COURT FILE NO.: 03-CL-5145
DATE: 20060530

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	) *Peter Howard*) for the Applicants and the Monitor
	) *David Ward*
AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO IVACO INC. AND OTHER APPLICANTS	) *Bruce Leonard*) for the Respondents
	) **MOTION HEARD:** May 26, 2006

<u>GROUND J.</u> (Orally):

[1] The sole issue on this motion is the interpretation of paragraph 3 of the Protocol approved by order of this court with respect to the determination by KPMG LLP (the "Expert") of the working capital adjustment and resulting purchase price adjustment under the three assets purchase agreements entered into in the liquidation of IVACO Inc.

[2] The Monitor has required an affidavit from Mr. Blakely, a prior employee of IVACO now employed by HEICO, the purchaser of assets of IVACO and a subsequent cross-examination on the affidavit.

[3] Section 3 of the Protocol provides "in the case of (c) in the event that matters become contentious, either HEICO or the Monitor shall require that the individual provide evidence under oath with a sworn affidavit to be provided and both parties shall be entitled to question the employee". Category (c) is a former employee of IVACO now employed by HEICO.

[4] This provision clearly gives either party the right to require an affidavit and a cross-examination and no consent of the other party is required. It also does not require that the Expert request an affidavit or a cross-examination. In interpreting this provision, it appears to me that the threshold is that matters become contentious and, if so, either party is clearly entitled to require the affidavit and the cross-examination.

[5] The threshold issue, therefore, would be whether matters have become contentious. It appears to be the position of HEICO that this must be determined by the Expert. I do not agree. The reference to matters becoming contentious is included in the Protocol which is incorporated by reference in an order of this court and it is up to this court to determine whether matters have become contentious. As a starting point, the issue between the parties involves an adjustment to

the calculation of working capital in the magnitude of $50 million and that in itself clearly is an area of contention. If I accept that one would have to go beyond that and determine that the course of the interviews of persons pursuant to paragraph 3 of the Protocol resulted in matters becoming contentious, the excerpts from the interviews contained in the materials before this court clearly indicate to me that there are a number of contentious matters relating to how adjustments were made, on what basis they were made, who participated in the decision to make those adjustments and in many other areas.

[6] Accordingly, I am of the view that the evidence before this court clearly indicates that matters have become contentious in the course of the interviews and that the Monitor is, therefore, entitled to require an affidavit and cross-examination of Mr. Blakely who is the only person in respect of whom such an affidavit and cross-examination is required. It also seems to me that this makes eminent sense from the point of view of interpreting the Protocol in a commercially reasonable and business-based manner. The whole purpose of the Protocol is to ensure that the Expert has the best information available in order to complete its task of determining the purchase price adjustment. If, in the course of interviews, there are different facts or different answers provided to questions relevant to that computation, it seems to me that, in the interest of assisting the Expert to complete its job, theses discrepancies be resolved in the most efficient manner and the Protocol provides that these discrepancies be solved by enabling either party to require an affidavit and a cross-examination.

[7] Accordingly, an order will issue declaring that the HEICO participants in the working capital dispute are obligated to provide an affidavit of Mr. Blakely in accordance with paragraph 3 of the Protocol and to produce him for cross-examination thereafter at a date and time to be scheduled in accordance with the Protocol.

Ground J.

Released: May 30, 2006

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SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO IVACO INC. AND OTHER APPLICANTS

ORAL REASONS

Ground, J

Released: May 30, 2006