

B201-997541

COURT FILE NO. 25-2996918, 25-2997457, 25-2997541
COURT COURT OF KING'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE CALGARY
MATTER IN THE MATTER OF THE BANKRUPTCY OF NOMODIC MODULAR STRUCTURES INC., AITHRA PROJECTS INC. AND NOMODIC MODULAR STRUCTURES (ONTARIO) LTD.



C40522

COM May 2, 2024

APPLICANT NORTHERN VISION DEVELOPMENT LIMITED PARTNERSHIP

RESPONDENTS FTI CONSULTING CANADA INC., in its capacity as Trustee in Bankruptcy of NOMODIC MODULAR STRUCTURES INC., AITHRA PROJECTS INC. and NOMODIC MODULAR STRUCTURES (ONTARIO) LTD., and ATB FINANCIAL

DOCUMENT **APPLICATION BY NORTHERN VISION DEVELOPMENT LIMITED PARTNERSHIP**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT Ryan F.T. Quinlan & Gil Miciak Barrister & Solicitor Phone: (780) 441-4336 Fax: (780) 428-9683 Email: rquinlan@dcllp.com; gmiciak@dcllp.com File #445-215880 **DUNCAN CRAIG LLP** LAWYERS MEDIATORS 2800 Rice Howard Place 10060 Jasper Avenue Edmonton, Alberta Canada T5J 3V9

NOTICE TO RESPONDENT(S): FTI CONSULTING CANADA INC., in its capacity as Trustee in Bankruptcy of NOMODIC MODULAR STRUCTURES INC., AITHRA PROJECTS INC. and NOMODIC MODULAR STRUCTURES (ONTARIO) LTD., and ATB FINANCIAL

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

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

Date: May 2, 2024
Time: 2:00 p.m.
Where: Edmonton Courts Centre (via Webex Video Conference)
Before Whom: The Honourable Justice Dunlop 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. A declaration that the funds paid from NORTHERN VISION DEVELOPMENT LIMITED PARTNERSHIP (“**NVD**”) to NOMODIC MODULAR STRUCTURES INC. (“**Nomodic**”) are subject to an express trust, for the exclusive benefit and use of NVD (the “**Trust**”). Further or in the alternative, that the funds paid from NVD to Nomodic are subject to a constructive or resulting trust, for the exclusive benefit and use of NVD.
2. Further, or in the alternative, a declaration that ATB Financial (“**ATB**”) is a trustee *de son tort* with respect to the funds deposited by Nomodic into Nomodic’s ATB account on October 6, 2023, originating from Champion Canada Internal ULC (“**Champion**”), in the amount of \$1,639,158.54 (the “**Champion Cheque Funds**”), or alternatively, that ATB is in knowing receipt of those funds.
3. An Order allowing NVD to trace the Trust assets.
4. An Order that the Trustee pay the entire balance of Nomodic’s RBC account, transit 00009, account 1348432, to NVD, or in the alternative, as much of the balance of that account as NVD is entitled to as determined by this Honourable Court.
5. An Order directing that ATB pay \$1,639,158.54 to NVD, or in the alternative, as much of the balance of that account as NVD is entitled to as determined by this Honourable Court.
6. An Order directing that NVD may apply for additional tracing Orders with respect to tracing the Trust funds and assets.
7. Costs of this application.
8. Such further and other relief as this Honourable Court deems appropriate.

Grounds for making this application:

9. On December 7, 2022, NVD entered into a Limited Notice to Proceed (“**NVD LNTP**”) with Nomodic. Under the NVD LNTP, Nomodic was to produce and install 117 modular hotel rooms for a project in Whitehorse. Pursuant to the NVD LNTP, NVD provided a pre-payment of \$3,750,774.00, including GST, to Nomodic (the “**Pre-Payment**”). Each portion of the Pre-Payment was allocated to complete specific aspects of the project. NVD requested that Nomodic keep the Pre-Payment in a separate, dedicated bank account.
10. Pursuant to the NVD LNTP, NVD advanced the Pre-Payment to Nomodic pursuant to a trust, conditions of which included that Nomodic would only use the Pre-Payment only for the purposes set out in the NVD LNTP, and would refund any unused funds to NVD under the terms of the NVD LNTP (the “**Trust**”). Nomodic deposited the Pre-Payment into a Royal Bank of Canada bank account (Institution 003, Transit 00009, Account 1348432) (the “**RBC Dedicated Account**”).
11. Nomodic made several unauthorized transactions in and out of the RBC Dedicated Account, including but not limited to, withdrawing \$497,000.00 from the account on January 23, 2023, and repaying that amount on January 30, 2023. With respect to this transaction, Nomodic intended to make restitution to the Trust by depositing \$497,000.00 into the RBC Dedicated Account.
12. On January 16, 2023, and in breach of the terms of the Trust, Nomodic transferred approximately \$1.9 million from the RBC Dedicated Account to Champion Canada Internal ULC (“**Champion**”).

This transfer was related to a Limited Notice to Proceed entered into between Nomodic and Champion (the "**Champion LNTP**"). NVD was not made aware of this transfer at the time.

13. On July 17, 2023, the NVD LNTP was terminated. NVD and Nomodic began negotiations on how the remaining unused portion of the Pre-Payment would be returned to NVD, pursuant to the terms of the NVD LNTP and Trust. On August 28, 2023, NVD found out that some of the Pre-Payment was forwarded to Champion.
14. On September 28, 2023, NVD, Nomodic, and Champion agreed that \$471,341.46 of the Pre-Payment would be retained by Champion for work it had completed. The parties also agreed that \$2,405,490.71 would be refunded from Nomodic to NVD (the "**NVD Refund**"). All three parties executed a Mutual Release and Settlement Agreement. As Champion was holding part of the Pre-Payment, the NVD Refund had to be comprised of \$1,639,158.54 from Champion, and the remaining approximately \$765,000.00 from Nomodic.
15. On September 28, 2023, Champion issued a cheque (the "**Champion Cheque**") to Nomodic in the amount of \$1,639,158.54 (the "**Champion Cheque Funds**"). The Champion Cheque was not immediately deposited.
16. Concurrently with these negotiations and settlement, Nomodic was having cash-flow issues, and was overdrawn on its ATB Operating Account.
17. On October 6, 2023, ATB emailed the CEO of Nomodic. In part, that email acknowledged that the Champion Cheque may be subject to a trust claim, reiterated a request for Nomodic to deposit the Champion Cheque into the ATB Operating Account, and assured Nomodic that ATB would distribute the funds in accordance with the trust if the trust was in priority to ATB's claim.
18. ATB was aware of the trust claim or potential trust claim regarding the Champion Cheque. ATB encouraged Nomodic to give the Champion Cheque to ATB, either to administer the Trust, or in breach of it.
19. On October 6, 2023, Nomodic deposited the Champion Cheque into the ATB Operating Account. Further on October 6, 2023, Bankruptcy Orders were issued with respect to several companies, including Nomodic.
20. The Champion Cheque Funds remain in the possession of ATB. ATB is a trustee *de son tort* with respect to the funds deposited by the Champion Cheque Funds, or alternatively, that ATB is in knowing receipt of those funds.
21. The RBC Dedicated Account remains in control of the Trustee. At the date of bankruptcy, the RBC Dedicated Account had a balance of approximately \$1.2 million.
22. On December 5, 2023, NVD in this bankruptcy submitted a property proof of claim to the Trustee pursuant to section 81 of the *Bankruptcy and Insolvency Act*, which was not rejected or disputed within 15 days in accordance with section 81(2) of the *Bankruptcy and Insolvency Act*.

Material or evidence to be relied on:

23. The pleadings and proceedings in this Action, including the Affidavit of Muhammad Ashraf, sworn October 6, 2023, and any questioning which may take place in relation to it.
24. Affidavit of Michael Hale, sworn December 1, 2023.

25. Supplemental Affidavit of Michael Hale, sworn March 28, 2024.
26. Affidavit of Ken Volk, sworn December 4, 2023.
27. First Report of the Trustee in Bankruptcy, filed.
28. Such further and other material as counsel may advise as this Honourable Court may allow.

Applicable rules:

29. *Alberta Rules of Court*, AR 124/2010.
30. *Bankruptcy and Insolvency General Rules*, CRC, c 368.
31. Such further and other rules as counsel may advise and this Honourable Court permits.

Applicable Acts and regulations:

32. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, including without limitation sections 37 and 81.
33. Such further and other Acts and regulations as counsel may advise and this Honourable Court permit.

Any irregularity complained of or objection relied on:

34. None.

How the application is proposed to be heard or considered:

35. Concurrently with the Trustee's application for advice and direction currently set for the same date and time, via Webex, before Justice Dunlop sitting on the Commercial List.

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.