No. S-205095
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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*,
S.B.C. 2002, C. 57, AS AMENDED

– AND –

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP

NOTICE OF APPLICATION

Names of applicants: Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership

To: The Service List

TAKE NOTICE that an application will be made by the applicants to Madam Justice Fitzpatrick at the courthouse at 800 Smithe Street Vancouver BC V6Z 2E1 on December 1, 2020 at 9:00 a.m., by MS Teams, for the orders set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. An Order substantially in the form attached as **Schedule A** hereto, providing for the following relief:

    (a) abridging the time for service of this notice of application, to the extent necessary;

    (b) extending the stay of proceedings to and including February 26, 2021;

    (c) approving: (i) the Monitor's execution of the Bid Offer Agreement (as defined below) between the Petitioners and Bosa Properties (OC) Inc. ("**Bosa**"), and (ii) the payment of a break fee in the amount of CAD $100,000 to Bosa on the terms set out in the Bid Offer Agreement.

2. An Order providing that the Confidential Supplement to the Third Report of the Monitor (the "**Confidential Supplement**") be filed under seal.

3. Such further and other relief as this Honourable Court may deem just.

Part 2: FACTUAL BASIS

1. The Petitioners, Evergreen House Development Limited Partnership and its general partner, Port Capital Development (EV) Inc., own the **"Terrace House Project"**. The Terrace House Project consists of an ongoing development of a high-rise luxury residential strata development in the Coal Harbour neighbourhood, located at 1250 W Hastings St., Vancouver.

2. On May 29, 2020, the Petitioners obtained an order in these proceedings (the "**Initial Order**") granting them various relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

3. Among other things, the Initial Order established a stay of proceedings (the "**Stay of Proceedings**") effective until June 8, 2020 and appointed Ernst & Young, Inc. as monitor (the "**Monitor**") in these proceedings with enhanced powers to execute control over the Petitioners, explore restructuring opportunities and administer a "dual-track" sale and investment solicitation process to obtain an equity investment, a refinancing or alternatively a sale of the Terrace House Property (the "**SISP**").

4. On June 8, 2020, the Petitioners obtained an amended and restated initial order (the "**ARIO**") in these proceedings that, among other things:

(a) extended the Stay of Proceedings to and including September 3, 2020;

(b) approved an interim financing facility (the "**DIP Facility**") with Desjardins Financial Security Life Assurance Company (the "**Dip Lender**").

5. On August 31, 2020, the Stay of Proceedings was extended. It is currently set to expire on December 4, 2020.

Activities since the last stay extension

6. Since the date of the last stay extension, the Monitor has, among other things, with the cooperation of the Petitioners:

a) managed the site preservation of the Terrace House Project, including payment to vendors and suppliers for post-filing activity;

b) managed the cash flows of the Petitioners, prepared reporting packages and corresponded with the DIP Lender regarding the DIP Facility;

c) obtained an extension of property and third-party liability insurance for the Terrace House Project;

d) administered Phase II of the SISP;

e) attended numerous meetings with the Terrace House Project's secured creditors; and

f) responded to numerous inquiries from various financial stakeholders of the Terrace House Project as well as other third parties.

Update on the SISP

7. All capitalized terms used in this section of this Notice of Application not otherwise defined have the meanings ascribed to them in the SISP.

8. A summary of the procedures undertaken by the Monitor for Phase I of the SISP that resulted in several non-binding LOIs on or before the Phase I Bid Deadline of July 24, 2020 are described in the Secord Report of the Monitor.

9. Since August 31, 2020, the Monitor has administered Phase II of the SISP, as summarized below.

10. Following consultation with the Petitioners and its secured creditors, the Monitor qualified six bidders to participate in Phase II of the SISP (the "**Phase II Bidders**"). The Phase II Bidders were advised, among other things, that: (i) the deadline for submission of "**Phase II Offers**" was set to 5:00 p.m. October 16, 2020 (the "**Phase II Bid Deadline**"), and (ii) the primary criteria that

the Monitor would consider in evaluating the Phase II Offers would include the purchase price and closing conditions for the proposed transaction.

11. Following commencement of the Phase II SISP, an additional party expressed interest in submitting an offer to acquire the Terrace House Project. As permitted under the SISP, the Monitor permitted this party to participate as a Phase II Bidder as well.

12. The Monitor received six Phase II Offers on or before the Phase II Bid Deadline, and prepared a side-by-side analysis of the bids (the "**Phase II Bid Analysis**") summarizing and comparing the financial terms and conditions of the bids. Copies of the Phase II Bid Analysis and Phase II Offers were provided to the Petitioners' secured creditors the week ended October 23, 2020.

13. The Phase II Offers vary in nature from build-out proposals, debt assumption and straight cash offers. Each offer was subject to confirmatory due diligence periods of between 60 to 90 days in order to undertake a review of the feasibility of the Terrace House Project and in particular a full review of costs to complete.

14. One of the Phase II Offers received was a refinancing and restructuring proposal submitted by the Port Capital Group.

Bid Offer Agreement and Break Fee

15. Following consultation with the Petitioners' secured creditors, the Monitor determined that the Phase II Bid submitted by Bosa was the best offer submitted.

16. On November 10, 2020, the Monitor, on behalf of the Petitioners, executed a "**Bid Offer Agreement**" with Bosa. The Bid Offer Agreement is conditional only and sets out the framework of the initial main business terms for a purchase and sale agreement for the Terrace House Project (a "**Formal Agreement**").

17. The key non-financial terms of the Bid Offer Agreement include the following:

(a) a due diligence period of 75 days;

(b) the contents and reporting of the feasibility study and due diligence review relating to the economics of the Terrace House Project (the "**Feasibility Study**") will be made available to the Monitor; and

(c) a break fee in the amount of $100,000 (the "**Break Fee**") is payable to Bosa if the Monitor on behalf of the Petitioners enters into a Formal Agreement with Bosa but an alternative transaction is approved by the Court and completed.

18. The Bid Offer Agreement does not include exclusivity provisions with Bosa. Although the Monitor does not intend to actively market the Terrace House Project during the completion of due diligence under the agreement, the Monitor retains the ability to consider alternative offers for the Terrace House Project, and the Monitor will continue to engage with the Port Capital Group regarding its restructuring proposal to determine if a viable restructuring proposal can be made.

19. In its Third Report, the Monitor notes that, in its view, the Bid Offer Agreement is the best viable option for maximizing the value that can be derived from the Petitioners' assets and or business in the context of the SISP at this time. Among other things, the Bid Offer Agreement allows the Monitor to benefit from the Feasibility Review from one of Canada's premier real estate developers, which will provide valuable insight into valuation parameters given the current uncertainty with the project.

20. The due diligence procedures undertaken by Bosa are extensive and necessitate engaging project consultants and the City of Vancouver. The cost associated with due diligence activities is significant, being in excess of $100,000.

21. Given the cost to be incurred by Bosa for the due diligence associated with the Bid Offer Agreement, the Break Fee is required and reasonable in the circumstances.

22. The Monitor is supportive of the approval of the Break Fee and notes in the Third Report that the quantum of the Break Fee is consistent with Bosa's due diligence costs and represents a reasonable payment to Bosa in the event a Formal Agreement is entered into, but an alternative transaction is ultimately approved by the Court.

23. The Petitioners will return to Court to seek approval of the Formal Agreement and sale contemplated therein if a Formal Agreement is finalized and no other viable and superior sale or restructuring agreement materializes.

Request for Sealing Order

24. Information regarding the Phase II Bidders, the Phase II Offers, the Bid Offer Agreement and the Phase II Bid Analysis is provided by the Monitor to the Court in the Confidential Supplement.

25. The Petitioners, with the support of the Monitor, request an order that the Confidential Supplement be filed under seal.

26. The Monitor is of the view that the public disclosure of the materials contained in the Confidential Supplement would be detrimental to the integrity of the SISP, and detrimental to the Petitioners' commercial interests and their ability to maximize value for stakeholders through the SISP in the event that the transaction with Bosa does not complete.

Necessity for Stay Extension

27. The Petitioners seek an extension of the Stay of Proceedings to and including February 26, 2021, being the approximate anticipated timeframe for the completion of the due diligence under the Bid Offer Agreement.

28. The Third Report of the Monitor contains a variance analysis of the actual cash flow activity versus the cash flow forecast appended to the Second Report of the Monitor for the period of August 22, 2020 to November 20, 2020. During this period, a positive variance of approximately $18,000 is observed.

29. The positive variance is attributable to timing differences for payment of certain expenses and spending restraint.

30. As set out in the Third Report of the Monitor, the Third Report Cash Flow Forecast prepared by the Monitor for the period of November 21, 2020 to February 26, 2021 projects that

the authorized borrowings under the DIP Facility are sufficient to pay obligations anticipated to arise over the proposed extension of the Stay of Proceedings.

31. The extension of the Stay of Proceedings to February 26, 2021 is necessary to permit Bosa to complete its due diligence procedures and work towards a binding agreement for the sale of the Terrace House Project and allows the Monitor and Petitioners to maintain operational control and to preserve the Terrace House Project.

32. The Petitioners have acted and continue to act in these proceedings in good faith and with due diligence.

Part 3: LEGAL BASIS

1. The Petitioners rely on the CCAA, the Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court.

The Bid Offer Agreement and Break Fee

2. The Petitioners rely on the Court's inherent jurisdiction and s. 11 of the CCAA for approval of the execution of the Bid Offer Agreement and Break Fee, which allows the Court to exercise its discretion to grant orders as are appropriate towards achieving the broad statutory and policy objectives of the CCAA.

see *Quest University Canada (Re)*, 2020 BCSC 1845

3. The Break Fee contemplated in the Bid Offer Agreement is commercially reasonable in the circumstances and is consistent with Bosa's anticipated due diligence costs. Furthermore:

(a) the Break Fee is calculated based on an expense reimbursement methodology and is not a "fee" or profit driven amount;

(b) the quantum of the Break Fee is reasonable in light of the purchase price in the Bid Offer Agreement;

(c) Bosa's due diligence activities will also be of benefit for the Monitor, the Petitioners and the SISP generally, and will thus have a positive impact on the restructuring;

(d) the Bid Offer Agreement is the best viable option at this time for maximizing the value derived from the Petitioners' assets in the context of the SISP;

(e) the quantum of the Break Fee is not expected to have a chilling effect on the ability of other parties to advance alternative offers; and

(f) the terms of the Bid Offer Agreement were the result of arm's length negotiations.

4. The quantum of the Break Fee represents a reasonable amount to be paid to Bosa in the event that a Formal Agreement is entered into, but an alternative transaction is ultimately approved by the Court. No creditor will be materially prejudiced by the Court's approval of the Break Fee.

5. The approval of the execution of the Bid Offer Agreement and approval of the payment of the Break Fee on the terms and conditions set out in the Bid Offer Agreement is appropriate in the circumstances and is recommended by the Monitor.

Stay Extension

6. Pursuant to s. 11.02(3) of the CCAA, the Court may extend the stay of proceedings for any period that the Court considers necessary provided that:

(a) the extension sought is appropriate in the circumstances; and

(b) the Petitioners have acted and are acting in good faith and with due diligence.

7. Since the Initial Order was pronounced on May 29, 2020, the Petitioners have acted and continue to act and operate in good faith and with due diligence.

8. The extension of the stay of proceedings is necessary to allow Bosa to complete its due diligence procedures under the Bid Offer Agreement and work towards a binding agreement for the sale of the Terrace House Project, and for the Petitioners and Monitor to maintain operational control and preserve the Terrace House Project.

9. Having regard to all the circumstances and the conditions outlined in s. 11.02(3) of the CCAA, the extension of the Stay of Proceedings to and including February 26, 2021 is reasonable and appropriate.

Sealing Order

10. A sealing order may be granted where:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

Sierra Club of Canada (Minister of Finance), 2002 SCC 41, ¶53

11. The Confidential Supplement includes information regarding the identity of the Bidders, the Phase II Offers, the Phase II Bid Analysis and the Bid Offer Agreement.

12. The sealing order sought is necessary to maintain the integrity of the SISP and to prevent a serious risk to the commercial interests of the Petitioners, and their ability to maximize value for stakeholders through the SISP in the event that the transaction with Bosa does not complete and the Monitor is required to re-approach the market for an alternative purchaser or investor.

Part 4: MATERIAL TO BE RELIED ON

1. At the hearing of this Application, the Petitioners will rely on:

(a) The Third Report of the Monitor, to be filed;

(b) The Confidential Supplement to the Second Report of the Monitor, to be filed under seal;

(c) The Second Report of the Monitor, dated August 27, 2020;

(d) the Amended and Restated Initial Order pronounced June 8, 2020;

(e) Such further material as counsel may advise and the Court permits.

The applicants estimate that the application will take 45 minutes.

☒ This matter is not within the jurisdiction of a master. Madam Justice Fitzpatrick is seized of this proceeding.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: November 27, 2020

Signature of Alexandra Andrisoi
Lawyer for the Applicants

THIS NOTICE OF APPLICATION is prepared and delivered by David E. Gruber and Alexandra Andrisoi of the firm Bennett Jones LLP, Barristers & Solicitors, counsel for the applicants, File No. 090034.00001, whose place of business and address for delivery is 2500 – 666 Burrard Street, Vancouver, British Columbia, V6C 2X8. Telephone: (604) 891-7500. Facsimile: (604) 891-5100. [andrisoia@bennettjones.com]

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs ____________ of Part 1 of this notice of application

☐ with the following variations and additional terms:

Dated: ______________________________

____
Signature of ☐ Judge ☐ Master

Appendix

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

☐ discovery: comply with demand for documents

☐ discovery: production of additional documents

☐ other matters concerning document discovery

☐ extend oral discovery

☐ other matter concerning oral discovery

☐ amend pleadings

☐ add/change parties

☐ summary judgment

☐ summary trial

☐ service

☐ mediation

☐ adjournments

☐ proceedings at trial

☐ case plan orders: amend

☐ case plan orders: other

☐ experts

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PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP

ORDER MADE AFTER APPLICATION
(Stay Extension and Break Fee Approval Order)

BEFORE THE HONOURABLE	)	
MADAM JUSTICE FITZPATRICK	)	1/December/2020

THE APPLICATION of the Petitioners coming on for hearing at Vancouver, British Columbia, by MS Teams, on the 1st day of December 2020; AND ON HEARING Alexandra Andrisoi, counsel for the Petitioners and those other counsel and parties listed on **Schedule "A"** hereto; AND UPON READING the material filed, including the Third Report of Ernst & Young, Inc., in its capacity as court appointed monitor, dated November 27, 2020 and the Confidential Supplement to the Third Report; AND pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, the British Columbia Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court;

THIS COURT ORDERS AND DECLARES THAT:

SERVICE

1. The time for service of the Notice of Application filed November 27, 2020 herein be and is hereby abridged such that the Notice of Application is properly returnable today and service thereof on any interested party is hereby dispensed with.

STAY EXTENSION

2. The stay of proceedings provided for in the Initial Order pronounced in this action on May 29, 2020, as amended and restated on June 8, 2020, and further extended by Order of this Court pronounced August 31, 2020, is hereby continued and extended to and including February 26, 2021.

APPROVAL OF BID OFFER AGREEMENT and BREAK FEE

3. The Monitor's execution of the Bid Offer Agreement attached as Appendix I to the Confidential Supplement to the Third Report of the Monitor (the "**Bid Offer Agreement**") between the Petitioners and Bosa Properties (OC) Inc. ("**Bosa**"), on behalf of the Petitioners, is hereby approved.

4. The payment of the break fee of CAD $100,000 to Bosa, on the terms and conditions provided in the Bid Offer Agreement, is hereby approved.

GENERAL

5. Endorsement of this Order by counsel appearing on this application other than counsel for the Petitioners is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

____

Signature of Alexandra Andrisoi
Lawyer for the Petitioners

BY THE COURT

____

REGISTRAR

Schedule "A"

(List of Counsel)

Counsel name/litigant	**Party represented**
Colin D. Brousson	CMLS Financial Ltd. and Desjardins Financial Security Life Assurance Company
William Roberts	Aviva Insurance Company of Canada
Peter Rubin	The Monitor, Ernst & Young, Inc.