

CITATION: Callidus Capital Corporation v. Xchange Technology Group LLC, 2013 ONSC
6783

COURT FILE NO.: CV-13-10310-00CL

DATE: 20131030

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: CALLIDUS CAPITAL CORPORATION, Applicant

AND:

XCHANGE TECHNOLOGY GROUP LLC, IT XCHANGE FINANCIAL SERVICES LLC, IT XCHANGE CORP., BLUERANGE TECHNOLOGY CORP., BLUERANGE TECHNOLOGY INC., PARTSTOCK COMPUTER LLC AND IT XCHANGE INC., Respondents

BEFORE: MORAWETZ J.

COUNSEL: J. Leslie and L. Corne, for the Applicant

H. Chaiton, for Duff & Phelps Canada Restructuring, Inc. (Proposed Receiver)

G. Maguire, for the Respondents

P. Guy and S. McGrath, for Jeffrey McFarlane

HEARD &

ENDORSED: OCTOBER 29, 2013

REASONS: OCTOBER 30, 2013

ENDORSEMENT

- [1] This application was brought by Callidus Capital Corporation (“Callidus”) for an order:
- (a) appointing Duff & Phelps Canada Restructuring, Inc. (“Duff & Phelps”) as Receiver of the respondents;
 - (b) approving the Asset Purchase Agreement dated October 25, 2013 between Duff & Phelps, as Proposed Receiver and 2393134 Ontario Inc., a company owned and controlled by Callidus, as purchaser; and

(c) approving a stalking horse process to be conducted by Duff & Phelps.

[2] The respondents (hereinafter, collectively, the "XTG Debtors") a part of a group of companies which carry on business as a highly integrated global supplier of information technology products (collectively, the "XTG Group"). The XTG Group has approximately 263 employees globally, including 57 in Canada.

[3] The XTG Group operates the following three business units:

- (a) Technology Remarketing, which operates in the secondary market and provides customers with refurbished hardware and systems;
- (b) Technology Rentals, which provides short-term rentals of IT and audio-visual equipment and services; and
- (c) Technology Reseller, which operates in the primary market and provides life-cycle management and computer systems design for specific control functions.

[4] The XTG Debtors include two Ontario corporations which carry on business and have assets in Canada, and five U.S. corporations, each of which has assets in Canada.

[5] Certain aspects of the XTG Debtors' business are centred in Ontario and Callidus submits that the XTG Debtors have the following substantial connections to Ontario:

- (a) the XTG Group was founded in Canada;
- (b) certain executives of the XTG Group maintain an office in Oakville, Ontario;
- (c) the bulk of the "back office" or support functions for the entire XTG Group are centralized and performed from Oakville, Ontario;
- (d) the accounting and finance functions for the XTG Group's worldwide operations are performed in Canada;
- (e) human resource functions of the XTG group are centralized and managed from Oakville, Ontario;
- (f) the XTG Group maintains deposit accounts which are generally swept to either a U.S. or Canadian dollar consolidation account maintained by Callidus at Bank of Montreal and applied against the Callidus debt;
- (g) IT Xchange Inc. and BlueRange Technology Inc., being the Canadian operating entities in the XTG Group, represent approximately \$15 million (15%) of the XTG Group's annual volume. Trade obligations of the Canadian entities presently total approximately \$1.4 million, or approximately 32% of the total trade debt of the XTG Group.

[6] Pursuant to an Amended and Restated Loan Agreement dated October 11, 2012 (as amended, the "Loan Agreement"), Callidus extended various credit facilities to the XTG Group. The XTG Group is indebted to Callidus as of October 24, 2013 in the amount of approximately \$36.97 million (U.S.). The XTG Group's obligations to Callidus are secured by perfected security interest, and charges upon all the property, assets and undertaking of the XTG Group, generally ranking in first priority.

[7] Following numerous defaults by the XTG Debtors pursuant to the Loan Agreement, on July 26, 2013, Callidus issued a demand for payment in full of the XTG Group's obligations and issued notices pursuant to section 244 of the *Bankruptcy and Insolvency Act* ("BIA").

[8] At the request of the XTG Group, Callidus entered into a forbearance agreement dated August 3, 2013 (the "Forbearance Agreement"), pursuant to which it agreed to forbear from exercising its rights and remedies until August 15, 2013. The Forbearance Agreement was amended so as to extend the forbearance period until September 4, 2013 or was terminated at that time.

[9] Pursuant to the Forbearance Agreement, the XTG Debtors consented to the appointment of Duff & Phelps as Receiver upon the occurrence of any termination event. The termination event and events of default under the Forbearance Agreement occurred on September 4, 2013, when the XTG Group failed to repay its indebtedness to Callidus, thereby triggering the consent of the XTG Debtors to the appointment of Duff & Phelps as Receiver.

[10] The record establishes that the XTG Debtors are insolvent, on both a balance sheet and cash flow basis and are unable to make payments of their liabilities to Callidus or other creditors generally.

[11] The record also establishes that since February 2013, the XTG Group, together with its professional advisors, has been conducting a refinancing solicitation process. No refinancing offers were generated.

[12] The record also establishes that, based on the results of the recent refinancing efforts and the liquidation analysis of the XTG Group's assets prepared Duff & Phelps, it appears that, if the XTG Group's businesses and assets are liquidated or sold to a third party, Callidus will incur a substantial shortfall such that there is no value for creditors ranking subordinate to Callidus.

[13] Callidus takes the position that, rather than incur a loss in the recovery of its loans, it would prefer to restructure the XTG Group's businesses and assets, with a view to improving its recovery in the future. In the anticipation of this application, a newly incorporated company owned and controlled by Callidus, executed and delivered the Stalking Horse Offer. The Stalking Horse Offer covers all of XTG Group's business and assets, including the shares of the foreign affiliates. The purchase price would be the amount owing to Callidus by the XTG Group at the date of closing, plus priority payable as of the date of closing, less \$3 million. The purchase price will be satisfied, in part, by credit bid and, in part, by payment or assumption of priority payables.

[14] The purchaser also agrees to assume all obligations related to Transferred Employees, obligations under Assumed Contracts, priming claims (unless paid in full on or prior to closing)

and post-filing obligations incurred from operating the business during the receivership proceedings. Further, the purchaser intends to offer employment to the majority of the existing employees on terms substantially similar to their existing employment.

[15] The proposed Stalking Horse process to be conducted by the Receiver includes a further marketing by the Receiver of the XTG Debtors businesses and assets for a period of three weeks. Duff & Phelps is of the view that, given the extensive refinancing solicitation process recently conducted by the XTG Group and its professional advisors, the proposed additional three week time period will provide ample opportunity for any interested persons to submit a superior bid.

[16] Under section 243 of the BIA and section 101 of the *Courts of Justice Act*, the court may appoint a receiver over all or, substantially all, of the assets of an insolvent person where it is just or convenient to do so, and on such terms as it may consider just.

[17] In the circumstances of this case, I accept the submissions of counsel to Callidus that the appointment is both just and convenient as it will:

- (a) facilitate the cross-border sale transaction by authorizing the Receiver to apply to the United States Bankruptcy Court under Chapter 15 of the *United States Bankruptcy Code* for recognition and enforcement of the orders granted by this court;
- (b) prevent the XTG Debtors and numerous creditors from continuing with or commencing enforcement proceedings, which will interfere with an orderly realization process;
- (c) bring stability to the XTG Group's ongoing operation so as to facilitate and orderly restructuring and realization process; and
- (d) permit the XTG Group's business operations to continue, and prevent significant loss of jobs, in the interests of stakeholders generally, including employees, customers and suppliers.

[18] Counsel to Callidus also submits that the appointment of a Receiver over the U.S. corporations is permissible. The term "insolvent person" is defined in the BIA as follows:

"Insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditor is provable as claims under this Act amount to \$1,000, and....

[19] In this case, the U.S. respondents have consented to the jurisdiction of Ontario and there appears to be a "real and substantial" connection between Ontario and the integrated businesses carried on by the respondents, as a whole. In addition, the U.S. respondents have minimal assets in Canada and, thus, have technically complied with the definition of "insolvent person". On balance, I am satisfied that it is appropriate for the Ontario court to exercise jurisdiction in the circumstances of this case.

[20] Callidus also seeks approval of the Stalking Horse Offer and the Sales Process.

[21] The criteria to be applied when considering the approval of a sale by a receiver are well established, and may be summarized as follows:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) whether the interests of all parties have been considered;
- (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 (See *Royal Bank of Canada v. Soundair Corporation*, (1991) 4 O.R. (3d) 1 (Ontario C.A.)).

[22] In this case, counsel submits that the sale of the XTG Debtors' assets as contemplated by the proposed Stalking Horse Offer and Sales Process should be approved for the following reasons:

- (a) the XTG Group has recently conducted an extensive refinancing solicitation process;
- (b) notwithstanding that process, no financing offers were generated and only one conditional Letter of Intent to purchase the business and assets of the XTG Group was obtained, at a purchase price substantially less than the amount owing to Callidus;
- (c) in light of the results of the solicitation process, it appears that the realizable value of the XTG Group's business and assets is significantly below the amount owing to Callidus, such that there is no value for creditors having an interest subordinate to Callidus;
- (d) pursuant to the Stalking Horse Offer, all obligations of the XTG Debtors ranking in priority to Callidus will be assumed by the purchaser or paid in full at closing;
- (e) the Stalking Horse Offer will prevent the loss of significant jobs; and
- (f) in the absence of approval of the proposed sales process, the XTG Debtors will not have sufficient liquidity to continue to operate which will be to the detriment of all stakeholders, including employees, customers and suppliers.

[23] Callidus also seeks to have confidential appendices 1, 2, 3 and 5 to the Report (the "Confidential Appendices") sealed, pending completion of a sales transaction or further order. I am satisfied that the Confidential Appendices do contain sensitive commercial information, the disclosure of which could be harmful to stakeholders. Having considered the principles set out *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41, I have been persuaded that the requested sealing order should be granted.

[24] In the result, an order shall issue appointing Duff & Phelps as Receiver of the XTG Debtors and an order shall also issue approving, authorizing and directing the Receiver to accept the Stalking Horse Offer and carry out the Stalking Horse Sales Process as described in the Report. As previously noted, an order shall also issue sealing the Confidential Appendices. The

parties are in agreement that nothing in the order shall affect any defences that Mr. Jeffrey McFarlane may have with respect to the personal guarantee he granted to the Applicant.

[25] The order has been signed.



MORAWETZ J.

Date: October 30, 2013