

TIMOTHY KEHRER, : SUPERIOR COURT OF NEW JERSEY
 : LAW DIVISION: MIDDLESEX COUNTY
 Plaintiff, :
 : JUDGMENT NO.: DJ-320310-04
 vs. :
 : Civil Action
 VERTEX INTERACTIVE, INC., and :
 CAPE SYSTEMS GROUP, INC, :
 :
 Defendants. :
 :

**BRIEF IN SUPPORT OF PLAINTIFF'S MOTION
FOR THE APPOINTMENT OF A RECEIVER**

On the Brief:

Glenn R. Reiser
William C. La Tourette

LOFARO & REISER, L.L.P.
55 Hudson Street
Hackensack, New Jersey 07601
(201) 498-0400
Attorneys for Plaintiff

PRELIMINARY STATEMENT

Plaintiff, a judgment creditor of the defendants, Vertex Interactive, Inc. ("Vertex") and Cape Systems Group, Inc. (collectively referred to as "Defendant" or "Cape Systems"), moves for the appointment of a receiver pursuant to *N.J.S.A. 2A:17-66* and *N.J.S.A. 14A:14-2*. The necessary facts supporting the motion are set forth in the accompanying Certification of Glenn R. Reiser ("Certification"), counsel for Plaintiff.

Plaintiff's judgment in the principal amount of \$83,273.00 originated as a foreign judgment entered in the Superior Court of California following a jury's finding that Defendant willfully failed to pay wages to Plaintiff, its former employee. Plaintiff domesticated the judgment in the Superior Court of New Jersey, and has been unsuccessful in his repeated attempts to discover assets of the Defendant that would enable him to satisfy his judgment. Defendant, a publicly traded corporation, repeatedly has failed to comply with prior discovery orders entered by this Court, most recently resulting in the issuance of three (3) separate civil arrest warrants against Defendant's CEO, Secretary, and another corporate officer due to their deliberate failure to appear for supplemental depositions.

In addition to Plaintiff's judgment lien, a recent judgment search performed in New Jersey reveals eleven (11) other creditors holding judgments against Defendant totaling nearly \$2 million. Also, in its most recent filing with the Securities and Exchange Commission, Defendant expresses "substantial doubt" as to its ability to continue as a going concern, acknowledges that it has defaulted

on its obligations with a certain unnamed note holder, and concedes that it requires substantial funds on a going forward basis in order to continue operating.

PROCEDURAL HISTORY & FACTUAL STATEMENT

Plaintiff incorporates by reference herein the statements set forth in Counsel's Certification submitted herewith. For the convenience of the Court, those statements are succinctly set forth herein.

On December 3, 2003 a jury verdict in the amount of \$83,230.90 plus interest at 10% *per annum* was entered in favor of Plaintiff and against Defendant in a lawsuit captioned, "*Timothy Kehrer v. Vertex Interactive, Inc., et. al.*, Superior Court of California, County of Los Angeles, Case No.: GC 030516. Certification, ¶ 3 and Exhibit A thereto. The jury verdict was reduced to a judgment on July 13, 2004. Ibid. The basis for the California Judgment was Defendant's willful failure to pay the Plaintiff wages earned while he was employed there. Ibid.

Pursuant to N.J.S.A. 2A:49A-26, Plaintiff domesticated the California Judgment in New Jersey on November 30, 2004 (the "Judgment"). Shortly thereafter, Vertex changed its name to Cape Systems Group, Inc. ("Cape Systems"), and on Plaintiff's application the Judgment was amended to include Cape Systems as the proper party pursuant to this Court's order dated May 27, 2005. Certification, ¶ 5 and Exhibit B.

Defendant is a New Jersey corporation, publicly trading under the stock ticker symbol CYSG.OB. Certification, ¶ 6. According to its website, Cape

Systems currently employs 29 people, and maintains a principal place of business at 3619 Kennedy Road in South Plainfield, New Jersey. Certification, ¶¶ 6-7. Cape Systems and its officers purposely refuse to comply with this Court's discovery orders. Certification, ¶¶ 9-10.

Plaintiff has made repeated efforts to collect his Judgment and to discover Defendant's assets for the purposes of execution. Certification, ¶¶ 9-10. On May 5, 2005, following Defendant's failure to answer an information Subpoena, Plaintiff filed a motion for an order to enforce litigant's rights. An order to that effect was entered on May 27, 2005. Defendant ultimately supplied answers to the Information Subpoena, however the responses were incomplete and evasive.

On October 26, 2005, the Court entered an Order for Discovery requiring Defendant to produce the following corporate officers for post-judgment supplemental proceedings on November 10, 2005: Nicholas R. Toms (CEO/Director), Barbara Martorano (the Secretary), and Dominick Velenzano (Controller). When Defendant's officers failed to appear for their depositions in compliance with the October 26, 2005 order, Plaintiff filed a second motion to enforce litigant's rights. On March 20, 2006, the Court entered an Order providing that if the "defendants fail to comply" and produce the corporate officers for depositions, "...a warrant for the civil arrest of Nicholas R. Toms [CEO], Barbara Martorano [Secretary] and Dominick Velenzano [Controller], shall issue out of this Court without further notice." Certification, ¶ 9 and Exhibit D thereto. Defendant failed to comply with the March 20, 2006 Order, and arrest

warrants issued thereafter on May 4, 2006. Certification, ¶ 10 and Exhibit E thereto.

In addition to the Plaintiff's judgment lien, there are eleven (11) other judicial creditors collectively holding \$1,923,918.08 in recorded judgment liens against the Defendant. Certification, ¶ 11 and Exhibit F thereto. Irrespective of the judgments, by the Defendant's own admissions it is either insolvent or on the verge of insolvency. Certification, ¶ 12. For example, in its May 15, 2006 quarterly report filed with the Securities and Exchange Commission ("SEC"), the Defendant expressed "substantial doubt as to our ability to continue as a going concern." Certification, ¶ 12. The report states:

Based upon our substantial working capital deficiency (\$25,085) and stockholders' deficiency (\$23,444) at March 31, 2006, *our recurring losses, our historic rate of cash consumption, the uncertainty arising from our default on one of our notes payable, the uncertainty of our liquidity-related initiatives described in detail below, and the reasonable possibility of on-going negative impacts on our operations for a further unknown period of time, there is substantial doubt as to our ability to continue as a going concern.*

The successful implementation of our business plan has required, and our ability to continue as a going concern will require, on a going forward basis, substantial funds to finance (i) expansion of our sales & marketing program, (ii) continuing operations, (iii) further development of our enterprise technologies, (iv) settlement of existing liabilities including past due payroll obligations to our employees, officers and directors, and our obligations under existing or possible litigation settlements and (v) possible selective acquisitions to achieve the scale we believe will be necessary to remain competitive in the global SCM industry. There can be no assurance that we will be successful in raising the necessary funds.

See Exhibit G to Certification (emphasis added). In the same SEC quarterly report under the category of **Fiscal 2006 Outlook**, defendant represents, "...that

in order to remain in business we must raise additional cash in a timely fashion.”

Ibid.

LEGAL ARGUMENT

THE COURT SHOULD APPOINT A RECEIVER OVER THE DEFENDANT CORPORATION BECAUSE DEFENDANT IS INSOLVENT AND IS OTHERWISE CONDUCTING ITS BUSINESS IN A MANNER GREATLY PREJUDICIAL TO THE INTERESTS OF ITS CREDITORS, AND TO AID PLAINTIFF IN THE EXECUTION OF HIS JUDGMENT.

Pursuant to *N.J.S.A. 14A:14-2(a)*, “a creditor whose claim is for a sum certain”, such as the Plaintiff herein, has standing to bring a receivership action in the Superior Court of New Jersey. *Id.* The statute provides creditors with the following grounds to seek appointment of a receiver:

- (a) the corporation is insolvent;
- (b) the corporation has suspended its ordinary business for lack of funds;
- (c) the business of the corporation is being conducted at a great loss and greatly prejudicial to the interests of its creditors or shareholders.

N.J.S.A. 14A:14-2(2).

In addition, *N.J.S.A. 2A:17-66* also authorizes the Superior Court to appoint a receiver to aid in the execution on behalf of a judgment creditor. This statute states, in pertinent part, that:

In aid of execution, the superior court may, on application of either the judgment creditor or the defendant and in its discretion, order the appointment of a receiver of the property and things in action belonging or due to or held in trust for the judgment debtor as aforesaid, at the time of the recovery of the judgment or at any time thereafter. *Ibid.*

including Plaintiff. At a minimum a receiver should be appointed to aid Plaintiff in the execution of his Judgment pursuant to *N.J.S.A. 2A:17-66*.

CONCLUSION

For the foregoing reasons and authorities, the Court should appoint a receiver to take control over the Defendant's business operations. Defendant cannot possibly dispute that it is either insolvent or on the verge of insolvency as evidenced by the statements set forth in its May 2006 SEC filing. Defendant also cannot dispute the nearly \$2 million dollars in unsatisfied judgments. In the absence of the relief requested, Plaintiff and the Defendant's other judgment creditors will sustain irreparable harm and prejudice.

LOFARO & REISER, L.L.P.
Attorneys for Plaintiff

Dated: July 13, 2006

By: 

Glenn R. Reiser