



No. H-140638
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

STARK BC VENTURE, LLC

PETITIONER

AND:

MOUNT BALDY REAL ESTATE, ULC, WINTER RECREATION ULC,
MOUNT BALDY SKI CORPORATION, ROBERT BOYLE, BRETT SWEEZY,
BRENT ALAN BAKER ALSO KNOWN AS BRENT BAKER, LAURA
LESLIE BREUNINGER BAKER, VANTAGEONE CREDIT UNION, B.C.
OPPORTUNITY FUND LLC, ATTORNEY GENERAL OF CANADA, AS
REPRESENTATIVE OF THE CROWN IN RIGHT OF CANADA, THE
OWNERS, STRATA CORPORATION KAS1840

RESPONDENTS

NOTICE OF APPLICATION

Name of applicant: G. Powroznik Group Inc. (the "Receiver")

To: The Petitioner and Its Solicitor

And To: The Respondents and their Solicitors

And To: Baldy Operating Corporation ("BOC"), Baldy Capital Corporation.
("BCC), Mercurian Management Corporation ("MCC"), Equity
Development Inc. ("Equity") and Fred Johnston (collectively, the
"Johnston Respondents" are Johnston and BOC, BCC, MCC and Equity)

And On Notice to Osoyoos Shoreline Development Ltd.

And To: Osoyoos Indian Band ("OIB")

And To: David Howard and To Market Inc.

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, British Columbia on Tuesday May 3, 2016 at 9:45 a.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order authorizing and directing the Receiver to take such steps as are, in the opinion of the Receiver, necessary or incidental for the recovery of the property, wherever situate, owned by Mount Baldy Ski Corporation and Mount Baldy Real Estate, ULC (collectively, the "Resort" or "Mount Baldy") including property previously located on the Resort property at 2680 Mount Baldy Rd, Oliver, B.C. V0H 1T0.
2. An order that the Johnston Respondents shall forthwith deliver the following documentation and property to the Receiver forthwith at its office at 250-750 West Pender Street or to a location at or near Osoyoos, B.C. (in accordance with a direction of the Receiver):
 - (a) all accounting records, invoices, estimates, repair records, formulas for the Resort held by the Johnston Respondents, whether in paper or electronic form;
 - (b) all documents or correspondence relating to the Resort business or any claim or entitlement of any person against the Resort business;
 - (c) records relating to communications with the Province of British Columbia or the Osoyoos Indian Band ("OIB") that relate to the business of the Resort or its proposed acquisition by the Johnston Respondents;
 - (d) all furniture, computers, printers, and equipment belonging to the Resort, including any that may now be located in an office controlled by the Johnston Respondents at #236, 15 Park Place Osoyoos, B.C., or any other location controlled by the Johnston Respondents where such property may be located;
 - (e) any keys or lock combinations, electronic or otherwise, relating to the Resort held by Fred Johnston or any of the Johnston Respondents;
 - (f) the computer server (the "Server") utilized by the Resort previously, containing stock photos used by the Resort;
 - (g) the Mount Baldy laptop which contains the seasons pass program information;
 - (h) all computer backups including USB drive(s) or interest based backups and voicemail cards;
 - (i) a point of sale (POS) server;
 - (j) all passwords and keys, software licences and operating instructions for the servers and laptop;
 - (k) all rights to the website on the internet under URL "www.skibaldy.com" (the "Website"), the email addresses including mail@skibaldy.com and the domain name "skibaldy.com" (the "Domain Name"), (i) together with details of the website

infrastructure including the content management system used for the Website; (ii) copies of all information which was posted on the Website; and (iii) all related source code, object code, URLs, content, files, user names or passwords, images, data, databases, domain names, configuration, emails, documents or records, marketing materials, training materials, whether electronic or written; and

- (l) all point of sale equipment, passwords and operating instructions.
3. A declaration that Mount Baldy Ski Corporation, by its Receiver, G. Powroznik Group Inc., is the sole legal and beneficial owner of the Domain Name and that the Receiver is entitled to have the domain "skibaldy" hosted by Hostmonster in the manner it shall determine, in its sole discretion, and that the Receiver shall have the right to appoint persons who are authorized to instruct Hostmonster and FastDomain to grant or refuse access to the site by the Johnston Respondents, to control content on the site at that domain, or to sell the site and the domain.
 4. An order that, on service of a copy of this Order by email to legal@hostmaster.com and abuse@hostmonster.com, FastDomain Inc. and Hostmonster are authorized and directed to change the owner of the Domain Name from "Mercurian Management Corporation" to "Mount Baldy Ski Corporation by its Receiver-Manager G. Powroznik Group Inc." or to any assignee or transferee directed by the Receiver.
 5. An order that the Johnston Respondents release and transfer to the Receiver any documentation, interest, password authority or other right which they now exercise over the Domain Name and the Website.
 6. An order that Osoyoos Shoreline Development Ltd., as landlord, is authorized and directed to provide access to the Receiver to enter into the business office of BOC for the Resort located at #236, 15 Park Place Osoyoos, B.C. to recover any property that the Johnston Respondents have located therein.
 7. An injunction restraining and prohibiting the Johnston Respondents and any of them from publishing, circulating, drafting, printing or communicating in any manner with the public or any individual on radio, television, internet, print media, or any online communication: (i) using the names "Baldy", "Ski Baldy", "Baldy Mountain", "Baldy Ski Hill", or "Baldy Ski Resort" in any manner whatsoever; or (ii) representing that any member of the Johnston Respondents has acquired or will acquire any interest in the Resort property or has reached an agreement for the acquisition of any interest in the Resort; (iii) soliciting business for the Resort including seasons passes; or (iv) otherwise representing that the Johnston Respondents are authorized by the Resort.
 8. An order that the Receiver may serve a copy of this Order on any person, agency, employee, licensor, contractor, registrar, landlord and such person is authorized and directed to provide information, documentation, particulars of ownership or registration and records including

computer records to the Receiver relating to the operation of the Resort during the 2014/15 season.

9. An order that no undertaking as to damages is required from the Receiver.
10. An order that the Receiver may serve this Order on the Johnston Respondents at the following emails: (i) fred.johnston@mercidian.com; (ii) fred.johnston@bcbaldy.com; (iii) fred.johnston@skibaldy.com, and by providing a copy to Shields Harney at 490-1177 West Hastings Street, Vancouver BC V6E 2K3.

Part 2: FACTUAL BASIS

Background Information

1. On July 14, 2014, an Order Nisi was pronounced over the assets and undertaking of Mount Baldy Ski Resort (the "Resort") which is located in the southern Okanagan region of British Columbia at 2680 Mount Baldy Rd, Oliver B.C., a 45 minute drive from either Osoyoos or Oliver. The Redemption Period in the Order Nisi was one (1) day. The Order Nisi contains a declaration that the Mortgage and General Security Agreement ("GSA") respectively charge the Lands and Personal Property, as defined therein.
2. By its terms, the GSA contains a charge over all present and after acquired personal property of Mount Baldy including broadly defined chattels and intellectual property. (Annexure 5 to the Petition paragraph 4.1(a)(iv)). The Order provides that the Receiver is to have care, control and possession of the assets and the Resort.
3. Due to the insolvency of the foreclosed operators, the Resort had not been operated for the 2013/14 season and it could not be opened for the 2014/15 season without material expenditure. The Petitioner, Stark BC Venture, LLC (the "Petitioner") did not have the funds to enable the Resort to operate under a receivership.
4. For reasons set out in the Report to the Court by G-Force Real Estate Inc., dated July 10, 2014, pursuant to the Order for Conduct of Sale made July 14, 2014, the Petitioner was given conduct of sale of the Resort and G-Force Real Estate Inc. was appointed as the court-appointed Marketing Agent ("Marketing Agent").
5. From and after July 14, 2014, the Marketing Agent undertook a marketing campaign, the particulars of which are set out in the Marketing Agent's Report filed November 4, 2014. The Resort was widely advertised domestically and internationally.
6. By the late autumn of 2014, as the Resort was not operational, no acceptable offer was received by the Marketing Agent. Potential Purchasers were deterred as the Resort was not operational. It was desirable to open the Resort so it would not be idle for two years. Fred

Johnston offered to buy it on the basis that the Resort would be operated by him in late 2014 and that by the end of January 2015, an Asset Purchase Agreement would be finalized. Because a foreclosure does not provide a process by which the assets would be repaired and readied for the 2014/15 ski season, a receivership appointment was contemplated.

7. Significant pre-season costs were anticipated to make the Resort operational and the Petitioner was not prepared to fund the costs of receivership and the costs to commence operations. The Marketing Agent and Fred Johnston worked toward a funding plan which would provide for the costs of the repairs, the cost of the receivership and operating costs for the season. What followed was plan whereby these categories of costs would be advanced from BOC sources and secured against the asset.

Agreements with Johnston Respondents and Appointment of the Receiver

8. Fred Johnston is the sole Director of Baldy Operating Corporation ("BOC"), and its affiliates Baldy Capital Corporation ("BCC") and Mercurian Management Corp. ("Mercurian").
9. In October of 2014, Fred Johnston proposed to the Petitioner that, if the Petitioner appointed a receiver, his company would pay the receivership expenses and operate the Resort for the 2014/15 ski season until his company could effect a purchase of the assets from the receiver. See Marketing Report to the Court dated November 4, 2014 at paragraphs 10-19. Accordingly, Fred Johnston incorporated BOC and BCC on November 6, 2014. The parties contemplated an Asset Purchase Agreement (the "Proposed Baldy APA") to be entered into by November 14, 2014 between a proposed receiver and Fred Johnston's company, which would be submitted for court approval by January 31, 2015. However, at that time, Fred Johnston could not raise the required funding and the Petitioner did not appoint a receiver. The Petitioner had no funds to proceed with a receivership unless there was a provision for a purchase of the Resort which would cover receivership and operations costs. The Marketing Agent referred funders and potential financiers to BOC.
10. The Receiver contemplated that Fred Johnston would raise the necessary funding. The Receiver was not aware until February 2015 that Fred Johnston had caused Mercurian Management Corp. to attempt a debenture offering for the purposes of this funding in early 2014. The Receiver has been advised that one such debenture was acquired by the Petitioner. At no time has the Receiver been advised that the Debenture issue was subscribed in a large enough manner to permit BCC or MCC to meet the funding requirements to acquire, fund operate or develop the resort.
11. By December of 2014, BCC and the Marketing Agent had arranged \$400,000 in funding so that it could proceed with the initial agreement with the Petitioner. On December 18, 2014, BCC and the Petitioner entered into an Amended Memorandum of Understanding (attached as Appendix C to the Receiver's First Report (the "Amended MOU")) wherein:

- (a) the Petitioner would appoint G. Powroznik Group Inc. of G-Force Group receiver-manager (the "Receiver");
 - (b) BCC would provide total funds of \$600,000 to the Receiver, in deposits of \$25,000 by January 19, 2015 and \$75,000 by January 31, 2015 on account of the purchase price for the Resort, and a loan of \$500,000 (the "Receivership Loan") by no later than January 19, 2015;
 - (c) the Receiver would immediately enter into an operating agreement with BOC, to allow BOC to operate the Resort for the 2014/15 ski season;
 - (d) BCC would negotiate an asset purchase agreement with the Receiver by January 30, 2015 (the Proposed Baldy APA, with amended timelines);
 - (e) BCC would complete the purchase of the Resort from the Receiver by May 15, 2015; and
 - (f) if all other terms were met, the Petitioner would finance the purchase of the Resort by providing a loan of \$4.2 million.
12. In accordance with the Amended MOU, the Petitioner appointed the Receiver on December 19, 2014 and the Receiver immediately entered into an Operating Agreement with BOC (attached as Appendix D of the Receivers First Report (the "Operating Agreement")). The Operating Agreement was negotiated in advance so BOC could go into immediate operation and the Receiver would not take possession of the assets.
13. It was contemplated under the Amended MOU and the Operating Agreement that BCC and BOC would pay all operational costs and all receivers' costs by providing funding to the Receiver and/or covering the costs directly. Accordingly, Johnston prepared an approved budget (the "Approved Budget") which called for the payment of the projected administrative and receivership costs, and which included a "Projected Additional Equity Investment Required to Cover Cash Deficit" of \$120,000. The Approved Budget is attached to as Schedule C to the Operating Agreement (which is Appendix D to the Receiver's First Report). It was to be a default under the Amended MOU if BCC and/or BOC failed to provide the required funding within the required time period.
14. The Petitioner allowed BOC to go into early possession and to operate the Resort on its account on the expectation that the Proposed Baldy APA would be finalized in less than two months. It was a fundamental term that BCC would negotiate the Proposed Baldy APA with the Receiver by January 30, 2015. It was to be a default under the Amended MOU if BCC failed to enter into the Proposed Baldy APA within that time period.
15. In accordance with the Amended MOU and the Operating Agreement, during BOC's operation of the Resort for the 2014/15 season, BOC and Fred Johnston acquired access to the Resort and such access provided temporary possession of the whole of the Resort assets,

including the assets for which the Receiver now seeks possession. Likewise, Johnston was given possession and access to computers and records necessary to operate the Resort. He was further introduced to those persons who were necessary employees, contractors and business associates required to operate the ski hill. He elected to communicate with the public without the approval of the Receiver.

Priority of Receiver's Certificates and Prejudice to the Petitioner

16. In accordance with the Amended MOU and the Operating Agreement, the receivership was funded by Receiver's Certificates that have priority over the Petitioner's security. It was anticipated that the Receiver's Certificates would be repaid by BOC/BCC as a credit against the purchase price on completion of the Proposed Baldy APA in 2015 so that, after the completion of the sale by vesting order, the Petitioner would have a first charge on the Resort's assets for \$4.2 million. However, the effect of this arrangement was that the Petitioner would bear the ultimate expense if the sale did not complete.
17. The completion of the purchase and payment of the receiver's costs by May 2015 were therefore fundamental conditions to the Amended MOU and to the Operating Agreement. If the sale did not complete, the Petitioner was prejudiced because all of the unpaid administrative costs and Receiver's Certificates ranked in priority ahead of the Petitioner's security and would remain on title.

Default by BCC under the Amended MOU and Termination of Agreements by Petitioner and Receiver

18. BCC arranged for the first \$400,000 of the Receivership Loan under the Amended MOU (in part with the benefit of referrals from the Marketing Agent) and \$400,000 in Receiver's Certificates were issued. But, the final \$100,000 of Receiver's financing required by the Amended MOU was not advanced or arranged by BCC on time and BCC did not pay the further \$75,000 deposit which was required by the Amended MOU and the Johnston Respondents failed to inject the additional \$120,000 in equity that was required by the Approved Budget.
19. No Asset Purchase Agreement was prepared by BCC by January 30, 2015 and no Asset Purchase Agreement was ever signed with BCC.
20. By April 29, 2015, BCC had defaulted under the Amended MOU as follows:
 - (a) it failed to make the required \$75,000 deposit and provide or arrange additional financing of \$100,000 by January 19, 2015;
 - (b) it did not to enter into the Proposed Baldy APA by January 30, 2015;

- (c) it did not inject the Projected Additional Equity Investment Required to Cover Cash Deficit of \$120,000;
 - (d) it refused to pay receivership expenses as agreed;
 - (e) in addition, BOC accumulated \$65,000 in debt for the 2014/15 ski season which it left unpaid and for which it invoiced the Receiver.
21. On April 29, 2015 the Receiver elected to terminate the Operating Agreement based on specified defaults.
22. On May 7 2015, the Petitioner terminated the Amended Memorandum of Understanding (Exhibit "B" to the affidavit of Scott Stark).
23. The Receiver was forced to pay several of the amounts which were left outstanding on BOC's balance sheet from its operation of the 2014/15 ski season in order for it to obtain services from the suppliers and former Resort manager. The debts set out on the BOC Accounts Payable Aging Summary (Exhibit "D" to the Affidavit #2 of Gary Powroznik) remain outstanding in part to the Receiver. The following were the largest of the debts remaining outstanding by the Johnston Respondents after 2014/15 season:
- (a) BOC owed the sum of \$21,905.13 to Snow-Tech Snow Cat Service Inc. ("Snow Tech"). The Receiver was forced to acquire the claim of Snow-Tech against BOC in order to obtain use of the snow cat required to clear snow from the Resort. With respect to this assignment of Snow Tech's claim to the Receiver, BOC owes the Receiver a further \$21,900, not including other amounts owed as referenced herein;
 - (b) BOC retained the services of Matt Koenig, the former manager of the Resort, who filed a claim under the *Employment Standards Act* against BOC for \$11,520.01 in unpaid wages. The claim was settled on the basis that BOC agreed to pay the claim in full but BOC did not pay the claim. The Receiver acquired the claim of Matt Koenig against BOC in order to obtain Koenig's agreement to continue to conduct maintenance at the Resort during the 2015/2016 snow season;
 - (c) Canada Revenue Agency garnished the accounts of BOC for source deductions; and
 - (d) To Market Incorporated and David Howard have sued Johnston and BOC for debt, for the value of services rendered and misrepresentation of their business relationship. Mr. Howard is a 25% shareholder of BCC with whom the Receiver dealt in early discussions. He was to perform marketing services for BOC.
24. On or about May 27, 2015, BOC delivered an invoice for the amounts on the BOC Accounts Payable Aging Summary to the Receiver which is attached as Exhibit "C" to the Affidavit #1 of Fred Johnston. Exhibit "F" to the Affidavit #2 of Gary Powroznik is a letter from BFRST

to solicitors for BCC dated June 12, 2015, which sets out the Receiver's objections to the invoice.

25. At the end of the 2014/15 season, the Resort was shut down for the summer. However, despite the termination of the Amended MOU and Operating Agreement, the Johnston Respondents continued to act as though they had an interest in the Resort and retained unlawful possession of certain of the assets of the Resort.

Negotiations following termination of the Amended MOU and Operating Agreement

26. After the termination of the Amended MOU with BCC, the Receiver began to identify additional prospects to acquire Mount Baldy's assets. The Receiver updated the marketing materials that had been used earlier by the Marketing Agent and began negotiations with new prospects.
27. However, during this time, BCC continued to claim that it had the financial capacity and desire to purchase the Resort's assets from the Receiver. Negotiations carried on through the spring and summer of 2015 toward a new form of agreement. Lawyers for BCC threatened litigation against the Receiver if the Receiver did not sell the Resort's assets to BCC.

Fred Johnston's Unauthorized Communications with the Public During Negotiations

28. Fred Johnston elected to communicate with the public about his progress and problems relating to his inability to acquire the assets without the approval of the Receiver in circumstances where the Receiver had requested that all negotiations were to be confidential.

June 2nd Press Releases

29. It is a requirement for any purchaser of the Mount Baldy assets to negotiate a new benefits agreement to replace the existing one with the OIB and for the Province of BC to assign the Master Development Agreement affecting all of the Resort's skiable terrain and infrastructure to a purchaser. On June 2, 2015, a press release was issued jointly by BCC and the Osoyoos Indian Band announcing that the parties had negotiated a new benefits agreement relating to the Resort's assets and operations (the "OIB Press Release"). Exhibit "T" to the Affidavit #2 of Gary Powroznik.
30. BCC had advised the OIB that it had an agreement with the Receiver to acquire the Resort's assets, which it did not. The act of entering into the benefits agreement with the OIB and publically announcing the agreement began a series of public announcements and activity by BCC and Fred Johnston which were intended, or had the effect of, eliciting support from the local skier population and businesses to (i) pressure the Receiver to sell the Resort's assets to BCC and (ii) dissuade any other potential purchasers from making an offer to the Receiver to acquire the assets, by making it appear that BCC had already acquired the rights to the Resort, when it had not done so.

31. Upon learning of the OIB Press Release, the Receiver demanded that a correcting press release be issued. Exhibit "E" to the Affidavit #2 of Gary Powroznik which is a letter from BFRST to the solicitors for BCC dated June 12, 2015. No such correction was made.

Registration of the Domain Name

32. By June 12, 2015, when Mr. Johnston knew there was no agreement in place with Receiver under which he could buy the assets of the Resort, he and MCC, without the approval of the Receiver, registered the Domain Name to MCC with FastDomain and arranged to have it hosted by Hostmonster and by doing so converted the website and the intellectual property in it to his own use. Prior to the receivership, the Website and Domain Name were used communicate with the public and to advertise and to profile the Resort. The Website has three components (i) domain name; (ii) host site; and (iii) content:

(a) **Domain Name.** The registered domain name is skibaldy.com (the Domain Name). This was the domain name used at the time the Receiver was appointed. Attached as Exhibit "H" to the Affidavit of Gary Powroznik is a copy of the website as it is now constituted on the internet;

(b) **Host Site.** The host site is located at the Hostmonster.com site. From the registrations, it seems that the pre-receivership company elected to register the Domain Name on FastDomain and have it hosted with Hostmonster. Attached as Exhibit "I" to the Affidavit of Gary Powroznik is a copy of the registration information specific to the skibaldy.com. It was created in on June 22, 1999 by Mount Baldy, long before its insolvency; and

(c) **Content.** Although certain text and photographs situated on the Website may have been placed on the site by BCC or Fred Johnston, the Receiver takes the position that the name 'Ski Baldy', or any similar name such as "Mount Baldy", "Mount Baldy Ski Resort", etc. and all print or media utilizing that name are the intellectual property of Mount Baldy.

33. On or about March 3, 2016, the Receiver's counsel telephoned FastDomain at their Registrar Abuse Line at 1 801 765 9400 and then spoke with a representative in the department described as the "terms of service" department and was provided with the following information:

(a) The registrar of the "skibaldy.com" domain name is FastDomain Inc.

(b) The host provider for the site is Hostmonster.com.

(c) Notices regarding ownership of the site should be sent to Legal@ Hostmonster.com.

(d) An order to require any change of service should first declare the owner of the domain name to be Mount Baldy Ski Corporation by its Receiver-Manager G. Powroznik Group Inc.; and it should then direct the transfer of the ownership of the domain name and the right to host the domain name on Hostmonster from MMC to Mount Baldy Ski Corporation by its Receiver Manager G. Powroznik Group Inc.

34. A letter was delivered from BFRST to FastDomain dated March 3, 2016 outlining the procedure and the position of the Receiver.

September 9th Press Release

35. Exhibit "M" to the Affidavit #2 of Gary Powroznik is a press release issued by Fred Johnston on September 9, 2015. That Press release is inaccurate for the reasons set out in a letter dated September 21, 2015 from BFRST to McCarthy Tetrault, who were then solicitors for Fred Johnston. The Receiver was forced to publish a correcting press release which it did (which letter and press releases are contained in Exhibit "C" to the Affidavit #1 of Leah Jonak).

Final Negotiations between the Petitioner, Receiver and BCC in September and October 2015

36. Notwithstanding the prior defaults, the Receiver and the Petitioner offered the Johnston Respondents a further opportunity to acquire the assets. In mid September 2015, at Fred Johnston's request, a meeting was arranged for October 1, 2015 between Fred Johnston, legal representatives of the Receiver, and the Petitioner, in an attempt to enter into a new Asset Purchase Agreement with BCC. On October 1, 2015, the parties met as arranged and at the meeting, Fred Johnston abandoned the prior potential transactions set out in the Amended MOU and proposed a new structure where he would pay \$3,375,000 cash on closing. A framework was set out for the terms of a new Asset Purchase Agreement (the "Second Proposed Baldy APA"). The negotiation was based on the premise the Second Proposed Baldy APA would not be signed unless BCC provided evidence of its ability to finance the transaction. See email of October 5, 2015 from Bonita Lewis-Hand to all parties attached as Exhibit "C" to the Affidavit #2 of Scott Stark.

37. Notwithstanding the state of negotiations, Johnston advised the media that BCC had purchased "...purchased the Oliver-area resort" when it had not. See Exhibit "U" to the Affidavit #2 of Gary Powroznik.

38. By late October 2015, it became apparent that BCC did not have any financing in place to make the purchase. On October 30, 2015, BCC sought fundamental changes to the terms of the Second Proposed Baldy APA. Then, on November 4, 2015, BCC provided a "Drop Dead Offer" which contained a term, among others, indicating that "there will no confirmation of availability of funds to close from the Purchaser until closing". See Exhibit "D" to the Affidavit #2 of Scott Stark. Negotiations then ended.

Business Office And Advertising

39. A business office (the "Osoyoos Office") was then opened in Osoyoos, BC on November 1, 2015 when Fred Johnston knew his companies did not have an asset purchase agreement in place or funding for the acquisitions. It advertises tickets and "On Hill Accommodations" for the Mount Baldy Ski Resort. Fred Johnston advised the press after the office was opened that he did not have an agreement to purchase the Resort and did not have an agreement to operate for the 2015/16 season. See photograph at Exhibit "J" to the Affidavit #2 of Gary Powroznik#2.

November 5th Press Release

40. Exhibit "V" to the Affidavit #2 of Gary Powroznik is a press release issued by Fred Johnston on November 5, 2015. That Press release is inaccurate for the reasons set out in letters dated November 5 2015 from BFRST to McCarthy Tetrault and November 6 2015 from Lawson Lundell to McCarthy Tetrault and Terra Law Corporation, who were also solicitors for Fred Johnston (which letters are set out as Exhibits "C" and D to the Affidavit #1 of Leah Jonak filed in this proceeding). The press releases are particularly damaging to the receivership because:

- (a) they suggested that Fred Johnston and his companies have a continued ongoing ability to purchase the Resort, which is untrue;
- (b) they suggested Fred Johnston and his companies have made a deal with Osoyoos Indian Band which may have the effect of dissuading other purchasers from making offers for the Resort;
- (c) they suggested that the Receiver is at fault for BCC's failure to enter into a purchase agreement for the Resort, which is untrue;
- (d) they wrongfully implied that the Receiver has been unreasonable in negotiations;
- (e) they interfere and are intended to interfere with the Receiver's efforts to negotiate a sale of Mount Baldy to a third party;
- (f) they damage the goodwill of the ski operation by publicizing the uncertainty surrounding the operation;
- (g) they made allegations that could limit the Receiver's ability to obtain adequate ski resort insurance upon the expiry of the current policy; and
- (h) the October 16, 2015 article states that Mr. Johnston purchased the Resort.

Increased Receivership Costs and Prejudice to the Petitioner from Fred Johnston's Conduct in Negotiations

41. During the period starting on January 31, 2015 and ending November 4, 2015 when the Drop Dead Offer was rejected, the Receiver's costs increased in major part due to:

- (a) the failure of BOC and BCC to conclude the purchase contemplated by the Amended MOU and the Proposed Baldy APA;
- (b) the normal administration costs associated with holding the assets longer than anticipated;
- (c) the attempts by the Receiver and its counsel to conclude an asset purchase agreement with BOC on alternate terms (the Second Proposed Baldy APA);
- (d) for the costs associated with refuting Fred Johnston's communications with stakeholders and the public alleging that he owned or would own the Resort; and
- (e) by the payments the Receiver had to make to BOC's creditors in order to secure delivery of services to protect the Resort's assets after the termination of the Operating Agreement.

42. These increased costs have prejudiced the position of the Petitioner.

43. In early November 2015, when the last attempt of Fred Johnston and BCC to acquire the Resort's asset failed, it became clear that neither the Petitioner nor the Receiver had any further confidence that Fred Johnston had the financing or other required resources to acquire the Resort's assets.

Prejudice to the Petitioner's Efforts to Sell the Resort and Further Costs

44. After it was clear that BCC could not effect a purchase of the Resort, the Receiver undertook negotiations with another prospective purchaser relating to an interim agreement to operate the Resort for the 2015/16 ski season and to complete a sale a few months later. An initial Letter of Intent (the "LOI") was received by the Receiver from such prospect on November 17, 2015.

45. The timing of the new agreement to operate the Resort for the 2015/2016 ski season was critical, due in part to the availability of insurance for the Resort's assets. The Resort's insurance was set to expire on December 1, 2015. Thereafter, the Receiver could apply for two kinds of insurance: (i) operating insurance; and (ii) shut down insurance. It was the intention of the Receiver to place an operator into the Resort by that date and to secure operating insurance to operate the Resort for the 2015/16 season because operating insurance

for the season would not be available if an operator were not appointed. Although, shut down insurance was available.

46. On or about November 25, 2015, the Receiver applied to the court on short notice, returnable November 30, 2015, to permit another potential purchaser to operate the Resort for the 2015/16 season and qualify for operating insurance coverage to replace the expiring policy on December 1, 2015.
47. The Johnston Respondents appeared and opposed the application, seeking an adjournment. The stated purpose is set out in the Affidavit of Fred Johnston, at paragraph 60, where he indicated that he wishes to tender a new letter of intent and purchase the assets by January 18, 2016. The adjournment was granted.
48. As a practical matter, it was then necessary for the Receiver to abandon its attempt to have the Resort operated during the 2015/16 season, because the Court had insufficient time to hear a contested matter until several days later, after which the new prospect determined that it did not have sufficient time to ready the Resort for the current ski season.
49. As a result of the application adjournment, the Petitioner suffered further prejudice:
 - (a) by the payments the Receiver had to make to BOC's creditors in order to secure delivery of services to protect the Resort's asset over the 2015/2016 season;
 - (b) because the prospective purchaser abandoned its attempt to purchase the Resort once it could no longer enter into operations for the 2015/2016 season;
 - (c) because the Resort did not operate for the 2015/2016 season and the goodwill of the Resort suffered as a result; and
 - (d) because of the costs to shut down.

Receiver's Attempts to Recover Assets

50. Following the end of negotiations with BCC into early November 2015, the Receiver sought to recover the Resort's assets from the Johnston Respondents. The Receiver demanded return of the assets in letters from BFRST dated September 21, 2015 and November 5, 2015.
51. Fred Johnston had taken certain Mount Baldy assets and moved them into premises in Osoyoos controlled by him without authorization from the Receiver. In a further letter from BFRST dated December 17, 2015, the Receiver demanded the return of specified assets, in particular, certain furniture, computers, printers, equipment, and card printer. No response was received and nothing was returned in response to that demand or repeated requests made by the Receiver to return these assets to the Receiver.

52. The Receiver is of the belief, based on the report of the landlord and new tenant of the Osoyoos Office that the following articles have been removed from the Osoyoos Office or have been removed from the Resort site into the possession of Fred Johnston:
- (a) accounting records, invoices, estimates, repair records, formulas for the resort in both paper or electronic form;
 - (b) documents or correspondence relating to the resort business and its employees;
 - (c) records relating to communications with the Province of British Columbia or the Osoyoos Indian Band relating to the business of the Resort or the acquisition by any buyer;
 - (d) furniture, computers, printers, equipment and other electronics located in an office at Osoyoos B.C.;
 - (e) keys, combinations and all point of sale equipment, passwords and operating instructions;
 - (f) the computer server utilized by the Mount Baldy Ski Resort;
 - (g) the Mount Baldy laptop which contains the seasons pass program information;
 - (h) all computer backups, including USB drive(s) and voicemail cards;
 - (i) a point of sale (POS) server; and
 - (j) passwords for the laptop and the server.

53. A letter was sent from BFRST to Osoyoos Shoreline Development Ltd., dated February 22, 2016. The purpose of this letter was to notify the owner of the property located at Suite #236, 15 Park Place that the Resort assets were apparently held inside that property without the express approval by the Receiver, and that the Receiver wished to be notified in any party attempted to remove those assets from the premises. No notice has been received by the Receiver. On or about April 18, 2016, the Receiver was advised that a new tenant had taken possession of the Osoyoos Office and that some of the property of the Resort appears to have been removed from the Osoyoos Office.

Need for Orders Sought

54. As of March 28, 2016, the Receiver is continuing negotiations to sell all of the Resort's assets. It is mandatory that the assets held by the Johnston Respondents be recovered by the Receiver in order to properly conclude a sale.

55. There is also a real risk that Fred Johnston will issue further press releases to upset the negotiations which the Receiver is currently undertaking with potential buyers. The need to pursue offers is critical to the Petitioner and the local residents who rely on the operation of the Resort for jobs and recreation.
56. As recently as January 18, 2016 Baldy Capital persisted in making an offer with no cash consideration. The Receiver's letter of January 31, 2016 (Exhibit "L" to the Affidavit #2 of Gary Powroznik) sets out a response to those communications. However, there is a very real risk that Fred Johnston will continue making media publications in connection with purported arrangements that have no substance. There is no justifiable commercial reason for involving the public with Mr. Johnston's efforts to acquire the Resort.
57. The Receiver is concerned with mounting evidence of the unpaid debts of BOC, BCC and/or of Mr. Johnston. Now that there appears to be a shareholder dispute in BCC, and in light of all the other difficulties faced with BOC and BCC to date, the Receiver is increasingly concerned with possible insolvency of BOC and potentially other related parties.
58. Accordingly, the Receiver submits that damages would not satisfy the Receiver for the irreparable harm which will result from continued publications of incorrect information regarding the Resort.

Part 3: LEGAL BASIS

1. The order (the "Receivership Order") of Mr. Justice Sewell (paraphrased) requires the Receiver:
 - (a) to exercise control over the Property (broadly defined) of the Resort at paragraph 2(a);
 - (b) to preserve and protect the Property of the Resort at paragraph 2(b);
 - (c) to prosecute proceedings relative to the property of the Resort at paragraph (j); and
 - (d) take steps reasonably incidental to these powers under paragraph 2(s).
2. Paragraph 3(iii) of the Order of Mr. Justice Sewell requires Persons, as defined therein, to advise the Receiver of Property in their possession, and deliver Property of the Resort to the Receiver.
3. Paragraph 4 of the Order of Mr. Justice Sewell provides that all Persons shall deliver Records of the Resort as defined therein to the Receiver. The definition of "Records" includes

information of any kind and computer programs, computer tapes, computer disks or other storage media.

4. Paragraph 4 of the Order of Mr. Justice Sewell provides that all Persons in possession or control of records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained.
5. The court orders have authorized the Receiver to sell the Resort's assets. Paragraph 4 of the Order for Conduct of Sale provides authority for the Petitioner to apply for orders as may be necessary to maximize realization. Paragraph 24 of the Receivership Order contains the usual term whereby the Receiver may apply to the court for advice and directions.
6. The Receiver takes the position that Property of the Resort includes the list of records and assets set out in paragraph 2 of the Orders Sought. In particular, this includes the Domain Name and other related intellectual property of Mount Baldy using the name of the ski hill. The intellectual property of a company in receivership falls under the care and custody of its receiver. There is no doubt that the assets for which the Receiver seeks recovery have no value whatsoever to any party, except an owner of the Resort.
7. The entire premise upon which possession of assets was given to BOC and BCC was their promise to purchase the assets and fund the receivership which has been breached several times. The Johnston Respondents have a demonstrated incapacity to purchase. In accordance with Recital E of the Operating Agreement, BCC and BOC were to arrange financing. The Receiver facilitated the loans by issuing Receiver's certificates.
8. Consistent with the other Mount Baldy Assets, the Operating Agreement did not allow for BCC or Johnston to retain any assets, including the Domain Name, after the 2014/15 ski season. The context of the Operating Agreement is set out in the Recitals; to the Operating Agreement which was only entered into because BCC expressed an intention to buy the Resort's assets. BCC did not complete a purchase of the Mount Baldy assets and has no legal ownership over the assets or intellectual property of Mount Baldy.
9. The Receiver has paid some of the material debts left behind by BOC.
10. As decided in *Schembri v Way*, 2011 ONCA 528 (CanLII), the court should consider the entirety of the circumstances of a sale process. In that case both buyers had a prior association with the land subject to sale.
11. Here, like the findings in *Schembri v Way* at paragraphs 8-9, Mr. Johnston has had a negative impact on the integrity of the sales process and that should be given significant weight.
12. Mr. Johnston has entered into negotiations and taken positions as set out in Mr. Powroznik's Affidavit, which are intended to give him an advantage in the purchase when he was in default of his obligations to purchase and as such, undermines the integrity of the process

(paragraph 18). At paragraph 17, the court takes into account the ultimate beneficiary of the sales process. Here it is Stark LP which has lost confidence in Mr. Johnston and supports this application.

An Order to Preserve Property

13. Rule 10-1(1) permits an order respecting the preservation of property. See *Dick v Northstar Tool Corporation*, 2010 BCSC 71 (CanLII) and *McKnight v Hutchison*, 2011 BCSC 36 (CanLII) at paragraphs 145-6:
 - (a) the Receiver has a property interest in the assets of the Resort as is set out in the Receivership Order. The Respondent has none. If the Respondent BOC had not breached its agreement with the Receiver and the Petitioner then it would have accepted the terms it negotiated, and closed a sale by May 2015;
 - (b) if BOC is allowed to continue its breach, then the whole of the undertaking will be held in limbo till BOC raises money, which it has demonstrated it cannot do;
 - (c) the entitlement of the Receiver to the assets of the debtor owner of the Resort is established by the Receivership Order; and
 - (d) the Petitioner will suffer irreparable harm.
14. The property is imperilled. BOC is using the assets for an improper purpose and it withholding assets which are necessary to the operations and goodwill of the Resort. The Website and Domain Name are fundamental to the public relations operations and goodwill of the Resort and its creditors. It is no answer that the damages may be available if BOC is not solvent. See *Peel Financial Holdings Ltd. v Western Delta Lands Partnership*, at paragraphs 60 and 48.
15. When making an order for the preservation of property, Rule 10-1(1) applies to the possession as the property is the subject matter of a proceeding.
16. Rule 10-1(1) does not require an undertaking as to damages. We do say Rule 10-1(1) is the preferred rule over 10-1(4). If 10-1(4) applies, the court may make an order that a preservation order need not contain an undertaking as to damages.
17. When a receiver seeks an order to preserve property while acting under the receivership order, it is appropriate for the court to make an order that an undertaking as to damages is not required. See *Business Development Bank of Canada v Aventura Properties Inc.*, 2016 ONSC 1545 (CanLII).

18. There is certainly a substantial case for the Receiver and the Petitioner that they are entitled to the assets. The Petitioner says that is plain and obvious. In any event, the threshold is a low one.
19. The balance of convenience favours a preservation order. See *HSBC Bank Canada v A F Carpet Services et al*, 2001 BCSC 7 (CanLII) at paragraphs 23-29. If the assets are returned to the estate, there is nothing to stop BOC from making a cash offer for the Resort's assets which exceeds the one which the Receiver will bring forward for approval. If the Respondents do not acquire the assets, the property for which the Receiver seeks recovery will have no value to them. The Resort did not operate during the 2015/16 ski season and is currently closed because of the actions by BOC. There is no prejudice to any party to return the assets as the Resort cannot open until next season. There is real prejudice if the assets are not available to be sold.
20. Rule 13-5(1) permits the court to require a person in possession of property to deliver up possession of the property for sale. The Receiver has authority by the Receivership Order to sell the Resort.
21. Section 57 of the *Law and Equity Act* permits recovery of specific property.
22. No payment was made for the property and no agreement has been reached which gives the Respondents the right to retain any property.

Injunction Test For An Order Restricting Publication

23. It is submitted that the Receiver does not need to satisfy the injunction test for the purpose of restructuring publication of its intellectual property, preserving the business, or misrepresenting the status of the sales process, recovering the property of the estate in the hands of a purchaser who failed to conclude a purchase. See *Westcana Leasing Corporation v Sightus Inc.*, 2007 ABQB.
24. But that even if the Receiver does need to satisfy the injunction test in *Attorney General of British Columbia v Wale*, it is able to do so.
25. The most recent treatment of *AG v Wale* is in *Vancouver Aquarium Marine Service Centre v Greg Charbonneau* at paragraphs 16-18. See also paragraphs 3, 11 and 14 where the court considers whether the material sought was obtained by breach of contract. That is certainly the case here. See also paragraph 7 where the plaintiff claims intellectual property in the website and aquarium blog. In the same manner, the Receiver seeks to recover the Mount Baldy intellectual property. In *Vancouver Aquarium*, the court examines defences. Here, there is no real defence that the Respondents failed to purchase. In his Affidavit #1, Mr. Johnston says he wants an opportunity to purchase the assets in an open bidding process.

26. There is a fair case to be heard in that the evidence is clear that Mr. Johnston has no interest in the assets. The balance of convenience favours the Receiver. The Petitioner and the Receiver will suffer irreparable harm if the status quo continues without the injunction.
27. If the Resort is sold to a third party, as the Receiver expects it will be, these items are crucial to the purchaser. There is no potential harm to the Johnston Respondents because: (i) if they outbid another purchaser, the assets will be sold to them; and (ii) if they do not outbid another purchaser, these assets cannot be used by them for any lawful purpose.
28. As indicated by Exhibit "K" to the Affidavit #2 of Gary Powroznik, the website is now blank for all practical purposes.

Rights in Intellectual Property

29. Paragraph 4.1(a) of the Petitioner's GSA contains a charge on intellectual property (iv) and tangible personal property (iii) and the undertaking (vi).
30. In *Tangerine Financial Products Limited Partnership v. Tangerine FP Investments Ltd.*, 2012 BCCA 521, Tangerine FP executed an "Assignment of "Business Know-How" (the "Assignment") in favour of Tangerine LP. The Assignment expressly represented that the Business Know-How included "all intellectual property and proprietary information". That is the same legally as a charge over all personal and after acquired personal property including intellectual property. Tangerine LP then petitioned court for wind-up and dissolution. A receiver was appointed under the model form in similar terms to the Receiver Order here. Court ordered for the sale of Tangerine LP's assets to a third party. In dispute was whether Tangerine LP's assets included the website used by Tangerine FP, and all related source code content, files, usernames and passwords. Tangerine FP argued that the website and related info was not an asset of Tangerine LP because it was not expressly conveyed to Tangerine LP under the Assignment. The trial judge found that the website was created in relation to the development of a marketable financial product and therefore the assignment of the "Business Know-How" must necessarily include the entirety of the electronic and physical website property. The judge reasoned that to find otherwise would result in a commercial absurdity (paragraph 54). Here, the website is Mount Baldy's public relations window to the world.
31. The trial judge found that the website was subject to the receivership order, under which the receiver was authorized to sell them. BCCA affirmed the trial judge's reasoning's, holding that a "plain reading of [the clause "all intellectual property and proprietary information"] can only mean that it included all the website property (however it is described) in the assignment of the Business Know-How" (paragraph 42). BCCA confirmed that this included the "URL 'tangerinfp.com' and all related source code, object code, URLs, content, files, user names or passwords, images, data, databases, domain names, configuration, emails, documents or records, marketing materials, training materials, whether electronic or written".

32. This, of course, is subject to the argument that the Johnston Respondents did not buy any property at all.
33. In general, if a company purchases and runs a website, the domain name, content, emails with the URL etc. are all exclusive property of the company. There is no possibility that they are property of a purchaser who failed to close.
34. *Insurance Corporation of British Columbia v. Stainton Ventures Ltd.*, 2014 BCCA 296 examines trademark infringement in the context of website domain names. This will provide insight on how to close the “skibaldy” site should the site’s present operator not relinquish its use. *ICBC v Stainton* concerns whether the website “icbcadvice.com” operated by the defendant (unaffiliated with ICBC) constituted a use of ICBC’s official mark without authorization. The test employed was whether a person familiar with ICBC’s mark, but having an imperfect recollection of it, would be likely to mistake the defendant’s mark for it (paragraph 18). Appeal was dismissed.

Part 4: MATERIAL TO BE RELIED ON

1. Receiver’s Report, made 25/Nov/2015
2. Affidavit #1 of Gary Powroznik, sworn 2/Dec/2015
3. Affidavit # 2 of Gary Powroznik, sworn 19/Apr/2016
4. Affidavit #2 of Chris Sinclair, sworn 21/Apr/2016
5. Affidavit #1 of Scott Stark, sworn 24/Nov/2015
6. Affidavit #1 of Leah Jonak, sworn 25/Nov/2015
7. Marketing Report, filed 04/Nov/2014
8. Supplemental Report to the Marketing Report, filed 18/Dec/2014
9. Order Nisi, made 14/Jul/2014
10. Order for Conduct of Sale, made 14/Jul/2014
11. Order Appointing Receiver, made 19/Dec/2014
12. Report in Support of Appointment, filed 10/Jul/2014
13. Affidavit #2 of Kim Manderson, made 04/Nov/2014
14. Amending Order, made 08/Jan/2015

The applicant estimates that the application will take one (1) hour.

This matter is ^{not} within the jurisdiction of a master.

Date: 21/APR/2016


Signature of
 lawyer for applicant(s)
Dennis K. Fitzpatrick

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (ii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).