conduct of the NOI Companies to date evinces a lack of due diligence and good faith.

33. In *Com/Mit Hitech Services Inc., Re*, Farley J. held that the failure of the debtor to "heed" the direction of its major secured creditor and "accommodate the prevailing wind" demonstrated a lack of good faith and due diligence.[26] The circumstances here are similar.

34. The Noteholders – who are the largest creditors of the Eureka Group, and likely the fulcrum creditors – have actively sought to engage the NOI Companies in discussions to navigate their obvious financial issues, establish a viable business plan, and provide additional financing if such a plan came to fruition.[27] Notwithstanding this support and repeated requests for further information, the Eureka Group did not and has not:

(a) disclosed in a satisfactory manner where or how the Noteholder Financing was spent or what happened to its liquidity;

(b) provided a detailed business plan with clearly articulated assumptions;

(c) disclosed certain documents requested by the Noteholders; or

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[24] *Baldwin Valley Investors Inc, Re*, [1994] OJ No. 271 at para 5 [*Baldwin*], BOA Tab 2; *Royalton Banquet & Convention Centre Ltd, Re* (2007), 33 CBR (5th) 278 at para 14, BOA Tab 3; *Kids' Farm Inc., Re*, 2011 NBQB 240 at para 17, BOA Tab 4.

[25] *Nortec Colour Graphics Inc., Re* (2000), 18 CBR (4th) 84 at paras 7-11 [*Nortec*], BOA Tab 5; BIA, *supra* note 23 s 50.4(9)(a). See also, *Com/Mit Hitech Services Inc, Re*, [1997] OJ No. 3360 at para 8 where the Court interprets the near identical language of s. 50.4(11)(a) of the BIA [*Hitech*], BOA Tab 6.

[26] *Hitech*, *ibid*, BOA Tab 6.

[27] Affidavit, *supra* note 1 at paras 18, 24.

(d) shared any information on their Proposal Proceedings prior to service of the materials for this motion.[28]

35. Paradoxically, the NOI Companies now suggest that an objective of the Proposal Proceedings is to refinance or negotiate their indebtedness to the Noteholders – the same Noteholders they have failed to meaningfully engage with in the months leading up to the Proposal Proceedings. The NOI Companies cannot be said to have acted or be acting with due diligence in these circumstances.

36. Additionally, the NOI Companies have provided misleading support for the Proposal Proceedings and Proposal Extension, including that:

(a) the Noteholders would be supportive of the Plan; and

(b) the Noteholders were not willing to provide further financing to the NOI Companies.[29]

37. Despite having seemingly recorded every material conversation with Mr. Gross, the NOI Companies have failed to provide any credible foundation for these beliefs.[30] While this may not rise to the level of bad faith, recording conversations without Mr. Gross' knowledge or consent and providing misleading information to the Court casts doubt on whether the NOI Companies have acted and are acting in good faith.

The NOI Companies are not Likely to Make a Viable Proposal

38. The purpose of the BIA's proposal provisions is to facilitate the rehabilitation of an insolvent debtor. To this end, debtors are protected by a stay of proceedings and provided with a thirty-day period to put forward a viable plan for their reorganization.[31] In this case, the Noteholders submit that the

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[28] *Ibid* at paras 8, 24-26.
[29] *Ibid* at para 20.
[30] *Ibid* at paras 19-20.
[31] *NS United Kaiun Kaisha, Ltd v Cogent Fibre Inc*, 2015 ONSC 5139 at para 8 [*Cogent*], BOA Tab 7.

Proposal Proceedings serve no rehabilitative purpose and that the NOI Companies will be unable to put forward a viable plan.

39. Pursuant to subsection 50.4(9)(b), the Court must decline to extend the period for filing a proposal if the NOI Companies are not likely to be able to make a viable proposal if the extension is granted.

40. A court is entitled to conclude that a debtor is not likely to make a viable proposal where it has failed to provide "even a hint" of what its proposal might look like by the time the debtor seeks an extension to file it.[32] A court may also determine that a debtor is not likely to make a viable proposal where its purported viability lacks an "air of reality".[33] A viable proposal must seem "reasonable on its face to the 'reasonable creditor'".[34]

41. The expectation that there be at least a 'hint' of a viable plan justifying the stay of proceedings or extension thereof is heightened in circumstances where:

(a) there is no active business;

(b) there are few significant creditors;

(c) there are few or no assets; and

(d) there are no complex financial arrangements.[35]

42. Here, there are no business operations. There is only one tangible asset and there are no complex financial arrangements. The NOI Companies have only 5 employees, so there are few jobs to be maintained or saved. There is no business to preserve or rehabilitate for the benefit of stakeholders; the NOI Companies own a single piece of real estate that is to be used for a facility that is not yet

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[32] *Ibid* at para 14, BOA Tab 7.
[33] *Ibid* at para 19, BOA Tab 7.
[34] *Baldwin*, *supra* note 24 at para 4, BOA Tab 2.
[35] *Cogent*, *supra* note 31 at para 20, BOA Tab 7.

operational.[36] Yet, the NOI Companies have presented only the skeleton of a plan rife with unsubstantiated speculation and contingencies including that:

(a) the capital expenditures required to make the Ottawa Facility operational are accurately budgeted;

(b) the construction of the Ottawa Facility will proceed on budget and on time, with no setbacks or issues;

(c) the value of the real property will increase substantially by completing the construction of the Ottawa Facility;

(d) the untested business plan put forward by Artiva is achievable, and will not be subject to setbacks or issues;

(e) despite the financial realities facing the entire industry, Artiva, a company with no operations, no track record and no license allowing it to sell and generate revenue, will become immediately cash flow positive within weeks of completing construction of its facility;

(f) the NOI Companies' current management has the knowledge to develop a cannabis plant clone business;

(g) the DIP Financing (which matures on June 30, 2020) can be refinanced on its maturity date; and

(h) the first mortgagee on the Ottawa Facility and the Noteholders can all be refinanced thereafter.[37]

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[36] Affidavit, *supra* note 1 at para 35.
[37] *Ibid* at para 33.

43. The NOI Companies' Plan is thus hardly 'reasonable on its face to a reasonable creditor'. The failure of the NOI Companies to engage with the Noteholders in respect of the Proposal Proceedings is indicative of the Plan's lack of foundation and 'air of reality'.[38] The fact that it is supported by Artiva's first mortgagee – a creditor that is clearly well secured – is not indicative of anything.

The Noteholders will be Materially Prejudiced if the Proposal Extension is Granted

44. Under subsection 50.4(9)(c) the Court must decline to grant the NOI Companies' Proposal Extension where a creditor would be materially prejudiced by the continuation of the time period for filing.

45. In the context of the BIA proposal provisions, material prejudice is measured objectively by evaluating "the degree of prejudice suffered vis-à-vis the indebtedness and the attendant security" of each creditor.[39] It is incumbent on the NOI Companies to provide some information to establish that no creditor will be materially prejudiced by the Proposal Extension.[40] This often entails a quantitative or qualitative analysis as to the extent of such prejudice.[41]

46. In the circumstances, the analysis required to demonstrate prejudice is straightforward. The only tangible asset with realizable value to satisfy the NOI Companies' obligations to the Noteholders is the Ottawa Facility. While the precise value of the Ottawa Facility has been kept confidential by the NOI Companies, it was originally purchased for CAD$7.75 million.[42] Sprouter Corporation Inc., David Van Segbrook and Donna Van Segrbook, the proposed DIP lender (the "**DIP Lender**"), does not think the property is worth more than $10 million.[43]

[38] *Nortec*, *supra* note 25 at para 12, BOA Tab 5.
[39] *Cumberland*, *supra* note 21 at para 11, BOA Tab 1; *Hitech*, *supra* note 25 at para 7, BOA Tab 6; *Baldwin*, *supra* note 24 at para 6, BOA Tab 2.
[40] *Baldwin*, *ibid* at para 6, BOA Tab 2.
[41] *Ibid*, BOA Tab 2; *Cumberland*, *supra* note 21 at para 11, BOA Tab 1; *Hitech*, *supra* note 25 at para 7, BOA Tab 6.
[42] Poli Affidavit, *supra* note 5 at para 56.
[43] Affidavit of Seann Poli sworn February 25, 2020, at para 26.

47. If the Proposal Extension is granted, the value of the Ottawa Facility to the NOI Companies' creditors will be eroded immediately by the DIP Financing in the amount of $2.3 million, plus the Administration Charge in the amount of $500,000. The Noteholders – secured creditors of the NOI Companies – would almost immediately be subordinated to $2.8 million of additional debt, which is a remarkable amount in the context of the NOI Companies and their single non-operational asset.[44]

48. The Noteholders submit that the DIP Financing will not be value accretive and, at its near criminal rate of interest, is incredibly expensive for a loan that is premised on receipt of a first secured interest on real estate.[45]

49. Given the NOI Companies' failure to put forward a credible business plan, there is no evidence demonstrating an offset to the material prejudice caused by the Proposal Extension and the intimately linked DIP Financing and Administration Charge. The Noteholders believe that the Plan is doomed to fail, and the consequences of the Proposal Extension (combined with the DIP Financing and the Administration Charge) would just be to erode the recovery of the Noteholders by almost $3 million.

50. Based on the foregoing, the Proposal Proceedings will materially prejudice the Noteholders and the NOI Companies' other subordinate creditors.

B. The DIP Financing Should Not be Granted and the DIP Charge Should not Prime the Noteholders' Security

51. Subsection 50.6(5) of the BIA provides a non-exhaustive list of factors to be considered by courts when determining whether to make an order for debtor in possession ("**DIP**") financing under subsection 50.6(1). These factors include:

> (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;

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[44] Affidavit, *supra* note 1 at para 39.
[45] *Ibid* at para 37.

(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.[46]

52. In the circumstances, the factors enumerated in subsection 50.6(5) of the BIA militate toward refusing to grant the DIP Financing and corresponding DIP Charge. If the Court exercises its discretion to grant the DIP Financing, the DIP Charge should not prime the Noteholders' Security.

The Duration of the NOI Proceedings are Unknown

53. The NOI Companies are seeking a forty-five day extension of time for filing a proposal but, have not indicated when a proposal will be filed.

54. Unlike the circumstances in nearly all cases where DIP financing has been granted under subsection 50.6 of the BIA, the proposed DIP Financing is not required for the NOI Companies' continued operations during the NOI Proceedings.[47] Rather, three of the four NOI Companies have no operating activity – although they are still proposed beneficiaries of the DIP Financing for the purpose of paying professional fees on behalf of companies with no assets – and the remaining NOI Company only requires the DIP Financing to begin production and "make it operational".[48]

The NOI Companies Have no Business to Continue to Manage

55. On the NOI Companies' own record, there is no business actually in need of managing. In any event, given the Past Management's mass departure, the NOI Companies are to be managed by Mr. Poli. As set out in greater detail immediately below, the conduct of the Past Management, including Mr. Poli, raises concerns regarding the NOI Companies' present management.

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[46] BIA, *supra* note 23 s 50.6(5).

[47] *OVG Inc, Re*, 2013 ONSC 1794 at para 25 [*OVG*], BOA Tab 8; *Mustang GP Ltd., Re*, 2015 ONSC 6562 at para 28 [*Mustang*], BOA Tab 9; *P.J. Wallbank Manufacturing Co, Re*, 2011 ONSC 7641 at para 13 [*Wallbank*], BOA Tab 10. *Colossus Minerals Inc, Re*, 2014 ONSC 514 is an outlier in this regard [*Colossus*], BOA Tab 11. However, in *Colossus*, the DIP was required given that the debtor was facing a liquidity crisis and needed to respond to a "serious water control issue" in order to preserve its mining interest and thereby maximize return for stakeholders in a sale and investor solicitation process. The DIP was subordinate to two of the debtor's material secured creditors.

[48] First Report of the Proposal Trustee Deloitte Restructuring Inc. at para 33 [First Report].

The NOI Companies' Management Does not Have the Support of Major Creditors

56. The Noteholders are a major secured creditor of the NOI Companies and no longer have confidence in the present management.

57. A history of suspected self-dealing, bad faith, and a lack of transparency caused the Noteholders to lose all confidence in the Eureka Group's Past Management.[49] Prior to the Proposal Proceedings, all of the Eureka Group's Past Management resigned at once and without warning raising further concerns as to management issues and credibility.

58. The lack of a Plan and the Eureka Group's continued lack of transparency have also left the Noteholders with no confidence in the present management of the NOI Companies, including Mr. Poli.[50]

The Value of the NOI Companies' Property

59. None of the NOI Companies have revenue or operations. At no more than $10 million, the value in the Ottawa Facility is not anticipated to be sufficient to repay the DIP Financing sought and the outstanding secured claims against the NOI Companies.

Creditors will be Materially Prejudiced by the DIP Financing

60. If granted, the DIP Financing will significantly and immediately reduce the amount available to creditors. Moreover, if the DIP Charge is given super-priority, it will materially erode the Noteholders' Security.

61. While some impact is to be expected from DIP financing, it should not be incommensurate with the value of the NOI Companies' property or their existing debt obligations.

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[49] Affidavit, *supra* note 1 at para 42.
[50] *Ibid* at paras 17, 28, 42.

62. This case is not akin to *OVG Inc., Re* where the DIP sought was only $100,000 relative to secured and unsecured claims of $3,200,000 and $6,800,000 respectively.[51] Nor is this case like *P.J. Wallbank Manufacturing Co., Re*, where a DIP in the amount of $500,000 was approved given that it was provided by a major creditor and purchaser of the debtor and was negotiated to minimize prejudice to the debtor's two significant secured creditors.[52] And, this case is not like *Colossus Minerals Inc., Re*, where a DIP of $4,000,000 was approved to ensure that the debtor's main asset, a gold and platinum mine, was not flooded prior to its sale.[53]

63. Here, none of the NOI Companies are operating companies. There is one asset that was purchased more than two years ago, remains unfinished and has no operations. In their "last gasp", the NOI Companies propose to rely on the DIP Financing to complete the project without any assurances that it could operate as a going concern once finished, and certainly not in the time frame proposed.[54] To do so, the NOI Companies have had to resort to financing using real estate as collateral at an effective interest rate of 58% – this alone is indicative of the NOI Companies' bleak prospects for success.[55]

64. The DIP Financing is not being used to rehabilitate an already viable enterprise.[56] Rather, the DIP Financing simply provides the NOI Companies with another opportunity to complete their project, without the parties bearing the greatest risks having any control over the decisions made.[57]

65. In the circumstances, the prejudice to the NOI Companies' creditors created by priming their security is not outweighed by the value that might be brought to the enterprise as a whole if the DIP

[51] *OVG*, *supra* note 47 at paras 7-8, 35, BOA Tab 8.
[52] *Wallbank*, *supra* note 47 at paras 4, 9, 24, BOA Tab 10. Likewise, this case is also not analogous to *Mustang*, *supra* note 47 where the proposed DIP of $1,000,000 was to be provided by the stalking horse bidder and absent the DIP, the debtor's operations would cease, BOA Tab 9.
[53] *Colossus*, *supra* note 47 at paras 2-10, BOA Tab 11.
[54] See *Cumberland*, *supra* note 21 at para 5 where Farley J. described the "lamentable tendency" of debtors to deal with the need for a reorganization at the last moment as "'last gasp' desperation moves", BOA Tab 1.
[55] *1512759 Ontario Ltd, Re* (2002), OJ No. 4457 at para 2, BOA Tab 12.
[56] *1252206 Alberta Ltd v Bank of Montreal*, 2009 ABQB 355 at para 27, BOA Tab 13.
[57] *Ibid*, BOA Tab 13.

Financing were given super priority. Thus, the DIP Financing and corresponding DIP Charge should not be granted.

66. In the event the Court chooses to exercise its discretion to grant the DIP Financing and the DIP Charge, it should not do so at the Noteholders' peril, who will be exposed, in effect, to a "lending regime" they were not prepared to entertain.[58]

67. If the DIP Lender has confidence in the NOI Companies' Plan and the value that can be created by it, it ought to be prepared to provide financing on a subordinated basis.

The Proposal Trustee's Report Should be Given Little Weight

68. Although the First Report of the Proposal Trustee dated February 19, 2020 (the "**First Report**") supports the approval of the DIP Financing, it does not contain any analysis to support that conclusion.

69. There is no suggestion that the Proposal Trustee has critically reviewed the Plan or the value that will allegedly be created by it. A critical analysis would have included an assessment of the NOI Companies' comments that they will have sufficient liquidity for the period up to April 29, 2020, and thereafter be able to generate revenue on a go-forward basis, including issues regarding the licensing the NOI Companies require and related timelines, obstacles and risks.[59]

70. The Proposal Trustee states that it "does not believe that creditors will be prejudiced from approval of the Interim Financing".[60] That comment implies that by granting the DIP Financing, value greater than at least $2.8 million will be generated in or around April 29, 2020, when the Proposal Extension expires. The First Report does not explain how the Proposal Trustee arrived at that conclusion. If the NOI Companies are not cash flow positive by early May 2020, further funding will

[58] *Ibid*, BOA Tab 13.
[59] First Report, *supra* note 48 at paras 32-33.
[60] *Ibid* at para 26.

be required at that time. If not available by way of a DIP loan, the NOI Companies will likely be liquidated and the existing creditors will be primed by at least $2.8 million of additional debt.

71. The First Report does not even provide the Court with the effective rate of interest for the DIP Financing after taking into account the commitment fee, which the Noteholders have calculated to be 58%. Nor does it compare the terms of the DIP Financing to similar DIP loans secured by real property. Rather, it simply attaches a list of DIP loans and concludes – without analysis – that the DIP Financing is reasonable.

72. For the foregoing reasons, the Noteholders submit that the First Report should be given little weight.

C. The Administration Charge Should not be Granted and Should Not Prime the Noteholders' Security

73. Pursuant to subsection 64.2(1) of the BIA, the Court may make an order declaring that all or part of the NOI Companies' Property is subject to a security or charge to cover the fees and expenses of the Proposal Trustee and legal experts engaged by the NOI Companies and the Proposal Trustee.[61] Such security or charge may, but is not required to, be given super-priority status.[62]

74. While the BIA does not codify any factors to guide the exercise of discretion under section 64.2, the approach of courts interpreting the analogous provision under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 section 11.52, is instructive.[63]

75. In *Canwest Publishing Inc., Re,* Pepall J. suggested that the following non-exhaustive list of factors may be used to assess whether the quantum of an administration charge is appropriate and whether any corresponding charges should be granted:

(a) the size and complexity of the businesses being restructured;
(b) the proposed role of the beneficiaries of the charge;

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[61] BIA, *supra* note 24 s 64.2(1).
[62] *Ibid* s 64.2(2).
[63] *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 s 11.52.

(c) whether there is an unwarranted duplication of roles;
(d) whether the quantum of the proposed charge appears to be fair and reasonable;
(e) the position of the secured creditors likely to be affected by the charge; and
(f) the position of the Monitor.[64]

76. Taken together, these factors weigh against granting the Administration Charge given that:

(a) The NOI Companies' businesses are neither large nor complex – simply, there are no operations.

(b) While there is no doubt that professional advisors are integral to a successful restructuring, there is minimal rehabilitating to be done here. The only 'restructuring' effort the NOI Companies are undertaking is the completion of the Ottawa Facility with a view to creating a revenue producing enterprise.

(c) At $500,000, the quantum of the Administration Charge is disproportionate to the size and complexity of the NOI Companies' value. In cases involving more complex BIA proposals, the administration charges granted have been less[65] and often, did not prime senior secured parties.[66]

(d) The secured creditors oppose the granting of the Administration Charge, especially if it primes their security. The Administration Charge, like the DIP Charge, will erode the Noteholders' Security without providing a clear benefit to the NOI Companies' stakeholders. If the professionals – including the Proposal Trustee who has reviewed the NOI Companies' cash flows – are confident in the Plan, they should be prepared to see the Administration Charge rank subordinate to the Noteholders' Security.

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[64] *Canwest Publishing Inc.,* Re, 2010 ONSC 222 at para 54, BOA Tab 14.

[65] See *Mustang, supra* note 47 at para 1 where the administration charge was not to exceed $150,000 in favour of the "debtors' legal counsel, the proposal trustee and its legal counsel"; *Colossus, supra* note 47 at para 11 where the administration charge was "in the maximum amount of $300,000 to secure the fees and disbursements of the Proposal Trustee, the counsel to the Proposal Trustee, and the counsel to the applicant in respect of these BIA proceedings"; *Electro Sonic Inc, Re*, 2014 ONSC 942 at para 7 where the administration charge was in the amount of $250,000 [*Electro*], BOA Tab 15.

[66] *Electro*, *ibid*, BOA Tab 15; *Colossus*, *ibid* at para 15, BOA Tab 11.

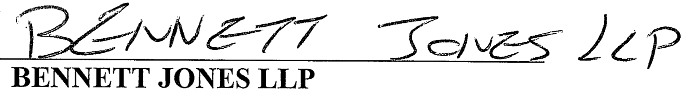
77. In the circumstances, the Administration Charge should not be granted. If granted, the Administration Charge should not be afforded priority over the Noteholders' Security.

PART V: RELIEF REQUESTED

78. Dominion submits that the NOI Companies have failed to meet their onus under subsection 50.4(9) of the BIA and thus, this Court should not grant the Proposal Extension. Further, Dominion submits that this is an appropriate case for the Court to exercise its discretion to decline granting the DIP Financing, DIP Charge, and Administration Charge. In the alternative, if the Court does exercise its discretion to grant the DIP Financing, the DIP Charge and/or the Administration Charge, Dominion submits that they should not prime the Noteholders' Security.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 2, 2020



BENNETT JONES LLP

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1.	*Baldwin Valley Investors Inc, Re*, [1994] OJ No. 271
2.	*Canwest Publishing Inc., Re,* 2010 ONSC 222
3.	*Colossus Minerals Inc, Re,* 2014 ONSC 514
4.	*Com/Mit Hitech Services Inc, Re*, [1997] OJ No. 3360
5.	*Cumberland Trading Inc, Re,* [1994] OJ No. 132
6.	*Electro Sonic Inc, Re,* 2014 ONSC 942
7.	*Kids' Farm Inc., Re,* 2011 NBQB 240
8.	*Mustang GP Ltd., Re,* 2015 ONSC 6562
9.	*Nortec Colour Graphics Inc., Re* (2000), 18 CBR (4th) 84
10.	*NS United Kaiun Kaisha, Ltd v Cogent Fibre Inc*, 2015 ONSC 5139
11.	*OVG Inc, Re*, 2013 ONSC 1794
12.	*P.J. Wallbank Manufacturing Co, Re,* 2011 ONSC 7641
13.	*Royalton Banquet & Convention Centre Ltd, Re* (2007), 33 CBR (5th) 278
14.	*1252206 Alberta Ltd v Bank of Montreal*, 2009 ABQB 355
15.	*1512759 Ontario Ltd, Re* (2002), OJ No. 4457

SCHEDULE B – STATUTES AND REGULATIONS

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3**

Section 50.4

Notice of intention
(1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

> **(a)** the insolvent person's intention to make a proposal,
>
> **(b)** the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
>
> **(c)** the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Certain things to be filed
(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

> **(a)** a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;
>
> **(b)** a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and
>
> **(c)** a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Creditors may obtain statement
(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception
(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

> **(a)** such release would unduly prejudice the insolvent person; and
>
> **(b)** non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected
(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors
(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report
(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

Where assignment deemed to have been made
(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting

the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time
(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal
(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

Section 50.6

Order — interim financing
(1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the

debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Individuals
(2) In the case of an individual,

> **(a)** they may not make an application under subsection (1) unless they are carrying on a business; and
>
> **(b)** only property acquired for or used in relation to the business may be subject to a security or charge.

Priority
(3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

Priority — previous orders
(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

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.

Section 64.2

Court may order security or charge to cover certain costs
(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Individual
(3) In the case of an individual,

(a) the court may not make the order unless the individual is carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36**

Section 11.52

Court may order security or charge to cover certain costs
(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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

Estate Number: 33-2618512/Court File No.: 33-2618512

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF LIVEWELL FOODS CANADA INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number: 33-2618510/Court File No.: 33-2618510

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

Estate Number: 33-2618513/Court File No.: 33-2618513

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF VITALITY CBD NATURAL HEALTH PRODUCTS INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

Proceeding commenced at Ottawa

FACTUM OF DOMINION CAPITAL LLC
(Motion Returnable March 4, 2020)

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