

**CITATION:** Comerica Bank v. Dragonwave Inc., 2017 ONSC 6104

**COURT FILE NO.:** CV-17-579715-00CL

**DATE:** 2017-10-06

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** COMERICA BANK

**AND:**

DRAGONWAVE INC.

**BEFORE:** Regional Senior Justice G.B. Morawetz

**COUNSEL:** *J. Dietrich and B. Goodis*, for the KSV Kofman Inc., Receiver and Manager of the Assets, Property and Undertakings of Dragonwave Inc.

*S. Kour*, for Dragonwave-X Canada, Inc.

*J. Carhart*, for Jabil, Inc.

*J. MacLellan*, for Chubb/Westchester Insurance

*C. Burr*, for Nokia Solutions and Networks BV

**HEARD**

**AND RELEASED:** October 6, 2017

**ENDORSEMENT**

[1] The motion to approve the Transaction for the sale of assets of Dragonwave Inc. to Dragonwave-X Canada, Inc. was not opposed. A sales process had previously been approved and the Second Report of the Receiver reviews the steps taken by the Receiver to implement the sales process. Having reviewed the Report, I am satisfied that the Receiver has taken the necessary steps to ensure that a fair and transparent process has been implemented.

[2] The principles set out *Soundair* have been followed. Specifically, the Receiver performed a liquidation analysis, a bid process resulted in multiple offers, the offers were received and analyzed and the Receiver has come forth and recommended approval of the Transaction with Dragonwave-X Canada.

[3] It is also noted that perspective purchasers were provided with the opportunity to meet with the debtor's key suppliers, including Jabil, Inc., the debtor's contract manufacturer. On a going-forward basis, Dragonwave-X has indicated that it is waiving section 6.4(e) APA conditions at this time, notwithstanding that no going forward arrangement has been entered into as between Jabil and Dragonwave-X and the approval of the Transaction being requested today does not have the effect of conveying Dragonwave's interest in the Jabil contract which was entered into prior to receivership.

[4] The Transaction is approved and the Receiver is authorized to take the necessary steps to complete the Transaction.

[5] The ancillary relief as set out in the draft order up to and including paragraph 10 (Articles of Amendment) is granted.

[6] The request to include paragraph 11 of the draft order concerning a direction by the court to the Director appointed pursuant to the CBCA to issue a Certificate of Amendment to effect the name change has been withdrawn. It is noted that I did raise a question as to whether the court had jurisdiction to issue such a direction, but in this proceeding, the issue is moot.

[7] The Receiver is authorized to make distributions to the Agent, Comerica and EDC as set out in paragraph 12 of the draft order.

[8] It is clear that there will be a shortfall to the secured creditors.

[9] Paragraph 13 of the draft order provides for a declaration that any distribution under this order shall not constitute a "distribution" of property or money by the Receiver for the purposes of section 107 of the *Corporations Tax Act (Ont.)*, s. 117 of the *Taxation Act, 2007 (Ont.)*, s. 159 of the *Income Tax Act (Canada)*, s. 270 of the *Excise Tax Act (Canada)*, or similar tax statutes and that the Receiver shall not incur any liability for such distributions.

[10] At this time, I question whether I have jurisdiction to grant the requested declaration. I acknowledge that this type of order has been granted in other proceedings, but it appears that there is no reported decision in Ontario that has addressed the issue. Therefore, I can only assume that these orders in other proceedings were made on an unopposed basis.

[11] The issue has been addressed in an article entitled "Distribution Certification – Have We Found the Holy Grail?" by Jean-Daniel Breton, as published in the Annual Review of Insolvency Law 2016 at page 811, which comments on the decision of Turcotte J. of the Superior Court of Quebec in *Re: 9210-6905 Quebec Inc.*, 2015 Carswell Que. 13743 (CSQue). The author comments on the jurisdictional issue that I have referenced and some practical approaches to solving the issue, including requests by receiver's to taxing authorities for comfort letters.

[12] At this point, I decline to grant the requested relief for such a declaration, without prejudice to the right of the Receiver to bring this issue on for determination in a more fulsome manner. Comprehensive factums will be required.

[13] The Receiver has also requested approval of its First and Second Reports and the activities of the Receiver as set out therein. The Receiver has advised that there have been no adverse comments to the Reports and the approval is granted.

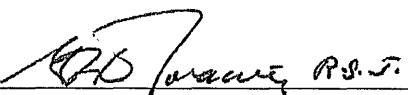
[14] The fees and disbursements of the Receiver and its counsel appear to be reasonable in the circumstances and they are approved.

[15] The Receiver has requested that Confidential Appendices 1, 2 and 3 be sealed. The Appendices contain information relating to the bid process and the liquidation analysis. I am satisfied that the information in the Appendices should remain confidential, as disclosure of such

information, at this time, could be harmful to stakeholders. Having considered the *Sierra Club* principles, the Confidential Appendices are to be sealed.

[16] After the Transaction has closed and the Receiver has filed its Certificate which will confirm the closing, unredacted copies of Appendices 1 and 3 are to be filed. Appendix 2, which is the liquidation analysis, need not be filed as it could impair the ability of the Receiver to fulfil its mandate.

[17] Motion granted. Order signed in the form presented, as amended.

  
Regional Senior Justice G.B. Morawetz

**Date:** October 6, 2017