Clerk's stamp:

COURT FILE NUMBER		1101-17318
COURT OF QUEEN'S BENCH OF ALBERTA		
JUDICIAL CENTRE		CALGARY
APPLICANTS		**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended** **AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, R.S.A 2000, c. B-9** **AND IN THE MATTER OF LEGACY COMMUNITIES INC., AIRDRIE CAPITAL CORPORATION, AIRDRIE COUNTRY ESTATES INC., RAILSIDE CAPITAL INC., RAILSIDE INDUSTRIAL PARK INC., FOUNDATION PLACE CAPITAL INC., and FOUNDATION PLACE INC.**
DOCUMENT		**BRIEF OF LAW AND ARGUMENT OF THE UNSECURED CREDITORS COMMITTEE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT		David W. Mann / David LeGeyt FRASER MILNER CASGRAIN LLP BANKERS COURT 15TH FLOOR, 850 - 2ND STREET S.W. CALGARY, ALBERTA T2P 0R8 PH. (403) 268-7097/3075 FX. (403) 268-3100 FILE NO.: 548427-1

BRIEF OF LAW AND ARGUMENT OF THE UNSECURED CREDITORS COMMITTEE

For the Application Before Madam Justice B.E.C. Romaine in Chambers on May 10, 2012 at 2:00 PM

Prepared by:

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Solicitors for the Unsecured Creditors Committee

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I. INTRODUCTION

1. This is the Brief of Law and Argument of the Unsecured Creditors Committee (the "**UCC**") created in these proceedings pursuant to an Order of Madam Justice B.E.C. Romaine made on January 19, 2012, as amended and restated (the "**UCC Order**").

II. ISSUES

2. The issues are:

   (a) whether Ronald Aitkens (alternatively also referred to as "**Mr. Aitkens**" or "**Management**") should be removed as the director of Legacy Communities Inc. ("**Legacy**"), Airdrie Capital Corporation, Airdrie Country Estates Inc. (collectively "**Airdrie**"), Railside Capital Inc., Railside Park Industrial Inc. (collectively "**Railside**"), Foundation Place Capital Inc., and Foundation Place Inc. (collectively "**Foundation**") pursuant to section 11.5(1) of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**"). (Legacy, Airdrie, Railside, and Foundation shall be collectively referred to as the "**Debtors**"); and

   (b) whether NAVIS Solutions Inc., and its principal, Mr. Keith Prosser should be appointed as the Chief Restructuring Officer ("**CRO**") of the Debtors.

III. FACTS

3. The facts are contained in the Affidavit of Kyle Brown, filed April 11, 2012 (the "**Brown Affidavit**"), the Supplemental Affidavit of Kyle Brown filed May 7, 2012 (the "**Supplemental Brown Affidavit**"), the various Affidavits sworn by Ronald Aitkens in these proceedings, the reports of Ernst & Young Inc. in these proceedings, and the cross-examination transcripts of Kyle Brown and Mr. Aitkens. The facts most pertinent to this application are set out below.

4. Parties who purchased bonds issued by one or more of the Debtors are referred to as "**Bondholders**". There are a large number of very small Bondholders. Approximately 40% of the Airdrie and Legacy Bondholders have invested $10,000 or less, and approximately 93% of Airdrie and Legacy Bondholder have invested $50,000 or less. Similarly, about 38% of Railside and Foundation Place Bondholders have invested $10,000 or less, and 92% of them have invested $50,000 or less.

- Brown Affidavit at Exhibit "Q".
- Supplemental Brown Affidavit at Exhibit "C".

A. Facts - Prior to the CCAA Proceedings

(a) Lift

5. 1252064 Alberta Ltd. ("**125**"), a company Mr. Aitkens is both the sole director and sole shareholder of, earned a "lift" of approximately $15.6 million by purchasing the real property now owned by Airdrie, Railside, and Foundation from third parties and then, shortly thereafter, reselling that real property to those Debtors, as follows:

(a) Airdrie: 125 acquired the real property for $5.4 million (the "**Airdrie Lands**") in a transaction with a closing date of October 25, 2006 and sold the Airdrie Lands, to Airdrie for $12 million on October 28, 2006 for a lift of $6.4 million;

- Affidavit of Ron Aitkens sworn on December 20, 2011 (the "**December 20 Affidavit**"), Exhibit "J" at pages 2 and 3.

(b) Railside: 125 acquired the real property (the "**Railside Lands**") for $15.1 million in a transaction with a closing date of September 11, 2007 and sold the Railside Lands to Railside for $22.5 million on March 31, 2008 for a lift of $7.4 million; and

- Affidavit of Ron Aitkens sworn on March 15, 2012 (the "**March 15 Affidavit**"), Exhibit "B" at pages 2 and 3.

(c) Foundation: 125 acquired the real property (the "**Foundation Lands**") for $3.06 million in a transaction with a closing date of August 30, 2007 and sold the Foundation Lands to Foundation for $4.5 million on February 7, 2008 for a lift of $1.44 million.

- March 15, Affidavit, Exhibit "E" at page 3.

(b) Non-Disclosure and Diversion of Funds

6. Legacy entered into an Investment Agreement dated December 15, 2005 with Harvest Capital Management Inc., ("**Harvest**") a company Mr. Aitkens is the sole director and sole shareholder of. Pursuant to this Agreement, Harvest or a related or affiliated company would invest funds on behalf of Legacy and pay Legacy interest of 7%, plus 20% or 30% of any investment gains.

Harvest would retain 70% or 80% of any investment gains, less the 7% interest payment (the "**Harvest Agreement**").

- Aitkens December 20 Affidavit, Exhibit "D".

7. The Harvest Agreement was not disclosed in any of the first Legacy Offering Memorandum dated July 15, 2005 ("**Legacy OM1**"), the second Legacy Offering Memorandum dated September 16, 2006 ("**Legacy OM2**") or the third Legacy Offering Memorandum dated October 29, 2007 ("**Legacy OM3**") (Legacy OM1, Legacy OM2, and Legacy OM3 shall collectively be referred to a the "**Legacy OMs**").

- Brown Affidavit at paras. 14 and 47(e).

8. Pursuant to the Harvest Agreement, Management caused approximately $9.6 million of Legacy funds acquired from Legacy Bondholders to be advanced to Harvest and 125 to be invested in investments located at Isla del Rey, Panama, Balsam Lake, Ontario, and Red Deer, Alberta (the "**Harvest Investments**"). The Harvest Investments were not disclosed to investors until Legacy filed for CCAA protection.

- December 20 Affidavit at paras. 26-33 and Exhibits "D", "E", "F" and "G".
- Brown Affidavit at paras. 14 and 47(e).

9. Management has admitted that the Harvest Investments are illiquid and a contributing factor in Legacy filing for CCAA protection. The Panama lands are subject to litigation.

- Aitkens December 20 Affidavit, at para. 40.

10. There is no evidence before the Court that any amounts have been repaid by Harvest or 125 since these proceedings commenced, or at all, notwithstanding that Mr. Aitkens controls all these companies. In cross-examination Mr. Aitkens confirms that Legacy has not made any demand for the return of the funds, has not demanded any security in respect of the amounts owing, has not issued a Statement of Claim, and that 125 cannot repay these amounts unless a repayment plan of unknown duration is agreed to.

- Transcript of cross-examination of Ronald Aitkens conducted April 24, 2011 (the "**Aitkens Transcript**") at page 50, line 10 to page 51, line 15.

11. The only business activities described in the Legacy OMs is acquiring 504 acres of land located west of Calgary, Alberta, near the Glencoe Golf and Country Club (the "**Legacy Lands**").

- Aitkens December 20 Affidavit, Exhibits "C" and "D".
- Brown Affidavit, Exhibit "Z"..

12. About half the Legacy Lands are in a flood plain and are not developable.

- Brown Affidavit at para. 46.

13. The presence of a sour gas well and high pressure sour gas pipeline (collectively the "**Sour Gas Well**") on the lands owned by Airdrie was not disclosed in the two Airdrie Offering Memoranda (collectively the "**Airdrie OMs**") and the Sour Gas Well was not pictured in any marketing materials prepared with respect to Airdrie even though the Sour Gas Well is a significant structure.

- Aitkens December 20 Affidavit, Exhibits "J" and "K".
- Brown Affidavit at para. 47(f).

14. Airdrie stated, in a marketing brochure respecting the Airdrie project, "Water issue resolved: As of December 20th, 2007 Alberta Environment dismissed appeal against the water sourcing for the Balzac East development zone". Yet, Mr. Aitkens deposes in the December 20 Affidavit that "(f)urther setbacks to the Airdrie Project were caused by water and sewage servicing issues that arose in or around 2008. ACE discovered at that time that it would be very difficult to bring the necessary water and sewage infrastructure to develop this area."

- December 20 Affidavit, at para. 60.
- Brown Affidavit at para. 47(g).

(c) Insufficient Communication with Bondholders

15. The only communication that Bondholders ever received regarding their investments were periodic updates. The tone of these updates was positive, and gave no indication of the dire state of the Debtors' financial affairs.

- Brown Affidavit at para. 47(h).

16. The Monitor has reported to this Honourable Court that Legacy and Airdrie did not provide adequate reporting to Bondholders during the past 5 or 6 years.

- Third Report of the Monitor, filed April 16, 2012 at para. 67.

17. Ron Aitkens has admitted that management changes are needed and to make governance of Legacy and Airdrie more direct and transparent, and that his involvement with the Debtors will be limited to a short interim period.

- Affidavit of Ron Aitkens filed April 16, 2012, at para. 19.
- Aitkens Transcript at page 56, lines 7-25.

(d) Lack of Progress

(1) Legacy

18. The objectives stated for the Legacy Lands in the Legacy OMs were as follows:

(a) In the short term, Legacy would invest the funds raised pursuant to the Legacy OMs into the purchase of the Legacy Lands and begin the process of taking the project through the necessary approval process at an estimated end cost of $500,000 to be funded by the capital raised through the Legacy OMs.

(b) In the long term, Legacy would either:

(i) Hold the land in anticipation of an increase in value and sell without land re-designation;

(ii) Obtain the re-designation approvals and sell the land to a third party developer;

(iii) Obtain the re-designation approvals and enter into a joint venture agreement with a real estate developer to develop the Legacy Lands; or

(iv) Obtain the re-designation approvals and develop the Legacy Lands.

(v) obtain approvals to subdivide the Legacy Lands; and

(vi) complete servicing of lots.

- Aitkens December 20 Affidavit, at para. 38.
- Brown Affidavit at Exhibit "Z".

19. Despite acquiring some of the Legacy Lands in 2006, Management has not been able to accomplish any of its long term goals and, indeed, has not been able to fully achieve any of its

short term goals, including the central task of acquiring all the Legacy Lands. No development, or even the acquisition of necessary development approvals and designations has occurred with respect to the Legacy Lands in approximately six years.

- Aitkens December 20 Affidavit at paras. 24 and 39-42.
- Brown Affidavit at paras. 14 and 47(c).

20. The total cost to Legacy to acquire all of the Legacy Lands is $26 million. Legacy raised $35,418,346 from Bondholders. Despite raising nearly $10 million dollars more than was required to acquire the Legacy Lands, Legacy only owns approximately 40% of the Legacy Lands and owns options to acquire the remainder. The exercise price for these options is $9 million, however Legacy has no working capital to exercise the options.

- Aitkens December 20 Affidavit at paras. 20 and 22-25.
- Second Report of the Monitor (Legacy and Airdrie Sources and Uses of Funds) filed April 5, 2012 ("**Sources and Uses Report**") at para. 17 and Appendix A.

(2) Airdrie

21. The objectives stated for the Airdrie Lands in the Airdrie OMs were as follows:

(a) In the short term, Airdrie would acquire the Airdrie Lands and pay out a vendor take back mortgage.

(b) In the long term, Airdrie would either:

(i) Sell the Airdrie Lands to a third party "as is";

(ii) Obtain the re-designation approvals from the M.D. of Rockyview to change current zoning from agricultural to medium residential and sell to a third party;

(iii) Obtain the re-designation approvals from the M.D. of Rockyview, service the Airdrie Lands and sell to a third party;

(iv) Obtain residential re-designation approvals from the M.D. of Rockyview, subdivide and service the property and sell individual lots to the general public; or;

(v) Sell the Airdrie Lands in parcels to a developer or other purchasers.

- Aitkens December 20 Affidavit, at para. 58.

22. Despite acquiring the Airdrie Lands in 2006, Management has not been able to accomplish any of its long term goals. No development, or even the acquisition of necessary development approvals and designations, has occurred on the Airdrie Lands in approximately six years.

- Brown Affidavit at paras. 14 and 47(c).
- Aitkens December 20 Affidavit at paras. 59 and 60.

(3) Foundation

23. The objectives stated for the Foundation Lands in the two Offering Memorandums respecting Foundation (the "**Foundation OMs**)" were to:

(a) Apply for and obtain the requisite permits necessary to construct a commercial building;

(b) Engage a construction company through a bid process;

(c) Construct a small commercial building of approximately 30,000 square feet, comprised of 5 floors with 3 levels of underground parking;

(d) Register a condominium plan with respect to the building to create separate titled units within the building; and

(e) Lease the units in the building to small to medium professional enterprises.

- Aitkens March 15 Affidavit, at para. 47.

24. Despite acquiring the Foundation Lands in 2008, Management has not been able to accomplish any of its long term goals, other than to obtain requisite building permits. No property development has occurred with on the Foundation Lands in approximately four years.

- Brown Affidavit at paras. 14 and 47(c).
- Aitkens March 15 Affidavit at paras. 48 and 49.

(e) Working Capital

25. The Sources and Uses Report indicates that each of Legacy and Airdrie do not have any working capital for development or anything else. Additionally, each of Legacy, Airdrie, and Foundation required debtor-in-possession ("**DIP**") financing upon receiving protection under the CCAA. Railside applied for DIP financing less then 30 days after entering CCAA protection. None of the Debtors have any cash and none of them have a business which generates cash.

- Brown Affidavit at para. 13.
- Aitkens December 20 Affidavit, at para. 64.
- Aitkens March 15 Affidavit, at para. 55.
- Affidavit of Ron Aitkens filed April 16, 2012.

26. At the time Legacy and Airdrie entered CCAA protection, the Monitor expected an additional $2.4 million in Legacy's bank account and an additional $208,000 in Airdrie's bank account, compared the actual amounts in those bank accounts.

- Sources and Uses Report at para. 14 and 26, and Exhibits A and B.

(f) Self Dealing and Conflicts

27. The Sources and Uses Report shows:

(a) parties controlled by Mr. Aitkens were overpaid fees totalling more than $1,200,000 by Legacy and totalling more than $475,000 by Airdrie.

- Sources and Uses Report, Legacy notes 13 and 14, Airdrie note 8.

(b) Pursuant to the Harvest Agreement, Mr. Aitkens caused Legacy to transfer $9.6 million of Legacy Bondholders money to private companies which Mr. Aitkens controls. Pursuant to this agreement Mr. Aitkens' companies are entitled to 70% or 80% of the upside, despite not investing any of their own money.

- December 20 Affidavit, Exhibit "D".

(c) Mr. Aitkens caused Legacy to acquire a water license from 133 for $95,000.

- Sources and Uses Report, Legacy note 8

(d) Project management fees in Legacy were paid to companies owned by former Legacy directors.

- Sources and Uses Report, Legacy note 11
- Brown Affidavit at para. 13.

28. The Affidavits of Ronald Aitkens filed March 15, 2012 and March 21, 2012 show:

(a) Foundation Place is owed $387,000 by 133 and owes $80,000 to 125.

- Affidavit of Ronald Aitkens filed March 15, 2012, Exhibit "G".

(b) unusual and significant balance sheet activity on the part of Railside.

- Affidavit of Ronald Aitkens filed March 15, 2012, Exhibit "G" and Affidavit of Ronald Aitkens filed March 21, 2012, Exhibit "A".

29. The Aitkens Transcript shows:

(a) Mr. Aitkens has not caused Legacy to demand the repayment of the amounts owed by 125, or done anything else to collect those amounts on behalf of Legacy. Mr. Aitkens acknowledges he has a "potential conflict" in this regard.

- Aitkens Transcript at page 51, line 24.

(g) Alberta Securities Commission Investigation and Settlement

30. Mr. Aitkens has previously been investigated by, and entered into a settlement agreement with, the Alberta Securities Commission respecting misrepresentations and non-disclosure related to a project named Spruce Ridge Estates. In the settlement agreement, Mr. Aitkens acknowledges that he has breached the *Securities Act* (Alberta) and acted contrary to the public interest.

- Brown Affidavit at paras. 54(i) and (j) and Exhibit "DD".

B. Facts - During the CCAA Proceedings

(a) Inadequate Responses to Information Requests

31. The UCC has requested information from Management on January 28, 2012, February 8, 2012, March 13, 2012, and March 28, 2012. In each case, Management's response has been inadequate: it has not fully responded to any of the UCC's information requests; it has taken

considerable time to respond when it has; and it has forced the UCC to reiterate and reaffirm prior requests on several occasions. Essentially none of the information requested by the UCC with respect to Foundation and Railside has been provided to the UCC, and very little of the Legacy and Airdrie information has been provided.

- Brown Affidavit at para. 7-12, and Exhibits "H", "I", "J", "K", "L", "M" and "N".

32. The UCC has been informed by the Monitor that the Debtors have been extremely slow in responding to the Monitor's requests for information and documents, and that the Debtors often only comply with the Monitor's requests once the Monitor imposes a deadline on the Debtors for compliance.

- Brown Affidavit at para. 10.

33. The Monitor has confirmed the foregoing and has stated that the Monitor is disappointed by Management's untimely responses to information requests.

- Third Report of the Monitor, at paras. 16, 66, 68 and 69.

34. The Sources and Uses Report also confirms that a considerable amount of requested information remained outstanding at the time of its filing (April 5, 2012), notwithstanding that the UCC first requested a Sources and Uses Report from the Monitor on January 24, 2012. Particularly:

(a) Paragraph 11 of the Sources and Uses Report confirms that certain information is outstanding;

(b) Paragraph 18 of the Sources and Uses Report confirms that a copy of the statement of adjustments is outstanding;

(c) Paragraph 22 of the Sources and Uses Report indicates that certain supporting documents are outstanding;

(d) Paragraph 23 of the Sources and Uses Report indicates that supporting documentation has not been provided;

(e) Paragraph 29 of the Sources and Uses Report indicates that the requested supporting documentation has not been provided;

(f) In Appendix A of the Sources and Uses Report the Monitor notes that documentation has not been provided in notes 5, 11, 12 and 14;

(g) In Appendix B of the Sources and Uses Report the Monitor notes that documentation has not been provided in notes 3, 4 and 7.

- Sources and Uses Report, as referenced above.
- Brown Affidavit, Exhibit "G".

(b) Railside Filings

35. The Aitkens March 15 Affidavit shows $6,205,000 owing to Railside Industrial Park Inc. from 125, but the balance sheet attached as Exhibit "A" to the Supplemental Affidavit of Ron Aitkens filed on March 21, 2012 no longer shows this receivable from 125 and, instead, contains a new line for "Capitalized Construction Costs" in the amount of approximately $7.8 million.

- Brown Affidavit at paras. 14(b) and (c).

(c) Management Meetings and Other Events of Late March 2012

36. During the week of March 26, 2012, the UCC became aware that Management of the Debtors had called a meeting for the 50 largest investors in each of Airdrie and Legacy to be held on the evening of Thursday, March 29, 2012. The UCC was not consulted prior to the Debtors organizing and calling this meeting.

- Brown Affidavit at para. 43.

37. As a result of the UCC's concerns regarding these meetings, a meeting occurred involving the Debtors, the UCC, the Monitor, and their respective legal counsel on the afternoon of March 28, 2012. At this meeting, the Debtors' agents showed a PowerPoint presentation to the UCC and Monitor and advised that this PowerPoint would be shown at the meeting of select investors on March 29, 2012 and subsequently. However, the PowerPoint presentation which was actually shown to investors at the March 29, 2012 meeting was not the same as the one which was presented to the UCC and its legal counsel on March 28, 2012. In particular, the PowerPoint presentation which was actually shown to Bondholders contained commentary about whether or not a CRO is necessary or advisable. Furthermore, the Debtors solicited their own proxy forms at these meetings which stated that the investor did not support the actions of the UCC to

appoint a CRO. These matters were not discussed at the March 28, 2012 meeting with the Debtors, the Monitor, and legal counsel.

- Brown Affidavit at para. 44, 45, and 48.
- Aitkens Transcript at page 7 and page 13, line 22 - page 14, line 27.

38. In respect of the events that occurred during the week of March 26, 2012 and at the Debtor's subsequent Bondholder meetings, the cross examination evidence of Mr. Aitkens shows:

(a) the Debtors had organized a meeting of select Bondholders for the evening of March 28, 2012, but did not disclose the existence of that meeting to the UCC and did not invite the UCC to that meeting, notwithstanding the meeting between the Debtors and the UCC on the afternoon of March 28, 2012, on that very topic.

- Aitkens Transcript at page 13, lines 5-21.

(b) the Debtors changed both the slide show and oral content of their presentation from what was demonstrated to the UCC and Monitor on the afternoon of March 28, 2012.

- Aitkens Transcript at page 13, line 22 - page 15, line 27.

(c) at some or all of the Bondholder meeting, the Debtors or its agents disclosed to Bondholders the legal fees incurred by the UCC, but not the legal fees incurred by the Debtors, the Monitor, or the Monitor's fees even though the Debtors' legal fees and the Monitor's fees are significantly higher.

- Aitkens Transcript at page 38, line 20 - page 39, line 8.
- Monitor's third Report Appendix B, C, D, and E.

(d) the Debtors or its agents incorrectly advised the Bondholders at these meetings that part of the proposed CRO's compensation would be a 3% fee.

- Aitkens Transcript at page 35, line 27 - page 36, line 4

39. The Monitor and the Debtors have been having weekly meetings to assess the status of these proceedings since early January, 2012. However the Debtors only made the UCC aware of this on March 28, 2012, and so the UCC has only had the opportunity to participate in these

meetings starting in April, 2012. Similarly the UCC was only made aware of the Debtor's "data room" on March 28, 2012.

- Brown Affidavit at Exhibit "M".
- Aitkens Transcript at page 47, lines 19-22.

(d) Neo Claim

40. Neo Exploration Inc. issued a Statement of Claim on January 31, 2012 against Ron Aitkens, Harvest Capital Management Inc., and other related and affiliated parties (the "**Neo Claim**"). The Neo Claim alleges, *inter alia*:

(a) breach of contract,
(b) misrepresentations in an offering memorandum,
(c) omission to disclose material contracts in an offering memorandum,
(d) breach of fiduciary obligations,
(e) self-dealing,
(f) high handed and malicious conduct worthy of punitive damages,
(g) realizing a significant "lift" at the expense of investors, and
(h) conspiracy.

- Brown Affidavit at para. 54(m).

(e) Dishonest Testimony

41. Mr. Aitkens has given dishonest testimony in his cross-examination which occurred on April 24, 2012 in respect of (i) his involvement with Foundation Mortgage "3" Corporation, and (ii) the continuing relationship between the Debtors, Management, and the Debtors' former sales agents.

- Supplemental Affidavit at paragraphs 9 - 14 and Exhibits "E" and "H".

C. UCC Bondholder Meetings and Proxy Results

42. The UCC organized and held meetings for Bondholders in Calgary, Red Deer, and Edmonton (the "**UCC Bondholder Meetings**"). A PowerPoint presentation was made to Bondholders at each of these meetings. This PowerPoint presentation was based upon the affidavits and other materials filed in these proceedings, and, with the consent of the Monitor, the draft Sources and

Uses Report which the Monitor had provided to the UCC. The Monitor reviewed and commented on the PowerPoint presentation, and its comments were incorporated into the PowerPoint presentation. The Monitor attended the UCC Bondholder Meetings in Calgary and Red Deer, but was unable to attend in Edmonton due to illness.

- Brown Affidavit at paras. 16-18 and 20.

43. Despite its requests the UCC was not provided with email addresses for Bondholders, which hindered the UCC's ability to communicate with Bondholders and invite them to these meetings.

- Brown Affidavit at paras. 9 and 17.

44. At each of the UCC Bondholder Meetings, a proxy form was available for all Bondholders to sign and submit to the UCC if they so desired. The essence of that form was to ask investors whether they supported the UCC seeking a CRO in these proceedings.

- Brown Affidavit at paras. 33 and 35.

45. As of May 3, 2012 the UCC had obtained Proxy Forms from a total of 602 Bondholders, as set out in the following table:

PROJECT	VALUE OF BONDHOLDER PROXIES	TOTAL BONDHOLDERS	%
Airdrie	$4,302,400.00	$14,738,500.00	29.19
Legacy	$9,330,600.00	$35,403,800.00	26.35
Railside	$5,512,620.00	$34,233,299.10	16.10
Foundation Place	$1,718,697.00	$8,513.505.00	20.19

- Supplemental Affidavit, Exhibit "A".

46. The UCC obtained Proxy Forms from 267 of the 407 eligible Bondholders who attended the meetings hosted by the UCC, which equates to 66% of eligible Bondholders.

- Supplemental Affidavit, Exhibit "A".

47. The UCC has received 603 Proxy Forms, which is 78.93% of the 764 Bondholders who have signed up for the UCC's website.

- Supplemental Affidavit, Exhibit "A".

D. No Equity in the Legacy Lands and the Airdrie Lands

48. Based on the values presented to certain Bondholders by Management at the Management Meeting, there is no stake in the Legacy or Airdrie projects for anyone other than the Bondholders of those projects.

- Brown Affidavit at paras. 45 and 57.
- First Report of the Monitor dated January 16, 2012, at paragraph 17
- Aitkens December 20 Affidavit at Exhibit "M".

E. Costs of a CRO v. Current Costs of these Proceedings

49. The Debtors have incurred, on average, approximately $95,000 per month in management and consulting fees since these proceedings were commenced. The prospective CRO would be paid $20,000 per month.

- Aitkens Transcript at page 47, line 19 – page 60, line 18.

F. Delay

50. Mr. Aitkens states in his recent Affidavit that the appointment of a CRO would unduly delay these proceedings. However, in cross examination Mr. Aitkens admits that he does not know how long it would take for a CRO could get up to speed. Further, Mr. Prosser is now retained by legal counsel to the UCC and is getting up to speed and has visited the Debtors' data room.

- Aitkens Transcript at page 61, lines 5-10.
- Supplemental Affidavit, para. 6.

51. In cross examination Mr. Aitkens describes the CCAA Plan of Arrangement of Legacy and Airdrie as a "balance sheet reorganization" which is not linked in any way to the development of the Airdrie Lands or the Legacy Lands.

- Aitkens Transcript at page 61, line 19 – page 62, line 10.

IV. <u>LAW AND ARGUMENT</u>

A. Removal of Director

52. Section 11.5(1) of the CCAA provides:

> The court may, on the application of any person interested in the matter, make an order removing from office any director of a company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances. **[TAB 1]**

53. It is respectfully submitted that based on the foregoing facts and for the reasons set out below, this test has been satisfied and Mr. Aitkens ought to be removed as a Director of the Debtors as he has unreasonably impaired the possibility of a viable restructuring, is likely to do so in the future, and has acted and is likely to act inappropriately as a director in the circumstances. For the same reasons, a CRO ought to be appointed.

1. Conduct Relating to the Debtors Prior to these Proceedings

54. It is respectfully submitted that the facts set out above clearly demonstrate a pattern implemented by Management in respect of the Debtors as follows:

(a) 125 acquires land;

(b) the applicable Debtor raises money from a large number of small investors by issuing bonds under an offering memorandum;

(c) the bonds and related offering memoranda:

  (i) have a maturity date five or six years in the future;

  (ii) have an attractive rate of return, but no interim payments;

  (iii) do not require any reporting; and

  (iv) do not contain any mechanism for Bondholders to exercise collective rights;

(d) the land is sold by 125 to the Debtor at a significant lift to 125;

(e) no development of any significance occurs for 5 or 6 years;

(f) there is virtually no reporting to bondholders, and any reporting does not accurately portray the financial situation of the project;

(g) all of the working capital is stripped out the Debtors through management fees and other amounts paid to related companies, and in the case of Legacy under the Harvest Agreement;

(h) the Debtor files for CCAA protection when the bonds mature;

(i) the Debtor has no working capital or business which generates cash and is required to immediately obtain DIP financing; and

(j) appraisals show the land is worth significantly less than what is owed to Bondholders, and indeed significantly less than what the Debtor paid for them for 5 or 6 years ago.

55. Viewed in its best light, and aside from (i) the general disregard of investors' interests, (ii) management fees, and (iii) related party dealings, the commercial enterprise engaged by the Debtors is nothing more than land speculation – a flawed business model when the up front "lifts" make appreciation in value sufficient to repay the Bondholders all but impossible.

2. Other Conduct

56. Mr. Aitkens has a history of conduct of the nature discussed herein. Within the past five years, he has been investigated by, and reached a settlement with, the Alberta Securities commission based upon conduct very similar to that described above. Neo Exploration Inc. has also initiated a lawsuit against him making allegations very similar to the conduct described above.

3. The Harvest Agreement is Illegal

57. As set out above, the only business activities described in any of the Legacy OMs is the acquisition of 504 acres of land near the Glencoe Golf Course. There is no discussion of using the funds raised from Legacy Bondholders for any other purpose, although each Legacy OM states: "We intend to spend the available funds as stated. We will reallocate funds only for sound business reasons" or substantially similar words. The Alberta Securities Commission has recently considered similar language in *Re Shire International Real Estate Investments Ltd.*, a situation similar to the situation at hand, and held as follows, with emphasis added:

> [183] Couch also implied that Bearspaw investors had fair warning (through disclosure in the Bearspaw OMs) that their money might be

reallocated to uses other than the Bearspaw Land, and hence that there was no wrong-doing. In that, Couch was wrong.

[184] By raising money under offering memoranda, Couch was relying on the offering memorandum exemption from the fundamental requirements of Alberta securities laws that investors be given the benefit of Commission-vetted disclosure in the form of a prospectus, and the involvement of a knowledgeable registrant. The offering memorandum exemption is widely used, and - used properly - affords efficiencies that can benefit both businesses seeking finance and investors. That said, proper use of the exemption relies heavily on those raising money giving prospective investors, through an offering memorandum, a fair and true - not misleading - picture of what they will be investing in.

[185] It is to that end that Alberta securities laws prescribe certain disclosure that must, at minimum, be included in an offering memorandum. Among such mandatory content - for reasons we think self-evident - is disclosure of the issuer's business and the way investor money is to be used. The law does not prescribe (apart from the obvious - for example, whatever is criminally prohibited) the sorts of business that are or are not permissible, nor how exactly they should use investor money. The key, simply, is that whatever the plan is, it be communicated honestly to prospective investors before they hand over their money.

...

[187] In the case of Bearspaw, a different, narrower business was touted. The Bearspaw OMs spoke of only one business, and prospective investors who read them would have no reason to doubt that this was the business they were investing in: the purchase and development (and later resale, piece-by-piece or as a whole) of the Bearspaw Land. There was no hint of some other project or projects, nor of a portfolio, nor of leaving the choice of projects for future determination. Similarly, while there was mention of commissions and other costs of the offering itself, and a $380 000 project management fee to Shire, there was no hint that any portion of the money invested was expected to be applied to any purpose unrelated to Bearspaw, the offering itself or the Bearspaw Land.

[188] We reproduce again the "reallocation warning from the Bearspaw OMs: "The Issuer intends to spend the net proceeds as stated. The Issuer will reallocate funds only for sound business reasons." Did this (as implied by Couch) give prospective investors fair warning of how she, and Bearspaw and Shire, would actually operate?

> [189] The warning was, admittedly, worded broadly. It did not specify precisely what alternative uses might be found for Bearspaw investor money. That said, it was not open-ended.
>
> [190] First, it must be read in context. That warning directly followed a fairly detailed discussion of how many dollars were to be spent on what aspects of the Bearspaw offering and business, most of that being the purchase and development of the Bearspaw Land. That, then, was the starting point for this reallocation disclosure.
>
> [191] Second, the reallocation statements were themselves limiting. The first statement reiterated what we think a reader would reasonably have assumed, that the intention was to do with the money what had just been disclosed in some detail. The second statement casts a reallocation as something exceptional, "only" to happen in certain circumstances.
>
> [192] Third, those certain circumstances were described as "sound business reasons". <u>While not stated expressly, we think a reader would reasonably have inferred - and would have been entitled to infer - two things: (i) that the "business reasons" would have something to do with the business of Bearspaw, which (as discussed) was the purchase and development (and eventual resale) of the Bearspaw Land; and (ii) that the soundness of such exceptional business reasons would be assessed, in a businesslike way, with a view to their consistency with the interests of Bearspaw and its investors.</u>
>
> [193] <u>To place any broader interpretation on the reallocation disclosure would, in our view, render the mandatory "use of net proceeds" disclosure in the Bearspaw OMs devoid of any value or purpose.</u>
>
> [194] <u>We noted above the Bearspaw OMs' disclosure of various risk factors, including risks associated with new ventures or real estate generally. This disclosure did not, however, alert readers to the prospect that much Bearspaw investor money would be applied to purposes unrelated to the Bearspaw Land.</u>
>
> [195] It follows, and we find, that the Bearspaw OMs' disclosure of potential reallocation, and of risk factors, did not give prospective investors reasonable warning that their money would be used for non-Bearspaw-Land purposes as, we found above, it in fact was.

- *Re Shire International Real Estate Investments Ltd.* 2011 ABASC 608 **[TAB 2]**

58. Based on the foregoing passage it is respectfully submitted that Mr. Aitkens has violated the applicable securities legislation and regulations by causing $9.6 million to be removed from

Legacy and invested in undisclosed projects in Red Deer, Ontario, and Panama, presumably relying on the reallocation wording contained in the Legacy OMs.

59. It is respectfully submitted that this is yet another example of potentially illegal activity on the part of Management and Management's disregard for the law and the interests of Bondholders.

60. We note parenthetically that Shire ended up in receivership, as did a similar case, Concrete Equities.

4. Debtors' Conduct Since Filing

61. Furthermore, since filing Management's misconduct has continued into these CCAA proceedings. Management has:

(a) shown a lack of candor in its dealing in these proceedings by:

(i) failing to directly interface with Bondholders until the end of March, 2012;

(ii) only organizing Bondholder meetings after the UCC had done so;

(iii) giving dishonest testimony in cross-examination; and

(iv) utilizing its resources and the sales agents to implement a "NO CRO" campaign.

(b) disregarded the requests of the Monitor by being extremely slow in responding to the Monitor, or non-responsive and only responding once deadlines are imposed by the Monitor;

(c) disregarded the interests of the UCC by;

(i) not responding to any of the information requests of the UCC;

(ii) unfairly and deceptively dealing with the UCC by:

(A) scheduling Bondholder meetings without or notice to or consultation with the UCC;

(B) changing the Powerpoint presentation which was shown to the UCC on March 28, 2012 when it was later shown to Bondholders at subsequent meetings;

(C) not disclosing the existence of the March 28, 2012 Bondholder meeting to the UCC;

(D) disclosing the legal fees of the UCC to the Bondholders without making any mention of significantly higher professional fees incurred by the other professionals in the process;

(E) providing false information concerning the costs of a CRO to Bondholders, and then asked Bondholders for proxies opposing the CRO;

(F) failing to include the UCC in the weekly meetings of the Debtors and Monitor until April, 2012; and

(G) failing to advise the UCC of the Debtors' "data room" until March 28, 2012.

62. It is for all of the preceding reasons relating to Management's conduct prior to and during these proceedings the statutory test contained in the CCAA is satisfied, and Management should be removed.

63. It is also respectfully submitted that there are numerous objective factors in addition to the misconduct of Management which support the appointment of a CRO. These include the fact that the Bondholders are under water, and Management's conflicts of interest.

64. Finally, it is respectfully submitted that where a CCAA debtor has no employees, no operations, no cash flow, and is essentially a land speculator, the usual doctrines invoked in favour of CCAA proceedings do not apply. These include the protection of employees, continuation of a going concern, continuation of management, and broader societal and community implications. Where those are absent Canadian Courts have refused to grant or continue CCAA proceedings, instead allowing creditors to enforce their rights. It is submitted that the Debtors' circumstances are similar, and there is nothing but bare land to preserve. These circumstances weigh in favour of the removal of Management and the appointment of a CRO.

- *Octagon Properties Group Ltd.*, 2009 CarswellAlta 1325, at paras. 9-14 **[TAB 3]**

5. Conclusion

65. It is respectfully submitted that Mr. Aitken's conduct with respect to each of the Debtors demonstrates that he has no regard for the interests and well being of the Debtors and the Bondholders. To date, Mr. Aitkens principal concern appears to have been that of enriching

himself at the expense of the Debtors and the Bondholders. His conduct during these proceedings falls far below that appropriate to a director and, indeed, shows little regard for the Court supervised CCAA process.

66. It is respectfully submitted that the test contained in section 11.5 of the CCAA is satisfied, and Mr. Aitkens must be removed as a director of the Debtors if the Debtors are to have a reasonable possibility of a successful restructuring in these proceedings. In order to successfully restructure the Debtors a Plan of Arrangement will need to be negotiated between the Debtors and the UCC on behalf of Bondholders. As the UCC has justifiably lost all faith in Management it is respectfully submitted that no Plan of Arrangement is possible as long as Management remains in place. Therefore, it is respectfully submitted, that the presence of Management will unreasonably impair the possibility of a viable restructuring in these proceedings.

B. Appointment of a CRO

67. The law in this area is not fully developed. However, as set out below, there is one Alberta case which comments on the appropriateness of a CRO appointment in situations involving a conflict of interest, and numerous academic articles have been written on the topic.

68. This Honourable Court has held that a perception of conflict of interest on the part of management is something that must be jealously guarded against, and can be avoided by the appointment of CRO:

> Because of the special circumstances that existed at the date of the Initial Hearing, the Monitor was given the power to carry on Skyreach's business. With that power comes a risk, be it perceived or real, of a conflict of interest, and where the Monitor advocates the position where a plan of arrangement that risk may be exacerbated. In making its application for the extension the Monitor presumed that it was reasonable for it to do since it was operating the business and there were no directors in place. <u>Although motivated by good intentions this gave rise to a perception of conflict of interest, something that must be jealously guarded against. The appointment of a chief restructuring officer or the appointment of new or returning directors can easily avoid perceptions of bias.</u> [emphasis added]

- Re 843504 Alberta Ltd. 2003 CarswellAlta. 1786 (ABQB) at paragraph 20. **[TAB 4]**

69. Here it is submitted that there is much more than a perception of bias: Management is guilty of unfair and potentially illegal conduct, and is in a position of hopeless conflict. A CRO is more than warranted in the circumstances.

70. Finally, the Court should be very wary of the Debtors' arguments about costs and delay in any event. While the UCC is highly concerned about costs, it is respectfully submitted that the UCC's arguments and evidence of substantive wrongs such as self-dealing, conflicts of interest, abuse of power, violating the terms of the Debtors' offering memoranda, and giving dishonest evidence, ought to automatically prevail over the Debtors' procedural arguments and evidence about costs and delay. The Court should not sweep Managements' wrongdoings and misconduct under the rug in the name of procedural efficiency.

C. Criteria for Choosing a Chief Restructuring Officer

71. Professor Janis Sarra has made the following statement respecting CROs:

> Chief Restructuring Officers (CROs) are increasingly used in CCAA workouts, frequently appointed in the initial stay order. ...(t)he appointment of a CRO can result in higher creditor confidence, particularly where creditors attribute the firm's financial distress to failures of governance. [emphasis added]

- Sarra, Janis P., "Governance and Control: the Role of Debtor-in-Possession Financing under the CCAA", 2004 ANNREVINSOLV 4 at page 27. **[TAB 5]**

72. While not all CROs are alike, they tend to generally possess the following:

> (a) People skills: for a CRO to have the ability to lead change and influence others to act or follow, they must have superior "people" skills. It is as important for the CRO to get along with people as easily in the boardroom as on a shop floor;
>
> (b) Managerial skills: CROs should have extensive experience running or advising businesses in crisis. Knowing how to meet deadlines in compressed timeframes is critical;
>
> (c) Strategic skills: CROs need to use and promote strong, flexible strategic thinking for all personnel in the organization to create solutions and avoid mistaking tactics for strategy; and

(d) Job knowledge: CROs should have a full complement of technical skills or be able to supplement their knowledge and experience with the extensive background of highly skilled people in the financial, operational, and technological aspects of the business.

- Aziz, William E., Grudzinski, Richard M., and Sellers, Edward A., "*Practical Aspects of Governing Distressed Enterprises in Canada*", 2006 ANNREVINSOLV 17 at page 24. **[TAB 6]**

73. Commentators have also noted that is it imperative that a CRO be independent and impartial. The Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals Joint Task Force on Business Insolvency Law Reform has stated that:

> In determining whether to confirm the appointment of a specified professional (including a CRO), the onus would be on the applicant to satisfy the court that the professional has the appropriate qualifications and can provide independent advice to the party of interest, taking into account consideration whether the professional can provide the engagement party with unfettered advice free from any conflicts of influence and whether a professional acting as a court officer can act in an impartial manner with the ability to deal with the rights of all interested parties in a fair and even-handed manner. For example, this would generally preclude a member of historic management acting as a chief restructuring officer of the debtor.

- Kent, Andrew J.F., Rostom, Wael, Maerov, Adam, and Weerasooriya, Tushara, "*Canadian Business Restructuring Law: When Should a Court say "No"?*" IIC-Art 2008-4, at page 11. **[TAB 7]**

74. Based on all of the foregoing it is respectfully submitted that a CRO candidate should have the following characteristics:

(a) the CRO should be arms length from the Debtors;

(b) the CRO should have expertise in the industry;

(c) the CRO should bring in new skill set to the proceedings and not duplicate the skill sets of the Monitor and other restructuring professionals;

(d) the CRO should result in higher creditor confidence; and

(e) the CRO should have people skills, managerial skills, and strategic skills.

75. In the circumstances of this case it is respectfully submitted that CRO candidate of the UCC ought to be given considerable weight given the conflicts and other factors listed above which impact on the credibility of the Debtors' choices and decisions.

76. It is respectfully submitted that the background, experience, and skill set possessed by the UCC's choice for CRO, Keith Prosser, satisfy the vast majority of the criteria for the appointment of a CRO discussed above. Specifically, Mr. Prosser has:

(a) recent experience in restructuring the MIC business of Sterling Bridge;

(b) experience in dealing with a large number of investors;

(c) experience in lending, commercial real estate, exempt market dealings, and public directorships;

(d) a skill set as a businessman will not duplicate the skill sets of the accounting and legal professionals already involved in these proceedings;

(e) not been involved with the Debtors, or their projects, in the past and, thus, will bring a fresh, independent perspective to these proceedings; and

(f) The compensation to be paid to Mr. Prosser is reasonable, and represents a significant savings compared to current management costs.

- Brown Affidavit at paras. 53-56, and Exhibit "FF".

77. It is noteworthy that Management appears to have used the cost of a CRO as a strategy to convince Bondholders to execute proxies against the appointment of a CRO, and Mr. Aitkens has testified in his April 16, 2012 Affidavit that a CRO would add to the costs of these proceedings. However, this assertion in fact false: the appointment of a CRO would represent significant cost savings in these proceedings. Mr. Aitkins' evidence to the contrary should be disregarded by this Honourable Court.

78. It is respectfully submitted that where the Debtors have advised Bondholders that the CRO would increase the costs of these proceedings, the Debtors have been dishonest, and have used

false information to obtain proxy forms from misinformed and fearful Bondholders. It is respectfully submitted that all of the proxies obtained by the Debtors are tainted with this misinformation and ought to be ignored by this Honourable Court. Similarly, the arguments of the Debtors in this regard against the appointment of a CRO are simply without merit.

79. Similarly, Mr. Aitkens has given evidence in his April 16, 2012 Affidavit that a CRO would cause delay in these proceedings. With respect, that assertion is also incorrect. The Legacy and Airdrie CCAA Plans of Arrangement are relatively simple balance sheet reorganizations whereby creditors' debt claims are converted to new equity, and the old equity is eliminated. The finalization of the CCAA Plans of Arrangement is in no way linked to the development of the projects. The drafting of the CCAA Plans has already commenced, and the Monitor and Debtors' legal counsel will be available to the CRO to finalize those Plans. It is submitted that it, it will not take a CRO any material time to get up to speed, and the Debtors' arguments in that regard are without merit.

80. With respect to the collection of proxies by both the UCC and Management, it is the submission of the UCC that the removal of Management pursuant to section 11.5 of the CCAA and the appointment of a CRO by this Honourable Court are not properly the subject matter of a vote or election. Rather, these are functions of the Court and are to be decided by the Court according to the government law and the circumstances of the case, not the wishes of the creditors. It is respectfully submitted that it would become virtually impossible to manage CCAA proceedings in such a manner. In any event, creditors do not get to vote upon legal matters such as whether the legal test for a removal of Management and the appointment of a CRO have been achieved.

81. It is also important to note that the appointment of a CRO is increasingly common in CCAA proceedings and is not, with respect, a drastic remedy. Given the circumstances of this case it may well have been possible for the UCC or the Bondholders to apply for the appointment of a receiver over the Debtors, or even petition the Debtors in the bankruptcy. The appointment of a CRO will have relatively little impact on these proceedings and no impact on the Debtors' estates whatsoever. While this is an important application in these proceedings it will not have the drastic consequences described by Mr. Aitkens in his Affidavits if successful.

82. Accordingly, it is respectfully submitted that this Honourable Court should appoint Mr. Prosser as CRO of the Debtors.

D. Form of Order

83. It is respectfully that the Form of Order sought by the UCC appointing Mr. Prosser as CRO of the Debtors is consistent with the types of Orders recently granted by the Alberta and Ontario courts when appointing Chief Restructuring Officers or a similar officer in CCAA proceedings.

- Orders granted in the CCAA proceedings of Medican Group of Companies, Rogers Oil & Gas Inc., and Aveos Fleet Performance Inc. **[TAB 8]**

84. It is also respectfully submitted that the proposed CRO Order is nothing like the Alberta Template Receivership Order. It is respectfully submitted that the essence of a receivership is to gather in the assets and property of the debtor, perform a liquidation, and then distribute any proceeds to the appropriate stakeholders. The essence of a Chief Restructuring Officer is fundamentally different and the proposed CRO Order does not contain the liquidation and distribution powers which are given to a receiver.

85. The *Bankruptcy and Insolvency Act* defines a "Receiver" as:

subject to subsections (3) and (4), in this Part "receiver" means a person who:

(a) is appointed under subsection (1); or

(b) is appointed to take possession or control of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was required for use in relation to a business carried on by the insolvent person or a bankrupt under:

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) an order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or manager.

- *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, sections 243(2) **[TAB 9]**

86. It is respectfully submitted that the proposed CRO does not fit within this definition.

87. Counsel has prepared a comparison of the Alberta Template Receivership Order and the proposed CRO Order sought by the UCC.

- Alberta Template Receivership Order – **[TAB 10]**

- Proposed CRO Order – **[TAB 11]**
- Comparison of proposed CRO Order and Alberta Template Receivership Order – **[TAB 12]**

88. The form of Order sought by the UCC is consistent with industry standards, and is nothing like the template Receivership Order which is used in Alberta. Any arguments that the form of Order sought gives the CRO "receiver-like" powers are incorrect.

V. CONCLUSION

89. Based on the foregoing, it is respectfully submitted that this Honourable Court should grant the Order sought by the UCC, *inter alia*:

(a) removing Ron Aitkens as a director of the Debtors; and

(b) appointing Keith Prosser as the Chief Restructuring Officer of the Debtors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

FRASER MILNER CASGRAIN LLP, ~~Solicitors for the UCC~~

Per: ______________________
David LeGeyt

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