

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N :

CERBERUS BUSINESS FINANCE, LLC

Applicant

- and -

B & W HEAT TREATING CANADA, ULC

Respondent

APPLICATION RECORD

September 26, 2019

McMILLAN LLP
Brookfield Place
181 Bay Street, Suite 4400
Toronto, ON M5J 2T3

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Lawyers for the Applicant

TO: CHAITONS LLP
5000 Yonge Street, 10th Floor
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Lawyers for B&W Heat Treating Canada ULC

AND TO: DEPARTMENT OF JUSTICE CANADA
Ontario Regional Office
130 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

Lawyers for Canada Revenue Agency

AND TO: MINISTRY OF FINANCE (ONTARIO)
Legal Services Branch
6th Floor, 33 King Street West
Oshawa, ON L1H 8H5

AND TO: A. FARBER AND PARTNERS INC.
150 York Street, Suite 1600
Toronto, ON M5H 3S5

Proposed Receiver of B & W Heat Treating Canada, ULC

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N :

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TAB 1

CV 19-00628115-00CL

Court File No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

CERBERUS BUSINESS FINANCE, LLC

Applicant

- and -

B & W HEAT TREATING CANADA, ULC

Respondent



APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on September 27, 2019 at a time to be confirmed by the Commercial List Office, at 330 University Avenue, 8th Floor, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

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IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: September 26, 2019

Issued by



Local registrar

A. Stanojevic

Address of 330 University Avenue
court office 9th Floor
Toronto, ON M5G 1R7

TO: **THE SERVICE LIST**

SERVICE LIST

TO: MCMILLAN LLP
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Lawyers for B&W Heat Treating Canada ULC

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Lawyers for Canada Revenue Agency

- 4 -

AND TO: MINISTRY OF FINANCE (ONTARIO)

Legal Services Branch
6th Floor, 33 King Street West
Oshawa, ON L1H 8H5

Kevin J. O'Hara
kevin.ohara@ontario.ca

Tel: (905) 433-6934 / Fax: (905) 436-451

AND TO: A. FARBER AND PARTNERS INC.

150 York Street, Suite 1600
Toronto, ON M5H 3S5

Stuart Mitchell and Peter Crawley
smitchell@farbergroup.com and pcrawley@farbergroup.com
Tel: (855) 775-8777 / Fax: (416) 496-3839

Proposed Receiver of B & W Heat Treating Canada, ULC

APPLICATION

1. The Applicant, Cerberus Business Finance, LLC, in its capacities as Collateral Agent and Administrative Agent under the Financing Agreement (as defined below), (the “**Secured Creditor**”) makes application for:

- (a) an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”) and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the “**CJA**”) appointing A. Farber and Partners Inc. as receiver (“**Receiver**”), without security, of all the property, assets and undertakings of the Respondent, B & W Heat Treating Canada, ULC (the “**Debtor**”);
- (b) an order approving the sale transaction contemplated by an asset purchase agreement dated September 25, 2019 (the “**APA**”) between the Receiver and Hilco Industrial Acquisitions Canada ULC (the “**Purchaser**”) and vesting in the Purchaser the Debtor’s right, title and interest in and to the assets described in the APA free and clear of all claims and encumbrances; and
- (c) such further and other relief as counsel may request and this Honourable Court deems just.

2. The grounds for the application are:

- (a) The Secured Creditor is the Collateral Agent and Administrative Agent under a financing agreement among, *inter alias*, the Debtor, as the

Canadian borrower, and the lenders from time to time party thereto, dated as of October 23, 2012, (as amended, supplemented or restated) (the “**Financing Agreement**”);

- (b) The Debtor is an Alberta unlimited liability corporation providing heat treating services for industrial applications, with operations at 60 Steckle Place, Kitchener, Ontario;
- (c) As of October 1, 2019, the Debtor owes the Secured Creditor USD\$3.0 million in respect of indebtedness under Term Loan B under the Financing Agreement (the “**Indebtedness**”);
- (d) The Indebtedness is secured by a pledge and security agreement, and a grant of security interest – trademarks, both made as of October 23, 2012 (together with the Financing Agreements, the “**Loan Documents**”) granting to the Secured Creditor a security interest in all of the Debtor’s present and after-acquired property;
- (e) The Debtor advised the Secured Creditor of its intentions to sell its business and assets on a going concern or liquidation basis. The Debtor has also advised the Secured Creditor in writing that it is insolvent. In the circumstances, the Loan Documents provide that the Secured Creditor may appoint a receiver;
- (f) On August 30, 2019, the Secured Creditor delivered to the Debtor a Notice of Intention to Enforce a Security further to section 244 of the BIA;

- (g) The Company retained Farber Corporate Finance Inc. (“**FCFI**”) to conduct a marketing and sale process to identify a buyer for the business;
- (h) FCFI carried out a robust process, which resulted in the Debtor and the Purchaser entering into the APA;
- (i) The APA contemplates the appointment of a Receiver over the Debtor to complete the sale transaction by way of an approval and vesting order;
- (j) The purchase price to be paid by the Purchaser is in line with the appraised value for the purchased assets;
- (k) The Debtor does not have sufficient liquidity to carry out a further sale process;
- (l) The appointment of Receiver is necessary to allow the Secured Creditor to maximize recovery of the Indebtedness;
- (m) The appointment of a Receiver is in the interests of justice and is just, convenient and necessary for the protection of the Secured Creditor;
- (n) Farber, a licensed insolvency trustee, has provided its consent to being appointed as the Receiver;
- (o) Section 243 of the BIA;
- (p) Section 101 of the CJA;

- (q) Rule 1.04, 2.01, 2.03, 3.02, 14.05 and 38 of the *Rules of Civil Procedure*, RRO 1990, Reg 194; and
 - (r) Such further and other grounds as counsel may advise and this Honourable may accept.
3. The following documentary evidence will be used at the hearing of the application:
- (a) The Affidavit of Eric Mannix sworn September 26, 2019 and the Exhibits thereto;
 - (b) Consent of Farbers; and
 - (c) Such further and other evidence as counsel may advise and this Honourable Court may permit.

September 26, 2019

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Lawyers for the Applicant

6 CERBERUS BUSINESS FINANCE, LLC
Applicant

and B & W HEAT TREATING CANADA, LLC
Respondent

CV-19-00628115-00CL
Court File No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at Toronto

NOTICE OF APPLICATION

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Lawyers for the Applicant

TAB 2

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

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Applicant

- and -

B&W HEAT TREATING CANADA ULC

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APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

AFFIDAVIT OF ERIC MANNIX
(sworn September 26, 2019)

I, Eric Mannix, of the unincorporated community of Williamsburg, in Whitewater Township, in the State of Michigan, hereby MAKE OATH AND SAY AS FOLLOWS:

1. I am Chief Financial Officer of BWT LLC. The Respondent, B&W Heat Treating Canada ULC (“**B&W**” or the “**Company**”), is an indirect wholly-owned subsidiary of BWT LLC. As a result, I have knowledge of the matters contained in this affidavit. The facts set forth herein are within my personal knowledge or determined from the face of the documents attached hereto as exhibits and from information and advice provided to me from others. Where matters deposed to herein are based upon information and advice from others, I have identified the source of my information and verily believe same to be true.

2. This affidavit is sworn in support of the application by the Applicant, Cerberus Business Finance, LLC, in its capacity as collateral agent (the “**Collateral Agent**”) under the Financing Agreement (as defined below) for the appointment of A. Farber & Partners Inc. (“**Farbers**”) as receiver (“**Receiver**”) under Section 243(1) of the *Bankruptcy and Insolvency Act* (“**BIA**”) and Section 101 of the *Courts of Justice Act* over the property, assets and undertakings of the Company, for the purpose of, among other things, completing a sale of the Machinery and Equipment (as defined below) to Hilco Industrial Acquisitions Canada ULC (“**Hilco**”).

BACKGROUND

B&W

3. B&W is an unlimited liability corporation governed by the *Business Corporations Act* (Alberta). Attached hereto and marked as **Exhibit “A”** is a copy of the Government of Alberta Corporate Registration System search result for B&W obtained on July 30, 2019.

4. B&W is a wholly-owned subsidiary of B&W Canada LLC, a Delaware company, and is part of the Bluewater Thermal corporate group (the “**B&W Corporate Group**”) with operations in Houston, Illinois, Michigan, Pennsylvania and Ontario. A copy of the B&W Corporate Group organization chart is attached hereto and marked as **Exhibit “B”**.

5. B&W is a supplier of heat-treating services for customers with aluminum, steel, alloy or metal parts that require heat treatment. B&W carries on business from a leased facility located at 60 Steckle Place, Kitchener, Ontario (the “**Premises**”). The term of the lease ends on November 30, 2033. The lease is a net lease with current basic rent for the Premises of \$38,960 per month. B&W is current with its rent payments.

6. B&W currently employs 20 unionized employees, of which three (3) are on long-term disability and four (4) have been laid off. These employees are represented by UNIFOR and its Local 1524. There are also four non-union salaried employees.

7. There is a defined contribution pension plan for the Company's salaried employees with Sun Life Financial. The Company is current with its employer contributions to the plan and there is no deficiency in the plan.

8. The Company is a member of the Canada-Wide Industrial Pension Plan, a multi-employer pension plan, for its unionized employees. The plan is known as a target pension plan, which is a defined contribution plan. The Company is current with its employer contributions to the plan and there is no deficiency in the plan.

9. The Company is current in payment of its wages to its employees, as well as its source deduction and HST obligations. As of September 12, 2019, the Company had trade payables outstanding of approximately CDN\$393,000.

The Applicant is a Secured Creditor of B&W

10. B&W, along with other members of the B&W Corporate Group, are parties to a financing (as amended, supplemented or restated from time to time, the "**Financing Agreement**") dated October 23, 2012 with the Collateral Agent, Cerberus Business Finance LLC, as administrative agent (the "**Administrative Agent**"), and other lender from time to time party thereto (the "**Lenders**"). Pursuant to the Financing Agreement, B&W is the Canadian borrower under a US\$3.0 million term loan (the "**Term Loan**") and is a guarantor of the US\$60.0 million advanced

by the lenders to certain U.S. companies in the B&W Corporate Group.¹ A copy of the Financing Agreement is attached hereto and marked as **Exhibit “C”**.

11. It is an event of default under the Financing Agreement if the Company admits in writing that it is insolvent (the “**Event of Default**”).

12. As of October 1, 2019, the Company will be indebted to the Lenders in the amount of US\$3.0 million with respect to the Term Loan.

13. As security for the obligations owed by the Company to the Lenders, B&W has granted in favour of the Collateral Agent a Canadian Pledge and Security Agreement dated October 23, 2012, and a Trademark Security Agreement dated October 23, 2012, copies of which are collectively attached hereto and marked as **Exhibit “D”**.

14. I have been advised by Sam Rappos of Chaitons LLP (“**Chaitons**”), the Company’s lawyers in this proceeding, that Chaitons has obtained an Enquiry Response Certificate current as of July 31, 2019 from the Ontario Personal Property Security Registration System (the “**PPSA Search Result**”), which evidences that on October 3, 2012, the Collateral Agent registered a financing statement under the *Personal Property Security Act* (Ontario) (“**PPSA**”) against the Company listing collateral classified as “inventory”, “equipment”, “accounts”, “other” and “motor vehicle included”. A copy of the PPSA Search Result is attached hereto and marked as **Exhibit “E”**.

15. I have also been advised by Mr. Rappos that, as seen in the PPSA Search Result, the Collateral Agent has the first-in-time PPSA financing statement registered against all of the

¹ The obligation was subsequently reduced to approximately US\$30.0 million.

Company's personal property. There is one other PPSA financing statement registered against the Company in favour of De Lage Langden Financial Services Canada Inc. with respect to five (5) specifically identified vehicles.

B&W's Financial Difficulties

16. Until several years ago, the largest and most profitable part of the Company's business was processing engine blocks for its main customer, which represented approximately 37% of the Company's revenue. In 2015/2016, the customer transferred its business to Mexico, away from the Company.

17. As a result of the loss of this business, the Company has suffered operating losses for several years. The B&W Corporate Group has its financial statements completed on a consolidated basis; thus, there are no separate financial statements available for B&W. However, the Company's internal records for the year ending December 31, 2018 confirmed that the Company had negative net income of CDN\$3,957,738 with respect to its customer sales in Canadian dollars.

18. Notwithstanding the many steps the Company took in an attempt to improve its financial state (including laying off employees, reducing hours, and completing a vendor pricing review in an attempt to shrink supply base costs), the Company is insolvent.

19. Due to the Company's unprofitability, the B&W Corporate Group determined that the best course of action was for a sale of the Company's business and assets on a going concern or liquidation basis.

20. B&W retained Farber Corporate Finance Inc. ("FCFI"), a party related to Farbers, to conduct a marketing and sale process to identify a buyer for the business. Below is a brief

summary of the information I have received from Peter Crawley of Farbers with respect to the sale process carried out by FCFI.

Completed Sale Process

21. The intention of the sale process was to canvass potential buyers who would either acquire the B&W business as a going concern on a stand-alone basis or for synergistic purposes. The Company's management provided FCFI with a list of prospective purchasers to be approached by FCFI. FCFI supplemented this list with additional potential acquirers that was known to it. The list included key competitors in the same or similar marketplace, with operations in the U.S. and/or Canada. The list also included B&W's largest customers, and large equipment and auto parts manufacturers with the capability to acquire an operation such as B&W as a vertical integration.

22. In total, 30 prospective purchasers were approached. FCFI created:

- (a) a non-confidential information teaser, which it provided to 20 parties;
- (b) a confidentiality agreement ("CA"), which was signed by eight (8) parties;
- (c) a confidential information memorandum ("CIM"), which was shared with the eight prospects who signed a CA; and
- (d) a secure online data room containing additional information about the business for those parties that received the CIM and wished to conduct further due diligence.

23. FCFI also facilitated site visits to the Premises and access to additional information as required by the eight parties.

24. As a result of the sale process, the Company received two offers:

- (a) a non-binding letter of an intent (the “**LOI**”) from a competitor of the Company (the “**Competitor**”) for B&W’s operating assets, which are detailed in **Exhibit “F”** (collectively, the “**Machinery and Equipment**”); and
- (b) an auction proposal from Hilco on August 14, 2019 for the Machinery and Equipment (the “**Auction Proposal**”). A copy of the Auction Proposal with all dollar amounts redacted is attached hereto and marked as **Exhibit “G”**. An unredacted copy of the Auction Proposal will be filed with the Court as a confidential exhibit.

25. The Company and the Competitor entered into negotiations regarding completing a sale transaction based on the terms of the LOI. However, the Competitor decided not to proceed with an acquisition of the Machinery and Equipment. Thus, the only potential transaction that resulted from the sale process was the Auction Proposal.

Sale to Hilco

26. Hilco and the Company subsequently negotiated and Hilco has executed an asset purchase agreement dated September 25, 2019 (the “**APA**”). The APA contemplates the appointment of a Receiver over the Company to complete the sale transaction by way of an approval and vesting order. A copy of the APA with all dollar amounts redacted is attached hereto and marked as **Exhibit “H”**. An unredacted copy of the APA will be filed with the Court as a confidential exhibit.

27. The APA provides, among other things, that Hilco will have access to the Premises for a four-month period following the closing of the transaction, with two options to extend by one month, to complete the auction of the Machinery and Equipment. During the access period (as it may be extended), the Receiver is responsible for payment of basic rent to the landlord. The

Receiver is responsible for payment of hydro, utilities and costs for the initial four month access period, and Hilco is responsible for payment of these amounts during any extension period.

28. The purchase price to be paid by Hilco for the Machinery and Equipment is in line with the appraised values for such assets, as set out in an appraisal completed by Hilco Valuation Services effective as of July 10, 2019 (the “**Appraisal**”). A copy of the Appraisal will be provided to the Court as a confidential exhibit.

29. As noted above, FCFI has conducted a robust sale process for B&W’s business and assets.

30. As a result of the Company’s financial difficulties, B&W does not have sufficient liquidity available to it to carry out a further sale process. I have no reason to believe that a better transaction for the Company’s stakeholders can be obtained than the one negotiated with Hilco under these circumstances.

31. It is my understanding that the Collateral Agent, the Administrative Agent and the Lenders support that conclusion and the sale transaction. To facilitate the completion of the sale transaction, the Collateral Agent, on behalf of the Lenders, has agreed to commence this application for the appointment of Farbers as Receiver.

32. On August 30, 2019, the Collateral Agent issued a notice of its intention to enforce its security under section 244 of the BIA, a copy of which is attached hereto and marked as **Exhibit “I”**.

33. The Collateral Agent, the Administrative Agent, the Lenders, the Company and the other parties to the Financing Agreement have executed a Waiver and Consent to Financing Agreement,

wherein the Collateral Agent and the Administrative Agent, on behalf of the Lenders, have agreed to waive the Event of Default, subject to the specific conditions set out therein.

34. I am of the view that it is just and convenient in the circumstances for the Court to appoint Farbers as Receiver to complete the sale of the Machinery and Equipment to Hilco in accordance with the terms of the APA, which Farbers will adopt if appointed as Receiver. Farbers has agreed to act as Receiver in this proceeding, as evidenced by its consent attached hereto and marked as **Exhibit "J"**.

35. In the event Farbers is appointed as Receiver, I understand that it intends to take all necessary steps to realize on any other personal property of the Company and to wind down the Company's operations.

36. As noted above, it is intended that an unredacted copy of the Auction Proposal, an unredacted copy of the APA, and the Appraisal be filed with the Court on a confidential basis. The Collateral Agent will be requesting that a sealing order be granted with respect to the documents until the sale transaction is completed, as public disclosure of the sale price for the Machinery and Equipment could jeopardize the Receiver's ability to maximize value on the sale of the property in the event that the transaction with Hilco does not close for any reason.

37. This affidavit is sworn in support of the Collateral Agent's application and for no other or improper purpose.

- 10 -

SWORN BEFORE ME at Traverse City,
Michigan, on September 26, 2019

Lawrence R. Lasusa

Eric Mannix

ERIC MANNIX

Commissioner of Affidavits
(or as may be)



TAB A

**THIS IS EXHIBIT “A” TO
THE AFFIDAVIT OF ERIC MANNIX
SWORN BEFORE ME THIS 26th
DAY OF SEPTEMBER, 2019.**

A Commissioner etc.

Government of Alberta ■ Corporation/Non-Profit Search

Corporate Registration System

Date of Search: 2019/07/30
 Time of Search: 12:11 PM
 Service Request Number: 31444567
 Customer Reference Number: 02564154-EDD3_5_662729

Corporate Access Number: 2012488850

Legal Entity Name: B&W HEAT TREATING CANADA ULC

Legal Entity Status: Active

Alberta Corporation Type: Named Alberta Corporation

Registration Date: 2006/06/12 YYYY/MM/DD

Registered Office:

Street: 3300, 421 - 7TH AVENUE S.W.

City: CALGARY

Province: ALBERTA

Postal Code: T2P 4K9

Records Address:

Street: 3300, 421 - 7TH AVENUE S.W.

City: CALGARY

Province: ALBERTA

Postal Code: T2P 4K9

Email Address: CALGARYCORPORATESERVICES@PARLEE.COM

Directors:

Last Name: SCOTT

First Name: SHAWN

Middle Name: VICTOR

Street/Box Number: 19012 NINTH LINE RR3

City: MOUNT ALBERT

Province: ONTARIO

Postal Code: L0G 1M0

Voting Shareholders:

Last Name: B&W CANADA LLC
Street: C/O 11 E 44TH STREET, SUITE 1803
City: NEW YORK
Province: NEW YORK
Postal Code: 10017
Percent Of Voting Shares: 100

Details From Current Articles:

The information in this legal entity table supersedes equivalent electronic attachments

Share Structure: THE CORPORATION IS AUTHORIZED TO ISSUE AN UNLIMITED NUMBER OF COMMON SHARES.
Share Transfers Restrictions: NO SHARES OF THE CORPORATION SHALL BE TRANSFERRED TO ANY PERSON WITHOUT THE APPROVAL OF THE BOARD OF DIRECTORS BY RESOLUTION.
Min Number Of Directors: 1
Max Number Of Directors: 9
Business Restricted To: NONE.
Business Restricted From: NONE.
Other Provisions: THE ATTACHED SCHEDULE IS INCORPORATED INTO AND FORMS PART OF THE ARTICLES OF THE CORPORATION.

Other Information:

Last Annual Return Filed:

File Year	Date Filed (YYYY/MM/DD)
2019	2019/07/04

Filing History:

List Date (YYYY/MM/DD)	Type of Filing
2006/06/12	Incorporate Alberta Corporation
2014/09/08	Change Address
2019/07/04	Change Director / Shareholder
2019/07/04	Enter Annual Returns for Alberta and Extra-Provincial Corp.

Attachments:

Attachment Type	Microfilm Bar Code	Date Recorded (YYYY/MM/DD)
Other Rules or Provisions	ELECTRONIC	2006/06/12

The Registrar of Corporations certifies that, as of the date of this search, the above information is an accurate reproduction of data contained in the official public records of Corporate Registry.

