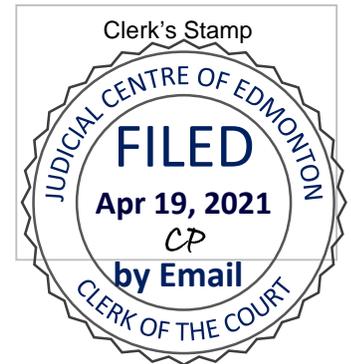


COURT FILE NUMBER 2003 – 07757
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON
PLAINTIFFS SYNERGY PROJECTS (DESTINY) LTD. and SYNERGY PROJECTS LTD.
DEFENDANTS DESTINY BIOSCIENCE GLOBAL CORP., DESTINY BIOTECH INC. and AAA SELF STORAGE DEPOT INC.



Inv: 076955
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COURT FILE NUMBER 2003 – 07758
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON
PLAINTIFFS SYNERGY PROJECTS (DESTINY) LTD. and SYNERGY PROJECTS LTD.
DEFENDANTS DESTINY BIOSCIENCE GLOBAL CORP., DESTINY BIOTECH INC. and 718721 ALBERTA LTD.



DOCUMENT APPLICATION BY RECEIVER FOR APPROVAL OF INTERIM DISTRIBUTIONS AND OTHER RELIEF

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
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File No. 205776

NOTICE TO RESPONDENTS

This application is made against you. You are a respondent. You have the right to state your side of this matter before the judge.

To do so, you must be in Court when the application is heard as shown below:

Date: April 29, 2021

Time: 10:00 AM

Where: **WEBEX using the following:**

<https://albertacourts.webex.com/meet/virtual.courtroom86>

Before Whom: The Honourable Mr. Justice Mah sitting on the Commercial List

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. An Order or Orders:
 - a) deeming service of notice of this Application and all materials in support to be good and sufficient and abridging the time for service to the time actually given;
 - b) approving the activities of the Receiver and statement of receipts and disbursements as described in the Third Report of the Receiver (the "Third Report");
 - c) approving the interim distributions recommended and set out in paragraph 107 and Appendix K of the Third Report;
 - d) declaring that Rolling Mix Concrete (Edmonton) Ltd. ("Rolling Mix") has priority over Premier Tech Technologies Ltd. ("Premier") in respect of certain equipment that was subject to a conditional sale between Premier and Destiny Bioscience Global Corp. pursuant to section 35(1) of the *Personal Property Security Act*;
 - e) providing advice and direction in respect of the priority to certain funds representing the sale proceeds of specific equipment that were subject to two leases between Destiny Bioscience Global Corp. and Meridian OneCap Credit Corp. ("Meridian");
 - f) approving the fees and disbursements of the Receiver to February 28, 2021;
 - g) approving the fees and disbursements of the Receiver's legal counsel to March 31, 2021; and
 - h) for such further and other relief as this Honourable Court deems just and appropriate in the circumstances.

Grounds for making this application:

2. Pursuant to an Order of the Court of Queen's Bench of Alberta granted May 22, 2020 (the "Receivership Order"), The Bowra Group Inc. was appointed as trustee under the *Builders' Lien Act*, RSA 2000 c. B-7 as amended (the "*BLA*") and receiver manager (the "Receiver") of all current and future assets, undertakings and properties of every nature and kind whatsoever of Destiny Bioscience Global Corp. ("Destiny Bioscience") and Destiny Biotech Inc. ("Biotech") (collectively "Destiny").
3. The Receiver has undertaken the steps and work set out in its Third Report.

4. The Receiver's activities to date are reasonable and appropriate.
5. The fees and disbursements of the Receiver and those of its legal counsel are fair and reasonable in the circumstances.

Proposed Interim Distributions to Certain Creditors

6. Caza Financial Inc. ("Caza") purchased the assets of Destiny for total proceeds of \$15 million.
7. Pursuant to the Asset Purchase Agreement, the purchase price is allocated as follows;
 - a) \$6 million - Nisku Organics Facility;
 - b) \$8 million - Nisku Genetics Lab;
 - c) \$500,000.00 - Leduc Facility; and
 - d) \$500,000.00 - The remaining chattels and equipment.
8. For the purposes of the distributions the Receiver is of the opinion the amounts allocated to the Nisku Organics Facility and the Nisku Genetics Lab and fixtures ought to form one pool of funds arising from the same proceeds. Such assets were located on the same parcel of land and were subject to the same lease with the landlord.
9. The Receiver proposes the following pools of sales proceeds from which distributions will be made;
 - a) \$14 million – the "Nisku Pool";
 - b) \$500,000.00 – the "Leduc Pool";
 - c) \$500,000.00 – the "Equipment Pool"; and(collectively the "Proceeds Pools").
10. Destiny Bioscience and Biotech have different creditors, and accordingly have different priority schemes.
11. The Receiver is of the opinion that;
 - a) the Nisku Pool and Equipment Pool are the property of Destiny Bioscience and available for its creditors; and
 - b) the Leduc Pool is the property of Biotech and available for its creditors.
12. Further, the Receiver is of the opinion that the following additional receipts collected be allocated as follows:
 - a) GST refunds – allocated on a *pro rata* basis to all the Proceeds Pools;
 - b) Rental Security deposits – allocated to the specific pool based on the lease it relates to;
 - c) Rental income from the Organics Facility – allocated on *pro rata* basis to the Nisku Pool and Equipment Pool as the rent collected was for use of the organics facility and equipment located on Nisku lands;
 - d) Miscellaneous (CRA wage subsidy) – allocated to the Nisku Pool as employees were employed by Destiny Bioscience; and

- e) in Bank – Equipment Pool as a result of the Wage Earner Protection Program (“WEPP”) claim.
13. The Receiver’s Borrowings and its professional fees (and those of its legal counsel) (collectively the “Receiver’s Charges”) ought to be allocated to multiple Proceeds Pools. The Receiver is of the opinion that the allocation of the Receiver’s Charges be taken from the Proceeds Pools on a *pro rata* basis, which would in effect result in such amounts being paid as follows:
- a) 93.4% from the Nisku Pool (the “Receiver’s Nisku Pool Payment”);
 - b) 3.33% from the Leduc Pool (the “Receiver’s Leduc Pool Payment”); and
 - c) 3.33% from the Equipment Pool (the “Receiver’s Equipment Pool Payment”).
14. Canada Revenue Agency (“CRA”) has filed an outstanding deemed trust property claim for \$303,364.00 in respect of Destiny Bioscience (the “Deemed Trust Claim”). There is no similar property claim for Biotech.
15. The Deemed Trust Claim applies against the Nisku Pool and the Equipment Pool as it relates solely to Destiny Bioscience. The Receiver is of the opinion, that the allocation of the Deemed Trust Claim be taken from the Nisku Pool and the Equipment Pool on a *pro rata* basis, which would in effect result in such amounts being paid as follows:
- a) 96.6% from the Nisku Pool (the “CRA Nisku Payment”); and
 - b) 3.4% from the Equipment Pool (the “CRA Equipment Payment”).
16. KV Capital Inc. (“KV Capital”) has a security interest in assets of Destiny Bioscience by way of a leasehold mortgage respecting the Nisku Lands and a charge over specific personal property, which in the context of the applicable assets in this matter relate to furniture.
17. As a result, the leasehold mortgage interest applies solely to the Nisku Pool and the personal property security interest applies in respect of equal to an amount attributable to the applicable furniture proceeds included in the Equipment Pool.
18. The Receiver is of the opinion that the payments to KV Capital be allocated as follows:
- a) 1.16% of the Furniture Pool, less any priority deductions and expense allocations as detailed in the Third Report (the “KV Equipment Payment”); and
 - b) the balance from the Nisku pool (the “KV Mortgage Payment”).
19. The amount owing to KV Capital as at April 19, 2021 is \$3,313,243.00, plus interest in the per diem amount of \$887.67 and unbilled WIP and legal fees of its counsel.
20. The Receiver is of the opinion that the Nisku Pool proceeds be paid out in the following priority:
- a) Firstly, to the Receiver for the Receiver’s Nisku Pool Payment and the other applicable expenses related to the administration of the estate set out immediately above;
 - b) Secondly, to CRA for the CRA Nisku Payment;
 - c) Thirdly, to KV Capital for the KV Mortgage Payment; and
 - d) Fourthly, the balance to various parties holding valid and enforceable liens against the Nisku Lands in priority and amount to be determined at a subsequent application, with such applicable amounts to be held back by the Receiver at this time and distributed at a later date.
21. The Receiver is of the opinion that the Leduc Pool proceeds be paid out in the following priority:

- a) Firstly, to the Receiver for the Receiver's Leduc Pool Payment and the other applicable expenses related to the administration of the estate set out immediately above; and
 - b) Secondly, the balance to various parties holding valid and enforceable liens against the Nisku Lands in priority and amount to be determined at subsequent application, with such applicable amounts to be held back by the Receiver at this time and distributed at a later date.
22. WEPP has filed a claim in the amount of \$36,814.00 (the "WEPP Claim").
23. Premier's potential purchase money security interest ("PMSI") in certain equipment that was subject to a conditional sale between Premier and Destiny Bioscience was not properly perfected as a result of Premier's failure to register its interest in such equipment as required by section 34(2) of the *Personal Property Security Act* ("PPSA") in order to obtain a PMSI-priority; and as a result, Premier does not have priority to such equipment. It is the Receiver's opinion that Rolling Mix has priority to the sale proceeds of these assets within the Equipment Pool pursuant to section 35(1) of the PPSA.
24. The Receiver is of the opinion that the Equipment Pool proceeds be paid out in the following priority:
- a) Firstly, to the Receiver for the Receiver's Equipment Pool Payment;
 - b) Secondly, to CRA for the CRA Equipment Payment;
 - c) Thirdly, to WEPP for the WEPP Claim;
 - d) Fourth, a hold back for the potential amounts to be distributed in respect of the equipment that were included in the APA and subject to the leases between Destiny Bioscience and Meridian, as discussed below;
 - e) Fifthly, the KV Capital Equipment Payment; and
 - f) Sixthly, the balance to Rolling Mix.
25. Each of the Leduc Facilities and the Nisku Facility are on leased land. As Destiny was unable to make payment to its contractor and others, certain parties filed builders' liens against the lands. Most, but not all, registered builders' liens are against the freehold interest of the landlord and the leasehold interest of Destiny in the lands.
26. Once the Receiver determines validity and enforceability of such liens, subject to any disallowance and/or variance notices in accordance with the Lien Claims Adjudication Process Order granted in these proceedings on August 14, 2020, the Receiver will make a subsequent application to Court to deal with allocation and/or distribution of the residual balances in the Nisku Pool and Leduc Pool.
27. As a result of the above, the Receiver proposes and seeks approval for the following interim distributions to various creditors from the funds it currently holds in trust:
- a) the sum of \$303,364.00 to CRA in respect of the Deemed Trust Claim;
 - b) the sum of \$3,313,243.00, plus interest from and after April 19, 2021 in the per diem amount of \$887.67, plus legal fees of its counsel to KV Capital in respect of the KV Mortgage Payment and KV Equipment Payment;
 - c) the sum of \$36,814.00 to WEPP in respect of the WEPP Claim; and
 - d) the sum of \$365,520.00 to Rolling Mix.

28. The Receiver proposes to hold back the balance of the funds it holds in trust, and shall seek approval for such future distributions, particularly in relations to the builder's lien claim, at a future date.

Advice and Direction Respecting Meridian's Potential Priority

29. The Receiver has obtained a legal opinion from its legal counsel regarding the security held by Meridian, subject to the normal qualifications and assumptions contained in an opinion of that nature, that the Meridian security, which takes the form of two leases in respect of two leased assets, is valid and enforceable and is subject to the provisions of the PPSA.
30. However, the Receiver has identified a possible priority defect in respect of Meridian's security, arising from Meridian's failure, at the time, to update or to register at first instance (as applicable) against the name of Destiny Bioscience, as opposed to its former name, 1825159 Alberta Ltd. ("182").
31. Meridian Equipment Lease Agreement number 600369 was executed by 182 and Edward S. Moroz on October 29, 2018 and by Meridian on November 22, 2018.
32. Meridian Equipment Lease Agreement number 614054 between 182 and Edward S. Moroz is undated on its face. Based on other documents provided by Meridian, it appears that this Equipment Lease was signed in July 2019, and by no later than July 24, 2019.
33. 182 changed its name to Destiny Bioscience on November 9, 2018.
34. Meridian's registrations did not originally expressly name Destiny Bioscience as a debtor, but it was added as a debtor in the applicable PPR registrations on September 9, 2020.
35. Pursuant to section 51 of PPSA, Meridian's security interest is subordinate to a perfected security interest in the applicable leased assets registered or perfected in the period from between expiry of the 15th days after Meridian first had "knowledge" within the PPSA of the new name change and September 8, 2020.
36. Knowledge under the PPSA can be actual or constructive, as section 1(2)(c) of the PPSA confirms that a corporation knows or has knowledge when information has come to the attention of (i) a managing director or officer of the corporation, or (ii) a senior employee of the corporation with responsibility for matters to which the information relates, under circumstances in which a reasonable person would take cognizance of it, or when the information in writing has been delivered to the registered office of the corporation or attorney for service for the corporation.
37. The Receiver has reviewed the books and records of Destiny Bioscience, and has no direct information, documents, or evidence as to when, or if, Meridian may have learned of the change in Destiny Bioscience's name before the date of the Receivership.
38. Destiny Bioscience's books and records indicate some understanding by Meridian of the name Destiny Bioscience.
39. Meridian, through counsel, has taken the position with the Receiver that Meridian did not have actual knowledge of the change in name "...until sometime after the date of the receivership."
40. It is the Receiver's opinion that the outcome of this knowledge issue is critical because in the circumstances of this case:
 - a) if Meridian did not have actual or constructive knowledge of the name change until after the Receivership Order, then due to the timing of other secured creditors' registrations and section 35(4) of the PPSA, it is the Receiver's opinion that Meridian would have the first ranking priority interest in the applicable sale proceeds respecting its leased equipment (subject to other super priority charges); but

- b) if Meridian had actual or constructive knowledge of the name change on or before April 2, 2020, then some other secured creditors (depending on the actual date of Meridian's "knowledge") would have the first ranking priority interest in the applicable sale proceeds respecting this collateral (subject to other super priority charges) pursuant to section 51 of the PPSA.
41. The Receiver is unable to arrive at a final priority opinion as the evidence on timing of Meridian's knowledge, actual or constructive, of the change of name given the information and evidence currently available to the Receiver is insufficient to form a final conclusion on the issue.
42. Accordingly, the Receiver is seeking advice and direction from this Honourable Court on this priority issue through a determination of the same.
43. Until the Court confirms the priority to the equipment that were the subject of these Meridian leases, the Receiver intends to hold back of the proceeds related to the applicable equipment subject to the Meridian leases.
44. Such further and other reasons as the Receiver may advise and this Honourable Court may accept.

Material or evidence to be relied on:

45. The Third Report of the Receiver, filed.
46. The pleadings and proceedings taken in this Action to date.
47. Such further and other materials as previously filed in this matter as counsel may advise and this Honourable Court permits.

Applicable rules:

48. Rules 1.3, 1.5, 6.11, 6.28, 6.47(c), 11.27 and 13.5 of the Alberta *Rules of Court*.
49. Such further and other authority as counsel may advise and this Honourable Court may permit.

Applicable Acts and regulations:

50. *Personal Property Security Act*, RSA 2000, c P-7, and in particular sections 1, 34, 35, 51, 64, 65 and 70 thereof.
51. *Business Corporations Act*, (Alberta) R.S.A. 2000, c. B-9 and in particular section 99 thereof.
52. *Judicature Act*, R.S.A. 2000, c. J-2, and in particular section 8 thereof.
53. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, sections 81.3(4), 81.4(4), 69(3), 243(1), 246(2), 247, 248, 249 and General Rule 126.
54. Such further Acts and Statutes as counsel may advise.

Any irregularity complained of or objection relied on:

55. Abridgement of time for service to the time actually given, if necessary.

How the application is proposed to be heard or considered:

56. Before the Honourable Mr. Justice Mah, by way of telephone appearance or WEBEX.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.