

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

BETWEEN:

JAMES RYAN

Applicant

- and -

6356095 CANADA INC.

Respondent

APPLICATION UNDER SECTION 211(8) OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED, AND RULE 14.05(2) OF THE *RULES OF CIVIL PROCEDURE*

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**MOTION RECORD OF THE LIQUIDATOR  
(Returnable October 1, 2009)**

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DAVIES WARD PHILLIPS & VINEBERG LLP  
1 First Canadian Place  
Suite 4400  
Toronto, ON M5X 1B1

Robin Schwill (LSUC #384521)  
Tel: 416.863.0900  
Fax: 416.863.0871

Solicitors for XMT Liquidations Inc., in its capacity as the liquidator of 6356095 Canada Inc. (formerly known as Excapsa Software Inc.), and not in its personal capacity

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**TAB 1**

Court File No. 06-CL-6752

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

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**NOTICE OF MOTION**  
(Returnable October 1, 2009)

XMT Liquidations Inc., in its capacity as the liquidator of 6356095 Canada Inc. (formerly known as Excapsa Software Inc.) (the "**Liquidator**") will make a motion to a judge presiding over the Commercial List at 330 University Avenue, Toronto, on Thursday, October 1, 2009 or soon after that time as the motion can be heard.

PROPOSED METHOD OF HEARING: The motion is to be heard

- in writing under subrule 37.12.1(1) because it is on consent or unopposed or made without notice;
- in writing as an opposed motion under subrule 37.12.1(4)
- orally.

THE MOTION IS FOR

- a) an Order, if necessary, abridging the time for service of this Notice of Motion and the Motion Record and that the Notice of Motion is properly returnable on October 1, 2009 and that further service of the Notice of Motion on any interested party, other than those served, may be dispensed with;
- b) an Order extending the time pursuant to Section 223(2)(b) of the *Canada Business Corporations Act*, R.S.C. 1985, C. C-44, as amended (the "CBCA");
- c) an Order approving the activities of the Liquidator as set out in its second report to this Honourable Court dated September 18, 2009;
- d) an Order approving the professional fees and disbursements of the Liquidator and its counsel and of counsel to the Respondent; and
- e) such further and other Orders as counsel may request and this Honourable Court permit.

THE GROUNDS FOR THE MOTION ARE:

- a) the Liquidator continues to effect the liquidation of the assets of the Respondent in good faith and with due diligence;
- b) given that the liquidation of the assets of the Respondent primarily consists of monitoring and enforcing the collection of certain promissory notes with payment terms beyond 2018, the liquidation proceedings are expected to

continue until at least 2018 unless such notes can be monetized at an earlier date;

- c) the Canada Revenue Agency has yet to complete its audit with respect to the Respondent's last several taxation years, which audit is required to obtain final clearance certificates from the Canada Revenue Agency;
- d) accordingly, it is premature for the Liquidator to apply to this Honourable Court for approval of its final accounts and distribution of the remaining property of the Respondent to the Respondent's shareholders as required by Section 223(2)(a) of the CBCA;
- e) the Liquidator has and continues to carry out and fulfil its obligations under the various Orders of this Honourable Court;
- f) the Liquidator's accounts are fair and reasonable given the nature of the instant liquidation proceedings and the work required to effectively carry out and fulfil its obligations under the various Orders of this Honourable Court in a prudent and diligent manner;
- g) the Liquidator has examined the bills of costs of its counsel and counsel to the Respondent, has verified that the services have been duly authorized and duly rendered and, in the opinion of the Liquidator, are reasonable;
- h) the inspectors appointed by this Honourable Court in respect of the liquidation of the Respondent support the relief being sought by the Liquidator;

- i) Paragraphs 11 and 44 of the amended and restated order of this Honourable Court made in these proceedings on November 30, 2006;
- j) Sections 217 and 223(2)(b) of the CBCA;
- k) Rules 3.02, and 37 of the *Rules of Civil Procedure*;
- l) such other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- a) the Second Report of the Liquidator dated September 18, 2009;
- b) the Affidavit of Sheldon W. Krakower sworn on August 26, 2009, filed separately;
- c) the Affidavit of Mark Schragger sworn on August 25, 2009, filed separately;
- d) the Affidavit of Gary Steinhart sworn on August 25, 2009, filed separately; and
- e) such further and other material as counsel may advise and this Honourable Court may permit.

September 23, 2009

DAVIES WARD PHILLIPS & VINEBERG LLP  
44th Floor, 1 First Canadian Place  
Toronto Canada M5X 1B1

Robin B. Schwill (LSUC #38452I)  
Tel: 416.863.5502  
Fax: 416.863.0871

Solicitors for XMT Liquidations Inc., in its  
capacity as the liquidator of 6356095 Canada  
Inc. (formerly known as Excapsa Software Inc.),  
and not in its personal capacity

TO: See attached service list.

**SERVICE LIST**

TO: Cassels Brock & Blackwell LLP  
2100 Scotia Plaza  
40 King Street West  
Toronto, Ontario M5H 3C2

John N. Birch  
Tel: 416.860.5225  
Fax: 416.640.3057  
jbirch@casselsbrock.com

Joseph J. Bellissimo  
Tel: 416.860.6572  
Fax: 416.642.7150  
jbellissimo@casselsbrock.com

Counsel to Gail Gleed and Melissa Gaddis in there capacities as Inspectors  
appointed in the liquidation of 6356095 Canada Inc.

AND TO: Paliare Roland Rosenberg Rothstein LLP  
250 University Avenue  
Suite 501  
Toronto, Ontario M5H 3E5

Chris G. Paliare  
Tel: 416.646.4318  
Fax: 416.646.4338  
chris.paliare@paliareroland.com

Massimo (Max) Starnino  
Tel: 416.646.7431  
Fax: 416.646.4301  
max.starnino@paliareroland.com

Counsel to Blast Off Limited and Joseph Tokwiro Norton

AND TO: Heenan Blaikie LLP  
Suite 2600  
200 Bay Street  
South Tower, Royal Bank Plaza  
Toronto, Ontario M5J 2J4

Angus T. McKinnon  
Tel: 416.360.2632  
Fax: 1.866.687.9888  
amckinnon@heenan.ca

Counsel to SC Fundamental LLC

AND TO: The Director appointed pursuant to Section 260 of the *Canada Business Corporations Act*  
9<sup>th</sup> Floor, Jean Edwards Towers South  
365 Laurier Avenue West  
Ottawa, Ontario K1A 0C8

Valérie Carpentier  
Tel: 613.957.4422  
Fax: 613.941.5781  
Valerie.Carpentier@ic.gc.ca

BETWEEN:  
JAMES RYAN (Applicant) – and - 6356095 CANADA INC. (Respondent)  
APPLICATION UNDER SECTION 211(8) OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED,  
AND RULE 14.05(2) OF THE RULES OF CIVIL PROCEDURE

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

Proceeding commenced at Toronto

**NOTICE OF MOTION**

DAVIES WARD PHILLIPS & VINEBERG LLP  
1 First Canadian Place  
Suite 4400  
Toronto, ON M5X 1B1

Robin B. Schwill (LSUC #384521)  
Tel: 416.863.5502  
Fax: 416.863.0871

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capacity

**TAB 2**

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

B E T W E E N:

**JAMES RYAN**

Applicant

-and-

**6356095 CANADA INC.**

Respondent

**APPLICATION UNDER SECTIONS 211(8) AND 223(2) OF THE CANADA BUSINESS  
CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED, AND RULE 14.05(2) OF  
THE RULES OF CIVIL PROCEDURE**

**SECOND REPORT TO THE COURT OF XMT LIQUIDATIONS INC.**

Date of Report:       September 18<sup>th</sup>, 2009

**A.     INTRODUCTION**

- (a) Pursuant to an order of the Ontario Superior Court of Justice – Commercial List (the “**Court**”) dated November 30, 2006 (the “**Original Order**”) annexed hereto as Appendix A, the Court made an order pursuant to section 211(8) of the *Canada Business Corporations Act* (the “**CBCA**”) to continue the voluntary dissolution and liquidation of the Respondent, formerly known as Excapsa Software Inc. (“**Excapsa**”) under the supervision of the Court. On December 22, 2006, the Court issued an Amended and Restated Order (the “**Amended and Restated Order**”) annexed hereto as Appendix B which, in part, made the appointment of the former liquidator, Mintz & Partners Limited, effective from January 15, 2007.
- (b) On August 21, 2008, the Court issued a subsequent order, inter alia, replacing the initial liquidator with XMT Liquidations Inc. (the “**Liquidator**”). A copy of such order is

annexed hereto as Appendix C (the “**Substitution Order**”). XMT Liquidations Inc. is a subsidiary of the Montreal-based accounting firm of WSBG LLP, a firm established in 1964 which has become a highly successful mid-sized boutique accounting firm with over 60 people.

- (c) On October 14, 2008, the Court issued an order approving the Amendment to Sale Documents Agreement with Blast Off Limited (“**Blast Off**”) and Tokwiro Enterprises ENRG (“**Tokwiro**”) dated as of September 22, 2008 (the “**Amending Agreement**”), subject to the Liquidator filing a further report (the “**Supplemental Report**”) to satisfy the Court that all of the conditions precedent in the Amending Agreement had been met and the basis on which the Liquidator concluded that such conditions precedent had been met (the “**Approval Order**”). Subsequent to the filing of the Supplemental Report, on November 3, 2008, the Court issued an Order authorizing the implementation of the Amending Agreement (the “**Final Approval Order**”). The Final Approval Order authorized the Liquidator to enter into such amendments to the Amending Agreement as it may consider necessary and appropriate. A copy of the Amending Agreement and the First Amendment thereto dated November 4, 2008 are attached hereto as Appendix D. A copy of the Approval Order is attached hereto as Appendix E. A copy of the Supplemental Report is attached hereto as Appendix F. A copy of the Final Approval Order is attached hereto as Appendix G.

## **B. BACKGROUND**

1. The Original Order resulted from a special resolution of the shareholders of Excapsa passed at a special meeting held on November 24, 2006 under the provisions of the CBCA which also adopted a plan of liquidation and distribution dated October 30, 2006. A special resolution was also passed authorizing Excapsa Software Inc. to change its name to 6356095 Canada Inc. which name change became effective on November 29, 2006.
2. Excapsa was a holding company which held the shares, directly and indirectly, in certain subsidiaries, being Excapsa Services Inc. (an Ontario corporation), Game Theory Ltd. (a Malta corporation), Game Theory Holdings Ltd. (a Malta corporation) and Game

Theory Services Ltd. (a Malta corporation). Game Theory Ltd. and Game Theory Services Ltd. were subsidiaries of Game Theory Holdings Ltd. Excapsa was incorporated in April 2004 and later continued under the CBCA with its registered and head office in Toronto, Ontario.

3. Excapsa and its subsidiaries developed, maintained, and marketed online gaming software applications, its main products being multi-player, real time, internet-enabled poker software, back office e-cash and reporting software and the poker network which it licensed to a variety of parties and were operated principally under the domain names ultimatebet.com and ultimatepoker.com.
4. On February 13, 2006, Excapsa issued a placement memorandum for a private placement of approximately 23 million shares. Concurrent with the private placement, Excapsa applied for and obtained a listing on the Alternative Investments Market of the London Stock Exchange (“AIM”). Excapsa’s shares began trading on AIM on February 16, 2006. Excapsa constitutes a mutual fund corporation for purposes of the *Income Tax Act* (Canada).
5. In anticipation of the passage of certain legislation in the United States (i.e., the *Safe Port Act* (Title 7 of the *Safe Port Act*, entitled Unlawful Internet Gambling Enforcement)), Excapsa entered into a stock purchase agreement on October 12, 2006 with Blast Off Limited (the “**Stock Purchase Agreement**”). According to the Stock Purchase Agreement, Blast Off Limited (“**Blast Off**”) is a company incorporated and based in Malta. Pursuant to the terms of the Stock Purchase Agreement, Excapsa sold all of the issued and outstanding common shares of its operating subsidiaries, namely Excapsa Services Inc. and Game Theory Holdings Ltd., for an aggregate purchase price of US \$130,000,000 (the “**Purchase Price**”) and delivered a promissory note (“**Note**”) for the balance of the Purchase Price. Blast Off transferred its shares of Game Theory Holdings Ltd. to a related party effective October 12, 2006.
6. Given the sale, Excapsa no longer had any operating business. As a result, and in light of the determination that there was no other business venture that Excapsa could reasonably undertake to maximize shareholder value, the board of directors of Excapsa decided to

place Excapsa into liquidation which decision was authorized by the shareholders by special resolution adopted at a meeting held on November 24, 2006.

7. Excapsa's shares no longer trade on AIM, having been de-listed in early December 2006. From the best information available to the Liquidator to date, it appears that Excapsa has approximately 224 shareholders of record. There is currently no active trading market for Excapsa's shares.
8. Pursuant to the Amending Agreement, Excapsa, Blast Off and Tokwiro agreed to the following material changes to the Stock Purchase Agreement and the Note:
  - 8.1. Excapsa paid Blast Off the sum of US \$14,625,000 by way of the reduction of the Purchase Price;
  - 8.2. Blast Off caused the delivery of approximately 6,900,000 shares in the capital stock of Excapsa for cancellation;
  - 8.3. Blast Off caused the delivery of approximately 49,312,566 shares (the "**Pledged Shares**") in the capital of Excapsa by way of a pledge as collateral security for the next US \$10,250,000 of payments under the Note (the "**Pledge**");
  - 8.4. Pursuant to a copyright assignment dated November 4, 2008 (the "**Copyright Assignment**"), Blast Off's subsidiary, Game Theory Limited, transferred an undivided ownership interest in certain gaming software (the "**Software**") to Aspacxe Holdings Inc. ("**Aspacxe**"), a wholly-owned subsidiary of Excapsa, in consideration of a payment of US \$375,000;
  - 8.5. Blast Off agreed to pay US \$500,000 in January 2009 on account of the indebtedness under the Note; and
  - 8.6. Blast Off agreed to resume monthly payments under the Note at the rate of US \$500,000 per month commencing in January 2009, subject to the right of Blast Off to defer up to two monthly instalments per year in certain circumstances.

Pursuant to the Amending Agreement, Blast Off acknowledged its indebtedness to Excapsa for principal in the amount of approximately US \$108,869,000 and unpaid interest as at September 30, 2007 in the amount of approximately US \$24,235,000.

9. In addition to the Approval Order, the transactions contemplated by the Amending Agreement were approved by the shareholders of Excapsa at a special meeting of shareholders held on November 14, 2008.
10. Blast Off and its subsidiaries provided the “Malta Pledge”, the “DN Security Agreement” and the “CL Escrow Agreement” (all as defined in the Amending Agreement) as security for the Note.
11. Blast Off paid the US \$500,000 referred to in Section 8.5 above as well as the monthly principal instalments due in January, March, April and May 2009. Blast Off claimed deferrals of the monthly principal instalments due in February and June 2009.
12. As at June 30, 2009, Blast Off was indebted to Excapsa for principal in the amount of US \$106,369,257 and accrued interest in the amount of US \$34,187,917 (in aggregate, the “**Existing Indebtedness**”).
13. The Liquidator was recently informed that Blast Off had suffered unexpected cash losses, due to the failure of a payment processor and the seizure of funds held in a US based bank account. Blast Off also reported operating losses in the first quarter of 2009. Blast Off’s management represented to the Liquidator that these financial setbacks coupled with a substantial and growing debt load had given rise to enhanced scrutiny over the company’s operations and were impeding its longer term growth objectives. As a result, Blast Off requested certain changes to the terms of the Existing Indebtedness in order to improve its capital structure, balance sheet, and business prospects. These changes are summarized below.

C. ACTIVITIES OF THE LIQUIDATOR

14. Since completing the transactions contemplated by the Amending Agreement in November 2008, a number of initiatives relating to the Software have been and are being pursued including the following:

- 14.1. Aspacxe obtained a perpetual royalty-free license from Centaurus Games LLC relating to the “Elimination Blackjack” game rules associated with Aspacxe’s blackjack Software;
- 14.2. Aspacxe is in active negotiations with a third party to license the blackjack Software in return for royalties;
- 14.3. Aspacxe is pursuing other potential opportunities for licensing the TBJ Software and Aspacxe’s poker Software.

In connection with the above opportunities, Aspacxe has been working closely with Realtime Edge Software Inc., the principal of which was Excapsa’s former VP Engineering and subsequently supported the Software for Game Theory Ltd. Aspacxe and Realtime Edge Software Inc. are in the process of formalizing a maintenance and support agreement. All transactions relating to the Software are subject to the approval of Aspacxe’s board of directors;

Ultimately, Aspacxe could eventually be sold or its shares distributed as part of the overall liquidation process.

- 14.4. The Liquidator completed and filed Excapsa’s tax return for the financial year ended June 30, 2008. Subsequent to the filing of the tax return, the Liquidator received federal and Ontario tax refunds totalling approximately \$2,541,317.00;
- 14.5. the Liquidator obtained a partial clearance certificate from Canada Revenue Agency (“CRA”) authorizing a US \$10,000,000 distribution by way of capital gains dividend to Excapsa’s shareholders (the “**Dividend**”). The Dividend was paid on July 24, 2009;

- 14.6. the Liquidator has been actively involved in negotiations with Blast Off as outlined in Sections 13 and 15 of this Report;
- 14.7. the Liquidator was able to secure CRA's commitment to commence its audit procedures with respect to Excapsa's last several taxation years. Various requests for information have been received from CRA and responses have been provided or are in process of being provided. After completion of the audit, the Liquidator is confident that it will be able to obtain the necessary clearance certificates from the CRA to make additional distributions to Shareholders.

**D. RESTRUCTURING OF THE EXISTING INDEBTEDNESS AND RELATED MATTER**

15. Pursuant to the Second Amendment to the Amendment to Sale Documents Agreement dated as of June 30, 2009 (the "**Second Amendment**"), Excapsa, Blast Off and the other applicable parties entered into the following transactions:

- 15.1. Effective June 30, 2009, the Existing Indebtedness was cancelled and Blast Off issued the following promissory notes in full, final and absolute payment of the Existing Indebtedness:

- (i) a promissory note (the "**First Note**") in the principal amount of US \$41,900,000 bearing interest at 8% per annum; and
- (ii) a promissory note (the "**Second Note**") in the principal amount of US \$64,469,257 bearing interest at 6% per annum.

(the First Note and the Second Note, collectively "**the New Notes**"). Principal under the First Note is payable at the rate of US \$225,000 per month from July through October 2009 and thereafter at the rate of US \$500,000 per month. Principal payments under the Second Note will commence in January of 2018 or when the First Note is retired, whichever is earlier, at the rate of US \$500,000 per month. Commencing in 2010, Blast Off has the right to defer up to 2 monthly principal instalments per year upon the satisfaction of certain conditions. Blast Off is entitled to a 10% early payment discount if the Notes are repaid in

