

Date: 20081023

Docket: T-2289-03

Citation: 2008 FC 1215

Toronto, Ontario, October 23, 2008

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

NETBORED INC.

Plaintiff

and

**AVERY HOLDINGS INC., SEAN EREN, SUSAN EREN, SUSAN KATZ, COREY KATZ
and BINARY ENVIRONMENTS LTD.**

Defendants

ORDER AND REASONS FOR ORDER

Court File No. T-2289-03

THE FEDERAL COURT

BETWEEN:

NETBORED INC.

Applicant

- and -

**AVERY HOLDINGS INC., SEAN EREN, SUSAN EREN, SUSAN KATZ, COREY KATZ
and BINARY ENVIRONMENTS LTD.**

Respondents

**REASONS FOR ORDER HEARD BEFORE
THE HONOURABLE MR. JUSTICE HUGHES**
at Courts Administration Services, Courtroom No. 5A,
180 Queen Street, West, Toronto, Ontario,
on Wednesday, October, 22, 2008

APPEARANCES:

Antonio Turco
Athar K. Malik

for the Respondents

Joel Vale

for the Applicant

Also present:

Alastair Hull
Ron Cooksey

Court Registrar
Court Usher

A.S.A.P. Reporting Services Inc. 8 2008
200 Elgin Street, Suite 1004
Ottawa, Ontario K2P 1L5
(613) 564-2727

130 King Street West, Suite 1800
Toronto, Ontario M5X 1E3
(416) 861-8720

1 Toronto, Ontario

2 --- Upon commencing the Order with Reasons on
3 Wednesday, October 22, 2008 at 1:15 p.m.

4 THE COURT: Madam reporter, I am
5 going to make a speaking order.

6 Subject to any editorial changes,
7 this shall be the order, so do you want to take
8 that down?

9 REASONS AND ORDER:

10 THE COURT: First of all, I have
11 heard counsel for the parties and I have heard
12 Ms. Eren-Katz on her own behalf. I am satisfied,
13 having read the material and heard everyone, that
14 the subject matter of the motion as raised by
15 Netbored does not and should not effect the order
16 that I gave on October 14th, 2005 in this matter.
17 The materials raised, even if proved, and I make no
18 judgment in that regard one way or the other, do
19 not and would not have affected the disposition of
20 costs that I gave at that time. This is without
21 prejudice to whatever effect matters raised in
22 respect of the motion may be put before or argued
23 or argued before or disposed of by the assessment
24 officer in this matter.

25 As to costs of this motion, I fix

1 them in the sum of \$2,500, payable in the cause,
2 the cause being the disposition of the taxation.

3 With respect to the directions,
4 and I can deal with the directions of Justice
5 Barnes of 12th August this year, and the further
6 direction of Justice Barnes in September of this
7 year concerning his disposition of the document
8 motion, I will allow Netbored ten days from this
9 date to bring any motion that it considers
10 appropriate before Mr. Justice Barnes concerning
11 the documents, or in the alternative, to advise
12 counsel for the defendants that it will not be
13 bringing such a motion.

14 I will give Netbored ten days from
15 the disposition of the Barnes motion or the advice
16 that they will not be seeking such a motion to file
17 its sur-reply as set down by Justice Barnes'
18 direction of 12th August. I will then allow a
19 further five days, being the same amount of time
20 set out by Justice Barnes for the filing of
21 material. The matter shall then be put in the
22 hands of the assessment officer for disposition as
23 to an assessment of the costs.

24 In the meantime, the parties are
25 directed through their counsel to consult with each

1 other and determine an appropriate mediator for
2 this and all the related litigation and to
3 endeavour to secure an appointment with such a
4 mediator within the next three months to see if
5 this whole matter can be mediated.

6 I feel very strongly that the
7 parties have let their emotions control their
8 judgment in this matter, and that in turn has
9 affected their pocketbooks. Therefore I would ask
10 that the parties explore the mediation, select a
11 mediator and find a date, and advise me as to what
12 has been happening in that regard.

13 I remain open to give further
14 directions and orders as may be the necessary in
15 this matter, and invite the parties by letter
16 simply to contact the court and ask that the letter
17 be sent to me as early as possible with respect to
18 further directions.

19 I have noted the undertaking by
20 counsel on behalf of Netbored to enter into the
21 mediation in good faith. Am I correct with that?

22 MR. VALE: Yes, sir.

23 THE COURT: And that to attend to
24 the matter promptly; am I correct in that?

25 MR. VALE: Yes, sir.

1 THE COURT: And that any
2 determination made and agreed to by the parties as
3 a result of the mediation may be entered as an
4 order of this or other appropriate court.

5 MR. VALE: Yes, sir.

6 THE COURT: Thank you. Mr. Turco,
7 am I correct in that from you as well, that your
8 clients will cooperate with a speedy mediation?

9 MR. TURCO: Yes, sir.

10 THE COURT: Thank you. Is there
11 any other matter I should address at this time?

12 MR. VALE: Sir, I believe you
13 mentioned that if there is a review of Officer
14 Stinson's order, that it could be you that reviews
15 that.

16 THE COURT: Thank you. I will
17 further stipulate that any review of Officer
18 Stinson's order should be directed to my attention
19 through the office of the Chief Justice who
20 administers these things.

21 So the Stinson request should be
22 made to the Office of the Chief Justice, that I be
23 assigned for any review of the order.

24 Is there any other matter?

25 MR. VALE: Just to understand,

1 because I don't have a copy of the order, while the
2 direction of Justice Barnes is outstanding --

3 THE COURT: Been amended in
4 accordance with this order.

5 MR. VALE: Yes, and the sur-reply
6 follow his disposition?

7 THE COURT: Yes, ten days after
8 the disposition by Barnes.

9 MR. VALE: Thank you, sir.

10 THE COURT: So October 29th now
11 becomes ten days after Barnes' disposition; or, if
12 you advise your friend that you are not proceeding
13 with the motion, ten days after that advice.

14 MR. VALE: Thank you, sir. Is
15 that ten business days?

16 THE COURT: No, ten days.

17 MR. VALE: Fair enough, thank you.

18 MR. TURCO: Your honour, two
19 points. One, you had mentioned costs, and you had
20 said "in the cause of the cost assessment". I am
21 unclear how that would work, because if there is
22 divided -- we will be arguing about who had more
23 success on the cost assessment.

24 THE COURT: Yes, that is true.

25 MR. TURCO: That is one point.

1 And then the other point --

2 THE COURT: I will reserve the
3 \$2,500. I have fixed the amount for any further
4 order to be made by me upon request of any counsel.

5 I will reserve the disposition, but I would like
6 to dispose of that only after I hear the
7 mediation. I can do one of three things. It will
8 go to your client, Mr. Vale, it will go to your
9 clients, Mr. Turco, or there will be no order as to
10 costs, because I feel that we have done something
11 today. While you weren't successful, Mr. Vale, I
12 feel that we have done something today.

13 I hope, and I am looking at you,
14 Ms. Eren, that this matter gets settled. Lawyers
15 and costs don't need to be happening.

16 MR. TURCO: The last point, your
17 honour, you mentioned my friend could bring his
18 motion before Justice Barnes. In Justice Barnes'
19 direction of September, he mentions that the motion
20 needs to be brought in writing. I wanted to make
21 sure --

22 THE COURT: Yes, in writing.

23 MR. TURCO: Thank you.

24 THE COURT: Is there any further
25 matter? Okay.

1 This court hereby orders that:
2 ORDER to go in accordance
3 with these oral reasons, as
4 may be edited.

5 Thank you.

6 --- Whereupon the hearing concluded Wednesday,
7 October 22nd, 2008, at 1:16 p.m.

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"Roger T. Hughes"
Judge

I HEREBY CERTIFY THAT I have, to the best
of my skills and abilities,
accurately recorded and transcribed therefrom,
the foregoing proceeding.

Catherine Keenan, Computer-Aided Transcription