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

APPLICATION RESPONSE

Application response of: Landa Global Acquisitions Ltd. ("**Landa**")

THIS IS A RESPONSE TO the notice of application of the Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (the "**Vendor**"), filed May 20, 2021.

Part 1: ORDERS CONSENTED TO:

NONE

Part 2: ORDERS OPPOSED:

The Application Respondents oppose the granting of the Orders sought in paragraphs 1(a) (abridging time for service) and 3(a) (approval of sale to Solterra Acquisitions Corp. ("S**olterra**")) 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 any of the Orders sought other than those specifically opposed.

Part 4: FACTUAL BASIS

1. The Notice of Application was filed May 20, 2021, and is said to be returnable May 25, 2021. It therefore provides only one business day's notice.

2. Landa was not served with the Notice of Application. It became aware of the application when the Monitor's Sixth Report to the Court was posted on the Monitor's website.

3. As set out in the Monitor's reports to the Court, Landa made an offer to purchase the Terrace House Project on March 25, 2021 (the "First Landa Offer").

4. The First Landa Offer was for $19,500,000, and was accepted by the Vendor.

5. Pursuant to the terms of the First Landa Offer, Landa has paid the Vendor a deposit of $1,900,000.

6. The Vendor's obligations to complete the transactions contemplated by the First Landa Offer were subject to a condition that the Vendor did not receive a Superior Offer before May 7, 2021.

7. The First Landa Offer contains a provision that if the Vendor accepts a Superior Offer, and if that Superior Offer results in a concluded agreement of purchase and sale, the Vendor will pay Landa a Break Fee of $200,000.

8. The First Landa Offer contains the following provisions:

> 8.6 **Vendor's Conditions.** The Vendor's obligation to complete the transactions contemplated by this Agreement is subject to the following conditions, all of which are for the sole benefit of the Vendor:
>
> > (a) the Vendor does not receive a Superior Offer on or before 5:00 p.m. (Vancouver time) on the Final Offer Date; …
>
> If the conditions set out in this Section have not been satisfied by notice in writing from the Vendor to the Purchaser, by the times specified in this Section, the Vendor may, with the written consent of the Monitor, by notice in writing to the Purchaser waive satisfaction of such conditions, in whole or in part, without prejudice to any of its other rights under this Agreement and complete the sale of the Purchased Assets or elect not to complete.
>
> 8.7 **Satisfaction and Waiver of Vendor's Conditions**. Notwithstanding anything to the contrary set out herein, from the date of issuance of the Preliminary Order until the Final Offer Date, the Vendor and its Authorized Parties may engage in further marketing of and

negotiations in connection with the Purchased Assets for the purposes of soliciting Bona Fide Offers from prospective purchasers that are not party to this Agreement (each, a "**Prospective Purchaser**"). In the event that the Vendor receives one or more Bona Fide Offers from Prospective Purchasers which provide for a superior offer to that of the Purchaser under this Agreement (a "**Superior Offer**"), the Vendor shall notify the Purchaser, in writing, that a Superior Offer has been received. The parties agree that if the Vendor receives one or more Superior Offers on or before the time limited in Section 8.6(a), the Vendor accepts one of such Superior Offers and such Superior Offer becomes unconditional, then: (i) this Agreement will automatically be null and void upon the delivery of notice of the same by the Vendor to the Purchaser; (ii) the Deposit shall be returned to the Purchaser with interest (if any); (iii) the Vendor shall use all commercially reasonable efforts to cause the transaction contemplated under such Superior Offer to be completed; and (iv) the Vendor shall pay the Break Fee to the Purchaser within a reasonable period of time following the Vendor's receipt of the proceeds of sale from such Superior Offer. The Vendor acknowledges and agrees that in its marketing of the Purchased Assets to Prospective Purchasers, it shall keep the terms of this Agreement (including the Purchase Price) confidential and shall not disclose any such terms to any Prospective Purchasers.

9. On or about May 14, 2021, the Monitor advised Landa that it had received a Superior Offer from Solterra. However, the Vendor has not returned Landa's deposit, as required.

10. On or about Many 17, 2021, Landa asked the Monitor whether it could submit a revised offer.

11. On May 19, 2021, the Monitor's Mike Bell wrote to Landa's Brandon Oye and said:

> Brandon,
>
> Sorry for the slow response, I've had a chance to discuss this matter with counsel.
>
> We are of the view that our agreement with Landa did not contemplate Landa making any further bids in the event a Superior Offer was received. We confirmed last Friday that we received a Superior Offer, and that has been executed. Given that chain of events, we are advised that we are required to present the Superior Offer to Court for approval.

> If Landa wishes to improve its offer, the Monitor is prepared to file the offer in a confidential report to the Court and the CMLS lenders or any other Party can make submissions on what transaction ought to be approved.
>
> Thanks,
> Mike

12. On May 21, 2021, the Monitor's Jason Eckford wrote to Landa's Brandon Oye and said:

> Hi Brandon,
>
> The Court Hearing is currently scheduled for **9:00am Tuesday, May 25, 2021** to be held via Teams. Login credentials are below.
>
> If you wish to submit a revised offer and can get it to us over the weekend, we will provide this to the Judge in a confidential report ahead of the scheduled hearing so that it will be considered.
>
> Please let us know if you have any questions.
>
> Thanks,
> Jason

13. Landa has now delivered a revised, improved offer to purchase the Terrace House Project. Landa understands that its offer is $500,000 more than the Solterra Offer. As well, closing would be in 30 days.

Part 5: LEGAL BASIS

1. Rule 8-1(8) requires that the materials referred to in Rule 8-1(7) be served at least 8 business days before the date set for the hearing of the application. Here, the Notice of Application was filed May 20, 2021, which is only 1 business day before the date set for the hearing.

2. Moreover, the Application was not served on the Application Respondents.

3. The Application Respondents recognize that in insolvency matters, the times for filing materials are frequently abridged. However, in the circumstances, the Application Respondents have not had sufficient time to prepare a response.

4. With respect to the substance of its position, in *Quest University, Re,* 2020 BCSC 1883, this court said (at paras. 175-177)

> 175 Section 36(1) of the CCAA allows the court to authorize the sale of a debtor company's assets out of the ordinary course of business. Section 36(3) of the *CCAA* lists the relevant non-exhaustive factors to be considered:
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
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> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> 176 The well-known considerations identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 6 are consistent with and overlap many of the s. 36(3) factors: see *Veris Gold Corp., Re*, 2015 BCSC 1204 (B.C. S.C.) at para. 25, referring to various authorities such as *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 2870 (Ont. S.C.J.) [Commercial List]) at para. *13*. Those considerations include: (i) whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers were obtained; and, (iv) whether there has been any unfairness in the sales process.
>
> 177 More generally, in analyzing whether a transaction should be approved, taking into consideration the s. 36(3) and *Soundair* factors, a court is to consider the transaction as a whole and decide whether or not the sale is appropriate, fair and reasonable: *Veris Gold* at para. 23.

5. In *Westcoast Savings Credit Union v. Wachal,* 1988 CarswellBC 547 (BCCA), Mr. Justice McFarlane remarked on the factors a court must weigh in situations such as this (at para. 10):

> 10 I agree … that judicial auctions ought not to be encouraged and that if they are carried too far, it would create chaos in the commercial world and receivers and purchasers would never be sure what was going to happen. <u>But the primary duty of the court is to see that the best possible price is obtained for the property in question</u>. Often, there will be one offer and then

> there will be other offers made at or about the time the application is ready to be heard. What is a receiver-manager to do in those circumstances? It seems to me that his duty is to put all the information which he has before the court with his recommendations.
>
> 11 In this case, the receiver-manager did his duty. He placed the two offers, the St. Laurent and Ericksteen offers, before the court, informed the court of the possibility of the third offer by Anaka's client, and when he appeared before the court, presented the M.S.A. Holdings Ltd. offer. <u>What is a judge to do when faced with that dilemma? Judges in this province have for quite some time now solved that problem by ordering that sealed bids be filed</u>. That was what was done by Mr. Justice Bouck in *Royal Bank v. Derco Indust. Ltd.* That was the general process which was given approval by this court, although in an obiter statement, in *F.B.D.B. v. Mission Creek Farm Inc.* (1988), 25 B.C.L.R. (2d) 188 at 199, [1988] 5 W.W.R. 241, 28 C.P.C. (2d) 171, 50 D.L.R. (4th) 616. In that case, the chambers judge had actually approved a sale but later set aside his order before it was entered and directed that four interested purchasers submit sealed bids. The result was the obtaining of the higher price. This court held that the judge enjoys a discretion to set aside or vary an unentered order, but concluded with this passage in the reasons of Mr. Justice Taggart at p. 199:
>
>> In the circumstances of this case, I think Judge van der Hoop properly exercised his discretion. His reasons for judgment show that he was concerned by the "flurry of activity", after a long period when no offers for the purchase of the property in question had been forthcoming, with several prospective purchasers expressing interest in the property. I think the judge was right to set aside his order of 5th December and direct a submission of sealed bids. That I understand is the practice commonly followed where a number of purchasers are interested in making offers for the property.

6. In *Royal Bank v. Vaishnav*, 2005 BCSC 1783, Mr. Justice Burnyeat reviewed the law in this area.

> 15 The earliest view on this question was set out by the Court of Appeal in *Westcoast Savings Credit Union v. Wachal* (1988), 32 B.C.L.R. (2d) 390 (B.C. C.A.) where Macfarlane J.A., dealt with an application for leave to appeal an order approving a sale where there were competing offers, and the appeal of the highest bidder who argued that its original lower offer should be approved in order to preserve "... the integrity of the process under which the sale occurs". In dealing with the standard of review, Macfarlane J.A. stated:
>
>> The court here was acting pursuant to the discretionary power found in Rule 50(5)(g) under which the court *may* order a sale of the

> mortgaged property. An appellate court will not presume to substitute its own discretion for the discretion already exercised by the judge or otherwise to interfere with such an order unless it reaches the clear conclusion that the discretion has been wrongly exercised in that no sufficient weight has been given to relevant considerations or that on other grounds it appears that the decision may result in an injustice: see *Taylor v. Vancouver Gen. Hosp.*, 62 B.C.R. 42, [1945] 3 W.W.R. 510, [1945] 4 D.L.R. 737 (C.A.).

A shorter statement of the same rule is that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong.
(at pp. 393-4)

16 The more current statement by the Court of Appeal on this question is set out in *British Columbia v. A & A Estates Ltd.* (2000), 75 B.C.L.R. (3d) 107 (B.C. C.A.), where the Court dealt with three appeals brought from an order of the Chambers Judge who ordered that a sale at $492,160.00 should be approved while setting aside an order of a Master who had approved a sale of property at $1,150,000.00. In dealing with the question of whether a late bid should prevail because it is higher, Esson J.A. stated on behalf of the Court:

> At the time Macfarlane J.A. spoke [in ***Wachal***, *supra*], the present system by which masters deal with virtually all applications for approval of sale in foreclosure proceedings had not come into effect. In 1991, when Macdonald J.A. refused leave to appeal in Sun Life [***Savings & Mortgage Corp. v. Sampson*** (1991), 59 B.C.L.R. (2d) 355 (B.C.S.C.); 62 B.C.L.R. (2d) 399 (B.C.C.A.)], the system had been in effect for a very short time. It has now been in effect for almost a decade. In 1988, Macfarlane J.A. expressed the view that trial judges understood the proposition that judicial auctions should be discouraged. Since then, the masters, a relatively small and cohesive group, have heard the great majority of applications to approve sales. They have gained a level of experience in these difficult matters which is higher than that of most judges. That being so, it is appropriate that judges hearing appeals from masters in these cases should start with the assumption that the masters understand the legal principles and factual considerations applicable to such applications. (at para. 44)

17 In dealing with the question of whether the order appealed from was an interlocutory or a final order, Esson J.A. stated:

> In saying that, I should not be taken as suggesting that the principles laid down in *Abermin Corp. v. Granges Explor*. Ltd. (1990), 45

> B.C.L.R. (2d) 188 should be modified. I assume, without deciding, that this was not a purely interlocutory matter and that it was therefore open to the judge to substitute her own view for that of the master. But, in deciding whether to give effect to a different view, a judge should give due recognition to the reality that masters have certain advantages arising out of their great experience in matters of this kind. (at para. 45)

18 In dealing with the general question of whether a lower offer can be approved, Esson J.A. stated:

> The passage referred to by the chambers judge in this case was clearly obiter but was intended to emphasize that a receiver's decision to enter into an agreement for sale subject to court approval should not be set aside "simply because a later and a higher bid is made". I do not disagree with that point of view provided it is applied within reasonable limits. Where the later offer is higher, the court may refuse to entertain it and to approve the sale recommended by the receiver or other person given conduct of sale. But in practice, that is done only where the improvement on the price is not significant and, in most cases, where it also appears that the late bid is less firmly secured than the recommended one. (at para. 40)

19 The statements of Esson J.A. in *A & A* regarding the standard of review have now been adopted by this Court. After concluding that the appeal from an order approving a sale required a re-hearing, Quijano J. in *Island Savings Credit Union v. Ferguson*, [2003] B.C.J. No. 1104 (B.C. S.C.) dealt with the standard of review as follows:

> In a number of cases in this jurisdiction it has been recognized that an order by a master approving sale is not an interlocutory order but is an order in the nature of a final order. Therefore, the appeal from such an order is by way of re-hearing. (at para. 19)

It is clear that, at this point, appeals from such orders are to be by way of re-hearing but that there is deference to be paid to the masters in recognition of their "great experience" in matters of this kind. (at para. 21)

20 While the highest price is an important factor, it is not the sole factor which should influence the Court in exercising its discretion to approve a sale in foreclosure proceedings. For instance, where the Court has fixed a specific bidding process, the integrity of the court process might well override the obtaining of the best price: *Selkirk, Re* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.); *Royal Bank v. Derco Industries Ltd.* (1988), 24 B.C.L.R. (2d) 202 (B.C. S.C.); *Bank of Nova Scotia v. Yoshikuni Lumber Ltd.* (1992), 74 B.C.L.R. (2d) 19 (B.C. C.A.); and *Wachal*, *supra*. As well, the higher offer

may not necessarily be approved where the "improvement on the price is not significant" or where it appears that the higher bid was "less firmly secured than the recommended on", per the comments of Esson J.A. in *A & A Estates*, *supra*.

7. In this case it seems apparent that the Monitor would have preferred that Landa be permitted to submit a revised offer, but that it felt constrained by the terms of the agreement between Solterra and the Vendor.

8. The revised offer of Landa is "significantly" better than the Solterra offer.

9. One of the factors the court must consider (as noted in *Quest*) is whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. Here, the Landa revised offer is substantially higher than the Solterra offer. This suggests that the consideration under the Solterra offer is not reasonable and fair.

10. The court should direct the Vendor to accept Landa's revised offer or, alternatively, direct a sealed bid process.

11. Solterra and Landa are both sophisticated parties. The Solterra offer is expressly made subject to this court's approval by way of a vesting order. It also expressly recognizes the risk of another, better offer being accepted by the Court. Thus, clause 8.5 contains this language:

    > In the event that an Order is granted ordering the sale of the Purchased Assets to a party other than the Purchaser, the Vendor shall pay to the Purchaser the Purchaser's reasonable costs incurred to the date of the Order up to a maximum of Fifty Thousand Dollars ($50,000.00), within ten (10) Business Days after the Vendor's receipt of proceeds of the sale of the Purchased Assets to such other party.

12. The two prospective purchasers have done their due diligence. They clearly understand that this is a court ordered process. Landa, for its part, would be prepared to submit a further, sealed bid for consideration not less than what it has offered. There is no risk to the creditors in this.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Balpreet Singh Khatra sworn May 25, 2021.

The application respondents estimate that the application will take 45 minutes.

[X] The application respondents have filed in this proceeding a document that contains the application respondents' address for service.

[ ] The application petitioners has not filed in this proceeding a document that contains an address for service.

The application respondents' ADDRESS FOR SERVICE is:

Turner & Co.
#1600 – 409 Granville St
Vancouver, BC V6C 1T2

Attention: Scott A. Turner

Email: sturner@turnerco.ca

Telephone: 604-336-3071

Date: 25/MAY/2021

Scott Adam Turner NRGBR1 Digitally signed by Scott Adam Turner NRGBR1 Date: 2021.05.24 17:49:06 -07'00'

Signature of
lawyer for application respondent
Scott A. Turner