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12-201-09

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT  
CIVIL ACTION NO. 04-1777

RENAISSANCE WORLDWIDE, INC.

vs.

CONVERGED ACCESS INC., et al.

**MEMORANDUM OF DECISION AND ORDER**  
**AFTER JURY-WAIVED TRIAL**

In this matter, Renaissance Worldwide, Inc. ("Renaissance")<sup>1</sup> claims that Sitara Networks, Inc. ("Sitara") failed to pay Renaissance approximately \$1.2 million in rent under a written sublease and that Converged Access, Inc. ("Converged") is liable for Sitara's debt because Converged is Sitara's corporate successor. Based on the credible evidence at trial, I find that Renaissance has sustained its burden of proof in this matter and that Converged is liable to Renaissance for the rent obligation incurred by Sitara.

This matter was tried without a jury over the course of several weeks.

**Findings of Fact**

I make the following findings of fact based on the credible evidence before me at that trial.

1. On or about June 30, 1998, Renaissance leased a building at 52 Second Avenue in Waltham, Massachusetts. Subsequently, on or about March 17, 2000, with the consent of its landlord, Renaissance sublet a portion of its leased premises to Sitara. Pursuant to the terms of that lease, Sitara agreed to pay rent monthly to Renaissance and to keep the premises in good condition. (See Exhibits 145 and 146).
2. The terms of the lease, specifically the amount of the monthly rent, were never modified in accordance with the lease provisions. In April of 2002, Sitara stopped paying rent in order

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<sup>1</sup>At some time after the sublease to Sitara, Renaissance was acquired by Aquent; hence the references to Aquent as the landlord at trial and in various exhibits.

- to bring Renaissance to the table to renegotiate the terms of the lease. (Exhibit 107, pp. MCV 1974-1975). Despite some efforts at negotiating a different rent amount, I find that no binding agreement was reached between the parties and no written amendment to the lease was ever signed by the parties. While Ken Pryde ("Pryde"), the Chief Financial Officer at Sitara and subsequently at Converged, testified at trial that there was an agreement in 2002 with Renaissance for a new rent of approximately \$47,000/month, that testimony is contradicted by Pryde's Financial Update of January 16, 2003 (Exhibit 107, pp. MCV 1974-1975), which indicates that negotiations with the landlord had not been successful and that the monthly rent at that time was \$81,788. The sublease was terminated by notice dated January 27, 2003 (Exhibit 167) and Sitara vacated the premises at the end of February of 2003. I credit the testimony of James McKeown of Renaissance that efforts were made to lease the premises after Sitara vacated them but that those efforts were not successful..
3. I find that Sitara owed Renaissance \$1, 168,369.79 for unpaid rent, base electric, escalations, and excess electric charges for the period of May, 2002, through the end of July, 2003.
  4. Malik Khan ("Khan") and two others, Manickam Sridhar ("Sridhar") and Sylvain Louchez, founded Sitara in 1996. As of May of 2004, Sitara's main office was located at 31 Dunham Road in Billerica, Massachusetts. Khan was a shareholder in Sitara and was its CEO/President and a member of its Board of Directors from the time of its inception until it went out of business in May of 2004.
  5. As of May, 2004, Khan was Sitara's CEO/President; Sridhar was the Chief Technology Officer and Vice-President of Engineering; Pryde was the Chief Financial Officer; Ron Waeghe ("Waeghe") was Vice-President of Sales; Doug Antaya ("Antaya") was Vice-President of Marketing; Keyur Patel was responsible for customer service.
  6. There was conflicting evidence as to who was on the Sitara Board of Directors. Apparently on the Board of Directors of Sitara when amendments to the corporate documents were being considered in February, 2004, were Khan, Joseph Alsop, David Brown, Richard Burnes, and Edwin Kania. (Exhibit 131, p. CR0018 and other pages). According to Board minutes from the meeting of April 9, 2004, however, James Wade is listed as a Board member, along with Khan, Alsop, and Kania as constituting all of the Directors of the Corporation (Exhibit 35).

Khan could not recall whether Wade was a member of the Board or was an observer at that time; other witnesses said that Wade was not a member, but merely an observer. I find that as of April of 2004, the Sitara Board of Directors was constituted of Khan, Alsop, and Kania. Wade was either a member of the Board or an observer.

7. Sitara owed money to Lighthouse Capital Partners ("Lighthouse"). Pursuant to the terms of a First Lease Forebearance and Amendment Agreement dated November 22, 2002, Sitara agreed to make monthly payments to Lighthouse and pledged its assets as security for its obligation to Lighthouse. In early 2004, Sitara fell behind in payments due to Lighthouse and, as of the time that Lighthouse foreclosed on Sitara's assets, Sitara owed Lighthouse approximately \$1.1 million.
8. At the beginning of 2004, Sitara sought additional capital from investors. While Sitara had a large number of investors at one point in time, only twelve investors participated in response to the 2004 "Escrow Financing." Those twelve investors were: The Woodford Farm Trust (whose principal was Joseph Alsop, a member of Sitara's Board of Directors); Ashford Capital; Daniel Holland; M/C Investors LLC; One Liberty Fund III, LP; SI Venture Fund II, LP; Minette LaCroix; Manny Fernandez; John Halligan; N. Adam Rin; Malik Khan; and NEA. As part of the pledge of the Escrow Financing, Sitara was required to reduce its unsecured debt by 80%.
9. When Sitara ran into financial difficulties in 2004 and was unable to make its payments to Lighthouse and other creditors, it hired Argus Management Corporation ("Argus"), a management consulting firm which specializes in assisting financially distressed companies. Argus was authorized to speak with Sitara's creditors in an effort to reach some compromise on the amounts it owed to those creditors in an effort to reach the 80% reduction called for by the Escrow Financing agreement.
10. Argus attempted to get Renaissance to compromise on the amount it was due for rent under the sublease. While there is a dispute in the evidence over what offers/demands were made at various times and over the reasons for the inability of the parties to reach an agreement, there is no dispute that the parties were unable to reach an agreement on an amount which would have been satisfactory to both sides. Renaissance participated in negotiations and at

some point indicated a willingness to settle for approximately 50-60% of what it was owed. I do not find that Renaissance acted in bad faith during these discussions. Specifically, I find that Renaissance, through McKeown and Domilici, did not refuse Sitara's settlement offers with the intent to drive Sitara out of business. Renaissance made a business judgment that what it was being offered to compromise the debt owed by Sitara was not reasonable and the company chose to fight, rather than settle.

11. In an e-mail to some colleagues and Sitara Board members dated April 8, 2004 (Exhibit 27), Khan noted the debt of \$1.1 million to Sitara's ex-landlord and laid out the then-current status of negotiation with Renaissance. He then discussed Sitara's current options, including the option which it eventually took: "[W]e hand the keys to Lighthouse and then purchase the assets back from them. We have spent time working this last option out with Argus, who have much more experience at this than we do . . . Financially, this is a better deal for all of us but more complicated." He concluded the e-mail with a promising assessment of the company's future and stated "we have to find a way to financially engineer a way to keep the company alive."
12. Khan worked with Argus to develop the plan to keep the company alive and consulted with Tom Doherty of Argus as to the timing and the manner of approaching Lighthouse with its plan. (See Exhibit 28).
13. By April 21, 2004, the plan had been proposed to Lighthouse and proposals were being discussed between Sitara and Lighthouse as to how Sitara's \$1.1 million debt to Lighthouse would be handled in the working out of the plan. In the course of that discussion, Khan indicated to Tom Conneely of Lighthouse that "If we are going to go through the trouble and expense of creating a new company, there is no point burdening it with the liabilities of the old company." (See Exhibit 31).
14. Khan continued working with Argus and then with Lighthouse to carry out the plan, which it had "engineered", to liquidate Sitara, hand over the assets to Lighthouse, and then, as a new company, purchase the assets back from Lighthouse. Khan wrote to Suzanne King, an investor in Sitara, on April 26, 2004:  
This [failure to reach an agreement with Renaissance] has put us in a difficult

position of having to liquidate the company and handing the assets over to Lighthouse. However, while the liquidation value is substantially under \$500K for Lighthouse, as an ongoing business, Sitara has considerably more value. We have a \$4m a year revenue business, running close to cash flow break-even. The attached presentation shows the strength of the fundamental business, and our blue-chip customer base. With the completion of the new integrated access device, which combines a voice gateway, firewall, VPN, intrusion detection, routing and switching, with wireless access and Sitara's unique QoS technology at a price point of below \$1000, we believe we can substantially enhance the value of this company. The new product is in the prototype stage and our plan is to have beta units available by the end of the year.

Given this situation, we have spoken to Lighthouse about the possibility of buying back Sitara's assets in an Article 9 secured asset sale transaction. . . We have reached preliminary agreement with Lighthouse to have a [new company] buy Sitara's assets from Lighthouse . . . With this transaction, [the new company] would inherit Sitara's current business, assets, IP, brand names, trade marks and copyrights, with no debt on its balance sheet . . . Moreover, if done expeditiously, which Lighthouse is eager to do, there would be a seamless transition from employees, customers and the market, with minimal disruption to the business . . .

The Sitara management team, its board and the investors represented on it, have chosen to execute this plan. We are in the midst of forming [the new company], and to have Lighthouse foreclose on Sitara by next Friday, followed by [the new company's] purchase of the same assets on terms described above.

15. On the next day, April 27, 2004, Renaissance brought this lawsuit against Sitara and Converged was incorporated by Ken Pryde in Delaware.
16. On April 30, 2004, Khan confirmed his agreement with Lighthouse's "last and best" offer. In that e-mail communication, Khan offered the services of "our" legal counsel to draft the notice of foreclosure and the proposed notice of sale of Sitara's secured assets to Converged. (Exhibits 32, 74). As part of the agreement, Converged agreed to assume, in the form of a new loan, the \$1.1 million in secured debt that Sitara owed to Lighthouse.
17. Lighthouse gave notice of default to Sitara on April 30, 2004, and sent a "Notice of Private Disposition" to Sitara, with a cc to Renaissance, on May 5, 2004. (Exhibit 137)
18. On May 17, 2004, Lighthouse sold all of Sitara's assets to Converged at a private sale. The sale included all of Sitara's personal and intangible property, its customer lists, trade secrets, inventory, patents, copyrights, trademarks, other intellectual property, etc. (Exhibit 1,

including Exhibit A which is attached thereto). After the sale, Converged owed Lighthouse \$1.1 million (See Exhibit 50), the same amount that Sitara had owed to Lighthouse before the sale.

19. Khan was the founder of Converged, which was incorporated by Ken Pryde on April 27, 2004, and was its CEO/President until his departure in the Spring of 2005. Khan was an original member of Converged's Board of Directors and remained on the Board after his departure in 2005. Sridhar became Converged's Chief Technology Officer or Vice-President of Engineering; Pryde became Converged's Chief Financial Officer; Waeghe became Converged's Vice-President of Sales; Antaya became Converged's Vice-President of Marketing; and Keyur Patel was responsible for customer service at Converged. While new people have been hired and new positions created since the time that Converged was founded, its initial management team was the same as had been in place at Sitara. (See Exhibit 2).
20. As with the Sitara Board of Directors, there was conflicting evidence as to who was on Converged's Board of Directors. While Converged argues that there were eight Converged Board members and points to testimony of Pryde to that effect, I recollect Pryde testifying, after being shown the minutes of the September 23, 2004 Board meeting, that four of the Directors, Moot, Suneby, Parker, and Morrissette, must have joined the Board later than September of 2004. From those minutes of the Board meeting of September 23, 2004, it appears that the Board members were Khan, Alsop, Daniel Holland, and James Wade (Exhibit 36). In an e-mail of November 18, 2004, with a cc to Khan, Pryde thanked Alsop, Holland, and Wade for attending the Board meeting on that date and gave them the dates for meetings through 2005. (Exhibit 81). In what appears to be a term sheet, dated December 30, 2004, regarding financing being obtained by Converged (Exhibit 34), there is a reference to leaving the Board as it was then constituted, with Khan, Alsop, Wade and Holland being the members, and adding a representative from North Atlantic Capital. Those same four members were listed as being in attendance on February 17, 2005; however, in those minutes they are noted to constitute a majority of the Board members (Exhibit 37). I find that at least through the end of 2004, there were four members of Converged's Board of

Directors: Khan, Alsop, Holland, and Wade. Depending on Wade's status as either a member or an observer of Sitara's Board, either two or three of Converged's four Board members had been on the Sitara Board of Directors. In addition, both Ed Kania, who was on Sitara's Board, and Dan Holland, who was on Converged's Board, were affiliated with Flagship Ventures, an investor in both entities.

21. Of the twelve investors in Sitara's 2004 Escrow Financing, eleven became initial investors in Converged. Those investors who contributed toward Sitara's wind down costs received shares of common stock in Converged which reflected the amount of money they had each contributed. (Exhibit 23)
22. When Sitara ceased operating in May of 2004, Converged hired the employees who were working for Sitara at that time. Converged began its operations with its principal offices in the same office formerly used by Sitara at 31 Dunham Road in Billerica, Massachusetts. Converged used Sitara's telephone and facsimile numbers. Visitors to Sitara's website were automatically redirected to Converged.
23. After purchasing Sitara's assets, Converged continued to market and sell Sitara's products to Sitara's customers, to honor the agreements that Sitara had with its customers, and to use the Sitara name. Khan wrote to former Sitara customers and business partners on May 19, 2004:

I am pleased to announce that Converged Access Inc., . . . today has successfully completed a management buyout of the assets of Sitara Networks, Inc. From Sitara Networks' secured lender.

The transaction is not expected to affect Sitara Networks customers and business partners. The acquisition includes the award winning QoSWorks® QoSArray™, and QoSDirector™ product lines, related technology and inventory. All of the employees of Sitara Networks were offered and have accepted positions with Converged Access Inc. Your contacts within the company, including sales and support, will remain the same as they were with Sitara Networks. In addition to myself, the management team of Ron Waeghe, Sri Sridhar, Doug Antaya, Keyur Patel, Gerry Roth, Juan Carlos Garcia and Ken Pryde have all agreed to lead their respective organizations.

.....  
With this buyout, the QoSWorks and QoSDirector products will be available from Converged Access through its direct sales force and global network of resellers. Every effort has been made to ensure that former Sitara Networks' customers do not

experience any disruption of service. Converged Access will provide support to former Sitara Networks customers. As part of this effort, Converged Access is honoring the warranty terms of all Sitara Networks products. The company is also committed to continuing to evolve the award winning functionality of these platforms. The QoSWorks and QoSDirector products continue to be available for delivery under their standard leadtimes. Since the Sitara Networks name is well known in the industry and has been acquired along with the other assets by Converged Access, it will continue to be used in association with the QoSWorks and QoSDirector products.

(Exhibit 2)

For more than a year after its acquisition of Sitara's assets, Converged continued to use Sitara's name on its product packaging and marketing materials and on its website.

24. QoSWorks and QoSDirector, both Sitara products, continued to be marketed and sold by Converged. QoSWorks products and services accounted for nearly all of the revenues of Converged in its first year in business.
25. QoSArray, another Sitara product, was not sold by Converged; however, although QoSArray was available for sale during the last two year's of Sitara's existence, it was not being actively sold by Sitara at that point in time.
26. Converged Traffic Manager ("CTM"), a Converged product, is QoSWorks re-branded. In May, 2005, Per Suneby (Suneby), Converged's Chief Strategy Officer at the time and later its President/CEO, noted that one of the "Imperatives for 2Q", the second quarter of 2005, was to rebrand QoSWorks to "Converged Traffic Management". (Exhibit 7, p. MCV 2208). In a June 13, 2005 e-mail, Khan referred to CTM as "Ex-QoSWorks." (Exhibit 21). Suneby also made reference to the "rebranding of Converged Traffic Managers (formerly QoSWorks)." in a July 29, 2005 e-mail. (Exhibit 9). While CTM may ultimately have had new or different features which QoSWorks did not have, I find that it was essentially the product which was developed, marketed, and sold by Sitara.
27. Converged Policy Manager ("CPM"), another product which Converged asserts it developed and which makes it a different company from Sitara, appears to be QoSDirector with a new designation. The product codes and descriptions used by Sitara for QoSDirector are the same as the product codes and descriptions used by Converged for its CPM.
28. Converged Compression Appliance ("CCA"), is a product of Converged which Sitara did

