

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

B E T W E E N:

HALEX CAPITAL INC.

Applicant

and

NATURAL ENERGY SYSTEMS INC.

Respondent

and

**APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, C B-3, AS AMENDED, AND SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. 1990, C. C. 43, AS AMENDED**

FACTUM OF DOUGLAS J. HALLETT

November 27, 2020

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FACTUM OF DOUGLAS J. HALLETT

PART 1 – OVERVIEW

1. The application, brought by Halex Capital Inc. (“Halex”) to appoint a Receiver, arises from events which are, in effect, a shareholders’ dispute between NES and Douglas J. Hallett (“Hallett”) and which are the subject of related litigation.
2. Hallett opposes the application and seeks to have the issue of Receivership referred to on-going arbitration between Hallett and NES.
3. It is the position of Hallett, as moving party, that the issues in question trigger the Dispute Resolution clause of a Unanimous Shareholders’ Agreement between Douglas Hallett, Craig McCewen, G. Paul Greenwood and Natural Energy Systems Inc. (“NES”). It is Hallett’s position that that the individual who is now pursuing receivership, Dragan Matovic (“Mr.

Matovic”) through his private company, Halex, finds himself in an irreconcilable conflict of interest.

4. It is also the position of Hallett that his motion should proceed prior to the Receivership application, as the determination of the issues may render the application unnecessary.
5. Hallett seeks, among other relief, an Order staying the application by Halex to appoint a receiver, and referring all issues raised to arbitration, in accordance with the Unanimous Shareholders’ Agreement. Alternatively, Hallett seeks dismissal of the Receivership application.
6. This factum is intended to support the Hallett motion and responds to the Halex Application.

PART II - SUMMARY OF FACTS

Background

7. Hallett is the founder, principal shareholder and director of Natural Energy Systems Inc. (“NES”), the respondent in the Commercial List proceeding. Hallett founded and incorporated NES as a vehicle to commercialize the unique waste-to-energy technology that he co-invented with his friend, Craig McEwen, now deceased.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 pp 11-13, at paras 1, 4, 6.

8. Mr. Matovic is the chairman and CEO of Halex (since its incorporation in 2012). He is also the chairman and CEO of NES (since March 2015). He has and continues to be a Director of both corporations for over the last 5 years.

Cross examination transcript of Dragan Matovic, p 5 q 2, 7, p 10 q 34.

Supplementary Affidavit of Douglas J. Hallett, Motion Record Tab 3 p 34 at para 5.

9. In 2008, a Unanimous Shareholders Agreement (the “USA”) was entered into by the shareholders of NES. The USA grants Hallett special status to elect the board’s majority and prohibits shareholders from voting shares against him. It also contains a Dispute Resolution Clause agreeing to arbitrate “all disputes and questions whatsoever which shall arise between any of the parties in connection with this Agreement... or as to any other matter in any way relating to this Agreement...”

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 12, at para 5.

10. The USA specifically states the following:

**ARTICLE 10
DISPUTE RESOLUTION**

10.1 Dispute Resolution.

All disputes and questions whatsoever which shall arise between any of the parties in connection with this Agreement, or the construction or application thereof or any Section or thing contained in this Agreement or as to any act, deed or omission of any party or as to any other matter in any way relating to this Agreement, shall be resolved by arbitration. Such arbitration shall be conducted by a single arbitrator. The arbitrator shall be appointed by agreement between the parties or, in default of such agreement, such arbitrator shall be appointed by a Judge of the Superior Court of Justice sitting in Toronto, upon the application of any of the parties and such judge shall be entitled to act as such arbitrator, if he or she so desires. Unless otherwise agreed to by the parties, the arbitration shall be held in the City of Toronto. The procedure to be followed shall be agreed to by the parties or, in default of such agreement, determined by the arbitrator. The arbitration shall proceed in accordance with the provisions of the *Arbitration Act, 1991* (Ontario). The arbitrator shall have the power to proceed with the arbitration and to deliver his or her award notwithstanding the default by any party in respect of any procedural order made by the arbitrator. The decision arrived at by the arbitrator shall be final and binding and no appeal shall lie therefrom. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 13, at para 8.

11. Mr. Matovic acknowledges that the affairs of NES are governed by this USA. Matovic/Halex also confirmed that Halex is a shareholder of NES. Halex acquired 125,000 common shares of NES for \$500,000.00 in 2012.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 pp 12-13, at paras 5-6.

USA Exhibit “I”, Affidavit of Dragan Matovic, Motion Record Tab 2 p 115-147.

Cross examination transcript of Dragan Matovic, P 12 q 46, p 16 55-56

12. On March 15, 2014, NES granted two GSAs (one to Hallett and one to Mr. McEwen), giving each security over the corporation's assets (i.e. the technology and patents). These GSAs were authorized by Hallett, and drafted and registered by, and on the advice of, NES's corporate lawyer. The validity of Hallett's GSA is an issue in the arbitration proceedings between NES and Hallett.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 14, at para 9.

13. On March 9, 2015, Hallett was purportedly removed from the NES board, contrary to the USA which, again, gives him the right to elect the majority. Shares were voted against Hallett, contrary to the expressed terms of the USA. Hallett has disputed, and continues to dispute, his removal from the board, and the matter is an issue in connection with the USA, and presently the subject of the ongoing arbitration, as described below.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 14, at paras 10-11.

14. The board of NES has purported to "suspend" Hallett's shareholder rights. He has disputed, and continues to dispute, the basis of this suspension, and the matter is presently being litigated in the ongoing arbitration. The validity of Halex's GSA is accordingly also a matter which is squarely before the arbitrator.

Cross examination transcript of Douglas J. Hallett, pp 5-7, q 8, 9, 15.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 14, at para 12.

Affidavit of Dragan Matovic, Application Record Tab 2 p 21, at paras 23, 25.

15. Notwithstanding the Dispute Resolution clause in the USA, which requires that the parties arbitrate their disputes, NES commenced a Court action against Hallett by way of Notice of Action dated February 28, 2017.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 14, at para 13.

16. In its Statement of Claim dated March 30, 2017, NES makes a number of allegations which are likewise within the ambit of the USA, including that Hallett misappropriated funds, and sought, among other things, an order cancelling all securities issued by NES to Hallett, including his shares in NES and the GSA in his favour dated March 17, 2014.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 15, at para 15.

17. In August 2017, NES moved for, and obtained, partial default judgment, solely in relation to its claim for misappropriated funds. NES sought no relief whatsoever in relation to Hallett's GSA.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 15, at para 16.

18. On February 15, 2018, Hallett moved to set aside the partial default judgment, and for an order that the NES action be stayed and referred to arbitration.

Affidavit of Douglas J. Hallett, Motion Record Tab p 15 at para 17.

19. In an Endorsement dated February 26, 2019, the Court set aside the partial default judgment against Hallett, granted leave for Hallett to deliver a Statement of Defence and Counterclaim, dismissed Hallett's motion that the NES action be stayed and referred to arbitration without substantive determination and without prejudice to Hallett seeking this relief "after the close of pleadings," and ordered NES to pay Hallett \$12,000.00 in costs.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 15, at para 18.

20. Hallett served his Statement of Defence and Counterclaim in the NES action on March 27, 2019. On November 5, 2019, NES delivered a Statement of Defence to Counterclaim.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 15, at para 19.

21. No discovery plan was agreed to in the NES action. No affidavits of documents were exchanged. No examinations for discovery were ever scheduled. No expert evidence was exchanged. None of the issues in that action was ever determined.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 16, at para 24.

22. NES repeatedly refused Hallett's requests to remit its matter to arbitration until December 19, 2019 when it finally relented.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 16, at para 25.

Cross Examination Transcripts of Dragan Matovic, p 36 q 134.

23. Between February 2019 and August 16, 2019, Halex states that it advanced money to NES estimated by Mr. Matovic at cross-examination in the amount of approximately \$50,000.00 to \$60,000.00, accounted for in promissory notes. There was no GSA concerning these loans. Partial answers to undertakings indicates that \$108,000.00 was loaned by Halex to NES in 2019.

Cross Examination Transcripts of Dragan Matovic, p 20 q 66.

Promissory Notes, Exhibit "B" Affidavit of Dragan Matovic, Tab 2 Application Record pp 28-48.

Answers to Undertakings of Halex.

24. On December 19, 2019, the parties agreed to arbitrate the issues in the related litigation pursuant to the Dispute Resolution clause of the USA. On January 28, 2020, NES and Hallett entered into an Arbitration Agreement.

Exhibit "A" Arbitration Agreement, Supplementary Affidavit of Douglas J. Hallett, Motion Record Tab 3 p 41.

Supplementary Affidavit of Douglas J. Hallett, Motion Record Tab 3, p 34 para 3.

Cross Examination Transcripts of Dragan Matovic, p 7 q 19, pp 62-63, q 240-242.

25. Three days later, on January 31, 2020, Halex purported to enter into a General Security Agreement (“GSA”) with NES in which it recharacterizes at least some of the promissory notes (i.e. loans made in 2019) as a “consolidated promissory note”. The GSA purportedly secures the loans made in 2019, as well as additional funds purportedly advanced to NES in 2020.

Cross Examination Transcripts of Dragan Matovic, pp 35-36 q 130-134.

26. Halex provided particulars of the amounts advanced to NES between February 6, 2019 and August 16, 2019 but has failed to provide copies of the promissory notes relating to those loans.

Cross Examination Transcripts of Dragan Matovic, pp 19 and 21; q 65 and 72.

Halex Answers to Undertakings.

27. Matovic recused himself with respect to decisions concerning the loans made in 2019, however, the applicant has refused to produce copies of any related emails.

Cross Examination Transcripts of Dragan Matovic, p 23 questions 78-80.

28. It is the position of the applicant that Matovic does not have authority to produce documentary evidence on behalf of NES, notwithstanding the fact that he is the Chairman and CEO of NES.

Cross Examination Transcripts of Dragan Matovic, p 24, q 80.

29. Similarly, Halex has failed to produce copies of documentary evidence to support the payments by Halex to NES between January 2020 and June 26, 2020.

Cross Examination Transcripts of Dragan Matovic, pp 30-31, q 110-113.

Halex Answers to Undertakings.

30. Halex has failed to produce the bank records relating to the loans purportedly secured by the GSA.

Cross Examination Transcripts of Dragan Matovic, pp 32-33, q 116-117.

Halex Answers to Undertakings.

31. Halex has failed to produce email communications between Matovic and the other directors of NES concerning the enforcement of the GSA.

Cross Examination Transcripts of Dragan Matovic, p 62, q 239.

Halex Answers to Undertakings.

Issues are Subject to the Agreed Upon Arbitration Clause and Arbitration Agreement

32. The loans that are the subject of the purported Halex GSA are properly the subject of the arbitration pursuant to the Dispute Resolution clause of the USA and the January 28, 2020 Arbitration Agreement. The recitals of the Halex GSA itself refer to Article 4.2 (c) of the USA and submit to the governing USA.

Natural Energy Systems Inc.

Resolution of the Board of Directors

Date: January 30, 2020.

On the matter of granting a registered security for a shareholder loan(s) from HALEX CAPITAL INC., ("Halex") to NATURAL ENERGY SYSTEMS INC., ("NES").

RECITALS:

WHEREAS NES has received a number of shareholder loans from Halex that have been approved by the NES Board of Directors;

AND WHEREAS NES has provided a consolidated Promissory Note to Halex in the amount of C\$175,000.00, dated January 31, 2020;

AND WHEREAS the NES Universal Shareholders' Agreement effective November 12, 2008 clearly states under ARTICLE 4.2 (c) "each loan shall be secured";

USA, Exhibit "I", Affidavit of Dragan Matovic, Motion Record Tab 2 p 115-147.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 20, at para 41.

33. The issues that are the subject of this application are captured by the broad language of the Dispute Resolution clause of the USA.

USA Exhibit "I", Affidavit of Dragan Matovic, Motion Record Tab 2 p 115-147.

34. Pursuant to the Arbitration Agreement dated January 28, 2020, NES agreed to arbitrate the NES action and Hallett's counterclaim. An arbitrator (Colin Campbell) has been appointed.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 17, at paras 29-31.

Supplementary Affidavit of Douglas J. Hallett, Motion Record Tab 3 p 34, at para 3.

Exhibit "A" is a copy of the executed Arbitration Agreement dated January 28, 2020.

35. On consent of the parties, Hallett adopted an Amended Statement of Defence and Counterclaim dated March 6, 2020 as part of his pleadings for the purposes of the ongoing arbitration. Accordingly, this pleading helps explain the scope of the arbitration. The validity of the Halex GSA is included in the scope of arbitration.

Supplementary Affidavit of Douglas J. Hallett, Motion Record Tab 3 p 34, at para 4.

Exhibit "B" being paragraph 156(h)(i) of Amended Statement of Defence and Counterclaim dated March 6, 2020, page 70 of Hallett Motion Record.

36. Mr. Matovic was a very active participant in the arbitration on behalf of NES. Mr. Matovic was described by NES's counsel, Mr. Camelino, as the representative of the NES board for purposes of the arbitration.

Supplementary Affidavit of Douglas J. Hallett, Motion Record Tab 3 p 34, at para 5.

37. The NES board did not have the authority to issue security to Halex in the first place.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 17, at para 30.

38. The arbitration was tentatively scheduled for a hearing on September 8 to 11, 2020. The hearing did not proceed. In mid-July, Hallett's lawyers received word from Halex's then counsel (Mr. Jeffrey Levine at McMillan LLP) that it intended to pursue this receivership. This development brought the arbitration to a halt.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 17, at para 31.

39. There were several conference calls with the arbitrator over time, most if not all of which, Mr. Matovic attended in his capacity as a director and officer of NES. The calls took place on or about February 12, 2020, February 27, 2020, March 12, 2020, March 25, 2020, April 13, 2020, June 2, 2020, June 19, 2020, July 28, 2020 and July 30, 2020. At no time was it ever suggested that Mr. Matovic was somehow attending these calls as a mere creditor of NES.

Supplementary Affidavit of Douglas J. Hallett, Motion Record Tab 3 p 34, at para 6-7.

40. In the arbitration, the parties have effectively adopted their court pleadings as their pleadings in the arbitration. The parties subsequently amended these pleadings during the arbitration.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 19, at para 29.

41. Hallett's pleadings were amended, in part, because he discovered, in January 2020, that NES had purported to grant the GSA to Mr. Matovic (Halex) without Hallett's approval. This is the very GSA that Halex now seeks to enforce. The validity of Halex's GSA is matter which is squarely before the arbitrator, as seemingly acknowledged by Mr. Matovic at paragraphs 23 and 25 of his October 5, 2020 affidavit.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 17, at para 29.

The Invalid GSA

42. As set out above, the Halex GSA was made without approval of Hallett, as required by the USA. The validity of the GSA that is the subject of this application ought to be determined by the arbitrator.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 17 at para 29.

43. Furthermore, the GSA that Halex now seeks to enforce was made contrary to the provisions of the PPSA. A significant amount (\$108,000.00) in installments of the \$175,000 purportedly "secured" by the GSA were provided to NES well prior to the existence of the GSA. The

financial statement registered for the Hallex GSA were made almost a year after the first loan installments of the GSA under the “consolidated promissory note”. In fact, the applicant’s answers to undertakings do not reveal any loans or payments made by Halex in January 2020 to NES.

Cross Examination Transcripts of Dragan Matovic, pp 25-26 q 87-88.

Halex Answers to Undertakings.

Conduct of Halex Does not Support Appointment of a Receiver

44. The applicant’s conduct in failing to disclose the true object of the application as well as an apparent conflict of interest is conduct that does not support the equitable remedy of a granting a Court-appointed receiver. The application by Halex is nothing more than a continuation of the shareholder dispute which has been ongoing since 2015 and has already been referred to arbitration.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 15, at para 18.

45. Halex issued the “consolidated” promissory note knowing full well that NES did not have sufficient operations to pay the initial sum or any future sum purportedly included in the consolidated promissory note dated January 31, 2020.

Cross examination transcript of Dragan Matovic, pp 25-26 q 87-89.

46. Mr. Matovic/Halex are in a conflict of interest. Mr. Matovic/Halex requests a receiver while a shareholder, officer and director of NES, as well as the chairman, director and CEO of Halex. In recent years, Mr. Matovic’s control and influence over NES has grown. Mr. Matovic has been supporting NES using funds from his private company Halex.

Cross examination transcript of Dragan Matovic p 5, 45 q 2, 179.

47. Mr. Matovic was an active participant in the arbitration and, outwardly at least, was the one who was principally instructing NES's lawyer in that proceeding.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 18, at para 34.

48. The very person who was seemingly funding and spearheading the litigation against Hallett (Mr. Matovic), is now pursuing a receivership through his own private company. He is doing so based on a GSA which is being disputed in the very arbitration which Mr. Matovic voluntarily agreed to participate in as an officer and director of NES.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 18, at para 35.

49. While Mr. Matovic was involved in setting up the arbitration schedule, he was, at the same time, signing off on promissory notes payable on June 30, 2020, including a final advance of \$25,000 on June 26, 2020 which was due to be paid only four days later.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 19, at para 39.

50. NES, Halex and Mr. Matovic knew that Hallett was actively disputing his exile as shareholder and director of NES through the litigation process, on the basis that his exile was contrary to the USA. NES authorized loans by Mr. Matovic (Halex) for purposes of funding the litigation against Hallett, and gave security to Mr. Matovic (Halex) which Hallett never would have approved.

**Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 19, at para 40.
Halex Answers to Undertakings.**

51. The board resolution of NES dated January 30, 2020, which purportedly authorized Halex's GSA, confirms that Halex's loans were secured in light of Article 4.2(c) of the USA, which requires that shareholder loans shall be secured.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 20, at para 41.

52. The loans touch and concern the USA, and are properly the subject of the ongoing arbitration. Mr. Matovic states the following (with “DJH” being Douglas J. Hallett):

18. Notwithstanding that DJH appears to have a registered security interest, which ranks in priority to Halex, there are legal and factual issues which render the DJH security invalid and/or significantly diminish the quantum of amounts purportedly secured by the DJH GSA (as defined below).

Affidavit of Dragan Matovic, Application Record paragraph 18.

53. The “legal and factual issues” described at paragraph 18 of Mr. Matovic’s October 5, 2020 affidavit are disputed matters which have already been referred to arbitration. There is simply no way to separate the issues in this application from the issues in the arbitration.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 20, at para 43.

54. Mr. Matovic loaned money to NES in part at least to fund the litigation against Hallett, and with the specific and collateral intention of precipitating NES’s insolvency and this receivership.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 19, at para 38.

Halex Answers to Undertakings.

55. Although Mr. Matovic appears to have recused himself from voting on the issue of his GSA, as seemingly evidenced by the Resolution he has produced in his affidavit, there were apparently discussions between Mr. Matovic, Mr. Greenwood, Mr. Naiman, and potentially others, wherein the option of enforcing the security and removing the intellectual property from the corporation were discussed.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 35, at para 10.

Cross Examination Transcript of Dragan Matovic, p 34, 44, q 121-122, 173.

56. It was not long after the final instalment of the deposit was due and paid that Mr. Matovic announced his intention to pursue this receivership.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 22, at para 51.

57. Mr. Matovic states in his affidavit that Halex is not a party to the arbitration. However, Halex and Mr. Matovic are, effectively, one and the same, and Mr. Matovic has been intimately involved with the ongoing arbitration.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 21, at para 45.

58. Mr. Matovic was instructing NES's counsel throughout the related litigation and arbitration. For Mr. Matovic to now seek to distance himself from that process by arguing that his company is not a party to the arbitration is disingenuous.

Affidavit of Douglas J. Hallett, Motion Record Tab 2 p 18, at para 34.

PART III - STATEMENT OF ISSUES

59. The following issues are raised by this application:
- (i) Should the issues be referred to arbitration pursuant to the Arbitration Clause?
 - a) Does the Arbitration Clause apply?
 - b) Does the arbitrator have jurisdiction to determine the validity of the GSA?
 - (ii) Is the GSA dated January 31, 2020 invalid and accordingly unenforceable, either in whole or in part?
 - (iii) Should the Commercial Court refuse to appoint a receiver?
 - (iv) Is there a conflict of interest that renders the GSA void ab initio?
 - (v) whether the enforcement of the GSA is a matter to be decided by the arbitrator pursuant to the Dispute Resolution clause in the USA;

- (vi) If the GSA is at least partially deficient, is it still possible to enforce i.e. can a Receiver be appointed pursuant to an invalid or partially invalid GSA.

PART IV - STATEMENT OF LAW & AUTHORITIES

Applicability of the Dispute Resolution/Arbitration Clause

60. The legislative framework of Section 7(1) of the *Arbitration Act*, 1991, SO 1991, c 17 contains *mandatory* language that a proceeding commenced by a party to an arbitration agreement be stayed on motion by a party.

7 (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced **shall**, on the motion of another party to the arbitration agreement, **stay the proceeding**. 1991, c. 17, s. 7 (1).

[*Emphasis Added*]

Arbitration Act, 1991, SO 1991, c 17, s. 7(1).

61. Mr. Matovic has repeatedly acknowledged that he/Halex is a shareholder of NES. He has also acknowledged that he/Halex are, in many respects, subject to the Arbitration Clause of the USA, including any potential sale of his/Halex's shares of NES. Accordingly, Halex is bound to have the dispute regarding the validity of the GSA determined by arbitration.

62. Section 7(2) of the *Arbitration Act* provides limited exceptions to the mandatory requirement, none of which apply.

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

Arbitration Act, 1991, SO 1991, c 17, s. 7(2).

63. Courts have confirmed that Section 7(2) includes only a limited exception to the mandatory requirement that Courts enforce arbitration clauses, and not to take jurisdiction where parties have agreed to arbitrate.

***MDG Kingston Inc v MDG Computers Canada Inc*, 2008 ONCA 656 (CanLII), Book of Authorities (“BOA”) Tab 1 at para 37.**

***Fowler v 1752476 Ontario Ltd*, 2010 ONSC 779 (CanLII), BOA Tab 2 at para 21.**

64. The Dispute Resolution clause of the USA and Arbitration Agreement dated January 28, 2020 undoubtedly meet the requisite test to apply to the herein dispute. The analysis for considering whether to stay arbitration pursuant to s. 7(1) or an exception under s. 7(2) of the *Arbitration Act* is well established in jurisprudence.

- (1) Is there an arbitration agreement?
- (2) What is the subject matter of the dispute?
- (3) What is the scope of the arbitration agreement?
- (4) Does the dispute arguably fall within the scope of the arbitration agreement?
- (5) Are there grounds on which the court should refuse to stay the action?

***Haas v. Gunasekaram*, 2016 ONCA 744, BOA Tab 3 at para 17.**

65. The question to be determined to grant a stay is not whether the arbitration clause applies, but merely whether it “at least arguable” for the arbitration agreement to apply.

***King Valley Estates Inc. v. Wong et al.*, 2019 ONSC 4809 (CanLII), BOA Tab 4 at para 6.**

66. The parties are subject to a Dispute Resolution clause of the USA. The subject matter of the dispute is the validity of the GSA, which falls within the broad scope of the Dispute Resolution clause encompassing “all disputes and questions in relation to the GSA”.

The Arbitrator has Jurisdiction to Determine Validity of the GSA

67. The general rule is that any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. Only where the challenge concerns a question of law alone should Courts depart from the general rule.

Muroff v. Rogers Wireless Inc., [2007] 2 S.C.R. 921 (S.C.C.), BOA Tab 5 at para 11.

68. The issues in the herein proceeding are not solely questions of law, but are instead questions of fact and mixed fact and law. Therefore, any issues regarding the arbitrator's jurisdiction ought to be determined by the arbitrator.

The GSA is Invalid and Accordingly Unenforceable

69. Notwithstanding the fact that the issues regarding the general security agreement ought to be determined at arbitration, the general security agreement is not, in fact, a valid security instrument as it does not comply with the provisions of the PPSA. Section 11 of the PPSA sets out the requirements for a security interest to attach to collateral. Specifically, s. 11(2) requires that value actually be given for the security interest to attach:

11(2) When security interest attaches to collateral

Subject to section 11.1, a security interest, including a security interest in the nature of a floating charge, attaches to collateral **only when value is given**, the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party and... [*Emphasis Added*]

Personal Property Security Act, RSO 1990 c. P. 10, s. 11(2).

70. The requirement in s. 11(2) that value actually be given by the creditor to the debtor has been confirmed in case law.

MacEwen Agricentre Inc. v. Bériault, [2002] OJ No 3314, BOA Tab 6 at paras 17, 32-33.

71. In the present case, Halex did not advance all of the amounts purportedly secured to NES. Accordingly, the GSA does not meet this requirement of the *PPSA*.

72. Sections 45-46 of the *PPSA* require that in order to perfect a GSA, a creditor must register a financial statement containing the required information presented in a required format, to provide notice to creditors.

45 (1) In order to perfect a security interest by registration under this Act, a financing statement shall be registered.

73. ...

46 (1) A financing statement or financing change statement that is to be registered shall contain the required information presented in a required format.

Personal Property and Security Act, RSO 1990 c. P. 10, s. 45-46

74. The perfection of the GSA purports to secure the security interests advanced to NES from February 2019 until August 2019, contrary to the PPSA. Section 45(4) allows a financial statement registered for security to also secure subsequent unperfected security interests. By contrast, however, Courts have specifically determined that this does not apply to correct previously unperfected security interests.

“Although it does not say so on its face, s. 45(4) was not intended, in my opinion, to permit a financing statement to perfect a security interest created or provided for in an earlier security agreement between the parties.”

***Adelaide Capital Corp. v. Integrated Transportation Finance Inc.* [1994] OJ No. 103, BOA Tab 7 at paras 75-78.**

75. Any issue as to whether the GSA is accordingly unenforceable in its entirety is, as set out above, an issue within the jurisdiction of the arbitrator.

Arbitration Act, 1991, SO 1991, c 17, s. 7(2).

***Muroff v. Rogers Wireless Inc.*, [2007] 2 S.C.R. 921 (S.C.C.), BOA Tab 5 at para 11.**

The Court Should Refuse to Appoint a Receiver

76. Appointing a receiver is an equitable remedy that is granted only where it is “just and equitable”, and the Court is entitled to weigh in the balance the conduct of the party seeking it.

***Royal Bank v. Boussoulas*, 2010 ONSC 4650, BOA Tab 8 at para 21.**

77. Where a creditor restructures a debtor's credit agreement to purposely create a default necessary to appoint a receiver, Courts have considered this conduct sufficient to deny the creditor the relief of appointing a receiver.

***Royal Bank v. Chongsim Investments Ltd.*, 1997 CarswellOnt 988, BOA Tab 9 at para 27.**

78. In the present case, Halex restructured previous promissory notes that were subject to arbitration as a "comprehensive promissory note" purportedly subject to the GSA. Halex did this knowing that NES would almost certainly default. Accordingly, Halex's conduct is such that this Honourable Court should deny the equitable relief of appointing a receiver.

79. A party requesting relief in equity must come with clean hands. The Court may deny the relief when the claimant's wrongdoing taints the appropriateness of the remedy being sought from the Court.

***Royal Bank v. Bousoulas*, 2010 ONSC 4650, BOA Tab 8 at para 21, 51.**

80. The applicant has failed to disclose issues to the Court which are directly related to the relief the applicant is requesting. Mr. Matovic was in a conflict of interest with respect to the GSA and this application and has failed to support the purported loans made to NES.

81. Courts will also refuse to grant equitable relief where a party is acting in bad faith. Where a GSA was entered into in bad faith to avoid the execution of an arbitral award, Courts have denied equitable relief.

***New York Stock Exchange, LLC v Orbixa Technologies Inc*, 2017 ONSC 4260, BOA Tab 10 at para 45.**

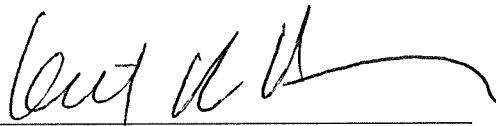
82. Likewise, where an applicant has transferred shares in bad faith to impede a company from exercising its legal rights, Courts have denied equitable relief.

***Royal Bank v. Bousoulas*, 2010 ONSC 4650, BOA Tab 8 at para 22.**

PART V – RELIEF SOUGHT

83. The respondent/moving party respectfully requests the following relief:
- (i) An Order staying the within action by Halex Capital Inc. to appoint a receiver;
 - (ii) An Order referring the issues raised herein to arbitration, in accordance with the Unanimous Shareholders' Agreement between Hallett, Craig McEwan, G. Paul Greenwood and NES, dated November 12, 2008;
 - (iii) An Order awarding the moving party his costs of this motion and his costs in responding to this application on a complete indemnity basis;
 - (iv) Such further and other relief as counsel for the moving party may advise and this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of November, 2020.



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SCHEDULE “A”**LIST OF AUTHORITIES**

1. *MDG Kingston Inc v MDG Computers Canada Inc*, 2008 ONCA 656
2. *Fowler v 1752476 Ontario Ltd*, 2010 ONSC 779 (CanLII)
3. *Haas v. Gunasekaram*, 2016 ONCA 744
4. *King Valley Estates Inc. v. Wong et al.*, 2019 ONSC 4809 (CanLII)
5. *Muroff v. Rogers Wireless Inc.*, [2007] 2 S.C.R. 921 (S.C.C.)
6. *MacEwen Agricentre Inc. v. Bériault*, [2002] OJ No 3314
7. *Adelaide Capital Corp. v. Integrated Transportation Finance Inc.* [1994] OJ No. 103
8. *Royal Bank v. Boussoulas*, 2010 ONSC 4650
9. *Royal Bank v. Chongsim Investments Ltd.*, 1997 CarswellOnt 988
10. *New York Stock Exchange, LLC v Orbixa Technologies Inc*, 2017 ONSC 4260

SCHEDULE "B"**LIST OF STATUTES**

1. *Arbitration Act*, 1991, SO 1991, c 17.
2. *Personal Property Security Act*, RSO 1990 c. P. 10.

HALEX CAPITAL INC.
APPLICANT

-and-

NATURAL ENERGY SYSTEMS INC.
RESPONDENT
Court File No. CV-20-00649326-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

NOTICE OF MOTION

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