

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**

BRIEF OF LAW AND ARGUMENT

Date: 18 February 2020

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SERVICE LIST

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AND TO:	<p>DELOITTE RESTRUCTURING INC. 8 Adelaide Street West, Suite 200, Toronto, ON M5H 0A9</p> <p>Attention: Hartley Bricks Tel: (416) 775-7326 Fax: (416) 601-6690 Email: hbricks@deloitte.ca</p>
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AND TO:	PALADIN TECHNOLOGIES INC. 29 Antares Dr #201 Nepean, ON K2E 7V2
AND TO:	OLYMPIA TRUST COMPANY PO Box 2581, STN Central Calgary, AB T2P 1C8
AND TO:	DOMINION CAPITAL LLC 256 West 38 th St, 15 th Floor New York, NY 10018
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AND TO:	ATTORNEY GENERAL OF CANADA Department of Justice Canada Ontario Regional Office – Tax Law Section The Exchange Tower 130 King Street West, Suite 3400 Box 36 Toronto, ON M5X 1K6 Attention: Diane Winters Tel: (416) 973-3172 Fax: (416) 973-0809 Email: diane.winters@justice.gc.ca

BRIEF OF LAW AND ARGUMENT

The Motion

1. This is a Motion by 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 “**Debtors**”) seeking an Order
 - (a) procedurally consolidating the Proposal Proceedings commenced by each of the Debtors under the Proposal Proceeding commenced by Eureka 93;
 - (b) granting charges over the Debtors’ assets, property and undertaking (the “**Property**”) to secure the fees and expenses of Deloitte Restructuring Inc. (“**Deloitte**”) and Gowling WLG (Canada) LLP (“**Gowling**”);
 - (c) approving \$2.3 million of interim financing (the “**Interim Financing**”) to be provided to the Debtors by Sprouter Corporation Inc., David Van Segbrook and Donna Van Segbrook (the “**Interim Lender**”) and granting to the Interim Lenders a charge over the Property;
 - (d) extending the date by which the Debtors are required to file proposals to 29 April 2020; and, if necessary
 - (e) sealing certain confidential documents contained in the volume titled Confidential Documents: Poli Affidavit.
2. The form of the Order being sought parallels the form of the Model or Template Order used in proceedings under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”).

I. Service of the Motion Record

3. The Motion Record has been provided to all of the secured creditor of Eureka 93, Livewell, Artivia and Vitality.
4. The Motion has not been served on any of the Debtors’ unsecured creditors.

II. Procedural/Administrative Consolidation

5. Proceedings under the BIA operate subject to the general principle that the litigation process should secure the just, most expeditious and least expensive determination of every proceeding on its merits. [*Bankruptcy and Insolvency General Rules, s 3; Rules of Civil Procedure, Rule 1.04(1)*]. One practical application of that general principle occurs when the Bankruptcy Court joins together two closely-related bankruptcy proceedings so that they can proceed and be managed together. Procedural or administrative consolidation does not involve the substantive merger or consolidation of the bankruptcy estates, but merely their procedural treatment together by the Bankruptcy Court. [*Electro Sonic Inc. (Re)*, 2014 ONSC 942 (CanLII), para 4]
6. Consolidating proceedings under Part III of the BIA also avoids a multiplicity of proceedings, and the costs associated with serving and filing with the Bankruptcy Court separate sets of (largely identical) materials at each juncture in the proceedings. [*Mustang GP Ltd. (Re)*, 2015 ONSC 6562 (CanLII), para 25]
7. The Debtors' businesses are highly integrated. Each of the Debtors is a direct or in-direct subsidiary of Eureka 93 and the Debtors share a single management team. The Debtors also share a number of secured creditors.
8. The cash flow projections filed by the Debtors indicate that, of the four Debtors, only Artiva is expected to have revenue—the proceeds from the Interim Financing—and incur operating expenses of any materials amount.
9. Consolidating the Proposal Proceedings will avoid a multiplicity of proceedings, and the costs associated with serving and filing with the Bankruptcy Court four separate sets of (largely identical) materials at each juncture in the Proposal Proceedings.
10. The Debtors' businesses are highly integrated. Each of the Debtors is a direct or in-direct subsidiary of Eureka 93 and the Debtors share a single management team. The cash flow projections filed by the Debtors indicate that, of the four Debtors, only Artiva is expected to have revenue—the proceeds from the Interim Financing—and incur operating expenses of any materials amount.

11. Orders similar to the one being requested by the Debtors were granted by the Bankruptcy Court in *Electro Sonic Inc. (Re)*, 2014 ONSC 942 (CanLII) and *Mustang GP Ltd. (Re)*, 2015 ONSC 6562 (CanLII)

III. Administrative Charge

12. The involvement of professional advisors is critical to a successful restructuring.
13. In *Canwest Publishing Inc., (Re)*, 2010 ONSC 222 (CanLII) the Court identified six non-exhaustive factors that the Bankruptcy Court may consider when determining whether to grant an administration charge. These factors include:
 - (a) the size and complexity of business being restructured;
 - (b) the proposed role of the beneficiaries of the charge;
 - (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 proposal trustee.

(a) Size and complexity of the Debtors' Business

14. In general terms, the process under the BIA is reasonably complex and the assistance of professional advisors is self-evidently necessary to navigate to completion. [*Mustang GP Ltd. (Re)*, 2015 ONSC 6562 (CanLII), para 33] In this particular case, the Debtors' business is not excessive large, but the structure of the business is complex. The complexity of the business was such that the prior management of the Eureka 93 Group was prepare required financial disclosure, which results in the shares of Eureka 93 being cease traded in the Fall of 2019.
15. The Debtors also operate in a highly regulated environment.

16. The Debtors' reorganization will involve a compromise or arrangement of unsecured creditor claims as well as a corporate arrangement to simplify the Debtors' corporate structure. There will be the need to engage the corporate as well as the securities legislation to effect the intended reorganization of the Debtors' business.

(b) Roles of Deloitte and Gowling

17. Deloitte is acting a proposal trustee and Gowling is acting as counsel to the Debtors. Deloitte will fulfill its statutory role under the BIA. Gowling will be providing legal advice to the Debtors.

(c) No Duplication of Roles

18. Gowling is the only law firm retained by the Debtors and will provide the Debtors will insolvency, securities corporate and regulatory advice. There is no duplication between the role of Gowling as legal counsel to the Debtors and the role of Deloitte as proposal trustee. While Deloitte has a statutory role to play in assisting the Debtors to negotiate with creditors, Deloitte is not able to provide the Debtors with legal advice or to assist the Debtors to prepare legal documents and agreements related to the Proposal proceedings.

(d) Quantum of the Administrative Charge Appears Fair and Reasonable

19. Given the work involved, the proposed charge, which will cover both Deloitte and Gowling, the proposed Administrative Charge is reasonable. Aside from the Interim Financing, the Debtors have no money or financing available to pay Gowling or Deloitte. Gowling has received no retainer from the Debtors. Deloitte has received a retained of only \$20,000 to cover the cost of administering the bankruptcies that will result if the Proposal proceedings are not successful.

(e) Position of the Secured Creditors

20. The Interim Lender supports the proposed Administrative Charge. Whether the Debtors' other secured creditors take any position with respect to the Administrative Charge is not known.

(f) Position of the Proposal Trustee.

21. Deloitte supports the granting of the Administrative Charge.

IV. Interim Financing

22. The provisions of the BIA with respect to interim financing parallel those of the CCAA and provide that in deciding whether to make an order approving interim financing and granting a charge to secure such financing, the Bankruptcy Court is to consider, among other things,

- (a) the period during which the Debtors are expected to be subject to proceedings under the BIA;
- (b) how the Debtors' business and financial affairs are to be managed during the proceedings;
- (c) whether the Debtors' management has the confidence of major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal(s) being made in respect of the Debtors';
- (e) the nature and value of the Debtors' property;
- (f) whether any creditor would be materially prejudiced as a result of the charge granted to secure the Interim Financing; and
- (g) the Deloitte's Report on the Debtors' cash flow projections.

(a) Period the Debtor to Proceedings

23. The Debtors commenced their Proposal Proceedings on 14 February 2020. The purpose of the Interim Financing is to fund the operation of the Debtors' business and the completion of the Ottawa facility so that Artiva can begin to generate revenue to fund a proposal. The Debtors are projecting that the Ottawa Facility will be completed by March of 2020 and that Artiva will begin to generate cash flow by April or May of 2020.

(b) Management of the Debtors

24. On or about September 2019, the Debtors' directors resigned *en masse* and the current directors were appointed to manage the Debtors' business and affairs. The current directors have overseen the Eureka 93 Group during a very difficult period for the companies and have developed a plan for the reorganization of the Debtors for the benefit of the Debtors' stakeholders.
25. The BIA provides for Deloitte to monitor the Debtors' cash flow and financial affairs, and to report any materials adverse change(s). In addition, the Commitment Letter provides for the Debtors to operate within an established cash flow and capital expenditure budget, and to make regular reports to the Interim Lender.

(c) Management has the Confidence of Major Creditors

26. In the over four months since the Eureka 93 Group's previous management resigned *en masse* leaving the company with no money to pay creditors or carry on business, no secured creditor has taken steps to enforce its security against the Debtors' property, and in particular the Ottawa Facility, as the current management worked to develop a plan to reorganize the Debtors for the benefit of the Debtors' stakeholders. Current management has co-operated with, or not opposed, secured creditors wishing to exercise their rights as against members of the Eureka 93 Group that are not to be part of the go-forward business.
27. The Interim Lender has expressed confidence in the Debtors' current managements by agreeing to provide the interim financing to the Debtors. [See *Colossus Minerals Inc. (Re)*, 2014 ONSC 514 (CanLII), para 5]

(d) Prospects of Viable Proposals

28. In the absence of the Interim Financing, there is no prospect that the Debtors' will be able to make a proposal to their creditors. [See *P.J. Wallbank Manufacturing Co. Limited (Re)*, 2011 ONSC 7641 (CanLII), paras 17 and 18]

29. The Debtors' cash flow projections demonstrate that the Interim Financing is sufficient to fund the Debtors' cash flow requirements. [See *Colossus Minerals Inc. (Re)*, 2014 ONSC 514 (CanLII), para 4]

(e) Nature and Value of the Debtors' Property

30. The Debtors property consists of the Ottawa Facility and the Health Canada License. The Health Canada License is likely not realizable in the sense that it can be sold or assigned by the Debtors or a secured creditor.

31. There is sufficient value in the Ottawa Facility that the secured creditors with security over the Ottawa Facility are not prejudiced by the Interim Financing.

(f) Whether any Creditor would be Materially Prejudiced

32. While interim financing and a related charge may affect creditors to a degree, any such prejudice is outweighed by the benefit to all stakeholders in a sale of the business as a going concern. The potential for creditor recovery is enhanced rather than diminished by the completion of the Ottawa Facility. [See *Mustang GP Ltd. (Re)*, 2015 ONSC 6562 (CanLII), para 29 and *P.J. Wallbank Manufacturing Co. Limited (Re)*, 2011 ONSC 7641 (CanLII), para 24]

(g) Trustee's Report on Cash Flow Projections

33. Deloitte has reviewed the Debtors' cash flow projections and provided the opinion required by the BIA. In addition, Deloitte has filed a Report indicating that it supports the approval of the Interim Financing and the related charge over the Debtors' property.

V. Extension of the Time to Make Proposals

34. Pursuant to s. 50.4(9) of the BIA, the Bankruptcy Court may extend the time by which the Debtors are required to file proposals in 45-day blocks where the Bankruptcy Court is satisfied that:

(a) the Debtors have acted, and are acting, in good faith and with due diligence;

- (b) the Debtors 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.
35. Deloitte has prepared a Report and has expressed the view that the Debtors' have satisfied the test for an extension of the time by which they must file proposals.
36. The Bankruptcy Court has jurisdiction to make an Order in advance of the expiry of the period the Debtors are required to file proposals extending the date by which the Debtors are required to make proposals to 45 days from the expiry of the initial period by which the Debtors are required to file proposals. [See *Colossus Minerals Inc. (Re)*, 2014 ONSC 514 (CanLII), para 37-43] In *Mustang GP Ltd. (Re)*, 2015 ONSC 6562 (CanLII), a proceeding under the BIA, the debtor filed a notice of intention to make a proposal on 29 September 2015 and applied for an extension of the time to file a proposal, which extension was granted, on 19 October 2015.
37. In *Lydian International Limited (Re)*, 2019 ONSC 7473 (CanLII), the Court found that it was not appropriate to extend the stay under the CCAA on a "first day" attendance. However, that case involved a Motion to extend the stay under the CCAA on the same day an Order imposing the initial stay was made in the face of newly-enacted provisions of the CCAA that restricted the jurisdiction of the Court to order a stay of longer than 10 days on an initial attendance under the Act. In this case, the Notices of Intention to Make a Proposal in respect of the Debtors were filed on 14 February 2020. The request for an extension at this time is made as a matter of procedural expedience as opposed in the face of legislative provisions that is intended to restrict the Court's jurisdiction.
38. In the *Lydian International Limited* proceeding the Initial Order was made on 24 December 2019 and the stay was extended on a Motion that was heard on 2 January 2020. [See *Lydian International Limited (Re)*, 2020 ONSC 34 (CanLII)]

VI. Confidential Documents

39. The Ottawa Facility Valuation and the Vitality Offer contain commercially sensitive information and keeping them both confidential will protect a commercial interest and the salutary effect of keeping them confidential outweighs any deleterious effects. The making of a sealing order in respect of materials filed with a court may be granted where (a) the order was necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonably alternative measures would not prevent the risk and (b) the salutary effects of the order outweighed its deleterious effects. As applied in the insolvency context that principle has led the Bankruptcy Court to adopt a standard practice of sealing evidence that contain appraisals or other evidence with respect to the value of property that is being (or may be) realized in an insolvency proceeding. The purpose of granting such a sealing order is to protect the integrity and fairness of the sales process by ensuring that competitors or potential bidders do not obtain an unfair advantage by obtaining sensitive commercial information about the asset up for sale while others have to rely on their own resources to place a value on the asset when preparing their bids. [See *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, 2014 ONSC 1173 (CanLII), paras 34 and 35]
40. Outside of a proposal process, the information in the Ottawa Facility Valuation and the Vitality Offer would be kept confidential by the Debtors and there is no legitimate reason a person should have access to this information in these proceedings. The only purpose for which any person would be interested in the Ottawa Facility Valuation and the Vitality Offer would be to inform an offer to purchase the Ottawa Facility or Vitality should the Proposal Proceedings fail and the Vitality become bankrupt.
41. While it was obtained by Artiva for the purposes of financing, the Ottawa Facility Valuation contains a confidentiality clause and a reliance clause that restricts the ability of third parties to rely on the Ottawa Facility Valuation.
42. Pursuant to Rule 4.06(3) of the *Rules of Civil Procedure* provides on the disposition of the matter in respect of which the Poli Affidavit was filed, the that the Confidential

Documents volume shall be returned to Gowling or the Debtors unless the Court orders otherwise

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of February 2020.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom, positioned above a horizontal line.

E. Patrick Shea
GOWLING WLG (CANADA) LLP
Lawyers for the Debtors

SCHEDULE A

Electro Sonic Inc. (Re), 2014 ONSC 942 (CanLII).

Mustang GP Ltd. (Re), 2015 ONSC 6562 (CanLII).

Canwest Publishing Inc. (Re), 2010 ONSC 222 (CanLII)

Colossus Minerals Inc. (Re), 2014 ONSC 514 (CanLII).

P.J. Wallbank Manufacturing Co. Limited (Re), 2011 ONSC 7641 (CanLII).

Lydian International Limited (Re), 2019 ONSC 7473 (CanLII).

Lydian International Limited (Re), 2020 ONSC 34 (CanLII).

GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc., 2014 ONSC 1173 (CanLII).

SCHEDULE B

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

50.4 (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),...

(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.

50.6 (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.

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

(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.

- (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.

64.2 (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.

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

Bankruptcy and Insolvency General Rules, CRC, c 368

3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

Courts of Justice Act, RSO 1990, c C.43

136. (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Rules of Civil Procedure, RRO 1990, Reg 194

4.06. (3) An exhibit that is referred to in an affidavit shall be marked as such by the person taking the affidavit and where the exhibit,

- (a) is referred to as being attached to the affidavit, it shall be attached to and filed with the affidavit;
- (b) is referred to as being produced and shown to the deponent, it shall not be attached to the affidavit or filed with it, but shall be left with the registrar for the use of the court, and on the disposition of the matter in respect of which the affidavit was filed, the exhibit shall be returned to the lawyer or party who filed the affidavit, unless the court orders otherwise; and
- (c) is a document, a copy shall be served with the affidavit, unless it is impractical to do so.

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