



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 321 OF 2020 ()

IN THE MATTER OF SECTIONS 94 AND 159 OF THE COMPANIES ACT

AND IN THE MATTER OF NUTCRACKER HOLDINGS LIMITED

PETITION

TO: The Grand Court of the Cayman Islands

The Petition of State Development Corporation "VEB.RF", a state corporation incorporated in Russia, whose registered office is Akademika Sakharova Prospekt, 9, Moscow, GSP-6, 107996 (the *Petitioner*) shows that:

INTRODUCTION

- 1 Nutcracker Holdings Limited (the *Company*) was incorporated and registered (registration no 181941) on 9 February 2007 under the Companies Law.
- 2 The last known registered office of the Company was c/o Genesis Trust & Corporate Services Ltd., PO Box 448, Elgin Court, Elgin Avenue, George Town, Grand Cayman KY1-1106, Cayman Islands.
- 3 The Company was struck off the Cayman Register of Companies (the *Register*) on 31 October 2019.
- 4 The amount of the reinstatement fee payable upon restoring the Company to the Register is CI\$5,836.69 (approximately US\$7,004.03).
- 5 The Company is indebted to the Petitioner in the sum of at least US\$127,825,026.31, for the reasons more particularly set out below.

BACKGROUND

The Company and 'The Nutcracker' Film

6 The Company was set up in 2007 as a special purpose vehicle to obtain financing for the production of a picture movie entitled "The Nutcracker" (the *Film*).

7 From four days after the date of incorporation until it was struck off, the Company's sole shareholder was Mr Andrey Konchalovsky (also known as Andrey Mikhalkov), a prominent Russian film producer. Mr Konchalovsky was also a director of the Company from the date of its incorporation until it was struck off on 31 October 2019. As far as the Petitioner is aware, at all times Mr Konchalovsky was the only director involved in the day-to-day operations of the Company; no other directors took part in the management of the Company.

8 As far as the Petitioner is aware, the Company's only substantial asset was the rights to the Film.

9 The Film was to be co-produced by two companies: Noisette Film Productions Limited (*Noisette*), which was incorporated in England on 13 June 2006; and HCC Media Group Limited (*HCC*), a Hungarian company.

10 Mr Konchalovsky was also the sole shareholder and a director¹ of Noisette from the date it was incorporated until it was struck from the England and Wales register of companies on 19 May 2015.

11 As far as the Petitioner is aware, Noisette did not carry out any other business activity apart from the production of the Film and its only substantial asset was the rights to the Film.

¹ Mr Paul Lowin was also a director of Noisette from 13 June 2006 until 11 June 2010. Mr Lowin was not appointed on the instructions of the Petitioner. To the best of the Petitioner's knowledge, Mr Lowin is a professional film producer.

Loan by the Petitioner to the Company

- 12 In or around 2006 or early 2007, Mr Konchalovsky approached the Petitioner to introduce the idea of the Film and to seek funding for the production and distribution of the Film. The Petitioner is a Russian state corporation that acts on the basis of federal law, whose main task is to contribute to the long-term economic development of Russia. The Petitioner, in partnership with commercial banks, finances large-scale projects aimed at developing infrastructure, industry, social projects, supporting technological developments and improving the quality of life in Russia.
- 13 On 17 May 2007 the Company submitted a loan application to the Petitioner seeking to borrow the entirety of the Film production costs.
- 14 On 4 June 2007 the Company (acting by Mr Konchalovsky) and the Petitioner executed a Financing Agreement by which the Petitioner committed to lend the Company US\$50million for a period of up to 3 years, at a fixed interest rate of 6.5% (the *Loan*). The exact terms on which the Loan was to be advanced were to be subsequently agreed between the parties and set out in 'Facility Documents' to be executed within two months of the date of the Financing Agreement.
- 15 The Financing Agreement is governed by English law and the parties submitted to the non-exclusive jurisdiction of English courts.
- 16 As a condition of making the Loan, the Petitioner required that Messrs Anatoly Ballo and Oleg Nikanov, who at the time were employees of the Petitioner, be appointed as directors of the Company. Mr Ballo and Mr Nikanov were appointed on 21 July 2007. Mr Ballo and Mr Nikanov did not play an active role in the affairs of the Company, and Mr Konchalovsky continued to act as the only director with day-to-day management of the Company at all times.
- 17 On 27 July 2007, the Company and the Petitioner executed a Loan Agreement (and the Facility documents listed at paragraph 18 below) governing the specific terms on which the Loan would be made, as required by the Financing Agreement. By way of summary, the key terms of the Loan Agreement were that:

- i) the Petitioner would advance a total aggregate amount of US\$50 million (clause 2.1), subject to certain precedent conditions being satisfied (clause 3);
- ii) drawdown of the Loan could be made on not less than three business days' notice and was to be made in writing in the form specified by the Loan Agreement. Drawdowns had to be made before 31 December 2008 (clause 4); and
- iii) the Company was to repay the entirety of the debt owed under the Loan Agreement by 1 May 2010 (clause 7.1) which was later extended to 28 April 2011 by a Deed of Amendment dated 27 April 2011.

18 The facility documents, by which the Loan Agreement was secured, were:

- i) a Charge over shares dated 27 July 2007 between Mr Konchalovsky and the Petitioner, whereby the shares in the Company were charged in favour of the Petitioner;
- ii) a Charge over shares dated 27 July 2007 between Mr Konchalovsky and the Petitioner, whereby the shares in Noisette were charged in favour of the Petitioner;
- iii) a Deed of Assignment and Charge dated 27 July 2007 (**DAC1**) between the Company and the Petitioner, under which certain rights in respect of the Film were charged in favour of the Petitioner, while the Company was granted a revocable license to continue with the production and exploitation of the Film;
- iv) a Deed of Assignment and Charge dated 27 July 2007 (**DAC2**) between the Petitioner, Noisette, HCC and Creativity Limited, a BVI Company involved in the Film screenplay, which the Petitioner understands may have been owned and/or controlled by Mr Konchalovsky. Under this Deed certain rights in respect of the Film were assigned to and charged in favour of the Petitioner, while Noisette, HCC and Creativity Limited were granted a revocable license to continue with the production and exploitation of the Film;
- v) a Deed of Assignment and Charge dated 24 August 2007 (**DAC3**) between the

Petitioner and Batrax Entertainment B.V. (**Batrax**), Fintage Magyar Szorakoztatoipari Kft (**Fintage Magyar**), Mansarde Films Inc. (**Mansarde**) and Fintage Collection Account Management B.V. (**Fintage Collection**), under which certain rights in respect of the Film were charged in favour of the Petitioner, while Batrax, Fintage Magyar and Mansarde were granted a revocable license to continue with the production and exploitation of the Film;

vi) Pledges dated 24 August 2007 made over bank accounts in the name of Fintage Magyar and Batrax in favour of the Petitioner; and

vii) various other agreements aimed at guaranteeing the completion of the Film production, which involved International Film Guarantors LLC (**IFG**) and Allianz Hungaria Insurance Company (**Allianz**).

19 On 27 July 2007 and 24 August 2007, the Borrower drew down the full amount of the Loan in two instalments (US\$25,000,000 on 27 July 2007 and US\$25,000,000 on 24 August 2007).

Collection Account Management Agreement

20 Under the terms of the Loan Agreement, DAC1, DAC2 and DAC3 , certain procedures were put in place to ensure that all revenue generated from the Film would be accumulated in a designated collection account (the **Collection Account**), which in turn would be primarily used to service the repayment of the Loan.

21 A Collection Account Management Agreement (**CAMA**) was entered into on 9 August 2007 between Fintage Collection, the Company, the Petitioner, Noisette, Odyssey Entertainment Limited (the original sales agent under the CAMA, who was replaced in 2010 by CP Media Limited), Allianz, IFG and the Screen Actors Guild, Inc. A separate Collection Account Management Agreement was also entered into in relation to merchandising sales related to the Film.

22 The terms of the Loan Agreement, DAC1, DAC2, DAC3 and CAMA provided for all proceeds derived from the exploitation of the Film to be paid into the Collection Account (without any deduction, recoupment or set-off), which would be under the

control and management of Fintage Collection. Thereafter Fintage Collection would administer the Collection Account and make payments pursuant to a hierarchical distribution procedure. The distribution procedure allowed for certain expenses to be paid in priority to repayment of the Loan, but in essence provided that the substantial part of the monies in the Collection Account would be applied towards repayment of the Loan. Upon satisfaction of the Loan, the monies in the Collection Account could then be applied to other beneficiaries under the CAMA.

Financial Performance of the Film

- 23 The Petitioner understands from public sources that the Film generated revenue of at least US\$17.18 million globally (of which approximately US\$13.7 million was generated in Russia).
- 24 The Petitioner was provided with account statements for the Collection Account for the period 2008 – 2019. The account statements do not show any revenues being derived from the Russian market. On 14 December 2015, the Petitioner asked Fintage Collection to provide information regarding the revenues derived from the Russia market and whether they were paid into the Collection Account. On 27 January 2016, Fintage Collection confirmed that no revenues were paid into the Collection Account in respect of the Russian market.

Failure to Repay the Loan

- 25 The Petitioner sent an initial request for repayment of interest due under the Loan on 1 July 2009 to the Company at its registered office.
- 26 On 23 July 2009 the Company sought an extension of time for the payment of the first interest instalment and repayment of the Loan. Mr Konchalovsky explained that this was due to a postponement in the release of the Film in order not to compete with the film *Avatar* and the fact that the majority of profits from the Film distribution would be received in Russia.
- 27 The extension was granted by the Petitioner, with the initial Loan maturity date extended until 28 April 2011.

- 28 From mid-2011 to late-2014 the Company sought to negotiate a debt restructuring with the Petitioner. Those negotiations were ultimately not successful and the Loan remained on the terms it was originally made (save for the extension of the Loan maturity date to 28 April 2011).
- 29 On 10 May 2016, the Petitioner sent a formal demand to the Company at its registered office for payment of all sums then due and owing under the Loan Agreement, totaling US\$91,974,373.48 and EUR557,591.64. The amounts due under the Loan Agreement are continuing to accrue as a result of interest, default interest and external fees being incurred by the Petitioner.
- 30 The Petitioner did not receive a response from the Company to its 10 May 2016 demand. Employees of the Petitioner did meet directly with Mr Konchalovsky on 17 May 2016 but no resolution was reached.
- 31 The Company has since been struck off the Register on 31 October 2019 for non-payment of annual fees.
- 32 In total, over the course of the Loan, the Petitioner has only received approximately US\$1.4 million by way of distributions out of the limited revenues that were paid into the Collection Account.
- 33 The amount outstanding under the Loan Agreement as at 25 November 2020 was **US\$127,825,026.31** (comprising the principal debt of \$49,602,343.63, interest totaling US\$42,475,691.08, default interest totaling \$33,241,956.87, plus commission and legal fees).
- 34 The Petitioner has exercised certain of its security rights so that it now owns the full rights to the Film. However, the market value of the rights to the Film is estimated to be less than US\$1 million and in any event significantly below the sum currently owed to the Petitioner.

GROUND FOR RESTORATION TO THE REGISTER AND WINDING UP OF THE COMPANY

35 The Petitioner submits that it is just that the Company be restored to the Register so that: (i) official liquidators may be appointed to investigate the affairs of the Company and realise its assets; (ii) the Petitioner can submit a proof of debt for the sums outstanding under the Loan Agreement; and, (iii) the affairs of the Company can be properly wound down in an official liquidation.

36 In the circumstances, it is just and equitable that the Company be restored to the Register and wound up under the provisions of the Companies Law.

37 Further, the Company is liable to be wound up under section 92(d) of the Companies Law on the basis that it is unable to pay its debts pursuant to section 93(c) of the Companies Law, as evidenced by:

- i) the fact that it has been unable to pay the amounts due and owing to the Petitioner under the Loan Agreement; and
- ii) it was allowed to be struck-off the Register for non-payment of fees.

NOMINATION OF JOINT OFFICIAL LIQUIDATORS

38 The Petitioner nominates John Paul Royle and Margot MacInnis of Grant Thornton Specialist Services (Cayman) Limited, 48 Market Street, 2nd Floor, Suite 4290, Canella Court, Camana Bay, Grand Cayman, Cayman Islands, as joint official liquidators of the Fund.

THE PETITIONER THEREFORE HUMBL Y PRAYS THAT:

- (1) The Company be restored to the Register.
- (2) The Company be wound up by the Court pursuant to the Companies Act.
- (3) John Paul Royle and Margot MacInnis be appointed as Joint Official Liquidators of the Company.

- (4) The Joint Official Liquidators be permitted to exercise any of the powers specified in Part I of Schedule 3 of the Companies Act with further sanction of the Court, and any of the powers specified in Part II of Schedule 3 of the Companies Act with or without further sanction of the Court.
- (5) The Joint Official Liquidators have sanction to engage attorneys and other professionally qualified persons both in and outside the Cayman Islands pursuant to paragraph 11 of Part I of Schedule 3 of the Companies Act.
- (6) The Joint Official Liquidators have sanction to seek recognition of their appointment in the United States of America, the United Kingdom, Hungary and any other jurisdictions that the Joint Official Liquidators subsequently deem appropriate.
- (7) The costs of and incidental to the Petition be paid forthwith out of the assets of the Company as an expense of the liquidation.
- (8) Such other order or directions may be made as the Court thinks fit.

Dated 23 December 2020



Harney Westwood & Riegels

Attorneys-at-Law for and on behalf of the Petitioner

NOTE: It is intended to serve this Petition upon:

- 1 The Registrar of Companies; and
- 2 The Company at its last known registered office.

THIS PETITION was filed by Harney Westwood & Riegels, Attorneys-at-Law for the Petitioner, whose address for service is 3rd Floor, Harbour Place, 103 South Church Street, PO Box 10240, Grand Cayman KY1-1002, Cayman Islands (**Ref: 041163.0017/PPS/MYB**)