

**ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)**

**IN THE MATTER OF THE NOTICE OF INTENTION TO
MAKE A PROPOSAL OF STAR NAVIGATION SYSTEMS GROUP LTD.**

**NOTICE OF MOTION
(Returnable March 31, 2020)**

Viraf Kapadia, a creditor of Star Navigation Systems Group Ltd., will make a motion to the court on March 31, 2020 at 10:00 a.m. or as soon after that time as the motion can be heard at 330 University Avenue, Toronto.

PROPOSED METHOD OF HEARING: The motion is to be heard:

- in writing under subrule 37.12.1(1) because it is on consent or unopposed or made without notice;
- in writing as an opposed motion under subrule 37.12.1(4);
- orally.

THE MOTION IS FOR:

- 1 The applicant seeks:
 - (a) an order pursuant to subsection 109(6) of the *Bankruptcy and Insolvency Act*, RSC, 1985, c. B-3 (the **BIA**) including the applicant's vote in the vote of creditors on the proposal made by Star Navigation Systems Group Ltd. (**Star**) to its creditors held on February 14, 2020;
 - (b) costs of this application; and
 - (c) such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

Star owes Kapadia significant debt

2 Viraf Kapadia is the co-founder and former CEO of Star, having worked as its CEO from 2000 until late 2019.

3 Kapadia is also Star's largest creditor, with substantial debt owed by Star to him personally principally through two sources:

(a) Deferred salary: Star has struggled to be profitable over many years, during which Kapadia, as Star's CEO, deferred a significant portion of his salary so as not to deplete Star's cash flows. These deferrals were recorded in Star's interim and annual audited financial statements year-over-year. As of March 31, 2019, according to Star's unaudited interim financial statements, that debt, including interest, amounted to \$1,797,603. In addition to these amounts, Kapadia deferred non-salary entitlements included in his employment agreement like a monthly car allowance; and

(b) Advances paid on behalf of the company: In 2018 and 2019, Kapadia used personal funds to finance a number of company expenses for which he was owed reimbursement, including: work travel; consulting fees for engineers retained to assist the company; office rent; directors' and officers' insurance premiums; minimum credit card payments; and other general corporate expenses.

4 Star is insolvent. On December 10, 2019, Star filed a Notice of Intention to make a proposal to its creditors pursuant to the *BIA*.

5 According to Star's Statement of Affairs filed in connection with the proposal process, Star has total unsecured debt of \$3,393,510.50.

6 Of that total, Kapadia is owed \$2,254,670.15 in unsecured debt. Kapadia is owed a further \$62,223.85 on a secured basis.

Kapadia prevented from voting at creditors' meeting

7 On January 8, 2020, Star obtained an order on consent extending the time for filing a proposal pursuant to its NOI until January 24, 2020.

8 On January 24, 2020, Star made its proposal to its creditors, and scheduled a meeting of creditors to approve that proposal on February 14, 2020 at 10:00 a.m.

9 On February 13, 2020, Kapadia filed a proof of claim and indicated his intention to vote against the proposal.

10 At approximately 5:28pm on February 13, 2020, the evening before the creditors' meeting, counsel to Star made written submissions to the proposal trustee arguing that Kapadia should not be permitted to vote his unsecured debt at the meeting in reliance on s. 109(6) of the *BIA* and the allegation that Kapadia had dealt with Star on a non-arm's length basis in the year prior to Star's filing of its NOI.

11 Kapadia made responding submissions late that evening.

12 Ultimately, at the creditors' meeting held February 14, 2020, the proposal trustee determined that (a) Kapadia's vote would be determinative of the outcome of the proposal, and (b) Kapadia had dealt not at arm's length with Star in the year prior to Star's filing of its NOI. Accordingly, having already determined the outcome of the vote (in which the proposal was not approved), the proposal trustee elected to redetermine the vote by excluding Kapadia's vote,

and as a result, the proposal was approved. But for this decision, the proposal would have failed.

The proposal trustee's determination was incorrect

13 S. 109(6) includes a mechanism for challenging the decision of the chair of a creditors' meeting to exclude a vote as a result of non-arm's length dealing:

If the chair is of the opinion that the outcome of a vote was determined by the vote of a creditor who did not deal with the debtor at arm's length at any time during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy, the chair shall redetermine the outcome by excluding the creditor's vote. The redetermined outcome is the outcome of the vote unless a court, on application within 10 days after the day on which the chair redetermined the outcome of the vote, considers it appropriate to include the creditor's vote and determines another outcome.

14 Kapadia relies on section 109(6) in bringing this motion.

15 The proposal trustee, as chair of the creditors' meeting, was incorrect in determining that Kapadia did not deal with the debtor at arm's length at any time during the period that began on the day that was one year before the date of the initial bankruptcy event and ended on the date of the bankruptcy, for several reasons:

- (a) first, Kapadia dealt at arm's length with Star in the year before the NOI; and
- (b) second, even if Kapadia was found to not have dealt at arm's length with Star in some respects in the year before filing its NOI, his dealing with Star in respect of his claim as creditor was at arm's length. More specifically, his relationship with Star did not unduly or improperly increase the debt owed to him by Star, nor was his decision to defer salary a result of or evidence of his being in a non-arm's length relationship with Star.

16 In the circumstances, it is appropriate to include Kapadia's vote in the vote of unsecured creditors and reinstate the initial outcome of the meeting, which is the denial of the proposal.

17 Kapadia relies on s. 109(6) of the *BIA*, and Rules 1.04 and 37.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

18 An affidavit of Viraf Kapadia, to be sworn;

19 The affidavits previously sworn in this and a related proceeding; and

20 Such further and other relief as counsel to Kapadia may advise and this Court considers appropriate.

February 24, 2020

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Estate/Court File No.: 32-2594575

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

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