

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF AN APPLICATION PURSUANT TO
SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, c. B3, AS AMENDED, AND SECTION 101 OF THE *COURTS
OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED**

B E T W E E N:

STRONACH CONSULTING CORP.

Applicant

- and -

BIONX CANADA INC.

Respondent

NOTICE OF MOTION

(Motion for Advice and Direction Returnable March 14, 2018)

Grant Thornton Limited, in its capacity as receiver and receiver and manager of all of the property, assets and undertakings of BionX Canada Inc. (in such capacities, the “**Receiver**”) will make a motion, that is to be heard before a Judge presiding over the Commercial List (Toronto) on Wednesday March 14, 2018 or as soon after that time as the motion can be heard at the Court House, 330 University Avenue, Toronto, Ontario, M5G 1R7.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR, *inter alia*, advice and direction from the Court with respect to amounts that are required to be paid by General Motors LLC and General Motors Company of Canada (together, “**GM**”) in the event that GM wishes to take possession of disputed assets located at BionX Inc., (“**BionX**”) in respect of, and connected to, an existing Purchase Order (as defined in the First Report of the Receiver dated March 12, 2018) and such further and other relief as to this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

- (a) On February 27, 2018, the Receiver was appointed over all of the assets, property and undertakings of BionX pursuant to an Order of the Ontario Superior Court (Commercial List);
- (b) BionX, together with its related companies and subsidiaries, are in the business of designing, manufacturing, and selling electronic propulsion systems for bicycles;
- (c) Prior to the appointment of the Receiver, BionX contracted with GM to design, engineer, develop, test and manufacture a mid-drive electric propulsion system for bicycles that were manufactured by GM (the “**GM Agreement**”);
- (d) The GM Agreement consisted of various Purchase Orders, including the following:
 - (i) Purchase Order (E4300237222) to engineer, develop, and design a prototype mid-drive electronic powertrain system (this phase is referred to as the “**Beta Program**”);

- (ii) Purchase Order (E4300554647) for the limited production of mid-drive electronic powertrain system units for further testing and validation (this phase is referred to as the “**Gamma Program**”); and
 - (iii) Purchase Orders (E4300557102 and E470021739) for the development of a production line to produce complete mid-drive electronic powertrain system units (this phase is referred to as the “**Production Program**”);
- (e) The price payable by GM for the Beta Program totaled \$11,816,054. The Beta Program was the initial phase of the GM Agreement, which constituted the engineering and development of a prototype mid-drive electronic powertrain system;
- (f) The purchase price for the Gamma Program Purchase Order totaled \$ US \$756,500. The purpose of the Gamma Program was to develop a limited number of “production intent” prototype mid-drive electronic powertrain units, batteries, and charger assemblies to be used as production validation samples (i.e. installed on electric bicycle frames being manufactured by a third-party supplier sourced by GM, validated, and tested);
- (g) The purchase price for the Production Phase was \$7,856,000. The Production Phase was the final phase of the GM Project, whereby a complete production assembly line would be developed and a listing of third party suppliers would be retained, to manufacture and assemble the final drive units and components;
- (h) Just prior to the appointment of the Receiver, GM terminated the GM Agreement;

- (i) Following the appointment of the Receiver, the Receiver was advised by BionX that GM owed BionX approximately \$4,523,171 in respect of the GM Agreement and the Purchase Orders;
- (j) There is currently a dispute between GM and the Receiver regarding the ownership of certain tooling and equipment located at the BionX facility. Specifically, at this time, GM claims ownership of the Beta Program tooling and equipment that was designed, engineered and tested pursuant to the Beta Program Purchase Order and the GM Agreement (the “**Disputed Beta Assets**”);
- (k) As GM assumes ownership of the Disputed Beta Assets, it brought a motion for an interim order in these receivership proceedings for recovery of personal property under Rule 44.01 of the *Rules of Civil Procedure* (Ontario);
- (l) Pursuant to Rule 44.01(1), a motion for the recovery of property may be brought where the property was unlawfully taken out of the plaintiff's possession, or where the property is unlawfully detained;
- (m) In order for GM to be successful on a Rule 44.01 motion, it must satisfy all of the elements listed in Rule 44.01(1). In particular, it must prove ownership or lawful entitlement to possession and that the property was “unlawfully taken” or is “unlawfully detained”. These are cumulative;
- (n) It is the Receiver's view that GM has not demonstrated that GM is the lawful owner of the Disputed Beta Assets;

- (o) While GM has remitted payment to BionX on account of invoices 1-18 in respect of the Beta Program Purchase Order, GM has not paid and does not intend to pay invoices 19-23 in respect of such Purchase Order (the “**Outstanding Invoices**”);
- (p) All of the Beta Program invoices (1-23) in respect of the Beta Program Purchase Order are “progress billings” for the design, development and engineering of the drive unit prototype (i.e. costs are billed on a periodic basis, based on completion of the Beta Program Purchase Order and not necessarily on an individual asset basis). Accordingly, all of the 23 invoices are connected and relate to the engineering, development and completion of the Disputed Beta Assets and the prototype rather than just invoices 1-18;
- (q) Pursuant to section 19 of the GM Agreement, all supplies, tools, materials, dies, gauges, fixtures, molds, patterns or equipment for which Bionx has been reimbursed by GM, shall be and remain the property of GM. GM has not reimbursed BionX for all amounts on account of the Disputed Beta Assets developed pursuant to the Beta Program Purchase Order;
- (r) It is the Receiver’s view that GM has not met the test set out in Rule 44.01(1). As GM has not paid the Outstanding Invoices, it is the Receiver’s view that GM does not have title over the Disputed Beta Assets. Further, the Disputed Beta Assets have not been unlawfully detained. It is the Receiver’s view that Disputed Beta Assets cannot be unlawfully detained in circumstances where GM has not demonstrated that it is the owner of such assets;
- (s) The Receiver brings this motion for advice and direction from the Court;

- (t) There will need to be a determination by the Court as to the ownership of the Disputed Beta Assets and any other assets claimed to be owned by GM. This will involve the Court determining whether GM is required to reimburse BionX: (i) for the entirety of the GM Agreement, (ii) for each Purchase Order governing such assets (which includes the costs of developing any disputed assets under the applicable Purchase Order) or (iii) whether GM is only required to reimburse BionX on for the disputed assets listed on a particular invoice without taking into account the costs of developing, engineering and testing those assets;
- (u) It is the Receiver's view that GM should be required to, at a minimum, pay for the entire Purchase Order governing any disputed assets and in particular the Beta Disputed Assets under Beta Program Purchase Order prior to taking possession of the Disputed Beta Assets. GM should not be allowed to selectively pay for a line item asset by specific invoice only thereby being relieved of the requirement to pay for the development, engineering and testing of the Disputed Beta Assets;
- (v) *The Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3;
- (w) Rules 2.03, 30.02 and 37 of the *Rules of Civil Procedure*; and
- (x) Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) The First Report of the Receiver dated March 13, 2018; and
- (b) Such further and other evidence as the lawyers may advise and this Honourable Court permit.

March 13, 2018

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Court File No.: CV-18-592741-00CL

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Proceeding Commenced at Toronto

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