No. S-205095
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATER OF THE *BUSINESS CORPORATIONS ACT,*
S.B.C. 2002, C. 57, AS AMENDED

AND

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

APPLICATION RESPONSE

Application response of: Macario Reyes (the "**Application Respondent**")

THIS IS A RESPONSE TO the Notice of Application of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (the "**Petitioners**") filed April 13, 2021.

Part 1: ORDER CONSENTED TO

The Application Respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application on the following terms:

NIL.

Part 2: ORDERS OPPOSED

The Application Respondent opposes the granting of the orders set out in paragraph 2 of Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondent takes no position on the granting of the orders set out in paragraphs 1 and 3 of Part 1 of the Notice of Application.

Part 4: FACTUAL BASIS

1. Capitalized terms used herein but not otherwise defined shall have the meaning as ascribed to them in the Notice of Application.

2. The Application Respondent is a director and officer of Port Capital Group Inc. and Port Capital Development (EV) Inc.

3. The Application Respondent is a covenantor on the Petitioners' first mortgage and a guarantor of the Petitioners' second mortgage in favour of the project's deposit insurer.

4. The Application Respondent is also a covenantor or guarantor to most credit facilities advanced to the Port Capital Group's various project specific limited partnership and general partners.

Part 5: LEGAL BASIS

1. The Application Respondent opposes the sealing order sought by the Petitioners (the "**Sealing Order**"), which would keep the purchase price under the PSA confidential (the "**Purchase Price**").

2. The leading case of *Sierra Club of Canada v Canada (Minister of Finance)*, held that a sealing order may only 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 v Canada (Minister of Finance)*, 2002 SCC 41 ("*Sierra Club*") at para. 45.**

3. The Petitioners have failed to establish either branch of this test.

4. The Petitioners submit that sealing orders in CCAA proceedings are routinely granted to prevent disclosure of confidential and commercially sensitive information regarding the market value of assets.

5. While a practice may have developed to allow the redaction of certain aspects of purchase agreements by way of sealing order, the practice must comply with *Sierra Club.* As Justice Dunphy noted in *Romspen v. Courtice*, "*Sierra Club* is the law of this land. The

open court principle is not a trifling obstacle to be honoured in the breach. It is a fundamental and basic principle underlying our system of justice and the rule of law itself."

> ***Romspen Investment Corp. v Courtice Auto Wreckers Ltd.,* 2018 ONSC 1591*,* at para. 21.**

6. In this particular case, the Petitioners argue public disclosure would be prejudicial in the event the proposed transaction does not close, and that the Sealing Order sought is the least restrictive means possible to prevent disclosure of the Purchase Price.

7. However, there is no "serious" risk that the proposed transaction in this case will not close. As noted in the Monitor's 5th report, the Purchaser's bid was attractive to the Monitor because, "it contained the fewest conditions and required the least amount of due diligence of the Phase II Bids." Ultimately, part of the key terms of the PSA that is now before the Court are, "financing conditions that have since been satisfied or waived and no due diligence conditions".

> **Monitors 5th Report, paras 25, 27**

8. Absent a "Superior Offer" being made prior to the "Final Offer Date" (as defined in the PSA), the risk of this transaction failing to close is *de minimis.*

9. Similarly, there are no salutary effects to the Sealing Order. Given the minimal risk of the transaction not completing, except in the face of a Superior Offer, there is no benefit in maintaining confidentiality in respect of the Purchase Price.

10. Further, there is no term of the PSA which specifically requires the Purchase Price (as opposed to other terms of the PSA) be kept confidential, and the general confidentiality obligations in sections 8.7 and 11.17 of the PSA are either:

    (a) limited to keeping all terms of the PSA confidential only from Prospective Purchasers (as defined in the PSA); or

    (b) subject to any requirements in the CCAA Proceedings.

    Neither provision of the PSA can justify the broad Sealing Order sought in this case.

11. Further, there is no benefit to the Purchaser in maintaining confidentiality of the Purchase Price. The PSA specifically contemplates the risk that a Superior Offer may be made, and compensates the Purchaser if that were to arise by way of the proposed Break Fee.

12. On the other hand, there are significant deleterious effects to the proposed order, beyond undermining a, "fundamental and basic principle underlying our system of justice and the rule of law itself". Those include:

(a) the Application Respondent is a covenator and guarantor for a number of the Petitioners' liabilities and, if the Sealing Order is granted, the Application Respondent will not know if the Petitioners' creditors will suffer a shortfall under the PSA and the extent of its liability under those guarantees (if any); and

(b) knowledge of the PSA purchase price may generally increase market competition, leading to a greater benefit to the Petitioners' stakeholders.

13. In these circumstances, it cannot be said that the salutary effects of the proposed Sealing Order outweigh the deleterious effects.

14. Lastly, the Sealing Order sought is not the least restrictive alternative measure. For example, an order which provided access to counsel for all stakeholders, other than counsel for the Qualified Offerors, would be considerably less restrictive and address the risks alleged by the Petitioners.

Part 6: MATERIAL TO BE RELIED ON

The Application Respondent estimates that the application will take 40 minutes.

☑ The Application Respondent has not filed in this proceeding a document that contains the Application Respondent's address for service. The Application Respondent's address for service is 20th Floor, 250 Howe Street, Vancouver BC, V6C 3R8.

Date: April 15, 2021

Signature of Jordan Schultz
Lawyer for the Application Respondent