

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

SA CAPITAL GROWTH CORP.

Applicant

- and -

ROBERT MANDER and E.M.B. ASSET GROUP INC.

Respondents

APPLICATION UNDER Rule 14.05 (3)(g) of the *Rules of Civil Procedure*
and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, as amended

FACTUM OF SA CAPITAL GROWTH CORP.
(Motion returnable May 9, 2012)

May 8, 2012

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FACTUM OF SA CAPITAL GROWTH CORP.

(Motion returnable May 9, 2012)

PART I – OVERVIEW

1. SA Capital Growth Corp. is the Applicant in these proceedings and the largest creditor in the estates of Robert Mander ("Mander") and E.M.B. Asset Group Inc. ("EMB").
2. Peter Sbaraglia ("Sbaraglia") has brought a motion (the "Motion") seeking an order, *inter alia*, compelling Duff & Phelps Canada Restructuring Inc., in its capacity as Receiver of the assets, properties and undertakings of the Debtors (in such capacity, the "Receiver") to provide copies of certain documents in its power, possession and/or control and to provide an index of certain materials in the Receiver's power, possession and control.
3. Sbaraglia, CO Capital Growth Corp. and others are subject to a separate receivership proceeding (the "CO Proceeding") in which Duff & Phelps Canada Restructuring Inc. is also the receiver of those parties. No assets remain in the CO Proceeding to fund the disclosures requested in the Motion. If the Motion is granted the costs of the requested disclosure would be entirely borne by the creditors of Mander and EMB.

4. SA Capital Growth Corp. respectfully submits that the relief sought on the Motion should not be granted. Sbaraglia is not a person to whom the Receiver owes any duties to disclose; he is not a stakeholder in these proceedings. Further, the relief requested in the Motion appears to amount to a fishing expedition.

5. If the Receiver is compelled to make the requested disclosure, the Receiver should be reimbursed by Sbaraglia for the costs of doing so.

PART II – FACTS

6. Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the “Court”) made over two years ago on March 17, 2010 (as amended, the “Receivership Order”), RSM Richter Inc. (n/k/a Duff & Phelps Restructuring Canada Inc.) was appointed as Receiver of the assets, properties and undertakings of Robert Mander and E.M.B. Asset Group Inc.

Thirteenth Report to Court of Duff & Phelps Canada Restructuring Inc. as Court-Appointed receiver of the Estate of Robert Mander, E.M.B. Asset Group Inc. and Related Entities dated April 30, 2012 at para. 1.0 (a) (the “Thirteenth Report”).

7. As a result of subsequent amendments to the Receivership Order, the Receiver has authority over the assets, properties and undertaking of entities related to Robert Mander and/or E.M.B. Asset Group Inc. (collectively, with the estate of Robert Mander and E.M.B. Asset Group Inc., the “Debtors”).

Thirteenth Report at para. 1.0 (b).

8. After its appointment, the Receiver received production of documents from certain parties with knowledge of the affairs of the Debtors. Also, the Receiver requested and held meetings with several individuals with knowledge of the Debtors.

Thirteenth Report at para. 2.0 (d).

9. In its Fourth Report, the Receiver advised the Court that numerous questions and issues identified by the Receiver suggested an investigation should be undertaken of CO Capital Growth Corp. and certain affiliated parties, including Sbaraglia (the “CO Debtors”).

Thirteenth Report at para. 2.0 (e).

10. On September 8, 2010 the Ontario Securities Commission (the "OSC") filed an application seeking the appointment of a receiver over the business, assets and undertakings of the CO Debtors.

Thirteenth Report at para. 2.0 (g).

11. The CO Debtors strenuously opposed the appointment of a receiver.

Thirteenth Report at para. 2.0 (i).

12. It was not until December 23, 2010 that a receiver was finally appointed over the CO Debtors.

Thirteenth Report at para. 2.0 (k).

13. On February 24, 2011, the OSC filed a Statement of Allegations against Sbaraglia, alleging certain violations of the *Securities Act* (Ontario).

Affidavit of Peter Sbaraglia sworn April 23, 2012 at para. 18 (the "Sbaraglia Affidavit").

14. The documents being sought by Sbaraglia on this Motion in connection with the above Statement of Allegations include:

- (a) Transcripts, recordings and/or notes of interviews conducted by the Receiver of 16 individuals and any documents provided by these individuals to the Receiver in connection with the interviews;
- (b) Deleted emails referred to in the Receiver's Fourth Report;
- (c) Documents provided to the Receiver by Peter Tonin and Peter Welsh, the former accountant and former lawyer for the Debtors, respectively;
- (d) An index of materials in the Receiver's power, possession and control; and
- (e) Additional documents as may be requested by Sbaraglia once he has had an opportunity to review the index.

Notice of Motion (Motion to Obtain Documents from Receiver)
dated April 23, 2012 at paras. 2 and 3.

15. The Receiver has advised that it conducted interviews with certain of the 16 individuals that are identified on this Motion. However, these interviews were conducted for the sole purpose of assisting the Receiver in connection with its obligations and authority under the Receivership Order. A majority of the information received in these interviews is highly speculative, unsupported and anecdotal. In preparing its reports to the Court, the Receiver relied on the financial information that it analyzed rather than the information derived from any interviews.

Thirteenth Report at paras. 3.1 (b) and (d).

16. The Receiver has advised that any notes of interviews that it performed were not reviewed by the individuals who were interviewed, and were not intended to be a verbatim transcript of those interviews. The Receiver has not confirmed that the notes are an accurate or complete review of all that was discussed at a particular interview.

Thirteenth Report at para. 3.1 (e).

17. The Receiver has advised that it has obtained thousands of documents over the past two years in these proceedings from a variety of sources. The Receiver has also advised that it has additional data in electronic form. The Receiver has not, to date, created an index of these thousands of electronic and hardcopy documents. The Receiver advises that compiling such an index would take in excess of one month and would cost approximately \$25,000.

Thirteenth Report at para. 3.2 (c).

18. Prior to this Motion being served, it was anticipated that distributions from the Debtors' estates to creditors were imminent. Prior to receiving this Motion, the Receiver was in the process of finalizing motion materials seeking approval of a distribution.

Thirteenth Report at para. 5.0 (b).

19. The available funds for distribution amount to, at most, \$1.2 million. According to the Fourth Report of the Receiver, it appears that claims in the Receivership likely exceed \$16 million in aggregate, with S.A. Capital Growth Corp.'s claim accounting for a high majority of that total. Based upon these figures, it is clear that recoveries to creditors, even if a distribution were made today, would amount to less than 10% of their claims.

Thirteenth Report at para. 5.0 (a)

Sbaraglia Affidavit at Ex. C, Motion Record of Peter Sbaraglia at p. 82.

20. As a result of an order granted in the receivership proceedings of the CO Debtors on October 3, 2011, the net proceeds realized by the receiver of the CO Debtors were transferred to the Receiver to reimburse the estates of the Debtors for fees paid by those estates. As such, it appears that the CO Debtors' estates have no funds available to pay for the proposed disclosures.

PART III –ISSUES AND THE LAW

21. S.A. Capital Growth Corp. responds to the following issues raised by the Motion:

- (a) whether the Receiver must comply with all or any part of the document request contained in the Motion; and
- (b) whether the Debtors' estates should be reimbursed for the costs of complying with the requests contained in the Motion.

22. The moving party asserts that the Receiver has an obligation to provide relevant documents to interested persons. Support for this general proposition can be found in *Battery Plus Inc.(Re)*, wherein *Bennett on Receiverships*, 2nd ed., is cited as follows:

As a fiduciary, the receiver owes a duty to make full disclosure of information to all interested persons. The receiver is obliged to respond to requests for information consistent with the position of the person making the request. If the cost of responding is excessive in the circumstances, the receiver can fix a fee for that cost, or otherwise apply to the court for directions.

Battery Plus Inc. (Re) (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J.) at para. 16 ("*Battery Plus Inc. (Re)*").

23. The above guidance, however, is not helpful to the moving party in the current circumstances. First, the moving party is not an "interested person" to whom the Receiver is a fiduciary. Second, the above passage cannot be utilized in a manner that authorizes a party to undertake a "fishing expedition". Third, the cost of complying with the moving party's request would be excessive in the circumstances.

Sbaraglia Is Not An "Interested Person".

24. In *Battery Plus Inc. (Re)*, the disclosure of information was sought in connection with motions to be brought against the interim receiver by the debtor company as well as the direct and indirect holders of all of the shares of the debtor company.

Battery Plus Inc. (Re) at paras. 1 and 7.

25. Justice Greer provided some guidance on who "interested persons" in a receivership would be, stating:

Who then, are these "interested persons" at law? Certainly, any prospective purchaser of the assets of the company in receivership falls within that category.... On the other hand, it is not reasonable to think that the receiver owes a duty to the owner of the shares or business in receivership, who was operating the business until the day before the interim receiver stepped in, to copy every single piece of paper that is now in the interim receiver's possession. That is an expensive folly not worth considering.... The Interim Receiver is acting in a fiduciary capacity to all parties in the proceeding.

Battery Plus Inc. (Re) at para. 17.

26. Sbaraglia is not a person interested in the Debtors' receivership proceedings. The Receiver has no duty to disclose information to Sbaraglia in these circumstances and incurring the cost and time to do so would breach the duties that the Receiver does have to all parties in these proceedings to conserve the assets of the estates of the Debtors.

27. Sbaraglia may have been an interested person in the CO Debtors' receivership proceedings. However, the CO Debtors have no remaining assets available to fund the disclosure request contained in the Motion. This does not mean that disclosure can be sought from the Receiver of an estate in which Sbaraglia has no interest simply on the basis that this estate has some limited funds.

The Receiver Should Not Be Required To Participate In A "Fishing Expedition".

28. An interested person cannot engage in a "fishing expedition". In *Battery Plus Inc. (Re)*, Justice Greer cautioned:

to allow all people involved in this Interim Receivership to automatically be entitled to access to all of the documents which came into the Interim Receiver's hands could cause the interim receivership to waste untold hours for no purpose. I am satisfied that, while there is a right of an interested party to certain relevant documents, these documents must relate to a specific purpose.

Battery Plus Inc. (Re) at para. 21.

29. It appears that Sbaraglia believes that the Receiver may have some documents relevant to his defence on the basis that the OSC appears to place some reliance upon statements made by the Receiver in its prior reports to this Court. However, it is not clear that those reports relied at all upon the evidence that Sbaraglia is currently seeking.

30. The Motion requests broad categories of information and reserves the right to request further information upon a review of an index to be created by the Receiver. The position appears to be that the Receiver may have some information that may be helpful and Sbaraglia would like the opportunity to look for this information.

31. The Motion proposes that a "fishing expedition" be undertaken at the expense of the estates of the Debtors.

The Cost Of Compliance With The Proposed Request Would Be Excessive.

32. The cost of compliance with Sbaraglia's request would be considerable in these circumstances. The Receiver estimates a cost of \$25,000. However, this figure could change if additional information requests are made in the future, as contemplated by the Motion. \$25,000 in an estate that holds only approximately \$1.2 million is excessive in these circumstances.

33. No third party appears to be prepared to fund the Receiver's performance of the requested disclosure exercise. Again, no funds remain in the CO Debtors' estates for this purpose.

34. It is suggested that the Receiver should bear the cost of complying with these disclosure requests. Even if the Receiver does have duties to make the requested disclosures, this assertion loses sight of the fact that the only parties that would truly bear the costs of this compliance are the creditors of the Debtors, who get no benefit from this disclosure.

35. If disclosure is to be made, the Debtors' estates should be reimbursed by Sbaraglia for the costs of that disclosure. This would be consistent with the general practice under Rule

30.10 of the *Rules of Civil Procedure* (Ontario). There is no evidence available to suggest that this practice should not be followed in the current circumstances. Security for that reimbursement should be posted in advance by Sbaraglia.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended, r.
30.10

Lalonde v. Bona Building & Management Co., [2010] ONSC 5928
(Ont. S.C.J.) at para. 8.

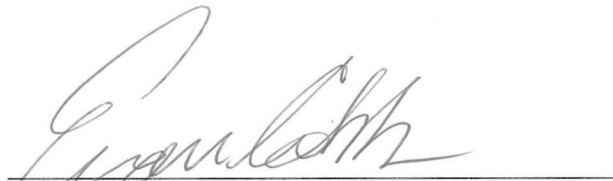
Other Relevant Factors.

36. When reviewing whether the Motion should be granted, it is respectfully submitted that the current stage of the proceedings should be considered. The receivership of the Debtors is otherwise substantially complete. Based upon information provided by the Receiver it appears that recoveries from the Debtors' estates will be quite limited. Further delay and further cost at this time will only serve to make an already unfortunate situation worse and the value of any disclosure to any defence that may be raised by Sbaraglia is at best speculative. In considering the delay and cost associated with the information request, one cannot lose sight of the fact that the request itself seeks to reserve the right to seek further disclosure from the Receiver in the future, creating further delays and additional costs.

37. Alternatives may be available to the disclosure requested by Sbaraglia in most cases. Sbaraglia has not explained why the individuals identified in the Motion cannot be called as witnesses in the OSC proceeding to provide a full and accurate account of their information on their dealings with Robert Mander and/or Sbaraglia. This would appear to be preferable to a partial, non-contextualized, recording of the Receiver who may have been recording such information for an entirely different purpose.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 8, 2012


Evan Cobb

Lawyer for S.A. Capital Growth Corp.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Battery Plus Inc. (Re)*, (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J.)
2. *Lalonde v. Bona Building & Management Co.*, [2010] ONSC 5928 (Ont. S.C.J.)

SCHEDULE "B"
THE TEXT OF ALL RELEVANT PROVISIONS
OF STATUTES AND REGULATIONS

Rules of Civil Procedure R.R.O. 1990, Reg. 194

Order for Inspection

30.10 (1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,

- (a) the document is relevant to a material issue in the action; and
- (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document. R.R.O. 1990, Reg. 194, r. 30.10 (1).

Notice of Motion

- (2) A motion for an order under subrule (1) shall be made on notice,
 - (a) to every other party; and
 - (b) to the person not a party, served personally or by an alternative to personal service under rule 16.03. R.R.O. 1990, Reg. 194, r. 30.10 (2).

Court may Inspect Document

(3) Where privilege is claimed for a document referred to in subrule (1), or where the court is uncertain of the relevance of or necessity for discovery of the document, the court may inspect the document to determine the issue. R.R.O. 1990, Reg. 194, r. 30.10 (3).

Preparation of Certified Copy

(4) The court may give directions respecting the preparation of a certified copy of a document referred to in subrule (1) and the certified copy may be used for all purposes in place of the original. R.R.O. 1990, Reg. 194, r. 30.10 (4).

Cost of Producing Document

(5) The moving party is responsible for the reasonable cost incurred or to be incurred by the person not a party to produce a document referred to in subrule (1), unless the court orders otherwise. O. Reg. 260/05, s. 5.

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Court File No: 10-8619-00CL

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Proceeding commenced at Toronto

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