

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

B E T W E E N:

**APPLICATION PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED AND SECTION 101(1)
OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1190, C. c.43, AS AMENDED**

COMERICA BANK

Applicant

- and -

DRAGONWAVE INC.

Respondent

FACTUM OF THE RECEIVER
(Motion for Sale Approval)
(returnable October 6, 2017)

October 4, 2017

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TO: THE SERVICE LIST

Lawyers for KSV Kofman Inc., in its capacity as
court appointed Receiver and Receiver and
manager of the assets, properties and
undertakings of DragonWave Inc.

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FACTUM OF THE RECEIVER

(Motion for Sale Approval)
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PART I – OVERVIEW

1. This is a motion by the Receiver¹ seeking an order substantially in the form attached as Schedule "A" to the Receiver's notice of motion returnable October 6, 2017, among other things, (i) approving the Transaction and authorizing the Receiver to take such additional steps and do such additional things as required to complete the Transaction and upon completion of the Transaction and filing of the Receiver's Certificate, vesting absolutely all of the Receiver's and the Company's right, title and interest in and to the Purchased Assets, in the Purchaser, free and clear of and from all Claims, except for the Permitted Encumbrances, (ii) authorizing the Receiver to take any steps to discharge Encumbrances registered pursuant to any intellectual property registry system; and (iii) authorizing the Receiver to file articles of amendment pursuant

¹ Defined terms not otherwise defined herein have the meaning provided to them in the Second Report to Court of the Receiver dated September 29, 2017 (the "**Second Report**").

to section 100 of the *Canada Business Corporations Act*² ("**CBCA**") to change the name of the Company; (iv) sealing Confidential Appendices 1 through 3 to the Second Report until further order of this Court; (v) authorizing the Receiver to distribute any funds in its hands from time to time to the Agent without further Order of this Court, in an amount not to exceed the amounts owing by the Company to the Agent and the Senior Secured Lenders; (vi) approving the First Report, the Second Report and the activities of the Receiver set out therein; and (vii) approving the fees and expenses of the Receiver and its legal counsel as set out in the Sieradzki Affidavit and the Bellissimo Affidavit (the "**Fee Affidavits**").

PART II – FACTS

2. On July 31, 2017, on the application of Comerica as Agent for the Senior Secured Lenders, the Court granted the Receivership Order.³

3. On August 14, 2017, at the request of the Receiver, the Court granted the Sale Process Approval Order. No party opposed the granting of the Sale Process Approval Order nor was an appeal of such order sought.⁴

SALE PROCESS

4. Prior to the commencement of these receivership proceedings, the Company had been formally pursuing restructuring, refinancing, sale and other strategic alternatives, and had engaged CIBC Capital Markets ("**CIBC**") in 2016 and Alvarez and Marsal Canada ULC ("**A&M**") in early 2017 for these purposes.⁵ During this time, the Receiver understands that (i) 43 parties were approached to participate in the CIBC and/or A&M processes, (ii) 16 parties executed confidentiality agreements and performed diligence on the Company, and (iii) one party

² *Canada Business Corporations Act*, R.S.C. 1985 c. C-44 ["**CBCA**"] at s. 100(e).

³ Second Report *supra* note 1 at para 2.

⁴ *Ibid* at para 1.1(1)(b).

⁵ *Ibid* at para 5.0(1).

submitted an offer to acquire substantially all of the Company's business and assets, which offer was not acceptable to the Senior Secured Lenders.⁶

5. Prior to formalizing and seeking Court approval of the Sale Process, the Receiver engaged extensively with a potential stalking horse bidder. However, given the complexity of the proposed transaction, the level of unsolicited interest expressed by other parties and the need to conduct a timely sale process, the Receiver, after consulting with the Senior Secured Lenders, proceeded to seek the Court's approval of the Sale Process without a stalking horse.⁷ The prospective stalking horse bidder became a participant in the Sale Process.⁸

6. An overview of the Sale Process conducted by the Receiver is as follows:

- (a) The Receiver prepared an interest solicitation letter that was circulated to 116 acquisition targets, including parties that were approached by the Company, CIBC and/or A&M in the pre-filing sales efforts, and parties that had contacted the Receiver on an unsolicited basis upon its appointment⁹;
- (b) A Confidentiality Agreement and the Acknowledgement, which interested parties were required to sign in order to obtain access to an online data room set up by the Receiver, were executed by 28 prospective going-concern purchasers¹⁰;
- (c) The Receiver was responsive to diligence requests submitted by interested parties, including by updating the data room with current financial and other information, as required¹¹;
- (d) Interested parties were also provided an opportunity to attend at the Company's head office for a management meeting. In total, seven management meetings

⁶ *Ibid* at para 5.0(2).

⁷ *Ibid* at para 6.0(2).

⁸ *Ibid* at para 6.0(2).

⁹ *Ibid* at para 6.0(3).

¹⁰ *Ibid*.

¹¹ *Ibid*.

were conducted in person or by phone. A representative of the Receiver was present at each of these meetings¹²; and

- (e) Prospective purchasers were also provided with the opportunity to meet with the Company's key suppliers, including Jabil Circuit, Inc. ("**Jabil**"), the Company's contract manufacturer¹³.

7. The Sale Process called for prospective purchasers to submit Bids by the Initial Offer Deadline of 5:00pm (EST) on September 15, 2017.¹⁴

8. Three offers were received by the Initial Offer Deadline, with a fourth being received shortly thereafter.¹⁵ Each of the four offers required significant clarification, including for the purpose of quantifying their value.¹⁶

9. After consultation with the Senior Secured Lenders, the Receiver requested that certain of the bidders provide clarification and additional information in respect of their respective bids by a Final Bid Deadline of noon on September 22, 2017 (EST).¹⁷

10. Of the bids submitted on September 22, 2017, the Purchaser submitted a revised bid before the Final Bid Deadline. One of the final bids was submitted shortly following the Final Bid Deadline.¹⁸

11. Having regard to the criteria set out in the Sale Process, the Receiver reviewed the bids received and in consultation with the Senior Secured Lenders determined that the Purchaser's bid was for the greatest value and was superior to the other offers received for other quantitative and qualitative reasons.¹⁹

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid* at para 6.1(1)(a).

¹⁶ *Ibid.*

¹⁷ *Ibid* at para. 6.1(1)(b).

¹⁸ *Ibid* at para 6.1(1)(c).

¹⁹ *Ibid* at para 6.1(1)(d).

ASSET PURCHASE AGREEMENT

12. The material terms of the Asset Purchase Agreement which was negotiated between the Receiver and the Purchaser include:

- (a) Purchase Price: The Purchase Price is comprised of cash consideration²⁰ plus the Assumed Liabilities. For the reasons discussed below, the Receiver proposes that the amount of the Purchase Price remain confidential and sealed;
- (b) Deposit: The Purchaser submitted a deposit representing 15% of the Purchase Price²¹;
- (c) Purchased Assets: Substantially all of the Company's business and assets, including its intellectual property, trade names, business names, domain names related to the business of the Company or owned by the Company, customer information and the Assumed Contracts (as defined in the Asset Purchase Agreement)²²;
- (d) Excluded Assets: The material excluded assets include cash in the Company's bank accounts, any award that may result from the ongoing Indian arbitration proceedings, the account receivable associated therewith, and the anticipated refund that may be received in respect of a letter of credit²³;
- (e) Employees: At least five days prior to the Closing Date, the Purchaser shall offer employment to at least 85% of the Company's current employees and the Purchaser will assume the vacation pay liability associated with those employees²⁴;

²⁰ The cash consideration is subject to limited adjustments for cure costs and inventory/AR adjustments. *Ibid* at para. 7.0(1)(b) and 7.0(1)(h).

²¹ *Ibid* at para 7.0(1)(c).

²² *Ibid* at para 7.0(1)(d).

²³ *Ibid* at para 7.0(1)(e).

²⁴ *Ibid* at para 7.0(1)(f).

- (f) Closing Date: The Closing Date shall be no later than October 20, 2017 or such other date as agreed by the parties²⁵;
- (g) Material Conditions: The material conditions precedent to closing are:
- (i) The Receiver obtaining third party consents for the Assumed Contracts. In this respect the Receiver does not expect such will delay closing as according to the Company's books and records the counterparties to the Assumed Contracts are not owed any money;
 - (ii) The Purchaser entering into the Key Replacement Contract or waiving the condition within five business days of execution of the Asset Purchase Agreement;
 - (iii) There shall not have been any material adverse change in the Company's operations which might materially and adversely affect the Purchaser's ability to carry on the operations after the Closing Date substantially as the Business is presently being conducted by the Receiver; and
 - (iv) The Court shall have issued the Approval and Vesting Order.²⁶
- (h) Other: The Asset Purchase Agreement requires that, if so authorized by the Court, the Receiver change the Company's name following completion of the Transaction.²⁷
- (i) Assignment: The Asset Purchase Agreement is assignable by the Purchaser to any affiliate of the Purchaser upon notice to the Receiver.²⁸ The Purchaser provided notice to the Receiver that it intends to execute an assignment agreement to assign its rights under the Asset Purchase Agreement to an affiliate named DragonWave-X Canada, Inc.

PART III– ISSUES

13. The key issues on this Motion are as follows:

- (a) Should the Court approve the Transaction and vest the Purchased Assets in the Purchaser?

²⁵ *Ibid* at para 7.0(1)(g).

²⁶ *Ibid* at para 7.0(1)(h).

²⁷ *Ibid* at para 7.0(1)(i).

²⁸ *Ibid* at Appendix "D" – Asset Purchase Agreement, at section 12.3.

- (b) Should the Court authorize the filing of the Articles of Amendment to change the Company's name to 3517667 Canada Inc. and direct the Director under the CBCA to effect the name change?
- (c) Should the Court approve the requested sealing order?
- (d) Should the Court approve the distributions to the Senior Secured Lenders?
- (e) Should the Court approve the activities of the Receiver as set out in the First Report and the Second Report? and
- (f) Should the Court approve the fees of the Receiver and Cassels?

PART IV- LAW

I. APPROVING THE SALE TRANSACTION

14. Section 3(l) of the Receivership Order empowers and authorizes the Receiver to apply for any vesting order or other orders necessary to convey the Property (as defined in the Receivership Order) or any part or parts thereof to a purchaser free and clear of any liens or encumbrances affecting the Property.²⁹

15. In *Royal Bank v Soundair Corp.* ("**Soundair**")³⁰ the Ontario Court of Appeal articulated the following factors to consider when determining whether to approve a sale by a receiver: (a) whether the receiver has made a sufficient effort to get the price and has not acted improvidently; (b) the interests of all the parties; (c) the efficacy and integrity of the process by which offers are obtained; and (d) whether there has been unfairness in the working out of the process.³¹

²⁹ *Ibid* at Appendix "A" – Order Appointing Receiver, at para 3(l).

³⁰ *Royal Bank v Soundair Corp.*, 1991 CarswellOnt 205 (Ont CA), per Galligan J.A. [**"Soundair"**] [Commercial List Authorities Book].

³¹ *Ibid* at para 16.

16. Where the Court finds that the receiver has acted reasonably, prudently and fairly and not arbitrarily, the Court will only decline to approve a sale recommended by a receiver in exceptional cases.³²

17. The Receiver respectfully submits that the Sale Process, Asset Purchase Agreement and the Transaction satisfy the requirements of the *Soundair* principles and should be approved by the Court.

(a) *The Receiver made sufficient effort to obtain the best price and has not acted improvidently*

18. The Receiver carried out the Sale Process in accordance with the terms of the Sale Process Approval Order, which was not objected to by any person nor has an appeal of such order been sought.³³ Given the Company's extensive pre-filing canvassing of the market, the liquidity of the Company and need for certainty to retain customers and employees and ensure stability for the Company, in the Receiver's view, the duration, timelines, and breadth of market canvassing and the Sale Process were commercially reasonable.³⁴

19. After receiving each of the offers submitted by the bidders on the Initial Bid Deadline, the Receiver had discussions with the bidders who had submitted competitive bids by the Initial Bid Deadline on certain aspects of their bids. The Receiver requested that final bids be submitted by no later than the Final Bid Deadline.³⁵

20. The Receiver's analysis, with input from the Senior Secured Lenders, determined that the Purchaser's bid offered the highest value for the business and assets of the Company of the bids received.³⁶ The consideration for the Transaction also substantially exceeds the liquidation value of the Company's assets.³⁷

³² *Ibid* at para 58.

³³ Second Report, *supra* note 1 at para 7.1(1)(a).

³⁴ *Ibid* at para 7.1(1)(a).

³⁵ *Ibid* at para 7.1(1)(k).

³⁶ *Ibid* at para 7.1(1)(c).

³⁷ *Ibid* at para 7.1(1)(j).

21. As a result, the Receiver believes that it has not acted improvidently and that its conclusion that the Purchaser's bid offered the best value should be approved by this honourable Court.

(b) *The Interests of all the Parties*

22. The Transaction is supported by the Company's Senior Secured Lenders, notwithstanding that they are projected to incur a substantial shortfall on the indebtedness owed to them by the Company.³⁸

23. As contemplated in the Sale Process, the Senior Secured Lenders were consulted at all critical stages of the Sale Process, including in reviewing the bids received by the Initial Bid Deadline, reviewing bids received by the Final Bid Deadline, the selection of the Purchaser as the Successful Bidder and the negotiations with the Purchaser, and have approved the final form of the Asset Purchase Agreement.

24. The Asset Purchase Agreement stipulates that the Purchaser is required to offer employment to at least 85% of the Company's employees.³⁹ As a result, the Transaction will preserve employment for a substantial number of the 136 employees of the Company, while the other offers received by the Receiver contemplated significant headcount reductions.⁴⁰ Pursuant to the Asset Purchase Agreement, the Purchaser will also assume the Company's accrued vacation pay obligation for the employees who remain employed in connection with the Transaction.⁴¹

25. The Asset Purchase Agreement also contemplates continued relationships with the Key Contract counterparty and the counterparties to the Assumed Contracts. As the Receiver

³⁸ *Ibid* at para 7.1(1)(e).

³⁹ *Ibid* at para 7.0(1)(f).

⁴⁰ *Ibid* at para 7.1(1)(d).

⁴¹ *Ibid* at para 7.0(1)(f).

understands that it is the intention of the Purchaser to continue operations, it is expected that suppliers and customers will also benefit from the Transaction.

26. The Receiver respectfully submits that the Transaction is the best transaction in the circumstances and is in the best interests of the Company's employees, key stakeholders, and creditors.

(c) *Efficacy and Integrity of the Process by which Offers are Received*

27. As noted above, the Receiver conducted the Sale Process in accordance with the Sale Process Approval Order granted by this Court.

28. In accordance with the Sale Process, the Receiver made information available to prospective bidders using an online data room. The Receiver was responsive to the requests of prospective bidders, adding timely information to the data room as requested.⁴²

29. In addition, representatives of Receiver and the Company's management made themselves available to meet with, and on seven occasions met with, prospective bidders. The Receiver also facilitated calls and meetings between prospective bidders and certain of the Company's suppliers.⁴³

30. Given the circumstances, parties were each given reasonable time to perform diligence and to submit bids. Further, following the submission of bids, all parties who submitted initial bids were given the opportunity to revise their bids after communications with the Receiver.

31. As demonstrated by the procedures outlined above, the Receiver submits that the process for receiving and evaluating offers was fair and reasonable, and conducted in accordance with the Court-approved Sale Process.

⁴² *Ibid* at para 6.0(3).

⁴³ *Ibid* at para 6.0(3).

(d) *Whether there has been Unfairness in the Working Out of the Process*

32. All interested parties who signed the Confidentiality Agreement and Acknowledgment were given access to the same information in the online data room and had timely access to the Receiver and to Company management.

33. The timelines to participate in the Sale Process were the same for all interested parties. Indeed, one bidder who submitted a bid on the Final Bid Deadline, who had not previously submitted a bid by the time of the Initial Bid Deadline, was not considered as a prospective purchaser.⁴⁴ As noted, such bid was highly conditional in any event.

34. As such, the Receiver submits there has been no unfairness in the process.

35. In addition, in the Receiver's view, there is significant urgency in completing a transaction at this time as a result of: (i) the Company's looming liquidity issues and lack of additional sources of funding, (ii) inventory purchases that will be required to ramp up urgently in order to meet customer orders, (iii) a need for positive messaging to its stakeholders, including employees, suppliers and customers, and (iv) a need to revive sales activity in major foreign markets, where customers may not be familiar with Canadian insolvency proceedings and require certainty in their business dealings.⁴⁵

36. Based on the above, the Receiver respectfully requests that this Honourable Court approve the Asset Purchase Agreement and the Transaction substantially in the form submitted in the Receiver's motion record.

II. APPROVAL OF NAME CHANGE

37. The Asset Purchase Agreement provides that, if so authorized by the Court, within 10 days of the Closing Date, the Receiver will take steps to change the Company's name to its numbered corporation name to allow the Purchase to use the "DragonWave" name.

⁴⁴ *Ibid* at para 6.1(1)(c).

⁴⁵ *Ibid* at para 7.2(1)(a)-(d).

38. As such, the Receiver is seeking an order that upon the filing of the Receiver's Certificate, the Receiver is authorized to file Articles of Amendment to change the Company's name to "3517667 Canada Inc.", and directing the Director appointed pursuant to the CBCA to issue a Certificate of Amendment to effect the change of the Company's name. Pursuant to section 100 of the CBCA, on an application by a receiver, a Court may make any order it thinks fit.⁴⁶

39. The Director appointed pursuant to the CBCA was served with the Receiver's motion record. The Receiver respectfully submits that the change of name is commercially reasonable, a key condition of the Transaction, and it is just and equitable in the circumstances.

III. SEALING ORDER

40. The Confidential Appendices include unredacted copies of the offer summary, Asset Purchase Agreement and liquidation analysis. The information contained in the Confidential Appendices is commercially sensitive information related to the assets of the Company and may affect the market value of the assets and potentially impair the ability of the Purchaser to conduct the business following closing of the Transaction.⁴⁷

41. Accordingly, the Receiver is seeking an order sealing the Confidential Appendices until further order of the Court.

42. Courts will grant sealing orders where:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures would not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on

⁴⁶ CBCA, *supra* note 2 at s. 100(e).

⁴⁷ Second Report, *supra* note 1 at para 7.3(1).

the right to free expression, which includes the public interest in open and accessible proceedings.⁴⁸

43. The requested sealing order is also necessary in order to protect the integrity and fairness of the Sale Process by ensuring that if the Transaction does not close as intended, other potential purchasers in the Sale Process will not obtain an unfair advantage by obtaining sensitive valuation and other information in respect of the Company's assets contained in the Confidential Appendices, which would impair the Receiver's ability to negotiate with other parties. If this information formed part of the public record, the recovery for the stakeholders and the integrity of the process could be adversely affected. Accordingly, sealing these materials outweighs the public interest of open and accessible court proceedings.⁴⁹

44. The requested sealing order is also necessary to protect the Purchaser's reasonable commercial interests in conducting the business following the closing of the Transaction, including valuation information on the collectability and salability of accounts receivable and inventory, respectively, all of which are Purchased Assets under the Transaction.

45. It is submitted that the Confidential Appendices contain information of the type covered by the test set out in *Sierra Club* and that no parties will be prejudiced by the sealing of the information.

IV. APPROVAL OF DISTRIBUTION TO THE SENIOR SECURED LENDERS

46. The Receiver has obtained an opinion from Cassels that, subject to the standard assumptions and qualifications contained therein, the security granted by the Company, as registered by the Senior Secured Lenders pursuant to the Ontario *Personal Property Security Act* ("PPSA"), creates a valid and perfected security interest in the Company's property.⁵⁰

⁴⁸ *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para 53, [2002] 2 S.C.R. 522; [*"Sierra Club"*] [Commercial List Authorities Book].

⁴⁹ Second Report, *supra* note 1 at para 7.3(1).

⁵⁰ *Ibid* at para 8.0(2).

47. The Receiver is not aware of any other secured creditors or any claim that ranks or may rank in priority to the Senior Secured Lenders other than amounts secured by the Receiver's Charge.⁵¹ Dell Financial Services Canada Limited ("**Dell**") and Ford Credit Canada Limited ("**Ford**"), two equipment lessors, have also registered financing statements against the Company.⁵² Dell's registration was previously bought out by the Company in 2014⁵³, and Ford's registration is a Permitted Encumbrance pursuant to the Asset Purchase Agreement.⁵⁴

48. The Net Proceeds to be received upon the closing of the Transaction are substantially less than the amounts outstanding to the Senior Secured Lenders.⁵⁵

49. The Receiver is requesting authority to distribute the Net Proceeds, or any portion thereof, as well as any proceeds of subsequent realizations of the Company's property excluded from the Transaction as the Receiver determines is appropriate, to the Agent, on behalf of the Senior Secured Lenders, as the principal secured creditors of the Company and the only creditors with an economic interest in the Net Proceeds,⁵⁶ up to the amount of the Company's indebtedness owing to the Senior Secured Lenders.⁵⁷

50. In addition, the Receiver is seeking a declaration that the distributions to the Senior Secured Lenders (from time to time) shall not constitute a "distribution" of property or money by the Receiver for the purposes of the Tax Statutes (as defined in the Approval and Vesting Order).

51. In other receivership and insolvency proceedings, Courts have declared that a distribution to a secured creditor by a Receiver will not constitute a distribution for the purposes

⁵¹ *Ibid* at para 8.0(3).

⁵² *Ibid* at para 3.0(3).

⁵³ *Ibid* at footnote 1 to the Second Report.

⁵⁴ *Ibid* at Appendix "D" – Asset Purchase Agreement, at Schedule 1.1A.

⁵⁵ *Ibid* at para. 7.1(1)(e).

⁵⁶ *Ibid* at para 3.0(3).

⁵⁷ *Ibid* at para 8.0(4).

of similar tax statutes.⁵⁸

52. The Canada Revenue Agency and the Ontario Ministry of Revenue were served with copies of the Receiver's motion record, including the Receiver's request for the relief described herein.

53. For the reasons set out above, the Receiver submits that the distributions to the Senior Secured Lenders as provided for in the Approval and Vesting Order be approved.

V. APPROVAL OF ACTIVITIES AND FEES

54. The Receiver is seeking approval of the First Report and the Second Report and the activities described therein.

55. In addition, The Receiver is seeking approval of its fees and disbursements (excluding HST) since the commencement of these proceedings until August 31, 2017 in the amount of \$208,552.00 and those of Cassels for the period ending September 22, 2017 in the amount of \$85,887.00, each as described in the Fee Affidavits. As detailed in the Fee Affidavits, the average hourly rate charged by each of the Receiver and Cassels for the applicable periods is \$413.13 and \$605.36, respectively.

56. The Receiver is not aware of any issues raised by the Senior Secured Lenders in respect of the approval of the fees and disbursements incurred by the Receiver and its counsel. Given that the Net Proceeds are not sufficient to repay the Senior Secured Lenders in full, it is the Senior Secured Lenders who have an economic interest in the payment of fees and disbursements for which approval is now sought.

57. The Receiver respectfully submits that its fees and disbursements and the fees and disbursements of Cassels are consistent with the rates charged by insolvency professionals in

⁵⁸ *In the matter of an Application pursuant to the Bankruptcy and Insolvency Act, the Bankruptcy of Saan Stores Ltd. – Les Magasins Saan Ltee* (29 August 2017), Toronto CV-08-00007599-00CL, Order of the Honourable Mr. Justice Hailey at para 8 (Ont Sup Ct [Commercial List]). A copy of this Order is reproduced at Schedule "A" to this Factum.

the Toronto market and that the fees charged are reasonable and appropriate in the circumstances.⁵⁹

PART V- RELIEF SOUGHT

58. The Receiver therefore respectfully requests that this Honourable Court grant the relief requested by the Receiver in its motion returnable October 6, 2017.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of October, 2017



Cassels Brock & Blackwell LLP

Lawyers for KSV Kofman Inc., in its capacity
as court appointed Receiver and Receiver and
manager of the assets, properties and
undertakings of Dragonwave Inc.

⁵⁹ Second Report, *supra* note 1 at para 10.0(4).

TAB A

SCHEDULE “A”

LIST OF AUTHORITIES

- 1 *Royal Bank v Soundair Corp.*, 1991 CarswellOnt 205 (ONCA) [Commercial List Authorities Book].
- 2 *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (SCC) [Commercial List Authorities Book].
- 3 *In the matter of an Application pursuant to the Bankruptcy and Insolvency Act, the Bankruptcy of Saan Stores Ltd. – Les Magasins Saan Ltee* (29 August 2017), Toronto CV-08-00007599-00CL, Order of the Honourable Mr. Justice Hailey (Ont Sup Ct [Commercial List]) [Please see attached].

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE Mr.

JUSTICE Hainey

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TUESDAY, THE 29th

DAY OF AUGUST, 2017



**GMAC COMMERCIAL FINANCE CORPORATION – CANADA / SOCIÉTÉ
FINANCIÈRE COMMERCIALE GMAC – CANADA**

Applicant

- and -

SAAN STORES LTD. – LES MAGASINS SAAN LTÉE

Respondent

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 47(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**

**AND IN THE MATTER OF THE BANKRUPTCY OF SAAN STORES LTD. – LES
MAGASINS SAAN LTÉE OF THE MUNICIPALITY OF METROPOLITAN TORONTO,
IN THE PROVINCE OF ONTARIO**

**ORDER
(Distribution and Approval of Fees and Activities)**

THIS MOTION made by PricewaterhouseCoopers Inc. in its capacity as
Court-appointed interim receiver and receiver of SAAN Stores Ltd. — Les Magasins
SAAN Ltée ("SAAN") (the "Receiver") for an order in the form attached as Schedule "A"

to the Notice of Motion dated August 22, 2017, was heard on August 29, 2017 at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion dated August 22, 2017, the Twentieth Report of the Receiver dated August 22, 2017 (the "**Twentieth Report**") and on hearing submissions of counsel for the Receiver and Black Saxon QRC Inc. as general partner for and on behalf of QRC Limited Partnership ("**Black Saxon**"), no other person appearing although duly served as appears from the affidavit of service of Monique Sassi sworn on August 22, 2017.

1. **THIS COURT ORDERS** that all terms not otherwise defined herein, shall have the meaning ascribed to them in the Twentieth Report.

Service and Filing

2. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record in respect of this motion be and it is abridged and validated, if necessary, such that the motion is properly returnable today.

Approval of Activities

3. **THIS COURT ORDERS** that the Twentieth Report, including the statement of receipts and disbursements attached as Appendix "F" thereto, and the activities of the Receiver as set out therein be and are hereby approved.

Approval of Fees

4. **THIS COURT ORDERS** that the fees and disbursements of the Receiver as described in the Twentieth Report and as set out in the Affidavit of Tracey Weaver, sworn August 21, 2017 and are hereby approved.

5. **THIS COURT ORDERS** that the fees and disbursements of legal counsel to the Receiver, Cassels Brock & Blackwell LLP ("**Cassels**") as described in the Twentieth Report and as set out in the Affidavit of Monique Sassi, sworn August 18, 2017 be and are hereby approved.

6. **THE COURT ORDERS** that the anticipated fees and disbursements of the Receiver and Cassels, each estimated not to exceed \$15,000 (plus H.S.T.), to complete their remaining duties and the administration of these receivership proceedings up to the date of the Receiver's discharge in accordance with the Appointment Order, all as set out in the Twentieth Report and the Appendices thereto, be and are hereby approved, and that the Receiver and Cassels shall not be required to pass their accounts in respect of any further activities in connection with the administration of these receivership proceedings provided the fees and disbursements of the Receiver and Cassels do not exceed the amount of \$15,000 (plus H.S.T.) each.

Distribution

7. **THIS COURT ORDERS** that the Receiver be and is hereby authorized and directed, to distribute to Black Saxon all such amounts that it may have available for distribution from time to time, including the amount of the H.S.T., Refund remaining after

payment of the amounts referred to in paragraphs 4, 5 and 6 hereof, in repayment of amounts owing by SAAN to Black Saxon.

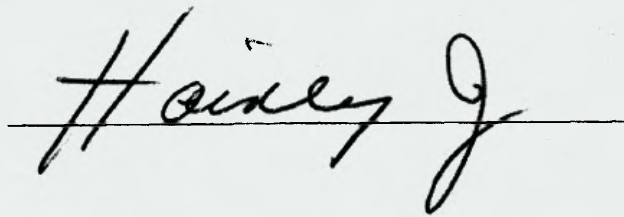
8. **THIS COURT ORDERS AND DECLARES** that any distributions, disbursements or payments made under this Order shall not constitute a “distribution” of property or money by the Receiver for the purposes of section 107 of the *Corporations Tax Act* (Ontario), section 117 of the *Taxation Act*, 2007 (Ontario), section 159 of the *Income Tax Act* (Canada), section 270 of the *Excise Tax Act* (Canada), or any other similar federal, provincial or territorial tax legislation (collectively, the “**Tax Statutes**”), and the Receiver shall not incur any liability under the Tax Statutes in respect of such distributions, disbursements or payments made by it and is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of or as a result of such distributions made by it in accordance with this Order and any claims of this nature are hereby forever barred.

Miscellaneous

9. **THIS COURT ORDERS AND DECLARES** that the provisions in the Order of the Honourable Justice Morawetz made in these proceedings on May 3, 2010 remain in full force and effect and that upon filling of the Receiver’s Certificate in accordance with paragraph 10 thereof the Receiver is entitled to the benefits and protections of such order.

10. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms

of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

A handwritten signature in cursive script, reading "Hainey J.", is written over a horizontal line.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

AUG 29 2017

PER / PAR: 

GMAC COMMERCIAL FINANCE CORPORATION – CANADA /
SOCIETE FINANCIERE COMMERCIALE GMAC - CANADA

SAAN STORES LTD. – LES MAGASINS SAAN LTEE

- and -

Applicant

Respondent

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 47(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
AND IN THE MATTER OF THE BANKRUPTCY OF SAAN STORES LTD. – LES MAGASINS SAAN LTEE OF THE MUNICIPALITY OF METROPOLITAN TORONTO, IN THE PROVINCE OF ONTARIO

Court File No. CV-08-00007599-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

ORDER

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Lawyers for the Interim Receiver and Receiver

TAB B

SCHEDULE "B"

RELEVANT STATUTES

Canada Business Corporations Act, RSC 1985, c C-44.

Directions given by court

Section 100

On an application by a receiver, receiver-manager or sequestrator, whether appointed by a court or under an instrument or act, or on an application by any interested person, a court may make any order it thinks fit including, without limiting the generality of the foregoing,

- (a) an order appointing, replacing or discharging a receiver, receiver-manager or sequestrator and approving their accounts;
- (b) an order determining the notice to be given to any person or dispensing with notice to any person;
- (c) an order fixing the remuneration of the receiver, receiver-manager or sequestrator;
- (d) an order requiring the receiver, receiver-manager or sequestrator, or a person by or on behalf of whom the receiver, receiver-manager or sequestrator is appointed, to make good any default in connection with the receiver's, receiver-manager's or sequestrator's custody or management of the property and business of the corporation, or to relieve any such person from any default on any terms that the court thinks fit, and to confirm any act of the receiver, receiver-manager or sequestrator; and
- (e) an order giving directions on any matter relating to the duties of the receiver, receiver-manager or sequestrator.

Corporations Tax Act, RSO 1990, c C.40.

Payment of tax by receivers

Section 107

(1) Every person required under subsection 75 (7) to deliver a return for a corporation for a taxation year shall, immediately on receipt of a notice of assessment or reassessment in respect of the taxation year, pay all taxes, interest, penalties and other amounts payable under this Act by or in respect of the corporation to the extent that the person has or had in the person's possession or control property belonging to the corporation or its estate, at any time since the taxation year, and the person shall thereupon be deemed to have made the payment on behalf of the corporation.

Certificate of Tax Paid

(2) Every assignee, liquidator, receiver, receiver-manager, and other agent, other than a trustee in bankruptcy, before distributing any property of the corporation under their control, shall obtain a certificate from the Minister certifying that all taxes, interest, penalties and other amounts

payable by the corporation under this Act have been paid or that security for the payment thereof in a form acceptable to the Minister has been given under section 103.

Personal liability of receivers

(3) Any person referred to in subsection (2) who fails to obtain the certificate referred to therein shall be personally liable to Her Majesty in right of Ontario for an amount equal to the taxes, interest, penalties and other amounts payable under subsection (1) and such debt shall be deemed to be tax owing by such person under this Act and may be enforced in accordance with the provisions of this Act.

Taxation Act, 2007, SO 2007, c. 11, Schedule A

Returns, payments and interest

Section 117

(1) Subsections 70 (2) and 104 (2), paragraphs 104 (23) (d) and (e), sections 158 and 159, subsections 160.1 (1), (3) and (4), 161 (1), (2), (2.2), (4), (4.01), (4.1), (5), (6), (6.1), (6.2), (7) and (11) and sections 161.2 and 161.3 of the Federal Act apply for the purposes of this Act.

Application of s. 161.1 of Federal Act

(2) If a collection agreement is in effect, section 161.1 of the Federal Act applies to a corporation in respect of interest determined with regard to tax payable under each of Divisions B, C, D and E of Part III.

Taxpayers owing \$2 or less

(3) If the Ontario Minister determines, at any time, that the total of all amounts owing by a person to the Crown in right of Ontario under this Act does not exceed \$2, the Ontario Minister may cancel the amounts owing. 2007, c. 11, Sched. A, s. 117 (3).

Refunds of \$2 or less

(4) If, at any time, the total of all amounts payable by the Ontario Minister to a person under this Act does not exceed \$2, the Ontario Minister may apply all or part of those amounts against any amount owing, at that time, by the person to the Crown in right of Ontario. However, if the person, at that time, does not owe any amount to the Crown in right of Ontario, those amounts are deemed to be nil.

Income Tax Act, RSC 1985, c.1 (5th Supp.)

Person acting for another

Section 159

(1) For the purposes of this Act, where a person is a legal representative of a taxpayer at any time,

- (a) the legal representative is jointly and severally, or solidarily, liable with the taxpayer
 - (i) to pay each amount payable under this Act by the taxpayer at or before that time and that remains unpaid, to the extent that the legal representative is at that time in possession or control, in the capacity of legal representative, of property that belongs or belonged to, or that is or was held for the benefit of, the taxpayer or the taxpayer's estate, and
 - (ii) to perform any obligation or duty imposed under this Act on the taxpayer at or before that time and that remains outstanding, to the extent that the obligation or duty can reasonably be considered to relate to the responsibilities of the legal representative acting in that capacity; and
- (b) any action or proceeding in respect of the taxpayer taken under this Act at or after that time by the Minister may be so taken in the name of the legal representative acting in that capacity and, when so taken, has the same effect as if it had been taken directly against the taxpayer and, if the taxpayer no longer exists, as if the taxpayer continued to exist.

Certificate before distribution

(2) Every legal representative (other than a trustee in bankruptcy) of a taxpayer shall, before distributing to one or more persons any property in the possession or control of the legal representative acting in that capacity, obtain a certificate from the Minister, by applying for one in prescribed form, certifying that all amounts

- (a) for which the taxpayer is or can reasonably be expected to become liable under this Act at or before the time the distribution is made, and
- (b) for the payment of which the legal representative is or can reasonably be expected to become liable in that capacity

have been paid or that security for the payment thereof has been accepted by the Minister.

Personal liability

(3) If a legal representative (other than a trustee in bankruptcy) of a taxpayer distributes to one or more persons property in the possession or control of the legal representative, acting in that capacity, without obtaining a certificate under subsection (2) in respect of the amounts referred to in that subsection,

- (a) the legal representative is personally liable for the payment of those amounts to the extent of the value of the property distributed;

(b) the Minister may at any time assess the legal representative in respect of any amount payable because of this subsection; and

(c) the provisions of this Division (including, for greater certainty, the provisions in respect of interest payable) apply, with any modifications that the circumstances require, to an assessment made under this subsection as though it had been made under section 152 in respect of taxes payable under this Part.

Appropriation of property

(3.1) For the purposes of subsections 159(2) and 159(3), an appropriation by a legal representative of a taxpayer of property in the possession or control of the legal representative acting in that capacity is deemed to be a distribution of the property to a person.

(4) and (4.1) [Repealed, 2001, c. 17, s. 154(1)]

Election where certain provisions applicable

(5) Where subsection 70(2), 70(5) or 70(5.2) of this Act or subsection 70(9.4) of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, is applicable in respect of a taxpayer who has died, and the taxpayer's legal representative so elects and furnishes the Minister with security acceptable to the Minister for payment of any tax the payment of which is deferred by the election, notwithstanding any provision of this Part or the *Income Tax Application Rules* respecting the time within which payment shall be made of the tax payable under this Part by the taxpayer for the taxation year in which the taxpayer died, all or any portion of such part of that tax as is equal to the amount, if any, by which that tax exceeds the amount that that tax would be, if this Act were read without reference to subsections 70(2), (5) and (5.2) and the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, were read without reference to subsections 70(2), (5), (5.2) and (9.4) of that Act, may be paid in such number (not exceeding 10) of equal consecutive annual instalments as is specified by the legal representative in the election, the first instalment of which shall be paid on or before the day on or before which payment of that tax would, but for the election, have been required to be made and each subsequent instalment of which shall be paid on or before the next following anniversary of that day.

Idem

(5.1) Where, in the taxation year in which a taxpayer dies, an amount is included in computing the taxpayer's income by virtue of paragraph 23(3)(c) of the *Income Tax Application Rules*, the provisions of subsection 159(5) apply, with such modifications as the circumstances require, as though the amount were an amount included in computing the taxpayer's income for the year by virtue of subsection 70(2) or an amount deemed to have been received by the taxpayer by virtue of subsection 70(5).

Idem

(6) For the purposes of subsection 159(5), the *tax payable under this Part* by a taxpayer for the taxation year in which the taxpayer died includes any tax payable under this Part by virtue of an election in respect of the taxpayer's death made by the taxpayer's legal representative under subsection 70(2) or under the provisions of that subsection as they are required to be read by virtue of the *Income Tax Application Rules*.

Election where subsection 104(4) applicable

(6.1) Where a time determined under paragraph 104(4)(a), (a.1), (a.2), (a.3), (a.4), (b) or (c) in respect of a trust occurs in a taxation year of the trust and the trust so elects and furnishes to the Minister security acceptable to the Minister for payment of any tax the payment of which is deferred by the election, notwithstanding any other provision of this Part respecting the time within which payment shall be made of the tax payable under this Part by the trust for the year, all or any portion of the part of that tax that is equal to the amount, if any, by which that tax exceeds the amount that that tax would be if this Act were read without reference to paragraph 104(4)(a), (a.1), (a.2), (a.3), (a.4), (b) or (c), as the case may be, may be paid in the number (not exceeding 10) of equal consecutive annual instalments that is specified by the trust in the election, the first instalment of which shall be paid on or before the day on or before which payment of that tax would, but for the election, have been required to be made and each subsequent instalment of which shall be paid on or before the next following anniversary of that day.

Form and manner of election and interest

(7) Every election made by a taxpayer under subsection 159(4) or 159(6.1) or by the legal representative of a taxpayer under subsection 159(5) shall be made in prescribed form and on condition that, at the time of payment of any amount payment of which is deferred by the election, the taxpayer shall pay to the Receiver General interest on the amount at the prescribed rate in effect at the time the election was made, computed from the day on or before which the amount would, but for the election, have been required to be paid to the day of payment.

Excise Tax Act, RSC 1985, c. E-15

Definitions

Section 270 (1) In this section,

receiver means a person who is a receiver within the meaning assigned by subsection 266(1);

representative means

(a) a person, other than a trustee in bankruptcy or a receiver, who is administering, winding up, controlling or otherwise dealing with any property, business, commercial activity or estate of a registrant, and

(b) a trustee of a trust that is a registrant.

Certificates for receivers

(2) Every receiver shall, before distributing to any person any property or money under the control of the receiver in the receiver's capacity as receiver, obtain a certificate from the Minister certifying that all amounts that are, or can reasonably be expected to become, payable or remittable under this Part by the receiver in that capacity in respect of the reporting period during which the distribution is made, or any previous reporting period, have been paid or that

security for the payment or remittance of the amounts has, in accordance with this Part, been accepted by the Minister.

Certificates for representatives

(3) Every representative of a registrant shall, before distributing to any person any property or money under the control of the representative in the representative's capacity as the representative, obtain a certificate from the Minister certifying that

(a) all amounts that are payable or remittable by the registrant under this Part in respect of the reporting period during which the distribution is made, or any previous reporting period, and

(b) all amounts that are, or can reasonably be expected to become, payable or remittable under this Part by the representative in that capacity in respect of the reporting period during which the distribution is made, or any previous reporting period,

have been paid or that security for the payment or remittance of the amounts has, in accordance with this Part, been accepted by the Minister.

Liability for failure to obtain certificate

(4) Any

(a) receiver who distributes property or money without obtaining a certificate as required by subsection (2) in respect of the amounts referred to in that subsection, or

(b) representative who distributes property or money without obtaining a certificate as required by subsection (3) in respect of the amounts referred to in that subsection

is personally liable for the payment or remittance of those amounts to the extent of the value of the property or money so distributed.

COMERICA BANK
Applicant

and DRAGONWAVE INC.
Respondent

Court File No. CV-17-579715-00CL

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

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE RECEIVER
(MOTION RETURNABLE OCT. 6, 2017)**

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appointed Receiver of the assets, properties and
undertakings of DragonWave Inc.