

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

BETWEEN:)
 JAMES RYAN) *Robin Schwill* for the Liquidator
 Applicant)
 - and -) *John Birch* for the Inspectors
)
 6356095 CANADA INC.) *Max Starnino* for Blast Off Limited
 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*)

Heard: October 14, 2008

**ENDORSEMENT
(Unofficial Typewritten Version)**

Motion to approve an amendment to the sale documents so as to effect a settlement of a claim by the purchaser Blast Off in the amount of \$81.4 million.

The proposed amended sale agreement is conditional on the Liquidator's being satisfied of a number of things. These include 66⅔% of the shareholders approving the amendment, being satisfied of the financial viability of the purchaser, and completing due diligence concerning the validity of the Buyer's Claim. These conditions are close to being met, but have not been yet.

Mr. Schwill has brought to the court's attention a letter, Ex. A attached, from Peter Collery, President of SC Fundamental, a holder of about 3.5% of the respondent's shares. In it, he raises some concerns about this motion and some of the process leading up to it. My concern is that the conditions in the amending agreement have not all been met yet. If they are, I have no hesitation in approving the amending agreement. That said, it seems to me the court should have evidence from the Liquidator that the conditions have been met including the basis on which it concludes the conditions have been met.

Order to go:

- (1) Approving the amendment to the sales agreement subject to the Liquidator filing a further report to satisfy the court that all conditions have been met.

(2) Particulars of this endorsement to be communicated to the shareholders as soon as possible.

(3) Counsel my return to me on a 9:30 appointment for final approval upon filing of the Liquidator's report concerning fulfilment of the conditions. The date of this 9:30 appointment is to be posted on the Liquidator's website as is the Liquidator's report concerning fulfilment of conditions.

Mesbur J.

Ex. A.

656095 Canada Inc.

October 13, 2008

SC Fundamental and its affiliates own approximately 7 million shares of 656095 Canada (the "Company"). We became aware only this afternoon of the possibility that a hearing will be held tomorrow, October 14, to approve a settlement of litigation (the "Settlement") with Blast Off Limited and its affiliate ("BO"). Evidently, the Court would approve the Settlement on the basis that holders of 2/3rds of the Company's outstanding shares have given it their informed consent. We have concerns that either (i) that consent is not truly informed; or (ii) some or all of the consenting shareholders and the persons soliciting their consents may have self-serving interests which are not shared by the balance to the Company's owners.

Our concerns can be divided into four separate categories:

- 1. Failure to disclose motivations and potential conflicts of interest:** As is described in greater detail below, shareholders are being asked to approve a very substantial settlement of seemingly weak claims with virtually no relevant information on which to base their decision. It seems difficult to understand why they would do so unless they have some interest in the fortunes of BO. This impression is not lessened by the fact that certain shareholders are willing to forfeit their shares to facilitate the deal, and that others are willing to pledge theirs to guarantee BO's performance under its note to the Company. Who are these shareholders? What common interests do they have with BO? How can we reconcile their behavior with the assertion in the First Liquidator's Report that "there is no evidence of overlapping shareholdings between Excapsa and Blast Off"? Aren't shareholders entitled to a broader disclosure of any and all relationships between any proponent of the settlement including consenting shareholders, inspectors and the liquidator on the one hand, and BO on the other?
- 2. Failure to analyze the merits of BO's legal position:** The Company proposes to pay BO almost \$15 million in settlement of what are presumably very credible claims. Shareholders, however, are provided with virtually no analysis demonstrating that credibility, or even any evidence that the Company made a serious effort to evaluate BO's case. For instance, wouldn't the fact that the contract with BO evidently provided that the software be sold on an "as-is" basis, provide a very strong defense? Wouldn't the Court-ordered extinguishment of all pre-filing claims similarly forestall BO's demands? Documents provided to the Court and shareholders provide *no* analysis of these issues, or, for instance, of BO's assertion that the software "tool" which permitted cheating was known to, and not disclosed by, the Company. Indeed, the Liquidator's report provides no description of any rigorous consideration of the relative merits of BO's case and the Company's defenses.
- 3. Failure to disclose BO's wherewithal:** One purported benefit of the settlement is that it will induce BO to resume payments on its note to the Company. Even before discovery of the cheating scandal, however, BO had defaulted on the note. BO has asserted that it subsequently suffered tens of millions of dollars in unreimbursed losses, but nevertheless promises that, if the Company will only give it \$15 million, this time it will *really* meet its obligations. Our skepticism about this is only heightened by BO's insistence that its financial statements not be made available to the Court or Company shareholders. It seems both incredible and alarming that Company shareholders should be asked to, in

essence, lend more than \$100 million to BO without being allowed to make an informed judgment about its ability to pay them back.

4. Other matters:

- According to the First Liquidator's Report, the original principal of the BO note was \$125 million. It appears that approximately \$13 million was paid between October of 2006 and the summer of 2007, during which time interest was accruing at 1% per month, or at a rate faster than the principal was being repaid. No payments have been made since the summer of 2007, during which time interest was presumably also accruing. According to the liquidators' report, the current principal of the note is less than \$109 million. How can this be?
- The report says that the Settlement will result in certain tax benefits for the company. No further discussion of the magnitude of these benefits is provided, nor is it explained how a company structured as a mutual fund with a view towards not paying taxes could even realize such benefits.
- There is no disclosure of who used the "tool" to cheat UltimateBet's customers, or what efforts have been made to recoup that person's ill-gotten gains. These questions would seem to have a bearing on both the merits of BO's case, and on the amount of damages it could claim from the Company.
- We're unclear (i) what the "declaration of shareholders" referred to in section 27.4 of the First Liquidator's report is, and (ii) why BO's owner would be unwilling for the Company's shareholders to know its contents.
- We have been concerned about the prospect of a settlement with BO since we first became aware of the possibility. In this regard we attempted to initiate a dialogue with the company and its liquidator some number of weeks ago. Our attempt has not been an unqualified success. By way of example, Company inspector Melissa Gaddis refused to disclose the identity of the persons who solicited consents for the removal of the former liquidator (who was seen as impeding a settlement). In discussions with the current liquidator, we were assured that no settlement would be approved until at least 30 days after a detailed proxy statement had been provided to shareholders. We were accordingly startled to discover this afternoon that a hearing to approve the Settlement might be held as soon as tomorrow.

In closing, I should stress that we are not asserting bad faith on the part of any party to the proposed settlement. Everyone may be acting in accordance with their duties and the best interests of Company shareholders. On the other hand, there are reasons to think that they may not be. At a minimum we lack the information to make a sensible judgment in this regard, and we respectfully request that no settlement be approved until that information is provided to the Court and to all Company shareholders.

Peter Collery

President, SC Fundamental

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

ENDORSEMENT