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May 4, 2015
File No.: 294212.00001/15951

WITHOUT PREJUDICE

BY COURIER

Pushor Mitchell LLP
301 – 1665 Ellis Street
Kelowna, BC V1Y 2B3

Attention: Mr. Blair Forrest

Dear Mr. Forrest:

Re: McHenry Software Inc. – Professional Negligence Matter

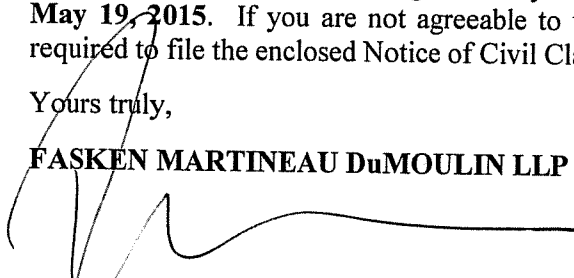
We are counsel to McHenry Software Inc. (“McHenry”). We wrote to you on September 19, 2013, on a without prejudice basis regarding your previous representation of our client with respect to its Software License and Development Agreement with ARAS 360. In that letter, we put you on notice that McHenry may advance a claim against you for professional negligence, but that whether it would do so or not would depend on the outcome of McHenry’s arbitration with ARAS 360. That arbitration is now concluded, and the outcome was not favorable to McHenry. The matter is now under appeal by McHenry, and cross-appeal by ARAS 360, in the BC Supreme Court. The hearing of the appeal petitions may not be for some time.

You will find enclosed a draft Notice of Civil Claim. Our client prefers not to file this Notice of Civil Claim until the appeals have been heard and addressed, but must ensure that limitations issues are addressed. We assume that your firm has a mutual interest in the possibility that the outcome of the appeals may negate the need to bring the enclosed claim against it. To that end, we are seeking your agreement to toll generally all limitation periods relating to the claims described in the enclosed Notice of Civil Claim.

We ask that you advise in writing whether you are agreeable to the proposed tolling agreement by **May 19, 2015**. If you are not agreeable to the proposed tolling agreement, McHenry will be required to file the enclosed Notice of Civil Claim against you in order to preserve its rights.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP



David Wotherspoon
DKW

Enclosure
294212.00001/90281722.1

* Fasken Martineau DuMoulin LLP is a limited liability partnership and includes law corporations.

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

McHENRY SOFTWARE INC.

PLAINTIFF

AND:

PUSHOR MITCHELL LLP, BLAIR FORREST and STEVEN WILSON

DEFENDANTS

WITHOUT PREJUDICE -
DRAFT NOTICE OF CIVIL CLAIM

This action has been started by the Plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the Plaintiff,

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFF

Part 1: STATEMENT OF FACTS

1. The Plaintiff McHenry Software Inc. ("MSI") is a company incorporated under the laws of North Carolina.
2. The Defendant Pushor Mitchell LLP ("Pushor Mitchell"), a law firm, is a limited liability partnership carrying on the practice of law, and maintains an office at 301 - 1665 Ellis Street, Kelowna, British Columbia.
3. The Defendant Blair Forrest is a partner of Pushor Mitchell.
4. The Defendant Steven Wilson is a partner of Pushor Mitchell.

Background to MSI's Retainer with Pushor Mitchell

5. MSI's principals Brian McHenry and Ray McHenry have been developing motor vehicle collision reconstruction and simulation software since the 1960s.
6. In 1994, Brian and Ray McHenry established MSI for the purpose of further developing their motor vehicle collision reconstruction and simulation software.
7. By 2009, MSI had developed a number of motor vehicle collision reconstruction and simulation software products that are capable of modeling various kinds of accidents (the "MS Simulation Tools").
8. ARAS 360 Incorporated, also known as ARAS 360 Technologies Inc. ("ARAS"), is a British Columbia company that, as of 2009, was located in Kamloops and developing a software product that would provide graphical representations of collision reconstruction programs, such as those developed by MSI.
9. In February of 2009, ARAS approached MSI about engaging in a project that would involve integrating the MS Simulation Tools with ARAS's graphical environment product, for the purpose of the commercial sale of the resulting integrated product (the "Integration Project"). MSI expressed interest in the Integration Project, and the parties agreed to discuss the matter further in the fall of 2009.

10. The parties discussed the Integration Project in the fall of 2009. MSI advised ARAS that any commercial arrangement that it would enter into with ARAS to carry out the Integration Project would require a “pre-purchase” of the MS Simulation Tools, and an expected revenue stream during the project work.
11. In early December of 2009, MSI and ARAS began the process of negotiating an agreement between the parties for the carrying out of the Integration Project.
12. The result of these negotiations was that by January of 2010, the parties had created a draft of a proposed agreement that was intended to be subject to British Columbia law (the “Draft Agreement”).

The Retainer

13. Before MSI would agree to the terms set out in the Draft Agreement, MSI required legal advice from a British Columbia lawyer regarding the terms and conditions of the Draft Agreement.
14. On February 1, 2010, Brian McHenry of MSI contacted Sue Connaghan, a lawyer of the Defendant Pushor Mitchell, to ask whether she would be able to review the agreement.
15. In reply to Mr. McHenry’s email, Ms. Connaghan recommended her colleague, Blair Forrest, a partner with the Defendant Pushor Mitchell, to review the Agreement on the basis that Blair Forrest worked in the technology area and was familiar with the kind of contract that MSI was considering entering into with ARAS.
16. Thereafter, Pushor Mitchell was engaged by MSI as its solicitor for the purposes of advising MSI on the negotiation of the commercial terms for the Integration Project (the “Retainer”).
17. The scope of the Retainer included:
 - (a) reviewing the proposed terms set out in the Draft Agreement to ensure that they were consistent with MSI’s understanding and intentions in regards to the terms of the Integration Project;
 - (b) advising MSI with respect to the effect of the proposed terms in the Draft Agreement;
 - (c) suggesting revisions and edits to the Draft Agreement necessary to ensure that MSI’s understanding and intentions in regards to the Integration Project were addressed, and to ensure that MSI’s commercial interests were protected.
18. On February 1, 2010, MSI forwarded the Draft Agreement to Blair Forrest for his review.
19. MSI advised and instructed Blair Forrest that, among other things, it was important to MSI that the proposed agreement with ARAS provided:
 - (a) for the pre-purchase of licenses for the MS Simulation Tools; and

- (b) an expected revenue stream during the Integration Project.
- 20. Blair Forrest provided his initial comments on the Draft Agreement on February 2, 2010, and provided further advice and comments on the terms of the Draft Agreement on February 3, 4 and 5, 2010.
- 21. Blair Forrest confirmed to MSI that the proposed Draft Agreement provided:
 - (a) for the pre-purchase of licenses for the MS Simulation Tools;
 - (b) an expected revenue stream during the Integration Project; and
 - (c) that pursuant to what would become section 10.2 of the final agreement between the parties (defined below as the "Agreement"), MSI would receive annual minimum payments from ARAS starting at \$160,000 in the first year of the Agreement, and increasing by a minimum of 20% thereafter for the remaining four years of the contract.
- 22. As part of Blair Forrest's review of the Draft Agreement he suggested edits to the Draft Agreement, which were accepted by ARAS and incorporated into the final draft of the Agreement.
- 23. In reliance on the legal advice provided by Pushor Mitchell, and in particular Blair Forrest, regarding the Draft Agreement, on or about February 5, 2010, MSI entered into a revised version of the Draft Agreement with ARAS entitled "Software Licensing and Development Agreement" (the "Agreement").
- 24. The Agreement reflected the legal advice, editing and input of Pushor Mitchell and Blair Forrest.
- 25. Thereafter, Pushor Mitchell remained engaged by MSI to provide legal advice and services with respect to the ongoing performance of the Agreement by MSI and ARAS.

The Resulting Contract

- 26. The Agreement provided, in part:

This Agreement is made as of the 5th day of February 2010 (the "Effective Date"), by and between McHenry Software, Inc. with principal offices at 103 Brady Court, Suite 200, Cary, NC 27511 (hereinafter referred to as "MS") and ARAS 360 Incorporated located at 402 - 1450 Pearson Place, Kamloops, BC (hereinafter referred to as "Reseller").

...

1.1 MS hereby grants Reseller a non-transferable worldwide exclusive license to market, use and distribute the MS-Software during the term of this Agreement to Reseller's end user customers, solely as a component of Reseller's Products and subject to the terms and conditions contained herein. Reseller shall have no

right copy or use MSA-Software except as expressly allowed herein and shall no right to make improvements, enhancements, modifications or derivative works in respect of the MSA-Software. The scope of Reseller's authority is specifically limited to the MSA-Software and the minimum authority necessary to perform the duties accepted pursuant to this Agreement. Reseller has no authority to bind MS by Contract or otherwise or to make representations except as specifically authorized by this Agreement.

...

3.0. The MSA-Software is to be a licensed component of the Reseller's ARAS 360 software. Reseller is responsible for all windows programming related to ARAS 360 software. MS will work with Reseller windows programmers to incorporate the MSA-Software components into the ARAS 360 software in a timely manner. MS may make suggestions for incorporation of the software into the ARAS 360 software, however, the final decisions as to how the MSA-Software is to be incorporated into the ARAS 360 software is the sole responsibility of ARAS 360. Therefore any delays caused by problems which may arise in the completion of the implementation of the MSA-Software components into the ARAS 360 software shall be the sole responsibility of Reseller.

...

4.0 MS will provide its best professional judgment in assisting and participating in the integration of the MSA Software into ARAS 360. During the approximately 6 month implementation stage (Feb through July 2010) MS will be available and provide priority response to inquiries from ARAS and designated ASAS agents and programmers to permit the rapid implementation of the software products. No other warranty, responsibility or liability shall pertain.

MS will work with Reseller windows programmers to incorporate the MSA-Software components into the ARAS 360 software in a timely manner. MS may make suggestions for incorporation of the software into the ARAS 360 software, however, the final decisions as to how the MSA-Software is to be incorporated into the ARAS 360 software is the sole responsibility of ARAS 360. Therefore any delays caused by problems which may arise in the completion of the implementation of the MSA-Software components into the ARAS 360 software shall be sole responsibility of Reseller.

...

7.2 This Agreement may be terminated by MS upon five (5) days written notice, for any of the following reasons:

7.2.1 If Reseller makes an assignment for the benefit of creditors, is adjudged an involuntary bankrupt, is placed into voluntary or involuntary

receivership or files a petition for bankruptcy or reorganization pursuant to any federal or state statute.

7.2.2 If Reseller provides customers or prospective customers with information in connection with the MSA-Software and/or this Agreement which is false or misleading.

7.2.3 If Reseller infringes the intellectual Property rights of MS with respect to the Software.

7.2.4 If Reseller fails to meet sales minimums over a 12 month period.

7.2.5. For any unforeseen reason which when presented to a proper court of arbitration is deemed appropriate to justify the termination of this Agreement.

...

10.2 Reseller shall initially purchase 100 licenses in advance of the ARAS MMIS product for the ARAS price of \$1200 per license, and 100 Licenses of ARAS Collide for the ARAS price of \$400 per license (\$160,000.00 in total), when the ARAS MMIS product is delivered and adequate time is allowed for successful integration into the ARAS 360 software product.

Reseller will advance the amount of \$40,000 when this Agreement is executed toward anticipated development costs by MS.

During the approximately 6 month implementation stage (Feb through July 2010) MS will be available and provide priority response to inquiries from ARAS and designated ASAS agents and programmers to permit the rapid implementation of the software products.

An additional amount of \$40,000 will be paid 30 days following the initial delivery of the alpha versions of ARAS MMIS and ARAS Collide which MS will deliver no later than March 31, 2010. Therefore the second \$40,000 shall be paid on or before May 1, 2010.

The remaining \$80,000 to be paid when ARAS MMIS and ARAS Collide are delivered in "ready for final version" form to ARAS 360 and a reasonable time is allowed for integration and preparation for sale. The 'reasonable time' will be no more than 45 days after delivery of the final versions of the ARAS MMIS and ARAS Collide software to ARAS 360. The expected delivery date is to be on or before June 1, 2010. 'Ready for sale' will be designated to be no later than 45 days after delivery of the 'ready for final version' of the software or July 15, 2010, whichever is sooner.

At end of the first year of this Agreement, the amount of sales actually made will be reconciled against the initial purchase, and Reseller will either pay additional monies for sales in excess of 100 licenses or MS will provide a credit toward the next year if sales are less than 100 licenses sold.

At the end of the first year, and for the 4 years that follow to the end of the contract, the annual prepayment for 100 licenses will increase by 20%.

MSI's Dispute with ARAS Over the Terms of the Contract

27. The integration of the software products pursuant to the Agreement was intended to commence shortly after the Agreement was executed in the winter of 2010.
28. The integration of the MS software into the ARAS suite was delayed until 2011 because the ARAS graphical environment was not ready for integration with MSI's software.
29. MSI sought the advice of Purshor Mitchell, and in particular Blair Forrest, with respect to the impact of the one year delay of the start of the project on the operation of the Agreement.
30. Blair Forrest's advice was that the delay did not impact the material terms of the Agreement and that no amendments or other actions were required between the parties to address the one year delay.
31. The integration work began in January of 2011, and a product was prepared for release to the public for sale in October of 2011.
32. ARAS paid McHenry \$40,000 in June of 2011.
33. MSI demanded payment of the remainder of the annual payment that it said was due and owing under the Agreement, but ARAS refused to pay McHenry. MSI sought the advice of Blair Forrest with respect to ARAS's refusal to pay McHenry.
34. Blair Forrest advised MSI that it was entitled under the provisions of the Agreement to terminate the Agreement on the basis of ARAS's refusal to pay the money that MSI said was owing under the Agreement.
35. In reliance on the advice from Purshor Mitchell, and in particular Blair Forrest, MSI terminated the Agreement effective December 21, 2011.

The Arbitration

36. Subsequent to the termination, MSI sought the advice of Blair Forrest regarding pursuing a claim against ARAS 360 for breach of contract.
37. Blair Forrest advised MSI that it had a strong case against ARAS 360.

38. In reliance on Blair Forrest's advice, MSI commenced an arbitration pursuant to the Agreement in December of 2012, claiming for, among other things, damages for breach of contract.
39. Steven Wilson, a partner of Pushor Mitchell, assumed conduct of the arbitration on behalf of MSI. The retainer was an entire contract that was to conclude with the award at the end of the arbitration (the "Arbitration Retainer").
40. MSI's claims against ARAS included a claim that in 2011 ARAS was required to pay MSI \$192,000 pursuant to section 10.2 of the Agreement, and that ARAS breached the Agreement by refusing to do so.
41. ARAS counterclaimed against MSI seeking, among other things, damages for wrongful termination of the Agreement.
42. On or about February 22, 2013, Steven Wilson advised MSI that he no longer wished to act on its behalf in the arbitration proceedings, and terminated the Arbitration Retainer on behalf of Purshor Mitchell.
43. Pushor Mitchell's termination of the Arbitration Retainer was without cause.
44. MSI then engaged new counsel to act on its behalf in the arbitration.
45. The Arbitration hearing took place on November 12-15, 18-19, 21-22, 2013, and oral submissions took place on January 17, 2014.
46. The Arbitrator handed down an Award in the Arbitration on March 26, 2014.
47. All of McHenry's claims against ARAS for breach of contract were dismissed.
48. The Arbitrator found that section 10.2 of the Agreement was "unclear" and therefore unenforceable.
49. The Arbitrator went on to find that there was no basis for McHenry to terminate the Agreement.
50. As a result, in his Award the Arbitrator dismissed McHenry's claim for damages for breach of contract for outstanding license fees, and he found McHenry's termination of the Agreement to be wrongful.

Part 2: RELIEF SOUGHT

1. The Plaintiff claims general damages.
2. The Plaintiff claims special damages.
3. The Plaintiff claims interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

4. The Plaintiff claims costs.

Part 3: LEGAL BASIS

1. The professional negligence of Pushor Mitchell, Blair Forrest, Steven Wilson (the “Defendants”), and each of them, caused injury and loss to MSI.
2. It was an express or implied term that, in carrying out the Retainer and the Arbitration Retainer, the Defendants would exercise all reasonable care, skill, diligence and competence as a solicitor.
3. Concurrent to its obligations under the Retainer, at all materials times, the Defendants owed a professional duty of care to MSI to exercise all reasonable care, skill, diligence and competence as a solicitor while acting on behalf of MSI.
4. The standard of care in the Province of British Columbia for solicitors in preparing and carrying out the review of commercial agreements and other corporate documents, and advising on the performance of commercial contracts, is that of a reasonably competent solicitor practicing in the area of corporate and commercial law.
5. The Defendants breached the Retainer and Arbitration Retainer and acted negligently in the performance of the services for which they were retained, by failing to exercise all reasonable care, skill, diligence and competence as a corporate solicitor while acting on behalf of MSI.
6. The particulars of the Defendants’ breach of the Retainer and Arbitration Retainer and duty of care include:
 - (a) failing to ensure that the Agreement contained terms and provisions that protected MSI’s interests;
 - (b) failing to ensure that the Agreement contained terms and provisions consistent with MSI’s understanding and objectives;
 - (c) failing to specify which MSI software products were to be modified by McHenry to permit the integration of McHenry products into ARAS's ARAS 360 products;
 - (d) failing to make clear the MSI deliverables;
 - (e) failing to make clear within the Agreement MSI’s entitlement to compensation, in particular:
 - (i) failing to ensure that the payment provisions of the Agreement were enforceable;
 - (ii) failing to advise MSI of the risk that the payment provisions of the Agreement, and in particular section 10.2, were void and unenforceable;

- (iii) advising MSI that the Agreement provided MSI with annual minimum payments from ARAS starting at \$160,000 in the first year of the Agreement, and increasing by a minimum of 20% thereafter for the remaining four years of the contract;
 - (iv) failing to ensure that the Agreement provided for the pre-purchase of licenses for the MS Simulation Tools;
 - (v) failing to ensure that the Agreement provided for an expected revenue stream during the Integration Project;
 - (vi) failing to address an internal inconsistency between paragraph 10.2 of the Agreement (where "[ARAS] will either pay additional monies for sales in excess of 100 licenses or [McHenry] will provide a credit toward the next year if sales are less than 100 licenses sold") and paragraph 10.3 (requiring minimal annual license fees in order for [McHenry] to be paid 20% of the license fees paid to [ARAS]);
 - (vii) under paragraph 10.3 of the Agreement, a "Customer Price" column is provided in the chart for license fees; however, the Agreement does not indicate minimum or required price of the software components. It is unclear whether MSI will be paid 20% of the license fees paid to ARAS based on the "Customer Price" or an alternative higher or lower price, depending on the circumstance;
 - (viii) the Agreement stipulates an initial 200 licenses (100 for MMIS and 100 for Collide), but the Agreement only envisions reconciliation based on 100 licenses.
 - (ix) paragraph 10.2 of the Agreement stipulates that "at the end of the first year, and for the 4 years that follow to the end of the contract, the annual prepayment for 100 licenses will increase by 20%;" however, no payment schedule is provided for the years following the first year;
 - (x) the Agreement includes no reference to free licenses issued by ARAS to its end user customers and whether MSI would be compensated for such issuance of licenses.
 - (xi) it is unclear from paragraph 10.5 what compensation McHenry is entitled to for ARAS's sale of ongoing Software Maintenance contracts.
- (f) failing to exercise care in drafting the Agreement overall. Indicating the lack of care, skill, and diligence, the Agreement is riddled with grammatical mistakes, and key words and phrases are poorly defined, or not defined at all. Examples include, but are not limited to:
- (i) 'MSA-Software' is used throughout the Agreement, but is never defined.

- (ii) Paragraph 1.1: "Reseller shall have no right copy or use MSA-Software except as expressly allowed herein and shall no right to make improvements, enhancements, modifications or derivative works in respect of MSA-Software" [emphasis added].
 - (iii) Paragraph 10.2 cites 'ready for final version,' but this phrase was never defined in the Agreement.
 - (g) failing to properly advise MSI of the impact of the one year delay to the start of the Integration Project on the contractual obligations of the parties under the Agreement;
 - (h) improperly advising MSI to terminate the Agreement;
 - (i) improperly advising MSI that it had a strong case against ARAS for breach of contract; and
 - (j) improperly terminating the Arbitration Retainer.
7. As a result of the Defendant's breach of contract and negligence, McHenry has suffered, and continues to suffer, loss and damage, the particulars of which include, but are not limited to:
- (a) the costs of the arbitration;
 - (b) special damages;
 - (c) general damages; and
 - (d) the costs of pursuing these proceedings.

Plaintiff's address for service: Fasken Martineau DuMoulin LLP
2900 - 550 Burrard Street
Vancouver, BC V6C 0A3

Fax number address for service (if any): n/a

E-mail address for service (if any): n/a

Place of trial: Vancouver

The address of the registry is: 800 Smithe Street, Vancouver, BC V6Z 2E1

Dated: 06-Mar-2015

Signature of Lawyer for Plaintiff

David Wotherspoon

Rule 7-1(1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

APPENDIX

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:



Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- ☐ a motor vehicle accident
- ☐ medical malpractice
- ☐ another cause

A dispute concerning:

- ☐ contaminated sites
- ☐ construction defects
- ☐ real property (real estate)
- ☐ personal property
- ☐ the provision of goods or services or other general commercial matters
- ☐ investment losses
- ☐ the lending of money
- ☐ an employment relationship
- ☐ a will or other issues concerning the probate of an estate
- ☒ a matter not listed here

Part 3: THIS CLAIM INVOLVES:

- ☐ a class action
- ☐ maritime law
- ☐ aboriginal law
- ☐ constitutional law
- ☐ conflict of laws
- ☐ none of the above
- ☐ do not know

Part 4:

The Solicitors for the Plaintiff are Fasken Martineau DuMoulin LLP, whose office address and address for delivery is 2900 - 550 Burrard Street, Vancouver, BC V6C 0A3 Telephone: +1 604 631 3131 Facsimile: +1 604 631 3232. (Reference: David Wotherspoon/294212.00001)