

ENDORSEMENT

- [1] The applicants seek vesting orders giving effect to two sale transactions approved by order of this Court dated July 9, 2008. GE objects to the orders insofar as they purport to transfer title to the equipment subject to equipment leases made by GE free and clear such leases.
- [2] GE has 39 equipment leases subject to terms that contemplate retention of title by GE until such time, if ever, as the lessees exercise purchase options at the residual value specified in the leases. It also has leased equipment pursuant to a master lease agreement that contemplates the return of the equipment at the end of the lease and an adjusting payment after sale of the equipment calculated by reference to the residual value specified in respect of each piece of equipment. There is also one conditional sales contract under which title does not pass until payment in full. Based on its review of the outcome of the sales process and the appraisals of the leased equipment, GE believes that it can receive a higher value for the leased equipment if it is allowed to take back the equipment and market the equipment itself.
- [3] GE acknowledges that all of the leases are "financing" leases and, more specifically, "leases that secure payment or performance of an obligation" for purposes of the PPSA. However, GE argues that, because the relevant documents purport to retain title to the equipment, the Court does not have the authority to transfer that title without its consent.
- [4] I do not think this is correct for two reasons.

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[5] First, the Court has authority under the CCAA to order the transfer of property free and clear of a creditor's security interest in the property to another party in return for a monetization of the security interest: see *Re SkyDome Corp.*, [1999] O.J. No. 1261 (Gen. Div.) per Farley J. That is the effect of the vesting orders in the present proceeding notwithstanding the retention of title clause in the relevant security agreements.

[6] Each of the relevant documents contains a provision by which GE retains title and ownership to the lease equipment. However, such retention of title is not necessarily retention of the complete rights of ownership. The title that GE retains under the equipment leases and conditional sales agreements described above is something considerably less than absolute ownership of the equipment. In substance, as financing leases, the leases represent secured loans rather than true leases. GE retains title solely for the purpose of securing its rights under the leases and its rights as the title-holder are limited accordingly. GE does not have unfettered ownership of the leased equipment. Instead, its rights are limited contractually and under the PPSA.

[7] In the case of the master lease, GE's rights are limited to receiving the lease payments and a terminal rental adjustment, if any, in its favour, upon the sale of the equipment. Under the 39 individual lease agreements, the purchase option arrangements give the lessee the right to determine whether GE retains the property. Moreover, possession does not automatically revert to GE on default notwithstanding the title retention by GE. Its rights are subject to all the rights of a debtor under the PPSA.

[8] In summary, the retention of title in the relevant agreements does not mean that GE has retained an interest in the leased equipment that cannot be the subject of an order under the CCAA monetizing that interest and ordering that title to the equipment be vested free and clear of GE's interest in the purchasers under the sales transactions.

[9] Second, to the extent that GE would otherwise have a right to object to the proposed vesting orders, I think it is estopped from doing so by its actions in connection with the sales process.

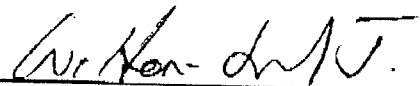
[10] At the time of the Initial Order, GE sought and obtained an exceptional right to consent to the sales process, which was granted by the Court in the exercise of its discretion. GE could only reasonably seek such relief if it intended the leased equipment to be a material portion of the assets subject to the sales process. At all times thereafter GE was aware that the sales process contemplated that the equipment leased by GE would be sold free and clear of the GE leases. At the hearing on the approval of the two sales transactions, GE argued unsuccessfully that it was entitled to a veto on the sale. At that time, its counsel pointed out that certain of the GE leases might not constitute "financing" leases and could not therefore be the subject of a vesting order. GE did not assert any right to remove the leased equipment from the sales transactions based on the title retention provisions until yesterday.

[11] Collectively, I think that these actions constitute an on-going implied representation to the Court as well as to the applicants and the creditors of the applicants that the leased equipment was to be included in the sales transactions. The parties have relied upon the implied

representation of GE in proceeding with the sales process. In effect, the Court has done so as well in its approval of the sales process and the sales agreements. GE cannot therefore come forward after the Court has already approved the sales transactions and assert a right to remove the leased equipment from the sales transactions based on the title retention provisions of the leases. If GE had intended to assert a right to prevent the transfer of title to the leased equipment, it was incumbent upon it to do so prior to completion of the sales process by expressly withdrawing this representation. To do so now would result in significant adverse consequences to other creditors and would negate a sales process that has been the subject of Court supervision at all stages.

[12] Accordingly, as the sales transactions have already been approved by the Court by the order of July 9, 2008 and the vesting orders before the Court merely give effect to such approval, orders shall issue approving the vesting orders in the forms agreed to between counsel.

DATE: July 22, 2008



H.J. Wilton-Siegel J.