

**IN THE MATTER OF ESW CAPITAL, LLC**

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**IN THE MATTER OF OPTIVA INC.**

**APPLICATION OF ESW CAPITAL, LLC**

(In Connection with a Transactional Proceeding under Rule 16  
and under Section 104 of the *Securities Act*, RSO 1990, c S.5)

**A. ORDER SOUGHT**

The Applicant, ESW Capital, LLC (“**ESW**”), requests that the Ontario Securities Commission make the following orders:

1. An order granting exemptive relief from the requirement set forth in section 2.29.1(c) of National Instrument 62-104 - Take-Over Bids and Issuer Bids (“**NI 62-104**”) on the basis set out below pursuant to s. 104 of the Ontario *Securities Act* and s. 6.1 of NI 62-104;
2. An order for an expedited hearing; and
3. Such further and other relief as counsel may advise and the Commission may deem appropriate.

**B. GROUNDS**

The grounds for the request are:

**Overview**

4. Optiva Inc. (“**Optiva**”) is a TSX listed company and whose head office is located in Ontario.

5. The Applicant seeks exemptive relief from the minimum tender requirement under NI 62-104 (“**Majority of the Minority Requirement**”) to allow Optiva’s independent shareholders to have the choice whether or not to tender to ESW’s take-over bid to acquire any and all of Optiva subordinated voting shares (“**Shares**”).

6. Allowing each shareholder the right to decide whether or not to accept or reject a non-coercive take-over bid is a core objective of the regulation of take-over bids.

7. The Majority of the Minority Requirement was never intended as a tool for entrenchment by an insider block.

8. Yet, in its operation in the present circumstances, the Majority of the Minority Requirement has become just that – a tool for two of Optiva’s principal shareholders to entrench their *de facto* control of Optiva and to block the fundamental right of Optiva’s independent shareholders (who exercise control or direction over approximately 31.74% of Optiva’s Shares) to choose whether or not to tender to the ESW bid.

9. ESW submits that exemptive relief is appropriate in these unique circumstances in promoting the core intentions underlying NI 62-104. It accepts as a condition of that relief that its bid be subject to a modified minimum tender requirement based on greater than 50% of the non-insider shareholders tendering to its bid (i.e. shareholders other than the bidder ESW and the two

other insider shareholders, including affiliates and persons acting jointly or in concert).

**Insider Block**

10. Besides an ESW affiliated entity, Optiva has two principal shareholders with 10% or more of the voting rights attached to the Shares, namely Maple Rock Capital Partners Inc. ("**Maple Rock**") and EdgePoint Investment Group Inc. ("**EdgePoint**").

11. As disclosed in Optiva's latest public disclosure, between them, Maple Rock and EdgePoint exercise control or direction over approximately 40.48% of the Shares (Maple Rock approximately 22.35% and EdgePoint approximately 18.13%).

12. Maple Rock and EdgePoint also hold over 86% of Optiva's secured debentures, which include covenants on how Optiva can distribute cash to shareholders, changes its capitalization through the purchase or sale of its own shares or incur subordinated debt.

13. Pursuant to director nomination agreements dated July 20, 2020 entered into between Optiva and each of Maple Rock and EdgePoint, Maple Rock and EdgePoint are each entitled to nominate (and have nominated) two of the eight directors to be elected by Optiva's shareholders at its forthcoming August 18, 2020 Annual and Special Shareholder Meeting, for a total of half of the directors.

14. As set forth in Optiva's June 26, 2020 news release, the remaining four nominees were selected subject to Maple Rock and EdgePoint's both agreeing to their nomination.

15. Accordingly, Maple Rock and EdgePoint have *de facto* control over Optiva through their combined control over the nomination of Optiva's board of directors, bearing in mind that over the last three annual general meetings the percentage of outstanding Shares voted in the election of directors has ranged between approximately 54% and 73% of the issued and outstanding Shares.

16. In those circumstances, with over 40% of combined ownership and control of Shares, Maple Rock and EdgePoint are assured their nominees and agreed upon nominees will be elected.

17. Since the start of the year, in matters concerning Optiva and in terms of ESW's bid (as discussed below), Maple Rock and EdgePoint have acted in lock-step with one another.

**ESW's Announced Intention to Make a Take-Over Bid**

18. On July 27, 2020, by news release, ESW announced its intention to make an all cash offer to acquire any and all Optiva Shares ("**ESW Bid**").

19. ESW's Bid offers Optiva shareholders \$60 per Share which represents an exceptional premium to Optiva stock's trading history by all measures. For example, ESW's bid represents a 92% premium to the 60-day closing high of the

Shares and is higher than Optiva's closing price on the TSX on any day for more than three years.

20. The ESW Bid will allow any and all shareholders who wish to walk away from the infighting between Optiva's three principal shareholders to do so. This infighting was initiated upon Maple Rock launching a "proxy fight" in January 2020, and EdgePoint announcing its support of Maple Rock in February 2020, acknowledging that it is in "regular communication with Maple Rock."

21. For the reasons outlined below, as announced on July 27<sup>th</sup>, the ESW Bid will be formally launched upon an exemption by this Commission to the minimum tender requirements under NI 62-104 to exclude Maple Rock and Edgepoint's Shares from being included in the 50% + 1 issued and outstanding Shares that must be tendered to the ESW Bid.

### **Insiders Intend to Block ESW Bid**

22. Based on prior public disclosure, Maple Rock and EdgePoint have declared their intention not to tender to the ESW Bid, thereby blocking the remaining 32% of Optiva's shareholders from being able to exit Optiva at the significant premium presented by the ESW Bid.

23. Within short order, on the same day as ESW delivering to Optiva on June 26, 2020, a letter containing a preliminary, non-binding indication of a willingness to explore a possible acquisition of all of Optiva's Shares at \$30 per Share, Maple Rock and EdgePoint advised Optiva that, "they have no interest or

intention of selling their shares or voting in favour of any transaction on the non-binding, preliminary indicative terms suggested by ESW, or in pursuing any discussions with ESW regarding such a possible transaction.”

24. Thereafter, by news release dated June 26, 2020, Optiva announced that Maple Rock and EdgePoint had agreed to subscribe for up to US \$90 million of debentures to be issued by Optiva to finance Optiva’s unilateral election to redeem its preferred shares held by ESW’s affiliate on July 20<sup>th</sup>. The rights attaching to the preferred shares were approved by Optiva’s shareholders, including the right to nominate a majority of Optiva’s seven person board of directors.

25. As part of the debenture financing, and Maple Rock and EdgePoint’s subscription commitment thereunder, Optiva, Maple Rock and EdgePoint agreed to increase the Optiva board to eight persons and further agreed that of the eight board nominees to be proposed for election at the forthcoming annual meeting of shareholders on August 18, 2020, the nominees would be comprised of “... two of such director nominees being designated by EdgePoint, two being designated by Maple Rock and the remaining four having been mutually agreed among the Independent Committee [of the Board], EdgePoint and Maple Rock.” Furthermore, Maple Rock and EdgePoint agreed to vote their shares in favour of the election of that slate of eight nominees. None of the foregoing was put to Optiva’s shareholders for approval notwithstanding the announced scheduled shareholder meeting.

26. Through the unilateral redemption of the preferred shares financed by Maple Rock and EdgePoint, and ancillary agreements, Maple Rock and EdgePoint have effected a *de facto* change in who controls the nomination of Optiva's board from ESW's affiliate to Maple Rock and EdgePoint, without any shareholder approval.

27. Since the announcement of the ESW Bid on July 27, 2020, both EdgePoint (on July 27) and Maple Rock (on July 28) have issued news releases reiterating that they have no interest or intention of selling their Shares to ESW.

28. Neither EdgePoint nor Maple Rock, however, have made any offers to acquire the Shares of Optiva's independent shareholders. Rather, they intend to use the Majority of the Minority Requirement to entrench their control over Optiva.

#### **Majority of the Minority Requirement**

29. The purpose of the Majority of the Minority Requirement is to address shareholder coercion or pressure to tender, namely that in the face of a bidder's ability to reduce or waive its minimum tender condition, shareholders will be compelled to tender to a bid they do not otherwise like out of concern that they will miss the opportunity to tender and be left holding less liquid securities of a controlled company.

30. The Majority of the Minority Requirement was never intended to operate to eliminate shareholder choice. Nor is it intended to enable insiders to entrench

their position of control by dictating to independent shareholders when they may or may not choose to exit from the Company at a premium under a take-over bid.

31. The express availability of exemptive relief pursuant to section 6.1 of NI 62-104 from its provisions recognizes that take-over bids are fact specific and there can be circumstances where upholding a take-over bid requirement can result in the opposite of its intended purpose.

32. The exclusion of certain shares from the Majority of the Minority Requirement has previously been raised, *in obiter*, in joint reasons issued by the Ontario Securities Commission and the British Columbia Securities Commission in *Hecla Mining Co.* as a possible remedy in the face of tactics interfering with shareholder choice.

33. Other elements of the take-over regime under NI 62-104 already mitigate against the concern of shareholders being pressured to tender, such as the requirement that bids remain open for 105 days (s.2.29.1(a)) and the 10-day extension period to tender (s.2.32).

34. Furthermore, independent shareholders are presently subject to Optiva being *de facto* controlled by Maple Rock and EdgePoint. As such, any concern that shareholders who do not tender will be left with less liquid securities because the issuer is a controlled company does not apply as Optiva is *de facto* already a controlled company.



35. In the present circumstances, the Majority of the Minority Requirement operates to exacerbate liquidity concerns by allowing Maple Rock and EdgePoint to leverage their position to dictate to Optiva's independent shareholders when they can tender into a bid, hence rendering their Shares less liquid. This turns the objective of the Majority of the Minority Requirement on its head.

36. Hence, exemptive relief is appropriate and in the public interest in such circumstances where the Majority of the Minority requirement will operate to undermine the intent and objectives of take-over regulation by replacing shareholder choice with insider entrenchment.

37. ESW would accept, as a condition to exemptive relief, a requirement that a majority of the independent shareholders (i.e. shareholders other than ESW, Maple Rock and EdgePoint and their affiliates and joint actors) be required to tender to its bid, to mitigate against any lingering concern of pressure to tender.

38. For the foregoing reasons, ESW requests that the ESW Bid be exempted from the requirement under 2.29.1(c) of NI 62-104 on terms that its bid must otherwise be subject to the requirement that it may not take up securities deposited under its bid unless more than 50% of the outstanding subordinate voting shares of Optiva (excluding securities beneficially owned, or over which control or direction is exercised, by ESW, Maple Rock or EdgePoint or by any affiliate or person acting jointly or in concert therewith) have been deposited under the bid and not withdrawn.

39. The Applicant relies on section 104 of the Ontario *Securities Act* and section 6.1 of NI 62-104.

40. The Applicant further intends to rely upon section 4.7 of Multilateral Instrument 11-102 in each of the relevant jurisdictions in Canada.

41. Such further and other grounds as counsel may advise and the Commission may permit.

### **C. EVIDENCE**

The Applicant intend to rely on the following evidence, as well a written memorandum and oral submissions, at the hearing:

- (a) The affidavit of Neeraj Gupta affirmed August 6, 2020; and
- (b) Such further other evidence as counsel may advise and the Commission may permit.

Dated this 6th day of August, 2020

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