

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

B E T W E E N:

**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

**FACTUM OF 2393134 ONTARIO INC.**

January 6, 2016

**DICKINSON WRIGHT LLP**

Barristers & Solicitors

199 Bay Street, Suite 2200

P.O. Box 447 Commerce Court Postal Station

Toronto, Ontario M5L 1G4

Fax: (416) 865-1398

**JOHN D. LESLIE**

LSUC Registration No. 29956P

Email: [jleslie@dickinsonwright.com](mailto:jleslie@dickinsonwright.com)

Tel: (416) 646-3801

**MICHAEL J. BRZEZINSKI**

LSUC Registration No. 63573R

Email: [mbrzezinski@dickinsonwright.com](mailto:mbrzezinski@dickinsonwright.com)

Tel: (416) 777-2394

Lawyers for 239314 Ontario Inc.

TO: **CHAITONS LLP**  
500 Yonge St  
Toronto, ON M2N 7E9

**Harvey Chaiton**  
Tel: (416) 218-1141  
Fax: (416) 218-1841

Lawyers for Duff & Phelps Canada Restructuring Inc.,  
in its capacity as court-appointed Receiver of the Respondents

AND TO: **NORTON ROSE FULBRIGHT CANADA LLP**  
Toronto Office – TD Centre  
TD Centre, South Tower  
79 Wellington St. W., Suite 2300, P.O. Box 128  
Toronto, ON M5K 1H1

**Alan B. Merskey**  
Tel: (416) 216-4805  
Fax: (416) 216-3930

Lawyers for Jeffrey McFarlane and Republic Funding Ventures LLC

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**FACTUM OF 2393134 ONTARIO INC.**

**PART I – OVERVIEW**

1. 2393134 Ontario Inc. (“**239**”) purchased substantially all of the business and assets of the Respondents (also collectively defined herein as the “**XTG Debtors**”) pursuant to a Court-approved asset purchase agreement dated as of the 25<sup>th</sup> day of October, 2013 (the “**APA**”) between 239 and the Court-appointed receiver. 239 is a wholly owned subsidiary of Callidus Capital Corporation (“**Callidus**”), the principal secured creditor of the XTG Debtors.
2. The purchase price under the APA was equal to the XTG Debtors’ indebtedness to Callidus less a “carve-out” of \$3 million. It was the intention of all parties to the APA that the “carve-out” be denominated in American dollars. However, due to a drafting error in the APA, the currency was inadvertently stated in Canadian dollars.
3. 239 brings this Motion for an Order, *inter alia*, rectifying the APA to reflect the common

intention of the parties to the APA that the “carve-out” be stated as USD\$3 million.

## **PART II – FACTS**

### **A. Background**

#### Loan Facilities and Guarantee

4. The XTG Debtors, together with other affiliated entities (the “**XTG Group**”), carried on business in Canada, the United States and elsewhere as suppliers of information technology products, rental assets and programs, including servers, storage devices, laptops and desktop computers with operations.

**Reference:** Fifth Report at s. 2.0(3)

5. On October 11, 2012, Callidus acquired certain loan facilities advanced by PNC Bank, National Association (“**PNC**”) to the XTG Debtors in the amount of USD \$22,000,000.00 (the “**Loan Facilities**”). The Loan Facilities were documented by an Amended and Restated Loan Agreement dated October 11, 2012 between Callidus and the XTG Debtors (as later amended from time to time, the “**Loan Agreement**”).

**Reference:** Amended and Restatement Loan Agreement, **Exhibit “A”**, Responding Motion Record

6. The Loan Facilities included (i) a demand “Revolving Loan” in the amount of \$20,000,000.00 which is margined against “eligible” accounts receivable and inventory and (ii) a demand “Single Advance Loan” in the amount of \$2,000,000.00 which is unmargined. The stated purposes for both the Revolving Loan and the Single Advance Loan were (1) to refinance a portion of the debt assigned from PNC to Callidus, and (2) to provide working capital for daily

business operations and other business purposes of the XTG Debtors.

**Reference:** Amended and Restatement Loan Agreement, **Exhibit “A”**, Responding Motion Record

7. At the request of the XTG Debtors, Amendment No. 1 to the Loan Agreement was made on November 2, 2012 to include two new demand facilities aggregating \$3,000,000.00 to fund inventory purchases.

**Reference:** Affidavit of Craig Boyer sworn October 25, 2013 (“**Boyer Affidavit**”) at para. 20, **Exhibit “J”**, Responding Motion Record

8. Thereafter, the XTG Debtors again requested that Callidus provide additional funding under the Loan Agreement. On January 4, 2013, Callidus agreed to do so on the terms and conditions set forth in Amendment No. 2 to the Loan Agreement, including the receipt of additional collateral.

**Reference:** Boyer Affidavit at para. 21, **Exhibit “J”**, Responding Motion Record

9. The XTG Debtors’ obligations to Callidus were secured by security interests, liens and charges upon substantially all of the property, assets and undertakings of the XTG Debtors (the “**Security**”).

**Reference:** Boyer Affidavit at para. 24, **Exhibit “J”**, Responding Motion Record

10. Callidus required that, and in consideration of the Loan Facilities, Jeffrey McFarlane enter into an Amended and Restated Limited Guarantee, in writing, dated October 11, 2012, as amended by Amendment to Amended and Restated Limited Guarantee dated June 6, 2012, limited to a maximum amount of USD \$3,000,000.00 (collectively, the “**Guarantee**”).

**Reference:** Amended and Restated Limited Guarantee dated October 11, 2012, filed  
Amendment to Amended and Restated Limited Guarantee dated June 6, 2013, **Exhibit**

**“B”**, Responding Motion Record

11. As security for his obligations under the Guarantee, Mr. McFarlane granted Callidus a mortgage/charge on the property municipally known as 2590 Sheridan Garden Drive, Oakville, Ontario.

**Reference:** Boyer Affidavit at para. 25, **Exhibit “J”**, Responding Motion Record

Demand on the XTG Debtors

12. By January 2013, the cash needs of the XTG Group exceeded the Revolving Loan’s maximum borrowing limit and Callidus’ exposure had significantly increased from USD \$22 million to USD \$36.97 million.

**Reference:** Boyer Affidavit at para. 30, **Exhibit “J”**, Responding Motion Record

13. On July 26, 2013, Callidus issued demand for payment in full of the XTG Debtors’ obligations, including all accrued fees and interest, under the Loan Agreement as well as Section 244 Notices under the *Bankruptcy and Insolvency Act*.

**Reference:** Boyer Affidavit at para. 34, **Exhibit “J”**, Responding Motion Record

14. According to Callidus’ records, the XTG Debtors were indebted to Callidus at the time of the demands in the amounts of CDN \$2,211,827.73 and USD \$29,163,686.05 for principal owing as of July 25, 2013 and the amounts of CDN \$6,744.59 and USD \$441,429.42 for interest owing as at June 30, 2013. The XTG Debtors were also indebted for a Facility Fee in the amount of \$2,250,000.00.

**Reference:** Boyer Affidavit at para. 35, **Exhibit “J”**, Responding Motion Record

Forbearance Agreement

15. On August 3, 2013, Callidus and the XTG Debtors entered into a Forbearance Agreement agreeing to the XTG Debtors’ request that it delay and forbear from exercising remedies under the Loan Agreement and the Security until August 15, 2013.

**Reference:** Forbearance Agreement, **Exhibit “C”**, Responding Motion Record

16. The primary purpose of the Forbearance Agreement was to provide Mr. McFarlane with additional time to continue ongoing negotiations with respect to a sale or refinancing of the XTG Group’s business. Notwithstanding Callidus’ forbearance and the extension of time, Mr. McFarlane failed to generate any offers acceptable to Callidus.

**Reference:** Boyer Affidavit at para. 37, **Exhibit “J”**, Responding Motion Record

17. Callidus’ obligations under the Forbearance Agreement were subject to the satisfaction of several conditions, including that Mr. McFarlane deliver to Callidus a Withdrawal Agreement by which Mr. McFarlane would be “immediately removed from any active executive or management role with the Borrowers.”

**Reference:** Forbearance Agreement, **Exhibit “C”**, Responding Motion Record at p. 81-82  
Withdrawal Agreement, **Exhibit “D”**, Responding Motion Record

18. Pursuant to the Forbearance Agreement, Mr. McFarlane acknowledged that he executed the Guarantee and was in default thereunder.

**Reference:** Forbearance Agreement, **Exhibit “C”**, Responding Motion Record at p. 76 and 79

19. Pursuant to the Forbearance Agreement, Mr. McFarlane further agreed that the Obligations, together with interest accrued and accruing thereon, and all fees, costs, expenses and other charges now or hereafter payable by the XTG Debtors and Mr. McFarlane to Callidus are unconditionally owing by the XTG Debtors and Mr. McFarlane to Callidus and the XTG Debtors and Mr. McFarlane have no defences, set-offs or counterclaims with respect to the Obligations. If there are any such defences, claims for set-off, counterclaim, claim, cause of action, damages or otherwise on any basis whatsoever against Callidus, Mr. McFarlane expressly released and discharged the same and Mr. McFarlane agreed that Callidus can rely upon Mr. McFarlane's acknowledgment and release as a full and complete answer to same.

**Reference:** Forbearance Agreement, **Exhibit "C"**, Responding Motion Record at p. 77

20. At the request of the XTG Debtors, an amendment to the Forbearance Agreement was entered into between the parties which, *inter alia*, extended the forbearance period from August 15, 2013 to September 4, 2013.

**Reference:** Boyer Affidavit at para. 43, **Exhibit "J"**, Responding Motion Record

#### XTG's Attempts to Find an Investor

(i) *Canaccord Process:*

21. In May of 2013, the XTG Group retained Canaccord Genuity Corp. ("**Canaccord**") to provide various advisory services, including a refinancing solicitation process to identify potential investors for the XTG Group.

**Reference:** Boyer Affidavit at para. 45, **Exhibit "J"**, Responding Motion Record



22. Following an extensive solicitation process conducted by Canaccord, including negotiations with any party that expressed an interest in the business of the XTG Group, the best expression of interest obtained from a third party was a non-binding and conditional letter of intent valued at an amount which was far less than what Callidus was owed by the XTG Debtors.

**Reference:** Boyer Affidavit at para. 45, **Exhibit “J”**, Responding Motion Record

23. The Canaccord solicitation process included the following steps:

- a. Canaccord identified 56 parties, including financial parties, strategic parties and private equity firms that it believed may have an interest in participating in a refinancing of the XTG Group;
- b. Interested parties were required to sign a confidentiality agreement in order to obtain a confidential information memorandum (“**CIM**”) prepared by Canaccord;
- c. Information concerning the XTG Group was provided in a virtual data room. The data room contained financial and other information, including employee data, occupancy leases, Callidus and Triangle loan agreements and supplier and customer information; and
- d. Canaccord arranged for interested parties to meet with management and tour XTG Group’s premises, upon request.

**Reference:** Boyer Affidavit at para. 46, **Exhibit “J”**, Responding Motion Record

24. The results of the Canaccord solicitation process were as follows:

- a. Twenty-three parties executed the Confidentiality Agreement and received a CIM. The balance of the parties did not express an interest in the opportunity.
- b. Canaccord received five verbal expressions of interest and three term sheets. Only one of these three parties performed due diligence. That party passed on the opportunity shortly after it commenced diligence.
- c. On August 15, 2013, Mr. McFarlane submitted to Callidus a letter of intent from one party who participated in the Canaccord process (the “**Letter of Intent**”). The Letter of Intent was submitted directly to Mr. McFarlane and not through Canaccord.
- d. The Letter of Intent was an offer to purchase for \$15 million (plus \$2 million in preferred equity in the acquiring “newco”) all of XTG Group’s business and assets (i.e. not a refinancing), before adjustments for past due payables (over \$4.5 million at that time). The Letter of Intent was subject to diligence, financing and required a 60-day exclusivity period.
- e. Callidus advised McFarlane that it was not prepared to consider the Letter of Intent.
- f. Financing for the Letter of Intent transaction was to be provided by a US private equity firm (the “**PE Firm**”). As an alternative to the Letter of Intent, the PE Firm made an offer to purchase the Callidus debt for \$17 million. This offer was also not acceptable to Callidus.

**Reference:** Boyer Affidavit at para. 47, **Exhibit “J”**, Responding Motion Record

(ii) *KPMG Process:*

25. KPMG was engaged in February of 2013 by the XTG Group to conduct a refinancing solicitation process. The process terminated in June of 2013. Mr. McFarlane was KPMG's principal contact. Only one term sheet was submitted under the KPMG Process. This party passed on the opportunity after it performed due diligence.

**Reference:** Boyer Affidavit at paras. 48-49, **Exhibit "J"**, Responding Motion Record

**B. The Receivership Order**

26. Despite the forbearance extension, the XTG Debtors were unable to refinance and defaulted on the terms of the Forbearance Agreement by failing to make payment on their obligations by September 4, 2013. This triggered Callidus' right to appoint a receiver, on consent.

**Reference:** Boyer Affidavit at para. 44, **Exhibit "J"**, Responding Motion Record

27. Pursuant to the Order of Regional Senior Justice Morawetz dated October 29, 2013 (the "**Receivership Order**"), Duff & Phelps Canada Restructuring Inc. ("**Duff & Phelps**")<sup>1</sup> was appointed receiver (the "**Receiver**") of all of the assets, undertakings and properties of the XTG Debtors.

**Reference:** Receivership Order, **Appendix "A"**, Fifth Report of the Receiver dated April 1, 2015 ("**Fifth Report**")

**C. Sale Process and Transaction**

28. The Receivership Order approved a Court-supervised sale process (the "**Sale Process**") of substantially all of the XTG Debtors' business and assets, which process included a "stalking

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<sup>1</sup> KSV Kofman Inc. effective July 1, 2015

horse” offer submitted by 239 on the terms and conditions contained in the APA (the **“Transaction”**).

**Reference:** Receivership Order, **Appendix “A”**, Fifth Report

29. The APA was negotiated among 239, Callidus and Duff & Phelps in advance of the receivership in contemplation of the stalking horse offer.

**Reference:** Fifth Report at s. 3.1(1)

30. The following summarizes the key terms and conditions of the APA/stalking horse offer:

- a. Vendor: the Receiver.
- b. Purchaser: 239.
- c. Purchased Assets: Substantially all of XTG Group’s core business and assets and the shares of its foreign affiliates.
- d. Purchase Price: The amount owing to Callidus by the XTG Debtors at the date of closing, plus priority payables at 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.
- e. Priority obligations: Assumed by 239 or paid at closing, including GE debt (to the extent it ranks in priority to Callidus and remains unpaid after closing), priming government obligations, priority employee claims and sales tax obligations.
- f. Assumed Obligations: 239 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.

- g. Employees: 239 intends to offer employment to the majority of the existing employees on terms substantially similar to their existing employment.
- h. Representations and warranties: Consistent with insolvency transactions, i.e. to be completed on an “as is, where is” basis without material representations and warranties.
- i. Closing: The Business Day that is two days following the date of the entry of the U.S. Order approving the transaction.
- j. Conditions: The only material condition precedent is the approval of the Ontario Court and the US Court approving the transaction.
- k. Transition Services Agreement: A Transition Services Agreement is to be utilized to assist to transition the existing operations to 239.

**Reference:** Asset Purchase Agreement, **Appendix “D”**, Fifth Report  
Boyer Affidavit at para. 62, **Exhibit “J”**, Responding Motion Record

31. At the time of the Receivership Order, Callidus was owed in excess of USD \$38 million by the XTG Debtors. As noted at paragraph 30(d), above, it was agreed that the purchase price for the Purchased Assets (the “**Purchase Price**”) would be the amount of the XTG Debtors’ obligations to Callidus as at the completion of the Transaction, less a “carve out” of USD \$3 million, plus the aggregate amount of all other obligations owing by the XTG Debtors to third parties with security ranking in priority to the security held by Callidus (the “**Priority Payables**”). The Purchase Price

(other than the Priority Payables) was to be satisfied by way of a credit bid.

**Reference:** Fifth Report at s. 3.1(2) and (5)

32. No offers were submitted during the Sale Process and on November 22, 2013 Regional Senior Justice Morawetz granted a Sale Approval and Vesting Order in accordance with the APA (the “**Vesting Order**”).

**Reference:** Vesting Order, **Appendix “C”**, Fifth Report

33. The Transaction closed on January 2, 2015 upon delivery of the Receiver’s Certificate to 239. Pursuant to Paragraph 3 of the Vesting Order, upon delivery of the Receiver’s Certificate, “all of the right, title and interest of the XTG Debtors in and to the Purchased Assets vested absolutely in the Purchaser, its nominees or assignees”.

**Reference:** Receiver’s Certificate, **Appendix “E”**, Fifth Report

#### **D. Intention of the Parties**

34. The “carve out” was intended to be USD \$3 million, the amount of the XTG Debtors’ indebtedness owing to Callidus by Mr. McFarlane pursuant to the Guarantee.

**Reference:** Fifth Report at s. 3.1

Written Interrogatories of the Receiver at q. 3

35. Section 1 of the Amended and Restated Limited Guarantee dated October 11, 2012, provides:

The undersigned hereby jointly and severally (if more than one) hereby guarantees payment to the Lender, upon demand therefore being made upon the undersigned, of all Obligations (as defined in the Loan Agreement) now or at any time and from time to time hereafter due or owing to the Lender from or by the Borrowers or by any successor corporation of the

Borrowers, limited to the amount of Three Million and 001/00 Dollars (US\$3,000,000.00) in total; plus interest thereon ... [Emphasis added]

**Reference:** Amended and Restated Limited Guarantee dated October 11, 2012, filed

36. The Amendment to Amended and Restated Limited Guarantee dated June 6, 2013 incorporates by reference the Amended and Restated Limited Guarantee dated October 11, 2012 and at Section 2 (c) references the USD \$3 million figure.

**Reference:** Amendment to Amended and Restated Limited Guarantee dated June 6, 2013, Responding Motion Record, p. 72

37. The purpose of the “carve out” was to preserve Callidus’ right to pursue Mr. McFarlane under the Guarantee.

**Reference:** Fifth Report at s. 3.1(5)

38. The particulars of the Purchase Price, including the amount of the “carve-out”, are set out in section 2.03 of the APA. Through inadvertence and a drafting error, the currency referenced at section 2.03 of the APA (and section 2.04 – Satisfaction of Purchase Price) was stated in Canadian dollars as opposed to American dollars.

**Reference:** Asset Purchase Agreement, **Appendix “D”**, Fifth Report

39. Mr. McFarlane acknowledged during cross-examination and in his affidavit sworn in connection with this Motion that his liability under the Guarantee is USD\$3 million.

**Reference:** Transcript of Cross-Examination of J. McFarlane dated November 11, 2015 at p. 6-7, q. 6, 8 and 9

McFarlane Affidavit at para. 8, Responding Motion Record

40. The Receiver's First Report dated November 19, 2013 recommending the Transaction correctly referenced the "carve-out" amount as USD \$3 million as did the Receiver's Pre-Filing Report dated October 25, 2013.

**Reference:** Receiver's First Report, **Appendix "B"**, Fifth Report

41. It was at all times the intention of the parties that the "carve-out" correspond to the amount of the Guarantee (i.e. USD \$3 million). It was due to an oversight that the "carve-out" in the APA was denominated in Canadian dollars.

**Reference:** Fifth Report at s. 3.2(1)

Written Interrogatories of the Receiver at q. 3, filed

42. The error has not at any time altered the intention of the parties or factored into Callidus' internal assumptions and calculations regarding the APA, the Guarantee and/or related matters.

**Reference:** Fifth Report at s. 3.2(1)

43. In its written responses to the written interrogatories requested by counsel for Mr. McFarlane, the Receiver confirmed that counsel for the Receiver and Callidus (and 239) had discussions in the weeks leading up to the receivership application regarding the purchase price and structure of the Transaction, and reached a mutual understanding that the contemplated purchase price would be equal to the Callidus debt less the amount of the Guarantee, which was stated as USD \$3 million.

**Reference:** Written Interrogatories at q. 3, filed

44. On December 15, 2015, the Receiver responded to additional written questions posed by counsel for Mr. McFarlane confirming, in detail, that all currency references in its Pre-Filing



Report to the Court dated October 25, 2013, unless specified otherwise therein, were in American dollars.

**Reference:** Letter from Chaitons LLP to Norton Rose Fulbright LLP dated December 15, 2015, filed

### **PART III – ISSUES**

45. The issue before this Court is whether the APA, as approved by the Vesting Order, can be rectified so that the “carve-out” of USD \$3 million referenced at sections 2.03 and 2.04 of the APA is denominated in American dollars as opposed to Canadian dollars?

### **PART IV – LAW AND ARGUMENT**

46. Rectification is an equitable remedy. As the Supreme Court of Canada stated in *Sylvan Lake Golf & Tennis Club Ltd. v Performance Industries Ltd.*: “[t]he court’s task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other.”

**Reference:** *Sylvan Lake Golf & Tennis Club Ltd. v Performance Industries Ltd.*, 2002 CarswellAlta 187, 2002 SCC 19 (S.C.C.) at para. 31, **Tab 1**, BOA

47. In *Wasauksing First Nation v. Wasausink Lands Inc.* the Court of Appeal for Ontario stated:

an applicant seeking rectification of a written agreement must demonstrate, on ‘convincing proof’, that the parties had a common intention, antecedent to the formal document in question and evidenced by some outward expression of accord, that continued unchanged until the time that the formal document was executed by the parties and that the formal document mistakenly did not conform to the prior common intention.

**Reference:** *Wasauksing First nation v. Wasausink Lands Inc.*, 2004 CarswellOnt 936, [2004] 2 C.N.L.R. 355 (Ont. C.A.) at para. 77 [*Wasauksing*], **Tab 2**, BOA

48. To obtain an order rectifying a contract, the applicant must prove:

- (a) a common intention held by the parties to the contract before the making of the written contract alleged to be deficient;
- (b) that this common intention remained unchanged at the date that the written contract was signed; and
- (c) that the written contract, by mistake, does not conform to the parties' prior common intention.

**Reference:** *Aim Funds Management Inc. v. Aim Trimark Corporate Class Inc.*, 2009 CarswellOnt 7006, 2010 G.T.C. 1002 (Ont. S.C.J.) at para. 21, **Tab 3**, BOA  
*Wasauksing, supra* at para. 81

49. The evidence before the Court, as detailed in the Fifth Report, the appendices thereto, the responses to the Written Interrogatories of the Receiver, and the Affidavit of Craig Boyer sworn October 25, 2013, demonstrates a clear and ongoing intention on the part of 239, the Receiver and Callidus that the “carve-out” be denominated in American dollars in order to correspond to the currency of the Guarantee, which remained unchanged at the time of executing the APA.

50. The Receiver, whose counsel drafted the APA, concedes that it was due to an oversight that the “carve-out” was denominated in Canadian dollars. Nonetheless, it was always intended and agreed by all parties to the APA that the “carve-out” would be USD\$3 million, as reflected in the description of the Transaction in the Receiver’s Pre-Filing Report and its First Report.

51. Mr. McFarlane has adduced no evidence to the contrary. In fact, during cross-examination he conceded that the only basis for his allegation that the “carve out” was to be denominated in Canadian dollars is the publically filed court documents.

**Reference:** Transcript of Cross-Examination of J. McFarlane dated November 11, 2015 at p. 12, q.

29-32, filed

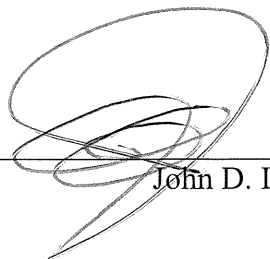
52. Mr. McFarlane is attempting to use a drafting error in the APA, an agreement to which he was not a party, to limit his obligations under the Guarantee. He is attempting to do so notwithstanding the express wording of the Guarantee limiting his liability to USD \$3 million and his acknowledgement in the Forbearance Agreement that the Guarantee is a binding obligation.

### **PART V – ORDER REQUESTED**

53. For the reasons set out above, 239 respectfully requests from this Honourable Court an Order:

- (a) directing that sections 2.03 and 2.04 of the APA be rectified so as to modify the currency of the \$3 million “carve-out” referenced therein from Canadian dollars to American dollars; and
- (b) declaring that the APA, as rectified, be approved and recognized under the terms of the Receivership Order and Vesting Order, *nunc pro tunc*.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 6<sup>th</sup> day of January, 2016.



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John D. Leslie

**DICKINSON WRIGHT LLP**

Barristers & Solicitors  
199 Bay Street, Suite 2200  
P.O. box 447 Commerce Court Postal Station  
Toronto, ON M5L 1G4  
Fax: (416) 865-1398

**JOHN D. LESLIE**

LSUC Registration No. 29956P  
Email: [jleslie@dickinsonwright.com](mailto:jleslie@dickinsonwright.com)  
Tel: (416) 646-3801

**MICHAEL J. BRZEZINSKI**

LSUC Registration No. 63573R  
Email: [mbrzezinski@dickinsonwright.com](mailto:mbrzezinski@dickinsonwright.com)  
Tel: (416) 777-2394

Lawyers for 2393134 Ontario Inc.

**SCHEDULE “A”**

**LIST OF AUTHORITIES**

1. *Sylvan Lake Golf & Tennis Club Ltd. v Performance Industries Ltd.*, 2002 CarswellAlta 187, 2002 SCC 19 (S.C.C.)
2. *Wasauksing First Nation v. Wasausink Lands Inc.*, 2004 CarswellOnt 936, [2004] 2 C.N.L.R. 355 (Ont. C.A.)
3. *Aim Funds Management Inc. v. Aim Trimark Corporate Class Inc.*, 2009 CarswellOnt 7006, 2010 G.T.C. 1002 (Ont. S.C.J.)

**SCHEDULE “B”**

**TEXT OF STATUTES, REGULATIONS & BY - LAWS**

None.

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Applicant

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Respondents

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Court File No. CV-13-10310-00CL

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Tel: (416) 646-3801

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LSUC Registration No. 63573R

Email: [mbrzezinski@dickinsonwright.com](mailto:mbrzezinski@dickinsonwright.com)

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Barristers & Solicitors  
199 Bay Street, Suite 2200  
P.O. box 447 Commerce Court Postal Station  
Toronto, ON M5L 1G4  
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Lawyers for 2393134 Ontario Inc.