**Form 27**
Clerk's stamp:

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SEP 27 2013
JUDICIAL CENTRE
OF CALGARY

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| COURT FILE NUMBER: | 1101 – 17318 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |

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 and AIRDRIE COUNTRY ESTATES INC., RAILSIDE CAPITAL INC., RAILSIDE INDUSTRIAL PARK INC., FOUNDATION PLACE CAPITAL INC. and FOUNDATION PLACE INC.

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| APPLICANT: | LANDSTAR TEAMWORKS PROJECT MANAGEMENT LTD. and MYLONAS ENTERPRISES LTD. |
| RESPONDENT: | FOUNDATION PLACE INC. and ERNST & YOUNG INC. as Court appointed Monitor of FOUNDATION PLACE INC. |
| DOCUMENT: | AFFIDAVIT OF GEORGE MYLONAS |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | OSLER, HOSKIN & HARCOURT LLP<br>Barristers & Solicitors<br>Suite 2500, 450 – 1st Street S.W.<br>Calgary, AB T2P 5H1<br><br>Solicitor: A. Robert Anderson, Q.C. & Michael Bokhaut<br>Telephone: (403) 260-7004 / 7023<br>Facsimile: (403) 260-7024<br>Email: randerson@osler.com/mbokhaut@osler.com<br>File Number: 1138935 |

**AFFIDAVIT OF GEORGE MYLONAS**
**Affirmed on September 27, 2013**

I, George Mylonas, of the City of Calgary, in the Province of Alberta, affirm and say that:

1. I am an officer of Landstar Teamworks Project Management Ltd. ("**Landstar**") and Mylonas Enterprises Ltd. ("**Mylonas**", collectively, the "**Creditors**")) and as such have personal knowledge of the matters herein deposed, except where stated to be based on information and belief, in which case I believe the same to be true. Counsel for the Creditors are A. Robert Anderson, Q.C. and Michael Bokhaut, of Osler, Hoskin & Harcourt LLP (the "**Creditor's Counsel**").

2. I make this Affidavit in support of the Creditors' opposition to the application set to be heard on September 30, 2013 of Ernst & Young (the "**Monitor**"), Monitor and Co-Manager of Foundation Place Capital Inc. ("**Foundation Capital**") and Foundation Place Inc. ("**Foundation Place**", collectively, "**FPI**"), to *inter alia*, extend the stay of proceedings with respect to FPI from September 30, 2013 to November 30, 2013 and increase the Administration Charge from $300,000 to $400,000 (the "**Monitor's Application**").

***Background***

3. On August 23, 2007, 1252064 Alberta Ltd. ("**125**") (as Vendor) and Mylonas (as Purchaser) entered into "This Option To Purchase and Agreement of Purchase and Sale" (the "**Mylonas Agreement**"). The Mylonas Agreement relates to the option to purchase the first floor of a multi-story mixed use (commercial and/or residential) building (the "**Building**") to be constructed on the Lands (defined below).

4. On August 30, 2007, and pursuant to article 5.6 of the Mylonas Agreement, Mylonas registered a caveat (the "**Mylonas Caveat**") bearing instrument number 071 434 678

against title to the Lands. The Caveat registered Mylonas' interest in and encumbrance against the Lands. The Mylonas Caveat remains registered on title to the Lands. On December 18, 2007, 125 sold the Lands to Foundation Place.

5. On January 30, 2009, Foundation Place and Landstar entered into a Project Management Agreement (the "**Landstar Agreement**"), whereby Landstar was contracted by Foundation Place to supervise and co-ordinate the construction of the Building on property owned (by that time) by Foundation Place and located at 139 17$^{th}$ Avenue S.E., Calgary, AB (the "**Lands**").

6. On April 6, 2009, and pursuant to s. 4.4 of the Landstar Agreement, Landstar registered a caveat (the "**Landstar Caveat**") bearing instrument number 091 091 720 against title to the Property to register its charge against the Property to secure payment of the fee owed to Landstar pursuant to the Landstar Agreement.

7. On July 7, 2009, (after both the Mylonas Caveat and the Landstar Caveat had been registered on title to the Lands) a mortgage of $8,500,000 was registered on title, listing the Mortgagee as Foundation Capital (the "**FPI Mortgage**").

8. The Creditors each filed a Proof of Claim against Foundation Place, both of which were disputed by the Monitor and the Creditors each filed an application (the "**Application**") dated December 19, 2012 to pursue their respective Proof of Claim. Mylonas sought a declaration that the Mylonas Caveat is valid and estimated to be valued at $650,000 (the "**Mylonas Claim**"). Landstar sought a declaration that the Landstar Caveat is valid and is determined to include a secured claim of $219,715.65 (the "**Landstar Claim**"). The Application was set to be heard on July 5, 2013 before The Honourable Justice Yamauchi.

9. I am advised by the Creditors' Counsel that on June 24, 2013, the Monitor agreed to allow the Landstar Claim, subject only to the right of FPI to assert that the Landstar Caveat should be subordinated to the FPI Mortgage. By way of an order granted by Yamauchi J. on June 27, 2013, the issues to be decided at the Application would be limited to whether Mylonas holds a valid interest in and/or contractual encumbrance in the Lands and not the monetary value of such interest.

10. The Application was heard on July 5, 2013 before The Honourable Justice Yamauchi, and the Reasons for Judgment are found at **Exhibit "1"**. An order was pronounced on July 5, 2013 (filed September 10, 2013) and declared that:

(a) The application by Landstar is granted, the Landstar Caveat constitutes a valid and subsisting caveat registered against title to the Lands, and the Landstar Claim is allowed as a secured claim in the amount of $219,715.65;

(b) The application by Mylonas is granted, and at this time, Mylonas has a valid interest in the Lands, and the Mylonas Caveat constitutes a valid and subsisting caveat registered against title to the Lands.

(the "**Order**", found at **Exhibit "2"**).

***Correspondence between Counsel***

11. The Monitor is represented by Sean Collins and Walker MacLeod of McCarthy Tétrault LLP (the "**Monitor's Counsel**"). I am advised by the Creditors' Counsel that Mr. MacLeod made representations to the Court at the Application that despite the Monitor allowing the Landstar Claim, a request would be made promptly to Landstar to subordinate the Landstar Caveat to the FPI Mortgage. Although not directly stated at the Application, it is our

understanding that such a request would be made to subordinate the Mylonas Caveat to the FPI Mortgage as well.

12. On July 23, 2013, the Creditors' Counsel sent a letter to the Monitor's Counsel, found at **Exhibit "3"**. This letter requested a summary of what amounts the Monitor claims as the Administration Charge and a breakdown of the costs that the Monitor has spent to date and intends on spending in the future in relation to the Lands; and

13. On September 6, 2013, the Creditors' Counsel sent an email to the Monitor's Counsel, found at **Exhibit "4"**. This email:

(a) requested that if the Monitor decides to extend the stay of proceedings, all evidence in support of the stay application is to be made by affidavit (pursuant to the Rules of Court) and not by Monitor's report;

(b) requested that all application materials, including affidavits, are provided to us well in advance of the hearing to extend the stay to provide sufficient time to review the materials, question the deponent(s) and obtain examination transcript(s) in time for the hearing;

(c) reiterated our position that there is no reasonable prospect for a plan of arrangement in this case; and

(d) advised the Monitor that FPI did not apply for DIP Financing or the Administration Charge on notice to the Creditors.

***The Monitor's Application***

14. The Creditors' Counsel was served with unfiled copies of the materials in support of the Monitor's Application on September 25, 2013 at 3:35 pm, being, *inter alia*, the Nineteenth Monitor's Report, dated September 25, 2013 (the "**Nineteenth Report**").

15. The Nineteenth Report indicates that a number of individuals have been working with Simmons Financial Holdings Ltd. ("**Simmons**") regarding a potential joint venture agreement and are currently negotiating a Letter of Intent (the "**LOI**"). The LOI has not been executed, though the Nineteenth Report indicates that the Monitor expects the LOI to be executed before September 30, 2013.

16. The Nineteenth Report does not attach the LOI and the LOI has not been presented to the Court in advance of the Monitor's Application. On September 25 and 26, 2013, the Creditors' Counsel requested a copy of the draft LOI but the Monitor refused to provide a copy to the Creditors until such time as the LOI was fully executed and then only if both Simmons and the Monitor consent to disclosing the executed LOI to the Creditors. The Monitor provided the Creditors' Counsel with some details of the LOI, but advised that any terms provided may be subject to change. The Creditors again contacted the Monitor on September 27, 2013 to discuss the draft LOI but no response was received.

17. The Nineteenth Report omits all of the correspondence between the Creditors and the Monitor described above and omits the Creditors' Counsel's request for the evidence contained in the Nineteenth Report to be submitted by way of an affidavit, and to be submitted with sufficient notice to allow for examination of the deponent(s).

18. The Monitor has not filed any evidence in support of the Monitor's Application and despite the specific request from the Creditors, has filed a monitor's report on very short notice. The Creditors wish to examine the Monitor on any evidence that is filed in support of the Monitor's Application regarding whether the Monitor has been proceeding diligently and in good faith, whether there is any reasonable prospect for a viable plan of arrangement (or whether any such plan is doomed to failure), and whether there is a strong likelihood that continuing the CCAA proceeding would enhance the value of the Lands. The Monitor has not provided its promised breakdown of the costs that the Monitor has incurred to date or what it intends on spending in the future.

***Value of the Lands***

19. An Agreed Statement of Some Facts was filed on June 17, 2013 and found at **Exhibit "5"** (the "**Agreed Facts**"). The Agreed Facts indicate that the value of the FPI Mortgage far exceeds the value of the Lands (as raw land) and if the Lands are sold as raw land, the amount recovered will be significantly less than the balance owed under the FPI Mortgage.

20. Foundation Place purchased the Lands from a related entity on December 18, 2008 for $4,500,000. Foundation Capital advanced $5,625,000 to FPI to purchase the Lands, and the majority of such funds were advanced in 2008. The FPI Mortgage was signed on May 26, 2009 and registered on title on July 7, 2009. It is my understanding that the value of the Lands currently stands at approximately $1,800,000 - $2,000,000.

***Service of FPI's Initial Application***

21. On March 15, 2012, an application was made to grant CCAA protection to Railside Capital Inc., Railside Industrial Park Inc., Foundation Capital and Foundation Place (the

"**Initial Application**"). On March 21, 2012, an order was granted providing CCAA protection to the above-noted entities (the "**Initial Order**"). The Initial Application sought and the Initial Order granted a charge for DIP Financing and an Administration Charge that ranks in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise.

22. The Creditors have no record of being served with the Initial Application or the Initial Order and the Creditors do not believe that they were served with the Initial Application or the Initial Order.

23. On May 11, 2012, Jeff Moroz of McLeod & Co LLP (my counsel at that time) sent an email (found at **Exhibit "6"**) to the Monitor advising that the Creditors should have been receiving notice of the CCAA proceedings and requesting that he be served with all future materials.

24. I make this Affidavit in support of the Creditors' opposition to the Monitor's Application to extend the stay of proceedings to November 30, 2013 or to increase the Administration Charge that would purport to rank in priority to the Creditors.

| | |
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| AFFIRMED BEFORE ME at the City of Calgary, in the Province of Alberta, this 27 day of September, 2013. | ) |
| Taylor Schappert | ) |
| A Commissioner for Oaths in and for the Province of Alberta | ) GEORGE MYLONAS |

**Taylor D. Schappert**
**Student-at-Law**

**TAB 1**

THIS IS EXHIBIT "1"
referred to in the Affidavit of
George Mylonas
Sworn before me this 27
day of September A.D. 2013
Taylor Schappert
NOTARY PUBLIC/COMMISSIONER FOR OATHS
IN AND FOR THE PROVINCE OF ALBERTA

CLERK OF THE COURT
JUL 05 2013
CALGARY, ALBERTA

# Court of Queen's Bench of Alberta

**Citation: Mylonas Enterprises Ltd v Foundation Place Inc, 2013 ABQB 385**

**Date:**
**Docket:** 1101 17318
**Registry:** Calgary

**In the Matter of The Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended**

**And in the Matter of the Business Corporations Act, RSA 2000, c B-9**

**And in the Matter of Legacy Communities Inc, Airdrie Capital Corporation and Airdrie Country Estates Inc, Railside Capital Inc, Railside Industrial Park Inc, Foundation Place Capital Inc and Foundation Place Inc**

**Between:**

**Mylonas Enterprises Ltd**

**Applicant**

**- and -**

**Foundation Place Inc and Ernst & Young Inc as Court-Appointed Monitor of Foundation Place Inc**

**Respondents**

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**Reasons for Judgment
of the
Honourable Mr. Justice K.D. Yamauchi**

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## I. Introduction

[1] The Applicant Mylonas Enterprises Ltd ("Mylonas") seeks a declaration that a proof of claim that it has filed with the Respondent Ernst & Young Inc in its capacity as the court-

appointed monitor of Foundation Place Inc (the "Monitor") is valid, which requires this Court to determine whether Mylonas has an interest in lands legally-described as Plan 7157H, Lots 1-3 (the "Lands").

[2] As with many matters that appear before the court involving the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], the parties have requested this Court to render its decision promptly. The Monitor advises that the issue presently before this Court "must be resolved" before the various stakeholders can determine how best to proceed with this matter. This Court has used its best efforts to accommodate the parties' request.

## II. Background

[3] Mylonas was the owner of the Lands. On December 18, 2007, pursuant to an agreement of purchase and sale between Mylonas, as vendor, and 1252064 Alberta Ltd ("125 Alberta"), as purchaser, Mylonas sold the Lands to 125 Alberta (the "Original Purchase Agreement").

[4] On August 23, 2007, Mylonas and 125 Alberta entered into an agreement, which the parties called an "Option to Purchase and Agreement of Purchase and Sale" (the "Option Agreement"), in which Mylonas acquired an "option to purchase" certain property described in the Option Agreement, which the parties defined as the "Commercial Property." This Court will use that same term in these reasons. In essence, the Commercial Property was to be the commercial component on the main floor of a multi-story, mixed-use project (the "Project").

[5] Pursuant to the Option Agreement, 125 Alberta covenanted and agreed to:

A. commence construction within two years of the closing of the Original Purchase Agreement, being August 23, 2009, with "commence" meaning approvals having been obtained: Option Agreement art 5.2;

B. provide Mylonas with an occupancy notice not less than 120 days of the proposed occupancy date for the Commercial Property (the "Occupancy Notice"): Option Agreement arts 1.1 and 5.3;

C. use its best efforts to make and pursue a subdivision application for the Project as soon as possible: Option Agreement art 5.4; and

D. use its best efforts to complete the Project within five years of the closing of the Original Purchase Agreement (being a completion date of August 23, 2012): Option Agreement art 5.5.

E. once Mylonas received the Occupancy Notice from 125 Alberta, it would have 30 business days to notify 125 Alberta of its intention to exercise its "option to purchase" the Commercial Property: Option Agreement art 2.1.

"Subdivision" was defined as the subdivision of the Lands into a condominium plan that allowed for the development of the Project ("Subdivision").

[6] The purchase price that Mylonas would be required to pay on its exercise of the option to purchase was set forth in the Option Agreement art 3.1, which provided:

> 3.1 The Purchase Price for the Commercial Property shall be based on the actual construction costs of the Commercial Property which cost shall include the proportionate share of the land cost (at the time the option to purchase is exercised) based on the percentage of the total buildable area plus an administration fee of 15% of the actual construction cost of the Commercial Property only (exclusive of GST). Actual construction costs shall be determined by a quantity surveyor, mutually agreed upon by the parties …

[7] The obligations of 125 Alberta and Mylonas under the Option Agreement to complete the sale and purchase of the Commercial Property was conditional on the subdivision of the Lands, the construction of the Project and the issuance of the Occupancy Notice for the Commercial Property. Option Agreement art 10.1 says:

> The Vendor and the Purchaser acknowledge and agree that the Commercial Property is not currently subdivided from the Gross Lands by virtue of a plan of subdivision or other plan or instrument registered at the South Alberta Land Registration District Office, and that the Obligation of the Vendor and the Purchaser to complete the sale and purchase of the Commercial Property is conditional upon the approval of the Municipality of the Subdivision of the Gross Lands in order to create a separate Certificate of Title for the Commercial Property. <u>The Vendor agrees to proceed with the Subdivision Application to the Municipality and to diligently pursue such application and the parties will keep each other fully informed as to its progress</u>. The Purchaser agrees to assist and cooperate with respect to the Subdivision Application, which application shall be made at the sole expense of the Vendor, including executing whatever documents and applications that are required to advance the Subdivision Application. [Emphasis added].

[8] The Lands were consolidated with a separate parcel of property and a new certificate of title was issued in respect of the consolidated property with the legal description of Plan 1011477, Block 4, Lot 41 (the "Foundation Place Lands"). The "Subdivision" has not yet occurred.

[9] On August 30, 2007, Mylonas registered a caveat bearing instrument number 071 434 678 in respect of the Option Agreement (the "Caveat"). It did this pursuant to Option Agreement art 5.6. The Caveat is currently registered against title to the Foundation Place Lands. The Option Agreement art 5.6 says that Mylonas will postpone its Caveat for the purposes of construction financing/investor syndication to a maximum amount not to exceed the cost of the Lands and the necessary construction financing. Otherwise it shall not be required to postpone its Caveat. There is no evidence of any construction financing.

[10] On or about February 12, 2008, Foundation Place Inc issued shares pursuant to an offering memorandum (the "FPI Offering Memorandum") to raise funds to purchase the Lands and develop the Project. On or about February 12, 2007, Foundation Place Capital Inc issued bonds pursuant to an offering memorandum ("FPCI Offering Memorandum") to raise funds to

purchase the Lands and develop the Project (collectively, the FPI Offering Memorandum and FPCI Offering Memorandum shall be referred to as the "Offering Memoranda").

[11] On December 23, 2007, 125 Alberta entered into an agreement with Foundation Place Inc to sell the Lands to Foundation Place Inc for $4.5 million (the "Sale Agreement"). On August 23, 2008, 125 Alberta transferred the title to the Lands to Foundation Place Inc. On July 7, 2009, a mortgage of $8,500,000 was registered on title in favour of Foundation Capital (the "Foundation Capital Mortgage"). The Foundation Capital Mortgage remains registered against title to the Foundation Place Lands, subsequent to the Caveat.

[12] Neither Foundation Place Inc nor the Monitor has decided whether to continue with development of the Lands or to abandon development and sell the Lands as raw land.

[13] The Offering Memoranda lists the Caveat as one of a number of encumbrances registered against the Lands and identifies specific provisions from the Option Agreement. The Offering Memoranda indicates that pursuant to the Sale Agreement, Foundation Place Inc became the assignee (as vendor) of the Option Agreement and is obligated to obtain approvals for construction of the Project by August 2009.

[14] Foundation Place Inc took steps towards obtaining the Subdivision, including retaining Landstar Teamworks Project Management Ltd. ("Landstar") and applying for a development permit for the Project. Foundation Place Inc must obtain a development permit before it can apply for the Subdivision. Landstar provided construction management services to Foundation Place Inc and assisted with Foundation Place Inc's development permit application. The development permit application was successful and Foundation Place Inc is free to obtain the development permit on paying the necessary bond to the City of Calgary. Foundation Place Inc has not yet made that payment.

**III. Discussion**

[15] Pursuant to section 130 of the *Land Titles Act*, RSA 2000, c L-4 [*LTA*], a person claiming to be interested in land for which a certificate of title has been issued may file a caveat in the appropriate Land Titles Office. Mylonas claims to have such an interest, so it registered the Caveat. However, a caveat does not create an interest in land or enhance an existing interest in land. Rather, a caveat is a statutory protection afforded to a person *claiming* an interest in land under the *LTA* and operates as a warning or protection of the alleged interest: ***Canada Trustco Mortgage Co v Wycott***, 2002 ABQB 399 at para 25. The caveator will only protect a valid and enforceable interest in land if the claim on which its caveat is based renders that person a "person interested in land": *LTA* s 130.

[16] Does the Option Agreement give to Mylonas an interest in land? The Supreme Court of Canada described the nature of an option in ***Canadian Long Island Petroleums Ltd v Irving Wire Products***, [1975] 2 SCR 715, 50 DLR (3d) 265 [***Canadian Long Island***, cited to SCR]. It said at 731-32:

> An option gives to the optionee, at the time it is granted, a right, which he may exercise in the future, to compel the optionor to convey to him the offered property.
>
> ...
>
> In other words, the essence of an option to purchase is that forthwith upon the granting of the option, the optionee, upon the occurrence of certain events, solely within his control can compel a conveyance of the property to him.

[17] The Monitor argues that because, among other things, the subdivision of the Lands had not been obtained, Mylonas' option to acquire the Commercial Property had "not vested." It provides this Court with the case of ***Sprague-Rosser Contracting Co v 572757 Alberta Ltd***, 2013 ABQB 205 (Master) [***Sprague-Rosser***] in support of its position. Sprague-Rosser Contracting Co (the "Purchaser") had purchased land from 572757 Alberta Ltd (the "Vendor"). The purchase agreement granted the Vendor an option to re-purchase the lands from the Purchaser if the Purchaser commenced construction and then failed to complete structural foundation work for an intended project on the lands within twenty-four months of the closing date. The Purchaser brought an application to discharge the caveat in respect of the option to purchase agreement that had been lodged.

[18] Master Schlosser said at paras 17 and 18:

> Paragraph 20.2 goes on to provide a right to the vendor for an irrevocable option to repurchase if the structural foundations are not completed within twenty four months from the closing date. The Agreement does not expressly cover the eventuality of Sprague-Rosser not constructing a building but <u>the choice not to build appears to be open to them as the Agreement does not otherwise oblige them to construct a building. As I read it, it was open to the Purchaser to choose not to build.</u> The irrevocable option to repurchase only arose if Sprague-Rosser started construction but did not otherwise comply with clause 20.
>
> Accordingly, the conditions subsequent giving rise to the right to repurchase did not materialize. At best, there may be a contractual dispute respecting a collateral agreement. In my view, this is not enough to sustain Caveat 102090959. [Emphasis added].

[19] The Monitor argues that while the Vendor could assert a claim for damages against the Purchaser, the fact that the condition associated with the right to purchase the property had not materialized was fatal to the caveat registered in respect of the option. This Court does not dispute the holding of Master Schlosser in ***Sprague-Rosser***, but it is important to note the emphasized portion of the quotation. The learned Master was repeating what he had said earlier in his decision, when he said "Nothing in the agreement specifically required the [Purchaser] to construct a building on the lands": ***Sprague-Rosser*** at para 8. In the case before this Court, 125 Alberta, the purchaser in the case before this Court, had a positive obligation to meet the requirements set forth in the Option Agreement.

[20] Master Schlosser at para 14 also said that "[t]he essence of a right of repurchase is that it is contingent upon the happening of conditions subsequent," relying on Paul Perell, *Options, Rights of Repurchase and Rights of First Refusal as Contracts as Interests in Lands*, 70 Can Bar Rev 1 (the "Perell Article"). It is important to note, however, that in ***Sprague-Rosser***, the Purchaser had no obligation to fulfill anything. Thus, the condition subsequent never materialized and the Vendor could not force the Purchaser to undertake it. In any event, the Perell Article only makes that statement as part of its argument.

[21] Many times throughout the Perell Article, the author notes that options to purchase real property create interests in land. This Court doubts that anyone can challenge that proposition, given the ***Canadian Long Island*** description. In the case with which this Court is dealing, does the Option Agreement create an option to purchase the Lands? Had 125 Alberta (or its successor in title, FPI) fulfilled its contractual obligations to obtain the Subdivision, complete construction of the Project and issued the Occupancy Notice, then the optionee, Mylonas, would either exercise its option or not. In other words, the option does not arise until certain conditions are fulfilled. This is a right of re-purchase. However, as the Perell Article says at 7:

> …[T]he vendor sells his or her property and reserves a right to repurchase the property. In this simple form, there is nothing analytically different to distinguish a right of repurchase from the option contract …

[22] In a "complex" right of repurchase, the right of repurchase does not arise immediately, but will depend on decisions or the conduct or status of the new owner of the land, in this case, 125 Alberta. The Perell Article provides examples of where, if the new owner fails to do something, such as build something on the property, the right to repurchase is triggered. For example, had the Option Agreement contained the positive covenant that 125 Alberta had to construct within a particular period, failing which Mylonas would have an option to repurchase, this would fall within the example that the Perell Article provides.

[23] The Perell Article says that complex rights of repurchase are analytically similar to rights of first refusal where "to become operational, these rights depend upon the decision, conduct or status of the owner of the land": Perell Article at 9. This differs from an option to purchase where the optionee controls the process: ***Canadian Long Island*** at 732. In support of this proposition, the author again refers to ***Canadian Long Island***. The right to purchase the land in the case of a right of first refusal depends on the vendor's decision to sell. The vendor might decide never to sell, in which case, the rights holder's ability to purchase would never arise. Martland J said at 732:

> [The right of first refusal] did not give to the respondents any present right to require in the future a conveyance of Sadim's undivided one-half interest in the land. It was not specifically enforceable at the time the agreement was executed. The respondents were not given any right to take away Sadim's interest without its consent. Their right under that clause was a contractual right, i.e., the covenant of Sadim that if it was prepared to accept an offer to sell its interest, the respondents would then, and only then, have a 30-day option to purchase on the same terms.

> The contingency in this clause is resolved solely upon the decision of Sadim to sell.

[24] Thus, Martland J held that the right of first refusal did not create an interest in land that was subject to the rule against perpetuities. He went on to say that the right of first refusal could be enforced by way of an injunction "to prevent Sadim from disposing of the land." He went on to say at 737:

> In this case Sadim did convey its interest in the land to Long Island, which took its title with full knowledge of the requirements of the restrictive covenant. This being so, I do not consider that the position of Long Island as against the respondents should be improved because Sadim had actually acted in breach of its commitment to the respondents, by assigning its interest to Canadian Long Island. This is a proper case for the application of the proposition stated in *Fry on Specific Performance*, 6th ed., p. 90:
>
> > § 205. Generally a stranger to the contract is not a proper defendant to an action for enforcing it. But this general rule is subject to exceptions.
> >
> > § 206. If a stranger to the contract gets possession of the subject-matter of the contract with notice of it, he is or may be liable to be made a party to an action for specific performance of the contract upon the equitable ground of his conscience being affected by the notice.

[25] This tells us two things. First, that the stranger to the contract, if it has knowledge of the holder of the right of first refusal, could be liable for an action for specific performance. In this case, FPI took the Lands knowing that it was subject to Mylonas's rights. Thus, it could be liable in an action for specific performance. Second, it tells us that the rights holder has an action for specific performance. This Court will address that issue later in these reasons.

[26] Perhaps because of the finding in ***Canadian Long Island***, the Alberta Legislature passed the *Real Property Statutes Amendment Act, 1985*, SA 1985, c 48, s 4, which added the *LPA* s 63. That section says that rights of first refusal create equitable interests in land. It says:

> 63(1) The following are equitable interests in land:
>
> (a) a right of first refusal to acquire an interest in land;
>
> ...
>
> (2) After registration of a caveat under the Land Titles Act protecting an equitable interest referred to in subsection (1), the equitable interest takes priority in accordance with section 14 of the Land Titles Act and runs with the land.

[27] Two Supreme Court of Canada decisions, ***City of Halifax v Vaughan Construction Co Ltd***, [1961] SCR 715, 30 DLR (2d) 234 [***City of Halifax***, cited to SCR] and ***Weinblatt v City of Kitchener***, [1969] SCR 157, 1 DLR (3d) 241, held that complex rights of repurchase create interests in land in cases where the city conveyed land to a purchaser with a provision that the

purchaser build on the land within a stipulated time and the purchaser failed so to do. In ***City of Halifax*** the court said at 719:

> My opinion is that when … [the purchaser of the land] acquired the fee simple, it did so subject to an equitable interest in the land held by the city as a result of [the right of repurchase].

[28] Even though the Perell Article does not agree with this conclusion, it provides arguments that would support the conclusion that complex rights of repurchase and rights of first refusal should be treated in the same manner as options to purchase, thereby providing the potential purchaser with an interest in land. Because Martland J in ***Canadian Long Island*** said that injunctions are available to enforce the right contained in these instruments, the ability of the vendor to deal with the property is restrained. An injunction is a proprietary remedy. If the vendor wishes to free itself from the restraint, it must obtain a release from the owner of the right, and the owner of the right may demand payment for the release: Perell Article at 24.

[29] As well, the Perell Article argues that if complex rights of repurchase and rights of first refusal may treated like property, they should be classified as property: Perell Article at 25. The *LPA* s 63 now statutorily says that rights of first refusal create equitable interests in land.

[30] Finally, the Perell Article at 26, says that "rights of first refusal and complex rights of repurchase closely resemble options in their structure and commercial function and arguably these rights merit the same treatment in law."

[31] If the *LPA* s 63 gives rights of first refusal the status of interests in land, and the common law gives options to purchase the same status, why should rights of repurchase not have the same status? They bear trappings of each. The facts of this case make this argument even stronger. In this case, 125 Alberta (and its successor, FPI) had a positive obligation to obtain the Subdivision and complete the Project. It did neither. Can it merely "lie in the weeds" and defeat an interest that it agreed to grant? Is this fair?

[32] The facts before this Court differ from those in the cases it has discussed so far. In those cases, the holder of the fee simple had a duty to complete construction. If it failed to do so, the right of repurchase would arise. In this case, the holder of the fee simple, 125 Alberta (and its successor in title, FPI), had a duty to obtain Subdivision and then complete the Project at which time the right of repurchase would arise. If it failed so to do, the Monitor argues, Mylonas's right to repurchase would never arise. In ***Pierce v Empey*** [1939] SCR 247 at 252, Duff CJC said:

> It is well settled that a plaintiff invoking the aid of the court for the enforcement of an option for the sale of land must show that the terms of the option as to time and otherwise have been strictly observed. The owner incurs no obligation to sell unless the conditions precedent are fulfilled or, <u>as the result of his conduct, the holder of the option is on some equitable ground relieved from the strict fulfillment of them</u> … [emphasis added].

[33] In the Perell Article, the author says at 5:

> … Duff C.J.C.'s statement in *Pierce v. Empey* leaves room for the operation of equitable doctrines that relieve the option holder of the obligation to perform strictly the conditions of the option. In this regard, many cases about options turn on the issue of whether the vendor, by his or her words or conduct, has waived strict compliance with the terms of the option or is estopped from asserting that the option has not been properly exercised.

[34] This Court recognizes that Duff CJC and the Perell Article were discussing strict compliance in the context of options to purchase. However, this Court could waive strict compliance in the case of a right of repurchase where the holder of the fee simple has done some act, or failed to do an act, which would entitle the rights holder to exercise their rights. In ***Steiner v EHD Investments Ltd***, [1977] 6 WWR 308, 6 AR 113 (Alta SC, App Div), a vendor undertook to use its best efforts to obtain subdivision of lands, which would permit the purchaser to purchase a portion of the subdivided lands. The vendor made no reasonable effort to obtain subdivision, and the court found that the purchaser would have no status to apply for the required subdivision. The court said at 311-312 [cited to WWR]:

> In my view, however, the vendor cannot by failing to apply for subdivision frustrate the entire agreement. Lord Atkinson, in the Privy Council decision of *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France*, [1919] A.C. 1 at 9, said this:
>
> > …But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract.

[35] As a result, the court held at 314 that "The purchasers have requested and, in my view, are entitled to an order that the defendant do specifically perform its contract, which is to make a *bona fide* application for subdivision."

[36] The Supreme Court of Canada dealt with a similar issue in ***Dynamic Transport Ltd v OK Detailing Ltd***, [1978] 2 SCR 1072, 6 Alta LR (2d) 156, [***Dynamic Transport***, cited to SCR]. In that case, subdivision approval was a condition precedent to the performance of the obligations to sell and to buy the real property. The sale and purchase agreement was silent as to which party would obtain the subdivision approval. The Supreme Court of Canada held that it was the vendor who has the obligation to obtain subdivision approval by saying at 1084:

> In a purchase-and-sale situation, the "person who proposes to carry out a subdivision of land" is the intending vendor. It is he who must divide his parcel of land, which has hitherto been one unit, for the purpose of sale. If a purchaser carried out the actual work in connection with the application, he could only do so

> in the vendor's name and as his agent. The vendor is under a duty to act in good faith and to take all reasonable steps to complete the sale. I cannot accept the proposition that failure to fix responsibility for obtaining planning approval renders a contract unenforceable. The common intention to transfer a parcel of land in the knowledge that a subdivision is required in order to effect such transfer must be taken to include agreement that the vendor will make a proper application for subdivision and use his best efforts to obtain such subdivision. This is the only way in which business efficacy can be given to their agreement.

[37] The court declared that the sale and purchase agreement was a binding contract, including the implied term that the vendor will seek subdivision approval. During that time, it allowed the purchaser to maintain its caveat. This suggests that the Supreme Court of Canada recognized that the purchaser had an interest in the impugned lands.

[38] In the case before this Court, it was 125 Alberta (and its successor, FPI) that had the obligation to apply for the subdivision and to construct the Project. Mylonas had no such obligation and it could not undertake that task. Can 125 Alberta (and its successor, FPI) rely on their failure to apply for the Subdivision to defeat Mylonas' rights? Based on the foregoing cases, it is clear that it cannot and, based on ***Dynamic Transport***, Mylonas may maintain its interest in the Property through its caveat.

[39] Does the Alberta Court of Appeal's decision in ***1244034 Alberta Ltd v Walton International Group Inc*** 2007 ABCA 372, 82 Alta LR (4th) 259 [***Walton***], change this. Before discussing ***Walton***, this Court feels it worthwhile to discuss briefly the Supreme Court of Canada's decision in ***Semelhago v Paramadevan***, [1996] 2 SCR 415, 3 RPR (3d) 1 [***Semelhago***, cited to SCR], which ***Walton*** followed. The issue in ***Semelhago*** involved an assessment of damages to which a purchaser was entitled on the vendor's refusal to complete the sale. It was not a case in which the Supreme Court of Canada was asked to rule on the issue of whether specific performance was available in the circumstances of that case. Sopinka J for the majority acknowledged as much at para 23. Nonetheless, he dealt with the issue of whether specific performance *should have been available* in the circumstances before him.

[40] Sopinka J at para 22 noted the tendency of courts to treat real estate as being unique such that specific performance would be available in the event of breach, and that some courts "have begun to question the assumption that damages will afford an inadequate remedy for breach of contract for the purchase of land: *ibid.* He went on to say:

> Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available. The guideline proposed by Estey J. in *Baud Corp., N.V. v. Brook*, (sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp*) [1979] 1 S.C.R. 633, with respect to contracts involving chattels is equally applicable to real property. At p. 668, Estey J. stated:
>
> > <u>Before a plaintiff can rely on a claim to specific performance</u> so as to insulate himself from the consequences of failing to procure alternate

> property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found.
>
> [Emphasis added].

[41] Sopinka J closed by saying at para 23, "In future cases, under similar circumstances, a trial judge will not be constrained to find that specific performance is an appropriate remedy." [Emphasis added].

[42] In ***Walton*** the Defendant Walton International Group Inc ("WIG") purchased land and sold 151 undivided interests in the land to investors, hoping later to sell the land to make profit for the investors. If WIG accepted an offer of sale, each investor had a right of first refusal entitling them to purchase interests of those investors accepting the offer, on same terms. WIG entered into an agreement of purchase and sale with plaintiff 1244034 Alberta Ltd ("124 Alberta"). WIG waived the conditions precedent to the sale. One of investors sought to exercise his right of first refusal. Accordingly, WIG advised 124 Alberta that it was unable to complete transaction. 124 Alberta filed caveat and *lis pendens* certificate. The Alberta Court of Appeal upheld the chambers judge's dismissal of 124 Alberta's application for an injunction restraining the conveyance of the land and the order requiring 124 to remove its caveat and the *lis pendens* certificate.

[43] Berger JA, for the majority, at para 2 repeated the statement from ***Semelhago*** that:

> ...[I]t should no longer be presumed that specific performance should always be granted in the case of contracts dealing with the sale of land. The Court did not conclude that specific performance will never be available in the case of property acquired for investment purposes. Rather, the relevant inquiry will be whether the property is "unique" or whether damages are an adequate remedy. [Emphasis added].

[44] The Monitor argues that Mylonas has tendered no evidence that the Lands unique such that specific performance would issue or that damages are not an adequate remedy. It argues that the Lands are commercial property and therefore "damages can be awarded to 'compensate' the plaintiff for the diminished quality of his investment": ***Domowicz v Orsa Investments Ltd***, [1993] OJ No 2214 at para 68, 15 OR (3d) 661 (Gen Div) [***Domowicz***].

[45] ***Walton*** and ***Domowicz*** were cases involving agreements for the purchase and sale of real property in which the purchaser was seeking to purchase the property for investment purposes. In ***Walton*** Berger JA said at para 13 "On the facts of this case, the purchaser had every intention to flip the property and/or to acquire it for the purchase price and then sub-divide to home builders." Berger JA goes on to say at paras 5-6:

> The author of Anger and Honsberger, *Law of Real Property*, 3rd ed. looseleaf, (Aurora: Canada Law Book, 2007) points out at p. 23-22 that:
>
>> In the post-*Semelhago* era, purchasers seeking to specifically enforce contracts for the sale of land in Canada bear the onus of establishing that damages would be an inadequate remedy in the particular circumstances.

> Should the purchaser be attempting to obtain the lands merely for investment purposes such onus would be exceedingly difficult to satisfy.
>
> ...

The author adds that the Court must determine the true intentions of the plaintiff so as to avoid a speculative lawsuit for profit.

[Emphasis added].

[46] In this case, there is no evidence before this Court that Mylonas was seeking to flip the Lands or that it was purchasing the Lands only for investment purposes. Berger JA stated that whether specific performance is available remains a matter of discretion for the trial judge and that each situation is to be determined on its facts: ***Walton*** at paras 2-3.

[47] In this case, this Court is not dealing with an agreement of purchase and sale of the Lands, as was the case in ***Semelhago*** and in ***Walton***. It is a right of repurchase which, once the vendor complies with its obligations, will be an option to purchase. Based on the foregoing, this created an interest in the Lands in favour of Mylonas.

[48] There is an added wrinkle to the matter before this Court. FPI sought protection from its creditors pursuant to the *CCAA*. The Monitor advises that neither it nor FPI has made a decision about whether to continue with the development of the Lands or sell the Lands as raw land. If a decision is made to sell the Lands as raw land, one wonders whether there is any viable prospect for a plan of arrangement under the *CCAA* because the sale would simply constitute a liquidation of FPI's assets that will yield less than the balance owing to Foundation Capital. There would be nothing left to restructure under the *CCAA* and thus, the *CCAA* might not be the most appropriate legislation under which the interests of the stakeholders must be dealt: ***Royal Bank v Fracmaster Ltd*** (1999), 244 AR 93 at para 16 (CA). In that case, Foundation Capital might decide to commence foreclosure proceedings. In that case, Mylonas should be provided with an opportunity to defend any such action.

[49] Damages, in this case, would not be an appropriate remedy because without the Lands, there is nothing against which Mylonas may recover its damages. FPI is insolvent and Foundation Capital, a related corporation, is the entity that would benefit from the discharge of the Caveat. This is a different situation from that with which the ***Walton*** court was dealing. On this basis alone, Mylonas has established that damages would not be an appropriate remedy in the circumstances before this Court.

[50] For the purposes of this application, this Court finds that Mylonas retains its interest in the Lands and it may retain the Caveat.

[51] Of course, if FPI (or a successor in title) is unable to obtain the Subdivision and complete the Project, or something similar, the conditions for the establishment of the option might not be fulfilled and Mylonas' interest might evaporate. This Court cannot rule on that matter at this time. Much depends on how matters unfold.

Heard on the 27th day of June, 2013.
**Dated** at the City of Calgary, Alberta this 5th day of July, 2013.

**K. D. Yamauchi**
**J.C.Q.B.A.**

**Appearances:**

A Robert Anderson, QC and Michael Bokhaut
Osler, Hoskin & Harcourt LLP
for the Applicant

Walker W MacLeod
McCarthy Tetrault LLP
for the Respondents

**TAB 2**

THIS IS EXHIBIT "2"
referred to in the Affidavit of
George Mylonas
Sworn before me this 27
day of September A.D. 2013
Taylor Schappert
NOTARY PUBLIC/COMMISSIONER FOR OATHS IN AND FOR THE PROVINCE OF ALBERTA

I hereby certify this to be a true copy of the original ORDER
Dated this 10 day of September 2013
for Clerk of the Court

Clerk's stamp:

CLERK OF THE COURT
FILED
SEP 10 2013
JUDICIAL CENTRE OF CALGARY

| | |
|---|---|
| COURT FILE NUMBER: | 1101 - 17318 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |

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 and AIRDRIE COUNTRY ESTATES INC., RAILSIDE CAPITAL INC., RAILSIDE INDUSTRIAL PARK INC., FOUNDATION PLACE CAPITAL INC. and FOUNDATION PLACE INC.

| | |
|---|---|
| APPLICANTS: | LANDSTAR TEAMWORKS PROJECT MANAGEMENT LTD.<br><br>MYLONAS ENTERPRISES LTD. |
| RESPONDENT: | FOUNDATION PLACE INC. and ERNST & YOUNG INC. as Court appointed Monitor of FOUNDATION PLACE INC. |
| DOCUMENT: | **ORDER** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | OSLER, HOSKIN & HARCOURT LLP<br>Barristers & Solicitors<br>Suite 2500, 450 – 1st Street S.W.<br>Calgary, AB T2P 5H1<br><br>Solicitor: A. Robert Anderson, Q.C./<br>Michael Bokhaut<br>Telephone: (403) 260-7004 / 7023<br>Facsimile: (403) 260-7024<br>Email: randerson@osler.com/mbokhaut@osler.com<br>File Number: 1138935 |

**DATE ON WHICH ORDER WAS PRONOUNCED:** **July 5, 2013**

**NAME OF JUSTICE WHO MADE THIS ORDER:** **Justice K.D. Yamauchi**

**ORDER**

**UPON THE APPLICATION** of Mylonas Enterprises Ltd. ("**Mylonas**") pursuant to the claims process order issued in respect of Foundation Place Inc. ("**FPI**") on July 5, 2012 (the "**Claims Process Order**") for an order allowing the proof of claim filed by Mylonas against FPI dated August 21, 2012, as amended on November 19, 2012 (the "**Mylonas POC**") and a declaration that Mylonas holds a valid interest in and caveat against the lands legally described as Plan 1011477, Block 4, Lot 41, Title # 101 106 898 (the "**Lands**"); **AND UPON THE APPLICATION** of Landstar Teamworks Project Management Ltd. ("**Landstar**") pursuant to the Claims Process Order for an order allowing the proof of claim filed by Landstar dated August 21, 2012 (the "**Landstar POC**") as a secured claim in the amount of $219,715.65; **AND UPON** noting the initial order issued under the *Companies' Creditors Arrangement Act* (Canada) (the in respect of FPI on March 21, 2012 that, *inter alia*, appointed Ernst & Young Inc. as the court-appointed monitor of FPI (the "**Monitor**"), the consent co-manager order issued in respect of the FPI on May 10, 2012 (the "**Co-Manager Order**") and the Claims Process Order; **AND UPON** noting the Notice of Dispute issued by the Monitor pursuant to the Claims Process Order in respect of the Landstar POC dated November 28, 2012 (the "**Landstar NOD**") and the Mylonas POC dated November 28, 2012 (the "**Mylonas NOD**"); **AND UPON** both such applications being opposed by the Monitor; **AND UPON** reading the Affidavit of George Mylonas, sworn on December 19, 2012, the Supplemental Affidavit of George Mylonas, sworn on March 26, 2013, and the Agreed Statement of Some Facts, filed June 17, 2013; **AND UPON** reviewing the Amended and Restated Order granted June 27, 2013; **AND UPON** this application having come on for argument on June 27, 2013; **AND UPON** having heard counsel for Landstar, Mylonas and the Monitor:

**IT IS HEREBY ORDERED, DECLARED AND ADJUDGED THAT:**

1. The application by Landstar in respect of the Landstar POC is granted and the Landstar POC is allowed as a secured claim in the amount of $219,715.65;

2. Landstar's caveat bearing instrument number 091 091 780 constitutes a valid and subsisting caveat registered against title to the Lands;

3. The application by Mylonas in respect of the Mylonas POC is granted and at this time:

    a. Mylonas has a valid interest in the Lands; and

    b. Mylonas' caveat bearing instrument number 071 434 678 constitutes a valid and subsisting caveat registered against title to the Lands (the "**Mylonas Caveat**");

4. This Order may be approved via electronic means.

**The Honourable Mr. Justice K.D. Yamauchi**

APPROVED AS TO ORDER GRANTED:

**MCCARTHY TÉTRAULT LLP**

Per: **Walker MacLeod**
Counsel for Ernst & Young Inc. as Court appointed Monitor of Foundation Place Inc.

**TAB 3**

Osler, Hoskin & Harcourt LLP
Suite 2500, TransCanada Tower
450 – 1st Street S.W.
Calgary, Alberta, Canada T2P 5H1
403.260.7000 MAIN
403.260.7024 FACSIMILE

THIS IS EXHIBIT "3"
referred to in the Affidavit of
George Mylonas
Sworn before me this 27
day of September A.D. 2013
Taylor Achapont
NOTARY PUBLIC/COMMISSIONER FOR OATHS
IN AND FOR THE PROVINCE OF ALBERTA

OSLER

Calgary
Toronto
Montréal
Ottawa
New York

July 23, 2013

A. Robert Anderson
Direct Dial: 403.260.7004
randerson@osler.com
Our Matter Number: 1138935

**WITHOUT PREJUDICE**

**By Electronic Mail**

McCarthy Tétrault LLP
421-7th Avenue SW
Suite 3300
Calgary AB T2P 4K9

**Attention: Walker W. MacLeod**

Dear Sir:

**Re: Applications by Landstar Teamworks Project Management Ltd. ("Landstar") and Mylonas Enterprises Ltd. ("Mylonas")
Action No. 1101-17318**

Further to the court appearance before Yamauchi J. on June 27, 2013 and the Reasons for Judgment filed July 5, 2013, attached please find a draft form of order for your review and approval.

We understand from your representations to the Court that the Monitor intends to make a request for Landstar to subordinate its caveat (the "**Caveat**") and we anticipate receiving the Monitor's request shortly. If the Monitor elects to make a subordination request, kindly advise in your request if the Monitor is requesting that Landstar subordinate its Caveat to the mortgage currently registered on title (the "**Foundation Capital Mortgage**"). As we have already advised, Landstar's position is that it is not prepared, willing, nor obligated to subordinate its Caveat to the Foundation Capital Mortgage.

In the event the Monitor requests that the Caveat be subordinated to the Foundation Capital Mortgage, we request that the Monitor file its application quickly in order to resolve this issue as soon as possible. Currently, we do not expect to file additional materials and intend to rely on the materials already filed and any future correspondence relating to the Monitor's subordination request.

Please provide a summary of what amount the Monitor claims as the Administration Charge and a breakdown of the costs that the Monitor has spent to date and intends on spending in the future in relation to the Lands. In the event that the Monitor elects not to develop the Lands, this CCAA proceeding is not the appropriate forum to deal with this kind of liquidation and it is not clear what amounts spent by the Monitor, if any, have preserved this asset for the benefit of stakeholders. Further, the Monitor has acted as a litigant throughout these proceedings and appears to have favoured the interests of one group of stakeholders to the detriment of our clients. We reserve the right to apply to limit any amount for which the Lands will be charged for costs incurred by the Monitor that have not benefitted all stakeholders including our clients.

Yours truly,

M. Bott

FOR: A. Robert Anderson, Q.C.

RA:jp
Enclosure

cc: Sean F. Collins, *McCarthy Tetrault LLP* (via email with enclosure)
Neil Narfason, *Ernst & Young LLP* (via email with enclosure)
Cassie Riglin, *Ernst & Young LLP* (via email with enclosure)
Michael Bokhaut, *Osler, Hoskin & Harcourt LLP* (via email with enclosure)
George Mylonas (via email with enclosure)
Randy Mabbott (via email with enclosure)

Clerk's stamp:

| | |
|---|---|
| COURT FILE NUMBER: | 1101 - 17318 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |

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 and AIRDRIE COUNTRY ESTATES INC., RAILSIDE CAPITAL INC., RAILSIDE INDUSTRIAL PARK INC., FOUNDATION PLACE CAPITAL INC. and FOUNDATION PLACE INC.

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|---|---|
| APPLICANTS: | LANDSTAR TEAMWORKS PROJECT MANAGEMENT LTD.<br><br>MYLONAS ENTERPRISES LTD. |
| RESPONDENT: | FOUNDATION PLACE INC. and ERNST & YOUNG INC. as Court appointed Monitor of FOUNDATION PLACE INC. |
| DOCUMENT: | **ORDER** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | OSLER, HOSKIN & HARCOURT LLP<br>Barristers & Solicitors<br>Suite 2500, 450 – 1st Street S.W.<br>Calgary, AB T2P 5H1<br><br>Solicitor: A. Robert Anderson, Q.C./<br>Michael Bokhaut<br>Telephone: (403) 260-7004 / 7023<br>Facsimile: (403) 260-7024<br>Email: randerson@osler.com/mbokhaut@osler.com<br>File Number: 1138935 |

**DATE ON WHICH ORDER WAS PRONOUNCED: July 5, 2013**

**NAME OF JUSTICE WHO MADE THIS ORDER: Justice K.D. Yamauchi**

TAB 4

## Bokhaut, Michael

**From:** Anderson, A. Robert
**Sent:** Friday, September 06, 2013 4:21 PM
**To:** MacLeod, Walker W.
**Cc:** Collins, Sean F.; Neil Narfason (Neil.Narfason@ca.ey.com); Nick.JB.Purich@ca.ey.com; Bokhaut, Michael
**Subject:** RE: Foundation Place Inc.

THIS IS EXHIBIT "4" referred to in the Affidavit of
George Mylonas
Sworn before me this 27
day of September A.D. 2013
Taylor Schappert
NOTARY PUBLIC/COMMISSIONER FOR OATHS IN AND FOR THE PROVINCE OF ALBERTA

Walker,
In the fourth sentence of the email below, there is a typo. It should read:

In our clients' view there is <u>no</u> reasonable prospect of a plan of arrangement in this case and they expect to exercise their right to question any deponent(s) on any evidence which may be filed in support of any application to extend the stay.

Thanks,
Robert

**From:** Anderson, A. Robert
**Sent:** Friday, September 06, 2013 4:05 PM
**To:** 'MacLeod, Walker W.'
**Cc:** Collins, Sean F.; Neil Narfason (Neil.Narfason@ca.ey.com); Nick.JB.Purich@ca.ey.com; Bokhaut, Michael
**Subject:** RE: Foundation Place Inc.

Walker,
Thanks your note.
Please ensure we are served with notice of any application to extend the general stay which, unless extended will expire on or about September 30. If the Monitor decides to apply to extend the general stay, please ensure that all evidence in support of the stay application is by affidavit (as the Rules require) and not by report. In our clients' view there is any reasonable prospect of a plan of arrangement in this case and they expect to exercise their right to question any deponent(s) on any evidence which may be filed in support of any application to extend the stay. Please ensure that all application materials including affidavits are provided to us well in advance of the hearing so that we have sufficient time to review the materials, question the deponent(s) and obtain examination transcript(s) in time for the hearing.
We note you comment that the Monitor is unaware of any application for additional DIP financing. As far as I am aware, FPI did not apply for DIP/interim financing on notice to our clients and if so could not obtain an order priming our clients' prior security (CCAA s. 11.2(1)).
Please let us know as soon as possible whether and if so when the Monitor will apply to extend the general stay. If there will be no application to extend the stay please advise what involvement, if any, Ernst & Young Inc. will have following termination of the CCAA proceedings. Specifically, does it anticipate being appointed as a receiver or bankruptcy trustee of FPI?
Regards,
Robert

**From:** MacLeod, Walker W. [mailto:wmacleod@mccarthy.ca]
**Sent:** Wednesday, September 04, 2013 5:02 PM
**To:** Bokhaut, Michael
**Cc:** Collins, Sean F.; Neil Narfason (Neil.Narfason@ca.ey.com); Anderson, A. Robert; Nick.JB.Purich@ca.ey.com
**Subject:** RE: Foundation Place Inc.

Michael, thanks, we are agreeable to the form of order you have provided and I have endorsed and attached same to this email. In respect of your other inquires, and as per our letter of August 9 (a copy of which is attached), if a postponement request is made in respect of the Landstar caveat it will be made by FPI. The Monitor is also unaware of any application that will be brought for additional DIP financing.

Thanks,

**Walker MacLeod**
Associate | Sociétaire
Bankruptcy & Restructuring | Faillite et restructuration
T: 403-260-3710
C: 403-463-1207
F: 403-260-3501
E: wmacleod@mccarthy.ca

**McCarthy Tétrault LLP**
Suite 3300
421 - 7th Avenue SW
Calgary AB T2P 4K9



**From:** Bokhaut, Michael [mailto:mbokhaut@osler.com]
**Sent:** Tuesday, August 27, 2013 10:49 AM
**To:** MacLeod, Walker W.
**Cc:** Collins, Sean F.; Neil Narfason (Neil.Narfason@ca.ey.com); Cassie.Riglin@ca.ey.com; Anderson, A. Robert
**Subject:** RE: Foundation Place Inc.

Walker,

Further to my voicemail just a few minutes ago, we do not agree with including paragraph 4 since no such order was made and we disagree that the order should reference the language in paragraph 51 because paragraph 51 is *obiter*. Paragraph 51 discusses a clearly hypothetical situation whereby *if* FPI is unable to obtain Subdivision and complete the project, *then* the conditions for the establishment of the option *might* not be fulfilled and Mylonas' interest *might* evaporate. The Judge then adds that "This Court cannot rule on that matter at this time."

I note that there is some additional *obiter* found at paragraph 48 of the Judgment whereby the Judge indicates that if the Monitor elects to sell the Property as raw land, the *CCAA* might not be most appropriate legislation under which the interests of the stakeholders must be dealt. We didn't include this *obiter* in our original order and don't propose to include this language at this time, because it is *obiter* and should not be found in the Order.

Further, the form order states that Mylonas has a valid interest in the Lands and a valid caveat <u>at this time</u>, so the order does not preclude the Monitor from making a subsequent application to attempt to defeat Mylonas' interest.

Attached is a revised copy of the Order, with your proposed paragraph 4 removed (I found one small nit which I've changed as well).

We have heard a rumour that the Monitor is preparing an application for additional DIP financing. Please confirm if the Monitor is bringing such an application and when the application is set to be heard.

We have been waiting since our last attendance at court for the Monitor to bring its promised application to postpone the Landstar and Mylonas caveats. I recall you indicated to Yamauchi J. at the application that the Monitor would be bringing a postponement application shortly. Please advise whether or not the Monitor will be bringing its application to postpone the Landstar and Mylonas caveats, and if so, when.

Thanks,

-Michael

**Michael Bokhaut**
Osler, Hoskin & Harcourt LLP
Direct Dial: 403-260-7023

**From:** MacLeod, Walker W. [mailto:wmacleod@mccarthy.ca]
**Sent:** Monday, August 19, 2013 9:07 AM
**To:** Bokhaut, Michael
**Cc:** Collins, Sean F.; Neil Narfason (Neil.Narfason@ca.ey.com); Cassie.Riglin@ca.ey.com; Anderson, A. Robert
**Subject:** RE: Foundation Place Inc.

Michael, thanks for your voicemail message in respect of the form of order. The proposed language in paragraph 4 of the order flowed from paragraph 51 of the reasons for judgment (I think that the specific terminology that was used by the court was that the interest might evaporate at a later date). Ultimately in considering your comments I do think we need some language in the order that provides clarity in respect of this point – if you want it to reference the specific language from paragraph 51 and/or have alternative language on that issue we are of course open to revising the language of the order.

Thanks,

**Walker MacLeod**
Associate | Sociétaire
Bankruptcy & Restructuring | Faillite et restructuration
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C: 403-463-1207
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E: wmacleod@mccarthy.ca

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421 - 7th Avenue SW
Calgary AB T2P 4K9

Please. think of the environment before printing this message.

**From:** MacLeod, Walker W.
**Sent:** Saturday, August 10, 2013 6:32 PM
**To:** 'Bokhaut, Michael'; Anderson, A. Robert
**Cc:** Collins, Sean F.; Neil Narfason (Neil.Narfason@ca.ey.com); Cassie.Riglin@ca.ey.com
**Subject:** RE: Foundation Place Inc.

Michael, thanks – a revised form of order and a redline to your version are attached.

**Walker MacLeod**
Associate | Sociétaire
Bankruptcy & Restructuring | Faillite et restructuration
T: 403-260-3710
C: 403-463-1207
F: 403-260-3501
E: wmacleod@mccarthy.ca

**McCarthy Tétrault LLP**
Suite 3300
421 - 7th Avenue SW
Calgary AB T2P 4K9



**From:** Bokhaut, Michael [mailto:mbokhaut@osler.com]
**Sent:** Friday, August 09, 2013 4:19 PM
**To:** MacLeod, Walker W.; Anderson, A. Robert
**Cc:** Collins, Sean F.; Neil Narfason (Neil.Narfason@ca.ey.com); Cassie.Riglin@ca.ey.com; Anderson, A. Robert; George Mylonas; Randy Mabbott
**Subject:** RE: Foundation Place Inc.

Walker,
Further to your request, attached is the form of order in word format.

-Michael

**Michael Bokhaut**
Osler, Hoskin & Harcourt LLP
Direct Dial: 403-260-7023

**From:** MacLeod, Walker W. [mailto:wmacleod@mccarthy.ca]
**Sent:** Friday, August 09, 2013 3:49 PM
**To:** Bokhaut, Michael; Anderson, A. Robert
**Cc:** Collins, Sean F.; Neil Narfason (Neil.Narfason@ca.ey.com); Cassie.Riglin@ca.ey.com
**Subject:** Foundation Place Inc.

Michael/Robert, further to your letter of July 23 please see the attached correspondence.

**Walker MacLeod**
Associate | Sociétaire
Bankruptcy & Restructuring | Faillite et restructuration

T: 403-260-3710
C: 403-463-1207
F: 403-260-3501
E: wmacleod@mccarthy.ca

**McCarthy Tétrault LLP**
Suite 3300
421 - 7th Avenue SW
Calgary AB T2P 4K9

Please, think of the environment before printing this message

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******************************************************************



******************************************************************

**TAB 5**

*THIS IS EXHIBIT* "5"
*referred to in the Affidavit of*
George Mylonas
*Sworn before me this* 27
*day of* September *A.D.* 2013
Taylor Schappert
NOTARY PUBLIC/COMMISSIONER FOR OATHS
IN AND FOR THE PROVINCE OF ALBERTA

CLERK OF THE COURT
FILED
JUN 17 2013
JUDICIAL CENTRE
OF CALGARY

**AGREED STATEMENT OF SOME FACTS**

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 and AIRDRIE COUNTRY ESTATES INC., RAILSIDE CAPITAL INC., RAILSIDE INDUSTRIAL PARK INC., FOUNDATION PLACE CAPITAL INC. and FOUNDATION PLACE INC.

| | |
|---|---|
| APPLICANT: | LANDSTAR TEAMWORKS PROJECT MANAGEMENT LTD. / MYLONAS ENTERPRISES LTD. |
| RESPONDENT: | FOUNDATION PLACE INC. and ERNST & YOUNG INC. as Court appointed Monitor of FOUNDATION PLACE INC. |

## AGREED STATEMENT OF SOME FACTS

1. Below is a summary of some, but not all of the facts relevant to this Action and agreed upon between Landstar Teamworks Project Management Ltd. ("**Landstar**"), Mylonas Enterprises Ltd. ("**Mylonas**"), Foundation Place Inc. ("**FPI**") and Ernst & Young Inc. as Court appointed Monitor of FPI (the "**Monitor**").

2. FPI purchased the Lands from 1252064 Alberta Ltd. ("**125**") pursuant to a purchase and sale agreement entered into on December 18, 2007 (the "**Purchase Agreement**") for a total of $4,500,000. Attached as Appendix "A" is a copy of the Purchase Agreement.

3. Foundation Place Capital Inc. ("**Foundation Capital**") and FPI entered into a loan agreement pursuant to which Foundation Capital advanced $5,625,000 to FPI (the "**Loan**") for the purposes of acquiring a parcel of land located at 133 – 17 Avenue S.E. (the "**Lands**"). The Loan was advanced from April 2008 – August 2011 and the majority of the Loan ($4,525,000) was advanced in 2008.

4. The mortgage of $8,500,000 registered against title to the Lands on July 7, 2009 (Registration Number 091 191 225) was signed on May 26, 2009.

5. The Monitor anticipates that if the Lands are sold as is (raw lands) that the amount recovered will be significantly less than the balance owed to Foundation Capital.

6. No decision has been taken by FPI or the Monitor whether to continue with development of the Lands or to abandon development and sell the Lands as raw land.

DATED at Calgary, Alberta, this 14th day of June, 2013.

AGREED ON BEHALF OF LANDSTAR TEAMWORKS PROJECT MANAGEMENT LTD. / MYLONAS ENTERPRISES LTD.

**OSLER, HOSKIN & HARCOURT LLP**

Per: M. Bokh

Michael Bokhaut

AGREED ON BEHALF OF ERNST & YOUNG INC. as Court appointed Monitor of FOUNDATION PLACE INC.

**MCCARTHY TÉTRAULT LLP**

Per:

Walker MacLeod

## Appendix "A"

# COMMERCIAL REAL ESTATE PURCHASE CONTRACT

# 731968Dec17
Purchase Contract Number

This form was developed by the Alberta Real Estate Association for the use of its members and may not be altered electronically by any person.

## PART A - OFFER TO PURCHASE

This Contract is between

THE SELLER
Name 1252064 Alberta Ltd.
Name

and

THE BUYER
Name Foundation Place Inc.
Name

### 1. THE PROPERTY

1.1 The Property is the Land, Buildings, Accepted Tenancies, Attached Goods (unless excluded) and included Unattached Goods located at:

Municipal Address: 133 - 17 Ave. SE, Calgary

Legal Description: Plan 7157FH Block _____ Lot/Unit 1-3

Title(s) # 071 434 677. A copy of the existing Title(s) attached hereto as Schedule "A".

If Condominium Property, legal description and details as described in Commercial Condominium Property Schedule (attached).

1.2 All Attached Goods (fixtures) except for:

1.3 No Unattached Goods (specific chattels) except for:

1.4 Title to the Property shall be subject to any reservations and exceptions stated on the Certificate of Title, non-financial obligations now on Title such as easements, utility rights-of-way, covenants and conditions that are normally found registered against property of this nature, and non-financial encumbrances which have been accepted by the Buyer (the "Permitted Encumbrances"). Unless otherwise agreed in writing, the Title shall be free and clear of all other liens, encumbrances, registrations and obligations except those implied by law.

The Buyer agrees to accept the following Permitted Encumbrances:

The Buyer agrees to accept the following tenancies (the "Accepted Tenancies"):

### 2. THE TRANSACTION

2.1 The Buyer and the Seller agree to act cooperatively, reasonably, diligently and in good faith.

2.2 The Buyer hereby offers to purchase the Property for the sum of $ 4,500,010.00 Four Million Five Hundred Thousand Ten Dollars (the "Purchase Price").

2.3 Other than the Deposits, the Buyer shall pay the Purchase Price by certified cheque, lawyer's trust cheque, bank draft or other agreed value as follows:

| Amount | |
|---|---|
| $ 10.00 | Initial Deposit |
| $ | Additional Deposit |
| $ | Assumption of Mortgage/Agreement for Sale (approximate principal balance) |
| $ | New Financing |
| $ | Seller Financing (as per attached Financing Schedule) |
| $ | Other Value |
| $ 4,449,990.00 | Balance Owing |
| $ 4,500,000.00 | **Purchase Price (plus GST, if applicable)** |

Seller's Initials _____ Buyer's Initials _____

2.4 In addition to the Purchase Price, the applicable GST will be paid by the Buyer. On or before the Completion Day, the Buyer may confirm to the Seller's lawyer that it is registered for the purposes of Part IX of the *Excise Tax Act* (Canada) (the "Act") and will provide its registration number. In that event, the Buyer covenants to assume liability for applicable GST accruing with respect to the contemplated transaction and further covenants to pay the applicable GST immediately after the Completion Day or to complete, sign and file such forms, filings or reports required by the Act within the prescribed time limits. The Buyer agrees to indemnify and save harmless the Seller from and against all liability, fines, penalties, costs, expenses and interest, including legal fees and disbursements on a solicitor/client full indemnity basis, which the Seller incurs or may incur as a result of or arising out of a default by the Buyer of its obligations described in this paragraph. If the Buyer does not confirm that it is a registrant under Part IX of the Act on or before the Completion Day, then the Seller will collect from the Buyer, the Buyer will pay the applicable GST and the Seller will then remit the GST amount as required by the Act.

## 3. DEPOSITS

3.1 The Initial Deposit shall be delivered in trust to 1252064 Alberta Ltd.

Unless otherwise agreed in writing, the Initial Deposit shall accompany the offer.

3.2 Any Additional Deposits shall be delivered in trust to

as follows

3.3 In the event that either Deposit(s) are undelivered or returned by the financial institution as funds not cleared or non-sufficient funds, then the Buyer must replace the Deposit(s) by certified cheque, money order or bank draft within two (2) Business Days of being notified that the Deposits did not clear. If the Buyer fails to provide the Deposit(s), the Seller may, at its discretion, terminate the Contract by notice in writing to the Buyer within two (2) Business Days.

3.4 Unless otherwise agreed in writing, no interest on the Deposits shall be paid to the Seller or the Buyer.

3.5 The Deposits shall be held in trust for both the Seller and the Buyer and shall be:

(a) applied against the Commission (as defined in the Commercial Real Estate Listing Contract or any other commission agreement signed by the Seller) and paid directly out of trust to the brokerage(s) when the Commission is earned in accordance with the terms of the Listing Contract or other commission agreement signed by the Seller;

(b) returned forthwith to the Buyer if this offer is not accepted and the cheque has not been deposited;

(c) refunded forthwith to the Buyer if this offer is not accepted and the Buyer's cheque has cleared the brokerage's trust account;

(d) refunded forthwith to the Buyer upon the Buyer's cheque clearing the brokerage's trust account if a condition is not satisfied or waived (as per Section 4) or the Seller fails to perform this Contract; and

(e) forfeited to the Seller if this offer is accepted and all conditions are satisfied or waived and the Buyer fails to perform on this Contract.

3.6 The brokerage holding the Deposits is further directed and authorized to pay that portion of the Deposits exceeding the Commission in trust to the Seller's lawyer no later than two (2) Business Days prior to the Completion Day.

3.7 If there is a dispute between the Seller and the Buyer as to entitlement to the Deposits then:

(a) the brokerage holding the Deposits shall review the circumstances, determine entitlement and pay the money to the party who is entitled to the Deposit;

(b) if no reasonable conclusion can be made in regard to (a) above, the brokerage shall notify the parties to the Contract in writing and shall pay the money into a lawyer's trust account;

(c) the parties agree to allow the lawyer and/or the brokerage to deduct from the Deposit a reasonable fee and costs incurred for dealing with the Deposit;

(d) a brokerage and/or lawyer acting in good faith under this clause shall not be liable to either party for any damages associated with the handling of the Deposit except as arising from the negligence of the brokerage or lawyer.

## 4. CONDITIONS

4.1 **Buyer's Conditions:** The obligations of the Buyer described in this Contract are subject to the satisfaction or waiver of the following conditions precedent, if any. These conditions are inserted for the sole and exclusive benefit and advantage of the Buyer. The satisfaction or waiver of these conditions will be determined in the sole discretion of the Buyer. The Buyer agrees to use reasonable efforts to satisfy these conditions. These conditions may only be satisfied or waived by the Buyer giving written notice (the "Buyer's Notice") to the Seller on or before 5 p.m. on the 18 day of December 2007 (the "Buyer's Condition Day"). If the Buyer fails to give the Buyer's Notice to the Seller on or before the Buyer's Condition Day, then this Contract will be ended and the Initial Deposit plus any earned interest will be returned to the Buyer and all agreements, documents, materials and written information exchanged between the parties will be returned to the Buyer and the Seller respectively.

Within three (3) Business Days of the Final Signing of this Contract (Section 18), the Seller will provide to the Buyer true copies of all agreements/documents/materials which reasonably relate to the Property and the Buyer's Conditions and which are in the possession of the Seller or under its control (the "Documents"). The Documents are required by the Buyer in order for it to decide whether the conditions are satisfied or should be waived. Any delay by the Seller in providing the Documents will extend the Buyer's Condition Day.

(a) **Financing Condition:** The Buyer being able to arrange a new mortgage loan upon terms acceptable to the Buyer and/or the Buyer being approved to assume an existing mortgage loan upon terms acceptable to the Buyer.

Seller's Initials Buyer's Initials

(b) **Due Diligence Conditions:**

(i) acceptable physical viewing/inspection of the Property;
(ii) acceptable review of legal title for the Property and any Unattached Goods;
(iii) acceptable review of any Permitted Encumbrances;
(iv) acceptable review of Accepted Tenancies;
(v) acceptable review of financial records and statements respecting the Property and any operating agreements that the Buyer is to assume;
(vi) acceptable review of all engineering, mechanical, electrical, plumbing, roof, heating, ventilation, construction or similar reports, studies, assessments, plans, drawings, specifications, correspondence or work orders;
(vii) acceptable review of all environmental reports;
(viii) acceptable review of all real property reports; and
(ix) acceptable review of the following additional agreements/documents/materials: ____________________

(x) The Buyer may also, at its expense, retain its own consultants to conduct such inspections, reviews and tests and to produce such observations, reports or assessments regarding the Property. In this regard, the Buyer and its authorized representatives will have access to the Property after the Final Signing of this Contract and during normal business hours in order to conduct all inspections, reviews and tests deemed necessary by the Buyer acting reasonably. The rights of the existing tenants must be respected and the Buyer will be responsible for all damages caused by its representatives. The Seller will provide the Buyer with such written authorizations and other assistance when reasonably required by the Buyer to facilitate or to complete its inspections, review or tests.

(c) **Additional Buyer's Conditions:**

4.2 **Seller's Conditions:** The obligations of the Seller described in this Contract are subject to the satisfaction or waiver of the following conditions precedent, if any. These conditions are inserted for the sole and exclusive benefit and advantage of the Seller. The satisfaction or waiver of these Conditions will be determined in the sole discretion of the Seller. The Seller agrees to use reasonable efforts to satisfy these conditions. These conditions may only be satisfied or waived by the Seller giving written notice (the "Seller's Notice") to the Buyer on or before 5 p.m. on the 18 day of December, 2007, (the "Seller's Condition Day"). If the Seller fails to give the Seller's Notice to the Buyer on or before the Seller's Condition Day, then this Contract will be ended and the Initial Deposit plus any earned interest will be returned to the Buyer and all agreements, documents, materials and written information exchanged between the parties will be returned to the Buyer and the Seller respectively.

4.3 Subject to clauses 4.1 and 4.2, the Buyer and the Seller may give written notice to the other party on or before the stated Condition Day advising that a Condition will not be waived, has not been satisfied and will not be satisfied on or before the Condition Day. If that notice is given, then this Contract is ended upon the giving of that notice.

## 5. INSURANCE

5.1 The risk of loss or damage to the Property shall lie with the Seller until the Purchase Price is paid according to the terms of this Contract. If loss or damage to the Property occurs before the Seller is paid the Purchase Price, then any insurance proceeds shall be held in trust for the Buyer and the Seller according to their interests in the Property.

## 6. WARRANTIES AND REPRESENTATIONS

6.1 The Seller represents and warrants to the Buyer that:

(a) the current use of the Land and Buildings complies with the existing municipal land use bylaw;
(b) the Buildings and other improvements on the Land are not placed partly or wholly on any easement or utility right-of-way and are entirely on the Land and do not encroach upon neighbouring lands, except where an encroachment agreement is in place;
(c) the location of Buildings and other improvements on the Land complies with all relevant municipal bylaws, regulations or relaxations granted by the appropriate municipality prior to the Completion Day, or the Buildings and other improvements on the Land are "non-conforming buildings" as that term is defined in the *Municipal Government Act* (Alberta);
(d) to the best of the Seller's knowledge, there is no legal action outstanding with respect to the Property;
(e) the Seller is not in breach of any contract with respect to the Property;
(f) the Seller is not in breach of any obligation to any third party with respect to the Property;
(g) within the meaning of the *Income Tax Act* (Canada), the Seller is not now, nor will be on the Completion Day, a non-resident of Canada nor an agent or a trustee for any person with an interest in the Property who is a non-resident of Canada;
(h) $______________ is the current monthly condominium contribution payable (fee for administrative an other expenses); and
(i) except as otherwise disclosed, the Seller is not aware of any defects that are not visible and that may render the Property dangerous or potentially dangerous to occupants or unfit for habitation.

6.2 All of the warranties contained in this Contract and any attached Schedules are made as of and will be true at the Completion Day, unless otherwise agreed in writing.

________ Seller's Initials ________ Buyer's Initials

6.3 The Seller and the Buyer each acknowledge that, except as otherwise described in this Contract, there are no other warranties, representations or collateral agreements made by or with the other party, the Seller's brokerage and the Buyer's brokerage about the Property, any neighbouring lands, and this transaction, including any warranty, representation or collateral agreement relating to the size/measurements of the Land and Buildings or the existence or non-existence of any environmental condition or problem.

6.4 The representations and warranties in this Contract may be enforced after the Completion Day, provided that any legal action is commenced within the time limits prescribed by the *Limitations Act* (Alberta).

6.5 The Buyer shall have the right to register a **caveat** against the Title to the Property upon the acceptance of this offer by the Seller. Should the Buyer fail to perform this Contract, it agrees to forthwith discharge that caveat.

## 7. ADDITIONAL TERMS

7.1 All time periods, deadlines and dates in this Contract shall be strictly followed and enforced. All times will be Alberta time unless otherwise stated.

7.2 Neither the Buyer or the Seller shall assign its interest in the Property without the written approval of the other, such approval not to be unreasonably withheld.

7.3 All changes of number and gender shall be made where required.

7.4 This Contract will be governed by the laws of the Province of Alberta. The parties submit to the exclusive jurisdiction of the Courts in the Province of Alberta regarding any dispute that may arise out of this transaction.

7.5 The following terms are a part of this Contract:

The Initial Deposit as per 2.3 of this agreement has been paid and released to the Seller.

## 8. CLOSING

8.1 Subject to compliance with the terms hereof, possession of the Property shall be available and given to the Buyer on or before 12 noon on the 1st day of January, 2009, (the "**Completion Day**"), subject to the rights of the Accepted Tenancies, if any.

When the Buyer obtains possession, the Property will be in substantially the same condition as it was in when this Contract was accepted.

8.2 All normal adjustments for the Property including but not limited to taxes, local improvement levy and assessments, municipal charges, rents, utilities, tenant deposits including interest, prepaid rent, mortgage principal and interest that are applicable with respect to the Property shall be adjusted as of 24:00 hours on the Completion Day. The Buyer shall assume all local improvements, assessments and charges against the Property as of that time.

8.3 Closing documents shall:

(a) consist of the transfer of land (the "Transfer") in registerable form together with all applicable conveyancing documents normally expected in a commercial transaction of this nature;

(b) include estoppel certificates for each of the Accepted Tenancies (if applicable); and

(c) be prepared at the expense of the Seller and delivered to the Buyer's lawyer within a reasonable time to confirm registration prior to the Completion Day.

8.4 In the event the Seller fails to deliver the Transfer to the Buyer's lawyer within such reasonable time, then the Buyer shall not be obliged to pay interest on that portion of the cash to close attributable to the Buyer's own funds, excluding mortgages, provided that those funds are paid to Seller's lawyer in trust, until the Buyer has a reasonable time in which to register the Transfer.

8.5 The Seller's lawyer may use the Purchase Price to pay out all mortgages, condominium contributions, registrations and other financial obligations that are the Seller's obligation to pay or discharge. Within a reasonable period of time after the Completion Day, the Seller's lawyer will provide the Buyer's lawyer with evidence of all discharges including, where required, a certified copy of the certificate of title and an estoppel certificate evidencing the payment of all condominium contributions that are the Seller's obligation to pay.

8.6 All money due and owing to the Seller including GST, if applicable, shall be paid to the Seller's lawyer on or before the Completion Day. If the Seller agrees to accept payment after the Completion Day, the Buyer shall pay interest at a rate of 3% per annum above the prime rate set by the Alberta Treasury Branch on all monies owing to the Seller, from the Completion Day to and including the date that the monies owing have been unconditionally paid.

8.7 If a new mortgage is a condition of this Contract, the Seller agrees to trust conditions that allow the Buyer's lawyer to register the Transfer so as to obtain the advance of mortgage funds on the new mortgage; provided however that the Buyer's lawyer undertakes, accepts, and complies with reasonable trust conditions imposed by the Seller's lawyer until the Seller has been paid the total Purchase Price.

8.8 The Seller's lawyer has a right to prepare (at the expense of the Buyer) any mortgage or agreement for sale between the Seller and the Buyer.

## 9. ATTACHED SCHEDULES

9.1 The following Schedules form part of this Contract and are attached:

- ☑ Schedule A (copy of Title)
- ☐ Schedule B (other documents)
- ☐ Commercial Condominium Property Schedule
- ☐ Addendum
- ☐ Other Schedules
- ☐ Financing Schedule
- ☐ Assumption of Mortgage/Agreement for Sale
- ☐ Other Value
- ☐ Seller Financing

Seller's Initials Buyer's Initials

## 10. CONFIDENTIALITY

10.1 The Buyer shall keep all information obtained in strictest confidence and shall only make the information available to the Buyer's employees, agents and professional advisors in strict confidence and shall return all of the Documents including all copies to the Seller before any Deposits are released to the Buyer pursuant to this Contract.

## 11. REMEDIES/DISPUTES

11.1 If the Seller or the Buyer fails or refuses to complete the Contract according to its terms, then the other party may pursue all available remedies. The Seller's remedies include keeping the Deposits and claiming additional damages. Both the Seller and the Buyer can claim reasonable costs including legal fees and disbursements on a solicitor/client full indemnity basis.

## 12. SECURITY FOR THE SELLER'S BROKERAGE'S FEES

12.1 The Seller does hereby irrevocably assign to the Seller's brokerage enough of the Purchase Price to pay all sums due and owing to the Seller's brokerage, and agrees to pay any unpaid balance of the Commission to the Seller's brokerage.

## 13. ADVICE

**13.1 This Contract is intended to create binding legal obligations. The Seller and the Buyer should read this Contract carefully and are encouraged to obtain legal advice before signing.**

**13.2 This Contract may be signed and sent by fax and this procedure will be as effective as signing and delivering an original copy.**

**13.3 Unless there is a dual agency or another written agreement, the Seller's brokerage represents the Seller as Seller's Agent and does not have a fiduciary relationship with the Buyer, and the Buyer's brokerage represents the Buyer as Buyer's Agent and does not have a fiduciary relationship with the Seller.**

**13.4 The Buyer and Seller agree that the sale and other related information regarding this transaction may be retained and disclosed by the brokerage and/or its real estate board(s) as required for closing and for reporting, appraisal and statistical purposes.**

## 14. DEFINITIONS

14.1 In this Contract:

(a) **Business Day** means a day when the Land Titles Office is open for business.

(b) **Buyer's Agent** means the licensed brokerage (including its broker, all associate brokers and agents) who represents the Buyer.

(c) **Seller's Agent** means the licensed brokerage (including its broker, all associate brokers and agents) who represents the Seller.

## 15. REPRESENTATIVES/NOTICE

**Note: The Representative information must be completed in full by the Buyer's Agent at the offer stage prior to the Contract being signed in order to permit communication on the Representatives.**

15.1 The Representatives identified in clause 15.2 represent the Seller and the Buyer.

15.2 For the purposes of giving and receiving any notice referred to in this Contract, and for acceptance of an offer to purchase, communication must be in writing and must be delivered to the address or faxed to the number described below.

**A notice sent or received by a Representative is proper notice for the purposes of this Contract.**

**Seller's Information:**

Seller's Address 4-4002 9th Ave N, Lethbridge, AB T1H 6T8

(postal code) Phone ______ Fax ______

Seller's GST # ______

**Seller's Representative:**

______

Broker, associate broker or agent registered to the brokerage

Brokerage Name ______

Brokerage Address ______

______ (postal code)

Phone ______ Fax ______

**Buyer's Information:**

Buyer's Address 4-4002 9th Ave N, Lethbridge, AB, T1H 6T8

(postal code) Phone ______ Fax ______

Buyer's GST # ______

**Buyer's Representative:**

______

Broker, associate broker or agent registered to the brokerage

Brokerage Name ______

Brokerage Address ______

______ (postal code)

Phone ______ Fax ______

______ Seller's Initials ______ Buyer's Initials

Purchase Contract # 731968Dec17

## 16. OFFER

**16.1** The Buyer offers to buy the Property for the Purchase Price according to the terms of this Contract.

**16.2** This offer/counter offer shall be open for acceptance in writing until 5 p.m. on Dec 18/07

SIGNED AND DATED at Lethbridge, Alberta at 5 p.m. on the ______ day of ______, ______.

FOUNDATION PLACE INC.
Name of Buyer (Print)

Per: [signature]
Authorized Signing Officer(s)

Ron Aitkens
Print Name of Authorized Signing Officer(s)

Per: ______
Authorized Signing Officer(s)

______
Print Name of Authorized Signing Officer(s)

x [signature]
Witness

Donna Petiot
Print Name of Witness

______
Witness

______
Print Name of Witness

# PART B - ACCEPTANCE

## 17. ACCEPTANCE

**17.1** The Seller accepts the Buyer's offer and agrees to sell the Property for the Purchase Price according to the terms of the Contract.

SIGNED AND DATED at Lethbridge, Alberta at 5 p.m. on the 18 day of December, 2007.

1252964 Alberta Ltd
Name of Seller (Print)

Per: [signature]
Authorized Signing Officer(s)

Ron Aitkens
Print Name of Authorized Signing Officer(s)

Per: ______
Authorized Signing Officer(s)

______
Print Name of Authorized Signing Officer(s)

x [signature]
Witness

Donna Petiot
Print Name of Witness

______
Witness

______
Print Name of Witness

## 18. FINAL SIGNING

**18.1** Final Signing of this Contract occurred at 5 p.m. on December 18 2007

Initials of the person(s) who signed last RA

### CONVEYANCING

Seller's Lawyer ______

Lawyer's Address ______ (postal code)

Lawyer's Phone ______ Fax ______

Buyer's Lawyer Alger & Associates

Lawyer's Address Lethbridge AB (postal code)

Lawyer's Phone 380 6005 Fax ______

**TAB 6**

*THIS IS EXHIBIT " 6*
*referred to in the Affidavit of*
George Mylonas
*Sworn before me this* 27
*day of* September *A.D.* 2013
Jaylor Schappert
NOTARY PUBLIC/COMMISSIONER FOR OATHS
IN AND FOR THE PROVINCE OF ALBERTA

>> To: 'cassie.hern@ca.ey.com' <cassie.hern@ca.ey.com>
>> From: Jeff W. Moroz <moroz@mcleod-law.com>
>> Sent: 5/11/2012 1:03PM
>> Subject: Foundation Group CCAA Proceedings
>>
>> >> Hi Cassie,
>> >>
>> >> As discussed, we represent Landstar Teamworks Project Management Ltd. and
>> >> Mylonas Enterprises Ltd.
>> >>
>> >> Our clients have first and second position secured claims against Foundation
>> Place
>> >> Inc.
>> >>
>> >> In the circumstances, we should have been receiving notice of all of the
>> proceedings.
>> >>
>> >> We confirm we require notice of any proceedings in the CCAA process.
>> >>

>> >> Regards,
>> >>
>> >>
>> >>
>> >> [Description: mcleod]
>> >> Jeff W. Moroz
>> >> Associate
>> >>
>> >> McLeod & Company LLP
>> >> Gulf Canada Square
>> >> 850, 401 - 9th Avenue SW
>> >> Calgary, Alberta T2P 3C5
>> >> Direct Line: (403) 225-6423
>> >> Main Line: (403) 278-9411
>> >> Fax: (403) 271-1769
>> >>
>> >> Email: moroz@mcleod-law.com<mailto:moroz@mcleod-law.com>
>> >> Website: www.mcleod-law.com<http://www.mcleod-law.com>
>> >>
>> >> CONFIDENTIALITY NOTICE
>> >> This e-mail message and any attachments are confidential and are intended only
>> for
>> >> the person(s) or organization(s) named above. The information contained in this
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