Court File No.: 08-CL-7878

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OF ARRANGEMENT OF UNIVERSAL SETTLEMENTS INTERNATIONAL INC.

Applicant

FACTUM OF THE APPLICANT, UNIVERSAL SETTLEMENTS INTERNATIONAL INC.
(Hearing Returnable April 9, 2015)

April 6, 2015

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Court File No.: 08-CL-7878

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

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AND IN THE MATTER OF A PLAN OF COMPROMISE OF ARRANGEMENT OF UNIVERSAL SETTLEMENTS INTERNATIONAL INC.

Applicant

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Court File No. 08-CL-7878

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OF ARRANGEMENT OF UNIVERSAL SETTLEMENTS INTERNATIONAL INC.

Applicant

FACTUM OF UNIVERSAL SETTLEMENTS INTERNATIONAL INC.
(Hearing Returnable April 9, 2015)

I. OVERVIEW

1. This motion is brought by the Applicant, Universal Settlements International Inc. ("**USI**") for, *inter alia*, an order approving the sale transaction (the "**Transaction**") contemplated by an Asset Purchase Agreement dated March 23, 2015 (the "**Sale Agreement**") between USI, in its capacity as trustee for the Plan Beneficiaries (the "**Vendor**") and the purchaser, (the "**Purchaser**") and vesting in the Purchaser all right, title and interest of the Vendor in and to the Purchased Policies that are sold pursuant to the Sale Agreement (the "**Purchased Policies**"), free and clear of all claims and encumbrances.

2. USI is in the business of "life settlements" which involves the purchase of life insurance policies from insured individuals at a discount from the face value of the policies, and selling interests in those policies to investors. Investment returns are intended to be earned on the maturity of the policies.

3. On December 2, 2008, USI filed for and obtained protection from its creditors under the CCAA. Ernst & Young Inc. was appointed as the Monitor of USI, and the Plan was sanctioned by the Court of June 22, 2009. Under the Plan, all policies held by USI on behalf of investors and on its own behalf (the "**Policies**") were pooled to be held in trust by USI for the benefit of USI's creditors. Since implementation, USI has been administering the Policies on behalf of the Creditors.

4. After almost six years after the implementation of the Plan, no proceeds have been available to distribute to Creditors. Further, insufficient proceeds have been generated by the Policies to pay the costs of maintenance, and USI has been required to incur costs of financing pursuant to a US$10 million revolving loan (the "**Revolving Loan**") in order to ensure that the Policies do not lapse.

5. To address this liquidity issue, USI, in consultation with the Monitor, recommended to the Creditors that the Monitor be permitted to conduct a process to market and sell the Policies. Conducting a sales process required a Plan Amendment, andthe Creditors approved the Plan Amendment, which was sanctioned by this Court. The Court further approved an amended and restated sale and investor solicitation process (the "**SISP**") to be conducted by the Monitor for, *inter alia*, the sale of all or some of the Policies.

6. The Monitor conducted the sale process in accordance with the SISP and after review of the Qualified Bids received, the Monitor and USI determined that the offer by the Purchaser was the best offer.

7. After identifying the Purchaser's offer as the superior offer in the SISP, and after extensive negotiations, USI entered into the Sale Agreement. USI now seeks Court approval of the Sale Agreement in accordance with its terms.

8. USI and the Monitor recommend the requested order on the grounds that:

(a) The SISP and the determination of the Successful Bid (as defined in the SISP) was conducted in a fair and reasonable manner;

(b) The purchase price set out in the Sale Agreement is the highest available and is fair and reasonable in all of the circumstances;

(c) In the absence of substantial maturities, USI will not be in a liquidity position to continue to pay premiums in respect of the Policies beyond June 30, 2015;

(d) The Revolving Loan matures on July 31, 2015 and there is no assurance of long-term funding beyond the completion of the proposed Transaction; and

(e) The proposed sale price, net of costs, taxes, and other deductions, is anticipated to provide sufficient cash to permit a distribution to Creditors in accordance with the Plan. The Sale Agreement and the transaction is anticipated to achieve recoveries for the Creditors and provide certainty and closure to USI and Creditors.

9. This Factum is filed in support of USI's motion for an Order:

(a) Approving the Transaction and the Sale Agreement, and vesting in the Purchaser title and interest in and to the Purchased Policies;

(b) Authorizing and directing USI to take such additional steps and execute such additional document as may be necessary to give effect to the Sale Agreement;

(c) Approving the Twenty-Third Report of the Monitor dated March 24, 2015 and the conduct and activities disclosed therein; and

(d) Sealing Confidential Appendices "E", "F", "G" and "I" of the Twenty-Third Report of the Monitor, dated March 24, 2015 (the "**Twenty-Third Report**").

II. FACTS

10. USI is an Ontario corporation that is in the business of "life settlements". Investing in life settlements involves the purchase of life insurance policies from insured individuals at a discount from the face value of the policies, and the sale of interests in those policies to investors. Investment returns are intended to be earned on the maturity of the policies.[1]

11. On December 2, 2008, USI filed for and obtained protection from its creditors under the CCAA, pursuant to the provisions of an initial order dated December 2, 2008 (the "**Initial Order**"). Pursuant to the Initial Order, Ernst & Young Inc. was appointed as the Monitor of USI.[2]

12. The Plan was sanctioned by the Court on June 22, 2009. Under the Plan all Policies held by USI on behalf of investors and on its own behalf were pooled to be held in trust by USI for the benefit of USI's two classes of creditors, Purchasers and Ordinary Creditors (collectively, the

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[1] Affidavit of Christopher Halas, sworn March 24, 2015 ("**Halas Affidavit**") at para. 3, Applicant's Motion Record, Tab 2.
[2] Halas Affidavit, at para. 4-5.

"**Creditors**"). Since implementation, USI has been administering the Policies on behalf of Creditors.[3]

13. After almost six years since the implementation of the Plan, no proceeds have been available to make any distributions to Creditors, as contemplated by the Plan. Insufficient proceeds have been generated by the Policies held pursuant to the Plan to pay the costs of maintenance, and USI has been required to incur the costs of financing pursuant to a US$10 million Revolving Loan in order to ensure that policies do not lapse.[4]

14. To address this liquidity issue, USI, in consultation with the Monitor, recommended to its Creditors that the Monitor be permitted to conduct a process to market and sell the Policies.[5]

Plan Amendment and SISP

15. The Plan did not permit a sales process to commence under these circumstances. Accordingly, USI, in consultation with the Monitor, proposed an amendment to the Plan (the "**Plan Amendment**") which, among other things, would amend the Sale Process provisions in section 4.9 of the Plan, to allow the Monitor to commence a process for the sale of or investment in, financing or re-financing of all or some of the policies that have not matured pursuant to the proposed SISP.[6]

16. On October 1, 2014, USI sought and obtained two orders:

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[3] Halas Affidavit, at para. 6.
[4] Halas Affidavit, at para. 7.
[5] Halas Affidavit, at para. 8.
[6] Halas Affidavit, at para. 9.

(a) a Meetings Order authorizing and approving the calling and holding of meetings of Purchasers and Ordinary Creditors on November 5, 2014 for purposes of considering and voting on the proposed Plan Amendment (the "**Creditors' Meetings**"); and

(b) an order approving the proposed SISP and authorizing the Monitor to commence the implementation of the SISP immediately upon and in the event of the achievement of the requisite statutory thresholds for approval of the Plan Amendment at the Creditors' Meetings, and the issuance of an order sanctioning the Plan Amendment (the "**SISP Approval Order**").[7]

17. On November 19, 2014, the Court approved an amended and restated SISP in order to reflect amendments to the timetable for the SISP.[8]

18. The Creditors approved the Plan Amendment at a Creditors' Meeting on November 24, 2014. On November 27, 2014, USI sought and obtained an order sanctioning the Plan, as amended by the Plan Amendment ("**Sanction Order**").[9]

19. Upon obtaining the Sanction Order, the Monitor commenced its conduct of the SISP.[10]

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[7] Halas Affidavit, at para. 10.
[8] Twenty-Third Report of the Monitor dated March 24, 2015 ("**Twenty-Third Report**"), at para. 12.
[9] Halas Affidavit, at para. 11.
[10] Halas Affidavit, at para. 12.

Conduct of the SISP

20. The Monitor was fully and exclusively authorized, empowered and directed to carry out the SISP.[11] The SISP was divided into two (2) Phases so as to protect the confidentiality of sensitive personal information of insured relating to the Policies.[12]

21. In Phase I of the SISP, twenty-eight (28) Confidentiality Agreements were executed with Prospective Bidders and these Prospective Bidders were deemed by the Monitor to be Phase I Qualified Bidders for the purposes of participating in Phase I of the SISP. These Phase I Qualified Bidders were provided with access to the Phase I electronic data room established by the Monitor and USI.[13]

22. By February 2, 2015, the Monitor had received 15 Letters of Intent ("**LOI**") from Phase I Qualified Bidders consisting of fourteen (14) offers to purchase and one offer to finance the portfolio of Policies.[14]

23. By February 10, 2015, after consultation with USI, the Monitor notified nine (9) Phase I Qualified Bidders that they had been qualified as Phase II Qualified Bidders. The Phase II Qualified Bidders were then provided with access to the Phase II electronic data room consisting of more detailed and un-redacted information on the Policies.[15]

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[11] Twenty-Third Report, at para. 24.
[12] Twenty-Third Report, at para. 26.
[13] Twenty-Third Report, at para. 37.
[14] Twenty-Third Report, at para. 39.
[15] Twenty-Third Report, at paras. 40 and 42.

24. The form of the Sale Agreement provided by the Monitor to Phase II Qualified Bidders required that each bidder allocate a specific purchase price to each Policy.[16]

25. On March 2, 2015, the deadline for delivery of Qualified Bids, the Monitor received four (4) Qualified Bids for the Policies. Each Qualified Bid was reviewed and assessed based on the criteria set out in the SISP.[17]

26. The primary consideration for the Monitor in evaluating the bids was the price offered for the Policies. The Monitor reviewed the prices offered for the Policies by each bidder in comparison to the other bids, and in comparison to a valuation prepared by an actuarial firm, Lewis & Ellis ("L&E"), prepared for USI at the Monitor's request.[18]

Results of the SISP

27. After review of the 4 Qualified Bids, the Monitor and USI recommended the bid from the Purchaser for the following reasons:

(a) The Qualified Phase II Bid submitted by the Purchaser is the highest of all bids received and is reasonable in the context of the valuation of the Policies obtained by USI prior to the SISP;

(b) The mark-up of the form of Sale Agreement submitted by the Purchaser with its offer had very limited changes to the template form provided by the Monitor;

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[16] Twenty-Third Report, at para. 43.
[17] Halas Affidavit, at para. 13 and Twenty-Third Report, at para. 45.
[18] Twenty-Third Report, at para. 46.

(c) The Purchaser has confirmed to the satisfaction of the Monitor that it has the financial wherewithal to complete the proposed Transaction;

(d) The Purchaser confirmed its ability to complete the proposed Transaction by the outside date of April 8, 2015 (now revised to April 13, 2015); and

(e) Completing the proposed transaction with the Purchaser results in the sale of all Policies, which saves the time and costs of any subsequent process to sell or otherwise deal with any remaining Policies.[19]

28. On March 6, 2015, the Monitor notified the Purchaser that it intended to move forward with a view to completing a transaction with it, and at the same time notified the other three Qualified Phase II Bidders that the Monitor was working to complete a transaction with another party.[20]

29. On March 23, 2015, USI executed the Asset Purchase Agreement dated March 23, 2015, conditional on receiving the proposed Approval and Vesting Order from this Court.[21]

Confidential Appendices

30. Appendices "E", "F", "G" and "I" of the Twenty-Third Report contain sensitive and confidential personal information of the insureds, sensitive commercial information regarding the pricing of individual Policies, and sensitive information regarding the valuations of the Policies, the disclosure of which could negatively impact the conduct of the SISP and the ability

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[19] Halas Affidavit, at para. 14 and Twenty-Third Report, at para. 51.
[20] Halas Affidavit, at para. 15.
[21] Halas Affidavit, at para. 16.

to pursue a subsequent transaction in the event that the proposed Transaction does not close for some reason.[22]

USI and the Monitor approve the Transaction

31. USI and the Monitor are of the view that the Sale Agreement and the Transaction are in the best interests of Creditors and represents a successful outcome of the conduct of the SISP. USI and the Monitor recommend the requested order on the grounds that:

(a) The SISP and the determination of the Successful Bid (as defined in the SISP) was conducted in a fair and reasonable manner;

(b) The purchase price set out in the Sale Agreement is the highest available and is fair and reasonable in all of the circumstances;

(c) In the absence of substantial maturities, USI will not be in a liquidity position to continue to pay premiums in respect of the Policies beyond June 30, 2015;

(d) The Revolving Loan matures on July 31, 2015 and there is no assurance of long-term funding beyond the completion of the proposed Transaction; and

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[22] Halas Affidavit, at para. 17 and Twenty-Third Report, at para. 64.

(e) The proposed sale price, net of costs, taxes, and other deductions, is anticipated to provide sufficient cash to permit a distribution to Creditors in accordance with the Plan. The Sale Agreement and the Transaction are anticipated to achieve recoveries for the Creditors and provide certainty and closure to USI and Creditors.[23]

III. ISSUES

32. The issues on this motion are:

(a) Should the Court approve the Transaction?

(b) Should the Court grant an order vesting title in the Purchased Policies in the Purchaser, fee and clear of all encumbrances as set out in the vesting order?

(c) Should the Court authorize and direct USI to carry out the terms of the Sale Agreement and take such additional steps and execute such additional documents as may be necessary to complete the Transaction?

(d) Should the Court authorize the sealing of the Confidential Appendices "E", "F", "G", and "I" of the Twenty-Third Report?

IV. LAW AND ARGUMENT

The Transaction should be Approved

33. In *Royal Bank v. Soundair Corp.*, the Ontario Court of Appeal summarized the duties of the Court when assessing whether to approve a transaction to sell assets:

> (b) It should consider whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;

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[23] Halas Affidavit, at para. 18 and Twenty-Third Report, at para. 65.

(c) It should consider the interests of all parties;

(d) It should consider the efficacy and integrity of the process by which offers are obtained; and

(e) It should consider whether there has been unfairness in the working out of the process.[24]

34. The *Soundair* factors focus on the "integrity of the process" which is integral to the administration of a sales process under the CCAA.

35. Where a sale process leading to the proposed sale is fair, transparent and efficient, the court will not lightly interfere with the exercise of the Applicant's and the Monitor's commercial and business judgment in the context of an asset sale.[25] Further, in cases such as the present, where the SISP was put in place by a Court Order, that sale process should be honoured except in extraordinary circumstances.[26]

36. USI submits that the Purchased Policies were marketed and the Sale Agreement negotiated in a fair, transparent and commercially reasonable manner, consistent with the SISP. The Sale Agreement with the Purchaser is the superior offer obtained in a robust and fair SISP.

(a) Effort to Obtain the Best Price

37. In the effort to obtain the best price for the Purchased Policies, the Monitor acted at all times in accordance with the SISP approved by this Court. The Monitor thoroughly canvassed

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[24] *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) [*Soundair*] at para. 16 (Commercial List Authorities Book at Tab 7).
[25] *Re Abitibi Bowater Inc.*, 2010 QCCS 1742 at para. 71.
[26] *Re Grant Forest Products Inc.*, 2010 ONSC 1846 at para 29.

parties who may have an interest in the SISP by speaking to potential bidders directly and sending out a Teaser Letter.[27]

38. Once bids were received, the primary consideration for the Monitor in evaluating the bids was the price offered for the Policies. Further, in evaluating the bids, the Monitor compared each bidder against the other bids and the valuation prepared by L&E.

39. The Monitor, in consultation with USI, determined that the Purchaser's bid was the highest available and is fair and reasonable in all of the circumstances.

40. The Transaction results in the sale of all Policies (including partial policies) held in trust by USI for the Plan Beneficiaries for US$37,760,218.23[28], plus an amount to reimburse USI for insurance policy premiums that are required to be paid prior to the closing date but relate to coverage periods that are after the closing date.[29]

41. USI submits that the Monitor, in consultation with USI, has taken all reasonable steps to obtain the best price, has followed the SISP, and acted providently. USI and the Monitor believe that the price is reasonable in the circumstances.

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[27] Twenty-Third Report at para. 24.
[28] This amount is less than the amount set out in the Sale Agreement because of maturities that have occurred after the signing of the Sale Agreement. Any maturities prior to the closing of the Transaction are credited to USI and deducted from the purchase price in the Sale Agreement. Two policies have matured in this period with death benefits payable to USI in Trust for the Plan Beneficiaries of US$5,000,000.
[29] Twenty-Third Report, at para. 55.

(b) Interests of the Parties

42. It is well established that the primary interest is that of the creditors. An examination of the SISP, applying the *Soundair* test, is to primarily be conducted from the perspective of those for whose benefit the SISP has been conducted.[30]

43. USI submits that the Transaction is in the best interests of the Creditors. After almost six years since the Plan implementation, no proceeds have been available to make any distributions to the Creditors, as contemplate by the Plan. Further, insufficient proceeds have been generated by the Policies to pay the costs of maintaining the Policies and a Revolving Loan was entered into to pay these costs to ensure that Policies do not lapse.

44. The Transaction will achieve recoveries for the Creditors (after payment of liabilities) and will provide certainty and closure to USI and the Creditors.

45. If the Transaction is not approved, and in the absence of substantial maturities, USI will not be in a liquidity position to continue to pay premiums in respect of the Policies beyond June 30, 2015. Further, the Revolving Loan matures on July 31, 2015 and there is no assurance of long-term funding beyond the completion of the proposed Transaction. If there are not sufficient funds to pay the premiums on the Policies, the Policies will lapse and the Creditors will not receive any recoveries under the Plan.

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[30] *Soundair*, at paras. 39 and 41.

(c) Efficacy and Integrity of the Process

46. The Monitor marketed and Purchased Policies and sought bids from interested parties fairly and in accordance with the SISP. All interested parties were given the opportunity to participate in the SISP.

47. The SISP was a fair and effective process for maximizing realization of the Purchased Policies. The Purchased Policies were appropriately marketed in accordance with the SISP, the terms of the Sale Agreement are fair and commercially reasonable, and the integrity of the SISP has been maintained throughout.

(d) No Unfairness in Working Out the Process

48. The Monitor, with the assistance of USI, made diligent and sufficient efforts to get the best price that it could for the Purchased Policies. The Monitor followed the Court-approved SISP which was fair to all parties interested in purchasing the Policies. The Monitor properly carries out the mandate that was given to it by the SISP Approval Order.

(e) Conclusion with Respect to the *Soundair* Principles

49. The Transaction is consistent with the *Soundair* principles and USI respectfully requests that it be approved by this Court.

Approval and Vesting Order

50. A condition of closing the Transaction is that the Approval and Vesting Order (as set out in the Sale Agreement) shall be issued and entered by the Court. USI therefore seeks the Approval and Vesting Order from this Court to facilitate the closing of the Transaction.

51. All parties with a known interest in the Purchased Policies whose interests would be affected by the Approval and Vesting Order sought have been served with the Notice of Motion and proposed Order.

Sealing Order

52. USI seeks to have Confidential Appendices to the Twenty-Third Report sealed. These Confidential Appendices contain sensitive personal information of the insured, sensitive commercial information regarding the pricing of individual Policies, and sensitive information regarding the valuations of the Policies provided by L&E.

53. A sealing order should only be granted where:

> (a) An order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.[31]

54. The information subject to the sealing request is highly sensitive personal and commercial information regarding the insureds and various offers obtain in the SISP. The disclosure of this information could be harmful to the insureds and could undermine the integrity of the SISP. The disclosure of this information would also pose a serious risk the SISP in the event that the Transaction does not close and it becomes necessary to re-market the Purchased Policies for sale.

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[31] *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (Commercial List Authorities Book at Tab 15).

55. The preservation of the integrity of the insureds personal information and the court-supervised SISP outweighs the public interest in open and accessible court proceedings, as this information would not otherwise be available to the public in the context of a private sale process.

V. RELIEF REQUESTED

56. For the reasons outlined above, USI requests that this Court grant an Order, among other things, approving the Transaction and the relief requested in the Notice of Motion.

ALL OF WHICH is respectfully submitted this 6th day of April, 2015.

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SCHEDULE "A" – LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)

2. *Re Abitibi Bowater Inc.*, 2010 QCCS 1742

3. *Re Grant Forest Products Inc.*, 2010 ONSC 1846 at para 29.

4. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522

Re Universal Settlements International Inc.

Court File No.: 08-CL-7878

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED IN TORONTO

FACTUM OF THE APPLICANT,
UNIVERSAL SETTLEMENTS INTERNATIONAL INC.
(Hearing Returnable April 9, 2015)

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