Court File No. 33-2466100
Estate File No. 33-2466100

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
(IN BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF VERSACCOUNTS LIMITED, OF THE CITY OF OTTAWA, IN THE PROVINCE OF ONTARIO

FACTUM OF SUNIL PANDE AND RICHARD ZHOU

(Returnable January 30, 2019)

January 30, 2019

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Rahool P. Agarwal LSO#: 54528I
ragarwal@lolg.ca
Tel: 416 645 1787

Lars Brusven LSO#:66209G
lbrusven@lolg.ca
Tel: 416 645 5076
Fax: 416 598 3730

Lawyers for the Sunil Pande and Richard Zhou

SERVICE LIST

TO: **DLA PIPER (CANADA) LLP**
1 First Canadian Place, Suite 6000
100 King Street West
Toronto ON M5X 1E2

Edmond F. B. Lamek (LSO #33338U)
edmon.lamek@dlapiper.com
Tel: 416 365 4444
Fax: 416 369 7945

Danny M. Nunes (LSO #53802D)
danny.nunes@dlapiper.com
Tel: 416 365 3421
Fax: 416 369 7945

Lawyers fir VersAccounts Limited

AND TO: **A FARBER & PARTNERS INC.**
150 York Street, Suite 1500
Toronto, ON M5H 3S5

Hylton Levy
hlevy@farbergroup.com
Tel: 416 496 3070

Robyn White
rwhite@farbergroup.com
Tel: 647 796 6030

Noah Litwack
nlitwack@farbergroup.com
Tel: 416 649 3719

Proposal Trustee

AND TO: **DENTONS CANADA LLP**
77 King Street West, Suite 400
Toronto, ON M5K OAl

Sara Van Allen
sara.vanallen@dentons.com
Tel: 416 863 4402

Lawyers for A. Farber &Partners Inc., in its capacity as Proposal Trustee

AND TO: **OSLER, HOSKIN & HARCOURT LLP**
100 King Street West, Suite 6200
1 First Canadian Place
Toronto ON M5X 1B8

Michael Shakra
mshakra@osler.com
Tel: 416 862.6643

Lawyers for Seattle Atlantic, Inc.

AND TO: **MINISTRY OF FINANCE**
77 Bay Street, 11th Floor
Toronto, ON MSG 2C8

Kevin O'Hara
Kevin.Ohara@ontario.ca
Tel: 416.327 8463

AND TO: **CANADA REVENUE AGENCY**
c/o Department of Justice Canada
Ontario Regional Office - Tax Law Section
130 King Street West, Suite 3400

Diane Winters
diane.winters@iustice.gc.ca
Tel: 416.973 3172

AND TO: **Kevin Riegelsberger**
200 W. Highland Drive, Unit 201
Seattle, WA 98119

kevin.riegelsberger@yahoo.com

AND TO: **Matthew Dougherty**
31 Deerfield Drive
Malvern, PA 19355

matthew_dougherty@cable.comcast.com

AND TO: **Michael Riegelsberger**
22840 Willard A venue
Lake Forest, CA 92630

mriegs@yahoo.com

AND TO: **Raymond Bigley**
4737 153 Avenue SE
Bellevue, WA 98006

rbigley91@gmail.com

AND TO: **Balthasar Wyss**
8531 SE 80th Street
Mercer Island, WA 98040

balthasarwyss@gmail.com

AND TO: **Webb Stevens**
116 E Edgar Street
Seattle, WA 98102

webbstevens@gmail.com

AND TO: **Rohit Thukral**
1030 NW 12th Avenue, A530
Portland, OR 97209

thuky@thuky.com

AND TO: **Timothy Duffy**
P.O. Box 10096
Bainbridge Island, WA 98110

tduffy@winslowbi.com

AND TO: **Tommy Pacholke**
47242 SE 13ih Street
North Bend, WA 98045

tpacholke@gmail.com

AND TO: **Pascal Van Dooren**
815 1st A venue, #212
Seattle, WA 98104

pascalvandooren@hotmail.com

AND TO: **Ryan Buma**
18015 15th Avenue NW
Shoreline, WA 98177

ryan.buma@comcast.net

AND TO: **Mitchell Stewart**
20 Willing Way
Malvern, PA 19355

mitchellstewart@gmail.com

AND TO: **The Jon Staenberg Trust**
2121 Terry Avenue, A1403
Seattle, WA 98121

ion(@staenberg.com

AND TO: **Michael Espenshade**
Pensco Trust Company LLC
P.O. Box 173859
Denver, CO 80217

assetmaintenance@pensco.com

AND TO: **Stephen Ferrante**
610 Industry Drive
Seattle, WA 98188

sferrante@emsposinc.com

AND TO: **Joseph Davy**
2820 W Lynn Street
Seattle, WA 98199

jp@davy.io

AND TO: **Nariman Ghandhi**
13 Eastern Road
London, UK N29LD

narighandhi@gmail.com

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RESPONDING FACTUM OF SUNIL PANDE AND RICHARD ZHOU

PART I - OVERVIEW

1. Sunil Pande and Yi Feng (Richard) Zhou (the **Concerned Shareholders**) request an adjournment of the motion brought by VersAccounts Limited (**VersAccounts** or the **Company**) as it relates to the approval of a "stalking horse" sales process (the **Sales Process**) and conditional approval of an asset purchase agreement (the **Seattle APA**) between the Company and Seattle Atlantic, Inc. (**SAI**).

2. The adjournment should be granted for the following reasons:

   a. a special shareholders' meeting is scheduled for February 9, 2019 for the purpose of considering resolutions to, among other things, replace the current Board of Directors;

b. contrary to the position taken by the Company on this motion, the Company is not facing liquidity issues in the short term and, accordingly, there is no immediate need to push through approval of the Sales Process and Seattle APA; and

c. the Sales Process and Seattle APA appear designed to discourage competitive bids, which should be of concern for the Court when a shareholders' meeting to consider replacing the Board is only 10 days away and the Company has exaggerated its liquidity problems in its representations to the Court.

PART II - FACTS

The parties

3. VersAccounts carries on business developing and supplying cloud-based "enterprise resource planning" software. The Company was founded in 2008 and reincorporated and recapitalized in 2013.[1]

4. Sunil Pande is the President and CEO of VersAccounts and is a member of the Board of Directors (the **Board**). Richard Zhou was the Company's Chief Technology Officer. They both joined the Company in 2013 and have been the Company's responsible for managing and overseeing all aspects of the Company's daily operations.[2]

5. The other members of the Board are Kevin Riegelsberger (the Board Chair), James Welch, and Mark Richardson (the **Other Directors**).

[1] Affidavit of Sunil Pande, sworn January 29, 2019 (the "Pande Affidavit") at para 6, Responding Motion Record of S. Pande and R. Zhou (the "Responding MR") at pgs. 2-3.
[2] Pande Affidavit at para 6, Responding MR at pgs. 2-3.

6. Mr. Pande holds his officer and director positions pursuant the Company's Unanimous Shareholders' Agreement (the **USA**). As per the terms of the USA, he cannot be removed without 66.7% shareholder approval.[3]

7. Messrs. Pande and Zhou each hold 20.6% of the Company's shares, for a total of 41.2%.[4]

8. Every VersAccounts shareholder is a party to a Voting Trust Agreement and Continuing Power of Attorney (the **Voting Trust Agreement**). Under the Voting Trust Agreement, the shareholder appoints Mr. Pande as "attorney and agent" for voting their shares. The 58.8% of shares not owned by Messrs. Pande and Zhou are subject to the Voting Trust Agreement and Mr. Pande has the right to vote those shares in accordance with the Voting Trust Agreement.[5]

The Company's financial picture

9. The Company's financial picture is not as dire as has been presented by the Company and the Trustee.

10. Neither the Company nor the Trustee make any reference to the existence of, or the revenues generated from, the Company's licensing arrangement with ServiceTrade Inc. (**ServiceTrade**). The ServiceTrade deal was finalized in August 2018, and is the largest deal the Company has ever closed.[6] The deal:

[3] Pande Affidavit at para 12, Responding MR at pg. 4.
[4] Pande Affidavit at para 10, Responding MR at pg. 3.
[5] Pande Affidavit at para 14, Responding MR at pg. 5.
[6] Pande Affidavit at para 18-19, Responding MR at pgs. 5-6.

a. provides for minimum royalties to the Company of US$150,000 per year, plus 20% of sales made by ServiceTrade beyond US$750,000 and 15% of sales beyond US$3,000,000;

b. accounted for 25% of the Company's 2018 recurring revenue stream, and 14.8% of 2018 billings; and

c. is projected to generate a minimum of $US150,000 in 2019, US$150,000 in 2020, US$180,000 in 2021, US $270,000 in 2022 and US$405,000 in 2023.[7]

11. The Company and the Trustee have expressed concerns over cash flow, but the Trustee's Projected Cash Flow does not illustrate immediate liquidity issues. The Trustee's Projected Cash Flow shows that the Company will remain cash positive, with at least a $20,000 buffer, through to April 16, 2019.[8]

12. Moreover, the Trustee's Projected Cash Flow is missing critical information. As opposed to receiving cash inflows of $92,102 over the next 13 weeks, the Concerned Shareholders estimate the Company will be paid $212,915 over that same time period, with $153,567 paid by the end of February and $59,348 paid by the end of March. The cash inflows expected by the Concerned Shareholders include a $30,000 payment from ServiceTrade by the end of February.[9]

13. The Concerned Shareholders' cash flow projection shows that the Company is well positioned to meet its short term obligations without assistance from the SAI deposit.

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[7] Pande Affidavit at para 18, Responding MR at pgs. 5-6.
[8] First Report of A. Farber & Partners Inc., in its Capacity as Trustee Under the Notice of Intention to Make a Proposal of VersAccounts Limited, January 25, 2019 (the "Trustee's First Report") at Appendix "E".
[9] Supplementary Affidavit of Sunil Pande, Sworn January 29, 2019 (the "Supplementary Pande Affidavit") at para 4 and Exhibit "A".

Events leading to the filing of the notice of intention

14. The Other Directors have been pursuing a sale of the Company to SAI and an insolvency proceeding since the summer of 2018.[10]

15. In July 2018, the Other Directors appeared content with the Company's trajectory. Management had recently closed the deal with ServiceTrade and the Company was ahead of its sales performance goals. The Board in fact approved a plan to seek out US$400,000-$500,000 in new investment. There was no discussion at the Board level at that time regarding a sale or insolvency.[11]

16. The Other Directors then abruptly changed course. After the July Board meeting, Mr. Welch refused to sign the required fundraising documents, notwithstanding the Board's approval to move forward. Then, on August 30, 2018, the Board Chair, Mr. Riegelsberger, made the following proposal to Mr. Pande:

a. the Company will pursue additional investment as approved at the July Board meeting, but employees (including the Concerned Shareholders) must give up their accrued salaries and Mr. Pande must agree to amend the USA to allow the Board to remove him as President and CEO; or

b. sell the Company to Joe Davy (a note holder and also principal of SAI), at a discount.[12]

[10] Pande Affidavit at para 30, Responding MR at pg. 8.
[11] Pande Affidavit at para 27, Responding MR at pg. 7.
[12] Pande Affidavit at para 29-30, Responding MR at pg. 8.

17. The Board Chair's proposal was the first time a sale had been proposed as a viable path forward.

18. The Board's next meeting was held on September 10, 2018. Mr. Pande was given only a few hours' notice, but attended. At the meeting, the Other Directors voted to terminate Mr. Zhou without cause, and purported to terminate Mr. Pande (the termination was ineffective because there was no shareholder approval to amend the relevant provisions of the USA).[13]

19. The Concerned Shareholders retained counsel. They attempted to negotiate a resolution with the Other Directors, but they could not agree on a deal.[14]

20. The Board subsequently met on November 5, 2018. Among other things, the Other Directors voted to increase the size of the Board, and to retain A. Farber & Partners Ltd. (**Farber**) to consult on an insolvency filing. The Board agreed that the Farber's recommendation would be reviewed and considered by the Board before being acted upon.[15] That never occurred.

21. On November 28, 2018, the Concerned Shareholders delivered a requisition to hold a special shareholders' meeting (the **Requisition**). The Requisition proposed that shareholders consider and vote on resolutions to:

a. amend the USA to remove James Welch as a director;

b. elect Richard Zhou as a director;

[13] Pande Affidavit at para 37, Responding MR at pg. 10.
[14] Pande Affidavit at para 40, Responding MR at pg. 10.
[15] Pande Affidavit at para 43, Responding MR at pg. 11-12.

c. remove the Other Directors from the Board.[16]

22. The Board held a meeting on December 14, 2018. At that meeting:

a. the Board resolved to fix the special shareholders' meeting for February 9, 2019—only a week before the last day on which the meeting could be held. Notably, there is no reference to the special shareholders' meeting in the Company's court materials or the Trustee's report;

b. the Other Directors refused to provide Mr. Pande with disclosure of communications between the Other Directors and Company counsel and Farber;

c. the Other Directors refused to agree to give Mr. Pande advance notice of any insolvency filing, though they advised that a filing was "imminent".[17]

23. On December 21, 2018, ServiceTrade told Mr. Pande that it was interested in exploring an acquisition of the Company's business. The Board agreed to engage in discussions with ServiceTrade, and authorized Mr. Pande and Mr. Richardson to negotiate on behalf of the Company.[18]

24. Messrs. Pande and Richardson met with ServiceTrade on January 10, 2019. ServiceTrade advised that it preferred an unlimited licensing arrangement for a 1-2 period. That type of arrangement has the potential to provide the Company upfront capital in the range of $2.5 million with recurring US$15,000 monthly payments.[19]

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[16] Pande Affidavit at para 44 and Exhibit "K", Responding MR at pg. 12.
[17] Pande Affidavit at para 50, Responding MR at pg. 13-14.
[18] Pande Affidavit at para 55-56, Responding MR at pg. 15.
[19] Pande Affidavit at para 58, Responding MR at pg. 15.

25. Messrs. Pande and Richardson agreed to give ServiceTrade a proposal by January 23, 2019. However, no proposal was made. Mr. Richardson last communicated with Mr. Pande about the ServiceTrade proposal on January 22, 2019.[20]

26. The next day, January 23, 2019, the Board Chair advised Mr. Pande that the Company had filed a notice of intention to make a proposal and that it would be seeking approval of a stalking horse sale process. Despite Mr. Pande's role as a director, and despite his ongoing discussions with Mr. Richardson up to and including Mr. Richardson's email on January 22, 2019, Mr. Pande had no prior notice of when the Company's notice of intention would be filed, nor did he receive disclosure of any information related to the proposed stalking horse sales process.[21]

The proposed sales process and stalking horse bid

27. The Company has sought approval of: (a) the "stalking horse" Sales Process; and (b) the Seattle APA as a stalking horse bid.

28. The Sales Process and the Seattle APA appear designed to discourage competing bids. Specifically:

a. SAI is entitled to a $50,000 break fee if does not succeed in the auction, and competing overbids must be in $25,000 increments. The result is that any competitive bid must be at least $325,000, 30% greater than the Seattle APA purchase price;[22]

[20] Pande Affidavit at para 59, Responding MR at pg. 15.
[21] Pande Affidavit at para 62, Responding MR at pg. 16.
[22] Pande Affidavit at para 64, Responding MR at pg. 16-17.

b. SAI is entitled to 50% of any deal with ServiceTrade approved by the Company within 120 days. In other words, if ServiceTrade bids for the Company's assets as part of the auction, SAI is entitled to take 50% of the purchase price proceeds (as well as the break fee).[23]

PART III - LAW & ARGUMENT

29. The Concerned Shareholders' request for an adjournment should be granted. Approving the Sales Process and the Seattle APA now could be highly prejudicial to the Company and its stakeholders, whereas a brief adjournment to late February will cause little or no prejudice to the Company, economic or otherwise.

Approval of the Sales Process should be delayed until after the shareholders' meeting

30. A special shareholders' meeting is scheduled for February 9, 2019—only 10 days from now. The business of the meeting will include consideration of a resolution to replace the current Board with the Concerned Shareholders.

31. The approval of the Sales Process and the Seattle APA should wait until after the shareholders' meeting. If the Concerned Shareholders take control of the Board, there is a possibility that they will determine that the proposed stalking horse sales process is not in the best interests of the Company.[24] They may decide to modify the process or abandon it all together.

32. If the Sales Process and Seattle APA are already approved, a new Board would only be able to change course at the cost of significant economic hardship on the Company. SAI would be

[23] Asset Purchase Agreement between VersAccounts Limited and Seattle Atlantic, Inc., January 23, 2019, at Article 8, at Exhibit "C" to the Affidavit of James Welch, sworn on January 24, 2019, Motion Record of the Moving Party.
[24] Pande Affidavit at para 70, Responding MR at pg. 18.

entitled to the $50,000 break fee. The funds spent on the Sales Process (estimated to be $25,000) would be wasted.

33. There would also be a cost to the administration of justice: the proceedings in this Court will have been largely meaningless.

34. The new Board would also be handcuffed with respect to dealings with ServiceTrade. Insofar as the executed Seattle APA has not been terminated, SAI is entitled to 50% of the proceeds of any ServiceTrade agreement. Any deal with ServiceTrade—the only other known possible counterparty—would be economically unfeasible.

35. In light of these factors, the new Board may feel compelled to follow through on the stalking horse sales process, even if they believe another route would have generated a better result for stakeholders. The interests and reasonable expectations of the Company's shareholders, as represented by the new Board, will have been frustrated because of economic penalties imposed by the Sales Process.

36. The meeting is only 10 days away. The Company's corporate governance process should be allowed to take its course unimpaired. Both the administration of justice and shareholder democracy will be best served by that outcome.

The Company does not require immediate liquidity

37. The Company and the Trustee have asserted that the Company is in dire financial straits and that the SAI deposit is needed to satisfy current obligations. The Company and the Trustee have mischaracterized or misunderstood the Company's actual financial position.

38. First, both the Company and the Trustee neglected to account for the revenues generated by the ServiceTrade royalty licensing deal finalized in August 2018. Given the materiality of the omission—the Company's largest deal ever, $150,000 minimum annual royalties, with upside potential of many multiples of the minimum—the Company and Trustee's financial analysis cannot be considered reliable.

39. Second, the Projected Cash Flow relied on by the Trustee for its liquidity assessment does not compute. For example:

a. the Projected Cash Flow includes $55,000 in estimated professional fees related to the Sales Process. The professional fees for the Sales Process should not be included in the cash flow analysis justifying need for the Sales Process—the analysis is circular;

b. even if projected professional fees of $55,000 were to be included, which the responding parties disagree with, the Trustee's Projected Cash Flow shows that the Company will be cash positive through to April 16, 2019, without the $50,000 SAI deposit.

40. Third, the Trustee's Projected Cash Flow is missing material information about expected cash inflows. The Trustee's projection estimates a total cash inflows of $92,102 over the next 13 weeks.[25]

[25] The "Supplementary Pande Affidavit at para 4 and Exhibit "A".

41. By contrast, in the cash flow projection prepared by Mr. Pande, the Company is expected to receive $212,915 over that same period, with $153,567 paid by the end of February and $59,348 paid by the end of March.[26]

42. Mr. Pande's cash flow projection demonstrates that the Company has a strong cash position in the short term. The SAI deposit is not necessary, and an adjournment of the approval of the stalking horse sales process will not cause any prejudice to the Company.

The Court should be wary of pushing through approval of the Sales Process

43. Where the shareholders' meeting to consider replacing the Board is only 10 days away, and the Company has sufficient cash in the short term to continue ordinary course operations, the Court should be wary of approving a Sales Process that appears designed to discourage competitive bids.

44. Several features of the Sales Process are concerning and would likely be determined to be unreasonable if challenged:

a. the break fee of $50,000, which is 20% of the Purchase Price;

b. the minimum bid increment of $25,000, which, together with the break fee, requires any competitive bid to be at least $325,000, or 30% more than the SAI Purchase Price; and

[26] Supplementary Affidavit of Sunil Pande, Sworn January 29, 2019 (the "Supplementary Pande Affidavit") at para 4 and Exhibit "A".

c. SAI's entitlement to 50% of any agreement with ServiceTrade, within 120 days of execution of the Seattle APA.

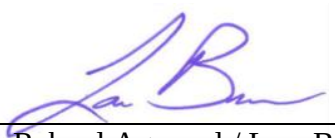
45. The provision in the Seattle APA giving SAI 50% of the proceeds of a ServiceTrade deal is particularly troubling. The practical effect of this term is that ServiceTrade—the only other known possible buyer—is effectively barred from an opportunity to bid in the Sales Process. If SAI is entitled to half of the proceeds of a ServiceTrade agreement, it would be near impossible for the Trustee to recommend a ServiceTrade bid unless it was far in excess of the SAI bid.[27]

46. This Court recently recognized that stalking horse bid procedures will be rejected for being unreasonable if they will have the effect of discouraging competitive bids.[28] Given the imminent shareholders' meeting and the Company's cash position, there is no need to push a Sales Process forward that has some very questionable components and may not meet the Court's reasonableness standard.

PART IV - ORDER REQUESTED

47. The Concerned Shareholders respectfully request the Company's motion as it relates to the approval the proposed Sales Process and the Seattle APA be adjourned to the week of February 25, 2019.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of January, 2019.



Rahool Agarwal / Lars Brusven

[27] E.g., a $600,000 bid by ServiceTrade would generate net proceeds to the Company of $250,000 ($600,000 minus 50% to SAI, minus the $50,000 Break Fee).
[28] *American Iron v 1340923 Ontario*, 2018 ONSC 2810 at para 37.

SCHEDULE “A” - LIST OF AUTHORITIES

1. *American Iron v 1340923 Ontario*, 2018 ONSC 2810

SCHEDULE “B” - TEXT OF STATUTES, REGULATIONS & BY - LAWS

Nil

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF VERSACCOUNTS LIMITED, OF THE CITY OF OTTAWA, IN THE PROVINCE OF ONTARIO

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PROCEEDING COMMENCED AT
TORONTO

RESPONDING FACTUM OF SUNIL PANDE AND RICHARD ZHOU

(Returnable January 30, 2019)

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Rahool P. Agarwal LSO#: 54528I
ragarwal@lolg.ca
Tel: 416 645 1787

Lars Brusven LSO#:66209G
lbrusven@lolg.ca
Tel: 416 645 5076
Fax: 416 598 3730

Lawyers for the Responding Parties, Sunil Pande and Richard Zhou

CITATION: American Iron v. 1340923 Ontario, 2018 ONSC 2810
COURT FILE NO.: CV-18-595577-00CL
DATE: 20180525

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

APPLICATION UNDER
SUBSECTION 243(1) OF THE *BANKRUPTCY 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**

RE: American Iron & Metal Company Inc., Applicant

AND:

1340923 Ontario Inc. and Waxman Realty Company Inc., Respondents

BEFORE: L. A. Pattillo J.

COUNSEL: *Wael Rostom* and *Stephen Brown-Okruhlik*, for the Applicant

Matt Moloci, for the Respondents

Steven Graff, for the proposed Receiver, A. Farber Group

A. Winton, for NASG Canada Inc.

Robert Brush and Clarke Tedesco, for American Iron & Metal, 134 Ontario and Waxman Realty Company Inc.

T. VanKlink, for the Business Development Bank

HEARD: April 20, 2018

ENDORSEMENT

[1] This is an application by American Iron & Metal Company Inc. ("AIM") for an order appointing A. Farber & Partners Inc. ("Farber") as receiver over all the property and assets of the Respondents, 1340923 Ontario Inc. ("134") and Waxman Realty Company Inc. ("Waxman Realty"). AIM also seeks approval of a stalking horse sale process "proposed by the proposed receiver" for the marketing and sale of the Respondents' respective ownership interests in certain real property, together with ancillary orders.

[2] The application is consented to by the Respondents. It is opposed, however, by NASG Canada Inc. ("NASG") on the grounds that approval of the stalking horse sale process and in particular the requested vesting order would remove its proprietary interest in the properties in question.

[3] AIM is part of a group of companies that carry on business in the scrap metal and recycling industry across North America and elsewhere.

[4] Waxman Realty was incorporated in July 2010 for the purpose of acquiring property located at 4350 Harvester Road, Burlington, Ontario (the "Burlington Property") which it acquired in the same month. The acquisition was financed by a loan from Roynat Capital Inc. pursuant to a loan agreement dated July 30, 2010. Waxman Realty issued a debenture in favour of Roynat granting it security over certain of Waxman Realty's assets, including its ownership interest in the Burlington Property.

[5] In December 2012, AIM purchased a 50% ownership interest in the Burlington Property from Waxman Realty. Since then, AIM and Waxman Realty have co-owned the Burlington Property as tenants in common pursuant to a joint venture agreement.

[6] 134 was incorporated in June 2007 for the purpose of acquiring property located at 143 Adams Boulevard, Brantford, Ontario (the "Brantford Property") which it acquired in the same month. In December 2012, AIM purchased a 50% interest in the Brantford Property from 134. Since then, AIM and 134 have co-owned the Brantford Property as tenants in common pursuant to a joint venture agreement.

[7] Both the Burlington Property and the Brantford Property have been operated as scrap yards.

[8] On October 12, 2012, both Waxman Realty and 134 issued demand debentures in favour of AIM, each in the amount of $3,000,000. Further, in July 2013, pursuant to a letter agreement with Waxman Realty, AIM paid $1,414,313.08 to Roynat on behalf of Waxman Realty and assumed the debt owed by it to Roynat on substantially the same terms as attached to the Roynat loan.

[9] AIM is owed $2,057,152.61 by Waxman Realty, as a result of advances made under the letter agreement, the Burlington Property joint venture agreement and the Waxman Realty demand debenture.

[10] AIM is owed $278,854.49 by 134 pursuant to advances made to 134 under the terms of the Brantford Property joint venture agreement and the 134 demand debenture.

[11] Waxman Realty and 134 (together the "Debtors") have acknowledged, among other things, their respective indebtedness and the validity of AIM's security over both the Burlington Property and the Brantford Property pursuant to a forbearance agreement dated December 22, 2017.

[12] On December 22, 2017, AIM, through its legal counsel, demanded payment of both Waxman Realty and 134's respective indebtedness and provided each of the companies with notice of intention to enforce its security in accordance with section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985. C. B-3, as amended (the "BIA").

[13] The purpose behind AIM's application to appoint a receiver is to facilitate a sale to itself of the Debtor's interests in both the Burlington Property and the Brantford Property. The proposed sale process contemplates the receiver marketing the two property interests based on a stalking horse bid by AIM. The stalking horse bid is set out in a stalking horse agreement and is comprised of a cash deposit in the amount of $360,000; a credit in the amount of $2,336,007.10, representing all the secured debt and accrued interest thereon outstanding on the loans provided by AIM to the Debtors; a further credit in an amount to be determined by the proposed receiver or the court as recoverable under a mortgage in favour of the Business Development Bank of Canada in the principal amount of $2,050,000 and an accompanying notice of assignment of rents in respect of the Brantford Property; and the balance to be paid in cash on closing.

[14] The stalking horse bid is supported by confidential valuations of both Waxman Realty and 134's interests in the respective properties. The terms of the bid include a $500,000 "break fee" plus a minimum overbid of $150,000. Finally, the proposed sale process seeks vesting orders that vest the Debtors' interests in the two properties "free and clear of any claims" in light of "separate ongoing litigation".

[15] Farber has filed a Report in its capacity as "proposed receiver" of Waxman Realty and 134 in which it outlines the proposed sale process, the stalking horse agreement and the break fee. It recommends that the sale process be approved and requests that the proposed Receiver be authorized to conduct the sale process, execute the stalking horse agreement and perform the receiver's obligations thereunder.

NASG

[16] The "separate ongoing litigation" referred to by AIM in its material in respect of the vesting orders, involves a claim by NASG against, among others, AIM, Waxman Realty, 134 and other Waxman parties including Camile Bouliane, commenced in the Superior Court on the Commercial List by Notice of Action dated June 25, 2014 (the "Action"). In the Action, NASG claims that the Defendants are liable for the theft of over 42 million pounds of carbon scrap metal from NASG which took place between January 2007 and May 2014. NASG states that the value of the carbon scrap stolen amounted to $7,384,524.99.

[17] NASG's statement of claim alleges numerous causes of action including negligence, negligent misrepresentation, unjust enrichment and/or breach of contract, oppression, theft and conversion and sets out multiple headings of relief including damages and "the imposition of a resulting and/or constructive trust over the funds and assets improperly acquired by the Waxman Defendants, the AIM Defendants and Bouliane, due to the conversion of or unjust enrichment relating to NASG Canada's carbon scrap metal."

[18] On June 26, 2014, NSAG obtained an *ex parte Mareva* Order requiring, among other things, that Waxman Realty and 134 (part of the Waxman Defendants) disclose their assets and provide a sworn statement with respect thereto. NASG's material filed in support stated that AIM was joined as a necessary party given its ownership interests in, among other things, the Burlington and Brantford Properties and expressly stated that no allegation of wrongdoing was being made against AIM.

[19] NASG's factum on the *Mareva* motion sought, among other things, a certificate of pending litigation ("CPL") against the Burlington and Brantford Properties on the basis of the allegation that the proceeds of the theft were used by the Waxman Defendants to purchase and/or improve the two properties and NASG was claiming a tracing order and constructive trust over the funds and assets improperly acquired by the Waxman Defendants.

[20] In granting the *Mareva* Order, Newbould J. refused to grant a CPL against the two properties. In the endorsement, he stated: "With respect to the two Waxman properties, I think that the request for a CPL should be dealt with after the material and today's order has been served. AIM has an interest in these properties and it is unlikely that the properties could be sold or financed before the return of the matter."

[21] When the matter returned to the court on July 4, 2014, the Defendants requested an adjournment. The June 26th order was extended to July 14, 2014. In respect of NASG's CPL request, Newbould J. wrote: "If there is any intent to deal with the Waxman/AIM properties before then, 48 hours' notice are to be given to the plaintiff's counsel."

[22] The matter came back before Newbould J. on December 2, 2014, at which time the parties agreed to a consent order which varied the June 26th order by, among other things, requiring that the Waxman Defendants provide 7 days' notice of intent to dispose or encumber either the Burlington or Brantford Properties.

[23] It was pursuant to the December 2, 2014 order that NASG was given notice of this application and have appeared by counsel to oppose it. It submits, given its propriety claim to the two properties (constructive trust), the court does not have the authority to vest off NASG's interest without due process which in the present case requires the trial of the Action. No trial date has been set for the Action.

[24] Initially, NASG requested a brief adjournment in order to complete the evidentiary record supporting its propriety claim. It subsequently withdrew that request and indicated that it was prepared to proceed on the basis of the record before the court.

[25] The court's authority to issue a vesting order is contained in section 100 of the *Courts of Justice Act*, R.S.O. 1990 c. C. 43 ("CJA"). That authority, however, does not extend to extinguishing third party proprietary rights: *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2018 ONCA 253.

[26] The question for determination, therefore, is whether NASG's contingent claim for a constructive trust in the Action gives it a proprietary interest in the two properties.

[27] A constructive trust is an equitable remedial remedy for certain forms of unjust enrichment. It does not automatically follow from a finding of unjust enrichment. In order for a constructive trust to be found, monetary compensation must be inadequate and there must be a link between the plaintiff's contributions and the property in which they claim an interest. Further, the extent of the constructive trust interest is proportionate to the claimant's contributions. See: *Peter v. Beblow*, [1993] 1 S.C.R 980, at para. 26; *Kerr v. Baranow*, [2011] 1 S.C.R 269 at pars. 47 to 53.

[28] In determining whether a monetary award is insufficient, the court may take into account the probability of recovery as well as whether there is a reason to grant the plaintiff the additional rights that flow from recognition of property rights: *Kerr* at para. 52.

[29] AIM submits that NASG's claim for a constructive trust is contingent and it has not established that it has any rights to the properties. In addition, it submits monetary damages are a sufficient remedy for NASG's claims. In that regard, it proposes that the net funds received from the sale of the two properties (after payment of encumbrances and costs) be held by the receiver pending a determination of NASG's claims in the Action.

[30] In my view, AIM's proposal is appropriate. Merely claiming a constructive trust does not create a proprietary interest. In my view, given AIM's proposal that the receiver hold the net sale proceeds pending the determination of NASG's claim coupled with the fact that AIM, who is a Defendant in the Action, continues to own the other ½ interest in the properties, I do not consider an award of monetary compensation to be inadequate. NASG agrees that AIM is a substantial company.

[31] Further, as there is no evidence of a link between the monies stolen from NASG and the properties, NASG's claim may only result in monetary damages. I recognize that NASG has had little time to prepare a complete record before me. Nevertheless, I am satisfied that even if NASG establishes that some of the funds for purchase or improvement of the properties came from funds obtained from the stolen scrap, in the circumstances, a monetary award would not be inadequate.

[32] Finally, there is no evidence that NASG seeks additional rights that may flow from potential property rights in the properties.

[33] Accordingly, I am satisfied that, based on AIM's proposal to have the receiver hold the net sale proceeds from the properties, vesting orders can issue upon the sale of both properties.

To the extent that NASG has any rights in the properties arising from the Waxman Defendants' actions, those rights are protected.

[34] NASG's request to dismiss the AIM's application is denied.

The Stalking Horse Bid

[35] As noted, the proposed sale process with the stalking horse bid includes a $500,000 break fee to AIM together with a minimum overbid amount of $150,000. I consider those amounts to be excessive in the circumstances.

[36] A "break fee" in the context of a receivership sale with a credit bid, is an amount which is intended to compensate the unsuccessful credit bidder for the costs it has incurred in carrying out the due diligence necessary to enter into the credit bid agreement in the event that another offer to purchase becomes the successful purchaser.

[37] Where break fees and overbid fees are reasonable, such that they do not jeopardize the ability of a competing bidder to make a bid, they have been approved by this court: *Re Parlay Entertainment*, 2011 ONSC 3492; *Re MPH Graphics Inc.*, 2014 ONSC 947.

[38] In this case, AIM has provided no evidence to justify the break fee of $500,000, apart from the Stalking Horse Agreement of Purchase and Sale which provides in section 6.1:

> In consideration for the Purchaser's expenditures of time and money in acting as the initial bidder in the Stalking Horse Bid and the preparation of this Agreement, and in performing due diligence pursuant to this Agreement, the Sale Process Orders shall also provide for liquidated damages in the amount of the Break Fee, payable by the Receiver to the Purchaser in the event that a materially higher offer than the Purchase Price advanced by the Purchaser pursuant to the terms herein is obtained for the Purchased Assets through the Sale Process and, as a consequence, the Receiver sells all or substantially all the Purchased Assets to a person or entity other than the Purchaser.

[39] Farber deals with the break fee at paragraph 17(k) of its Report and concludes, based on the underlying complexity of AIM's roles in negotiating the Stalking Horse Agreement as well as its ongoing requisite involvement and negotiation with any successful third party purchaser, that the break fee "represents a fair and reasonable estimate of the costs and damages which would be incurred by AIM if the Stalking Horse Bid is not consummated." Apart from its comments on complexity, Farber provides no analysis of how it arrived at that conclusion.

[40] Nor has Farber provided any information or recommendation concerning the proposed overbid fee of $150,000.

[41] I am not satisfied that the proposed break fee and the overbid fee are reasonable based on the material before me.

[42] With respect to the break fee, there is no evidence of what AIM's costs were in undertaking due diligence in respect of the transaction. I suspect that there was very little due diligence given that AIM has been a 50% owner of the properties with the Debtors since December 2012 and must be intimately familiar with them and their encumbrances. Nor, in my view is it appropriate to include in the break fee, as Farber has done, an amount in respect of future negotiations with the purchaser of the properties. While there will no doubt be negotiations with a third party purchaser of the Debtor's interests in the properties, it is not appropriate to require such purchaser to pay AIM's costs of such negotiations.

[43] As noted, there is no information concerning the overbid fee and why it is reasonable in the context of the proposed sale, particularly when it is viewed together with the proposed break fee.

[44] The purpose of the sale process in a receivership is to obtain the highest and best price for the property for the benefit of all creditors. It is important in approving the sale process to ensure that it is open to competing bidders. While there is a place for both break fees and overbid fees, they must be reasonable in the circumstances in that they must not jeopardize the ability of a competing bidder to make a bid. Given the property interests to be sold and the proposed credit bid in this case, I am not satisfied that the proposed break fee and the overbid fee, individually and combined, are reasonable.

[45] For the above reasons, therefore, I do not approve the Stalking Horse Agreement and the proposed sale process.

Conclusion

[46] Based on the material filed and the reasons set out herein, I am satisfied that it is just and convenient to appoint Farber as the receiver for both Waxman Realty and 134. As indicated, however, I am not prepared to approve the proposed stalking horse agreement or the sale process, without prejudice to the receiver and AIM revising them to address my concerns as noted herein and reapplying for approval.

[47] Given the commercial sensitivity of the valuations of both the Burlington Property and the Brantford Property in the context of the proposed sale, I am satisfied that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 41 has been met and accordingly the Confidential Exhibits shall be sealed pending the completion of any sale.

[48] At the conclusion of the argument, AIM indicated that it may want to reconsider its request for the receiver pending my decision. Upon receipt of these reasons, AIM should arrange a 9:30 am appointment before me to advise how it wishes to proceed.

[49] Costs, if not agreed, can also be dealt with at the 9:30 appointment.

L. A. Pattillo J.

Released: May 25, 2018