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

AMENDED 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 Order sought in paragraph 3(a) (approval of sale to Solterra Acquisitions Corp.("**Solterra**")) 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. 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").

2. The First Landa Offer was for $19,000,000. It was accepted by the Vendor.

3. Pursuant to the terms of the First Landa Offer, Landa has paid a deposit of $1,900,000. This amount is being held by the Monitor.

4. The Vendor's obligations to complete the transactions contemplated by the First Landa Offer were subject to a condition that the Vendor should not have received a "Superior Offer" before May 7, 2021.

5. 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. This was approved by the Court.

6. The First Landa Offer contains the following provisions:

> 6.6 **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.
>
> 6.7 **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 beforethe time limited in Section 8.6(a), the Vendor accepts one of such SuperiorOffers 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 allcommercially 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.

7. In an Affidavit sworn June 4, 2021, Brandon Oye, Landa's CFO, explains the circumstances of how Landa came to know that a Superior Offer had been received by the Trustee and its contents:

> 10. At 5:07 p.m. on May 7th, I sent an email to the Monitor's Mike Bell, asking if the Monitor had received any further offers. A few minutes later, Mr. Bell responded by saying:
>
> > Brandon,
> >
> > Yes, we received one or more offers. I haven't had an opportunity to review the offer(s) in any detail so can't comment if they are bona fide but will be in contact no later than Monday.
> >
> > Thanks,
> >
> > Mike

11. Early the following week, I contacted Mr. Bell by telephone to enquire about the status of the offers the Monitor had received, and in particular whether any was a "Superior Offer".

12. On May 11th at 5:33 pm, Mr. Bell sent me an email in which he said:

> Brandon,
>
> Thanks for the message, ...
>
> Given the various stakeholders and interests, and our overall obligations, <u>we need to consult with the Secured Creditors before determining whether or not we received a Superior Offer</u>.
>
> As I noted on our call yesterday, one of the offer(s) we received contains elements that may appear on the surface to be superior but other elements which may suggest otherwise and we have sought clarity with respect to those points.
>
> I anticipate that we will be in a position to confirm very shortly. Appreciate your patience.
>
> Thanks.
>
> Mike Bell

13. Copies of my email exchanges with Mr. Bell are attached as Exhibit "C" to Mr. Khatra's affidavit.

14. By May 14th, I still had not been advised by Mr. Bell whether the Monitor had received a Superior Offer. Accordingly, I sent him an email asking for an update. He responded by saying:

> Brandon,
>
> We have now completed our consultation with the Secured Creditors and note the following:
>
> - We can confirm we received a Superior Offer to the Landa offer from another party.

- It is our intent to file that Superior Offer with the Court next week at which point the terms of the offer will be disclosed.

Can we set up a call on Monday to discuss procedures going forward?

Thanks,

Mike

15. I responded to Mr. Bell by telling him that Landa was disappointed, and asked him to call me the following Monday (May 17th). Among other things, I wanted to speak to Mr. Bell to find out why it had taken so long to determine that the Solterra offer was a Superior Offer and, generally, to find out what had happened between May 7th and May 14th, when Mr. Bell notified me that the Monitor had determined that the Solterra offer was in fact superior.

16. Landa had concerns, prior to speaking with the Monitor on May 17th, about the fairness of the process, and was considering the possibility of putting forward an argument that the Monitor (and the Petitioners) were bound to proceed with Landa's initial offer, because there had not been strict compliance with the bid deadline terms described above. In this regard, it seemed odd, at best, that it had taken the Monitor a week to evaluate the offer or offers it had received by May 7th. (I have since reviewed the Solterra offer dated May 13, 2021, which is attached to the Monitor's Sixth Report. If that is the form in which the offer was presented on May 7th, it seems to be obviously superior to the initial Landa offer. Why, then, did it take seven days to evaluate?)

17. On May 17th, I and Kevin Cheung, Landa's CEO, and Jin Koh, an advisor to Landa, spoke to the Monitor's Mike Bell and Jason Eckford by telephone. Again, the main purpose of the call was to find out what had happened between May 7th and May 14th. During the course of this conversation Mr. Bell disclosed that one of the offers the Monitor had received was from Solterra, and that it was for $21,000,000. I don't recall whether Mr. Bell revealed any other details of the Solterra offer, such as time of closing. My main recollection is that he told us the price.

18. Neither I nor the other Landa representatives had asked to be told the amounts of other bids. Rather, it was Mr. Bell who volunteered the

information. I believe, based on my overall impression of the call, that he did so by way of satisfying Landa that the Solterra offer was indeed a "Superior Offer" and, thus, to allay Landa's concerns about fairness.

19. At some point after Mr. Bell disclosed the amount of the Solterra offer, Mr. Cheung asked whether Landa could submit another offer, which would either match or improve on that offer. Mr. Bell initially responded favourably, but then, on reflection, said that because he had accepted Solterra's offer, he would need to consult with counsel to determine whether it was possible for Landa to bid again.

20. I do not wish to suggest that Mr. Bell did anything wrong in disclosing the amount Solterra had bid. At the time of our conversation of May 17th, and before we indicated to Mr. Bell that Landa might be prepared to increase its offer, Mr. Bell would have been under the impression that Landa did not intend to make a further bid. (Indeed, when Landa submitted its Initial Offer it did not intend to make a higher bid.) Rather, I have assumed that Mr. Bell would have had the impression that Landa was trying to determine whether it had a basis to argue that the Monitor was bound to proceed with Landa's Initial Offer, because the strict terms of the bid deadline had not been met. It was only when Mr. Bell revealed the amount of the Solterra offer that Mr. Cheung asked about the possibility of a further bid.

21. By the conclusion of our conversation of May 17th, Mr. Cheung and I indicated Mr. Bell and Mr. Eckford that Landa would be prepared to offer more than $21,000,000 and, in that context, we asked him to let us know what the process would be for doing that. We left it that Mr. Bell would consult with counsel and get back to us.

22. On May 18th, the following day, I followed up with Mr. Bell by email, and asked whether he had any update on what I described as "the process for us [Landa] to submit a revised offer". On May 19th I followed up again, and later that day Mr. Bell wrote back to me 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

8. On May 24th, Landa did deliver a revised, improved offer to the Monitor, which the Monitor did put before the court.

9. Landa intended no unfairness to Solterra in making its improved offer. Indeed, Landa fully anticipated that if the court was inclined to consider higher offers, Solterra would be given a further opportunity to bid. The court has now extended that opportunity.

10. To further address any suggestion of unfairness to Solterra, Landa has now submitted a further revised offer to the Monitor, substantially improving on its second bid. Solterra is aware of the price Landa has already offered, and therefore will know the minimum bid it will have to at least match if it wishes to be the highest bidder.

11. If Solterra does not submit a further bid, Landa will, in effect, be "bidding against itself". That is as it may be. Landa believes that the Terrace House project can be successful even at the higher price it has now offered.

Part 5: LEGAL BASIS

Price vs. Process

1. Ultimately, the issue before the court is whether it should insist on strict compliance with the process established for bidders in prior orders in this proceeding, or allow Landa to improve on its initial offer and, in so doing, achieve a significantly higher price for the assets of the Petitioners and, hence, greater recovery for the Petitioners' creditors.

2. In *Quest University, Re,* 2020 BCSC1883, this court said (at paras. 175-177):

> 175 Section 36(1) of the CCAA allows the court to authorize the sale of adebtor 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;
>
> (b) whether the monitor approved the process leading to the proposed saleor 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 creditorsthan 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 otherinterested 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. SoundairCorp.* (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 isappropriate, fair and reasonable: *Veris Gold* at para. 23.

3. In *Westcoast Savings Credit Union v. Wachal,* 1988 CarswellBC 547 (BCCA), Mr.Justice McFarlane remarked, in the context of receivership sales (at para. 10):

> 10 I agree ... that judicial auctions ought not to be encouraged and thatif they are carried too far, it would create chaos in the commercial world

> andreceivers and purchasers would never be sure what was going to happen. But the primary duty of the court is to see that the best possible price is obtained for the property in question. Often, there will be one offer and then there will be other offers made at or about the time the application is readyto 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.
>
> In this case, the receiver-manager did his duty. He placed the two offers, the St. Laurent and Ericksteen offers, before the court, informed thecourt 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. What is a judge to do when faced with that dilemma? Judges in this province havefor quite some time now solved that problem by ordering that sealed bids be filed. That was what was done by Mr. Justice Bouck in *Royal Bank v. Derco Indust. Ltd...*

4. In *Royal Bank v. Vaishnav*, 2005 BCSC 1783, Mr. Justice Burnyeat said, with respect to foreclosure sales.

> 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*.

5. Similar considerations apply in CCAA proceedings. Thus, in *8450025 Canada Inc. and Teliphone Data Centers Inc. (Re),* 2017 BCSC 1291, Mr. Justice Macintosh observed (at para. 13)

> Finally, from ... paras. 42 and 43 [of Galligan J.A.'s reasons for judgment in *Soundair*], one sees that the primary concern of the party in the Monitor's position is protecting the interests of the creditors, while a secondary but very important consideration is the integrity of the sale process.

6. In *Bank of Montreal v. Renuka Properties Inc.,* 2015 BCSC 2058, a receiver had been appointed by the bank to sell certain assets of the debtor companies, who had operated a pharmacy chain. The receiver established a sales process and the highest bidder, Royal Med, offered $1,025,000 for the assets. After the deadline had passed, a bid of $1,499,000 was received from another party. The

Receiver sought approval of the bid it had accepted, based on the rationale of protecting the integrity of the process. The court considered the *Soundair* factors and said (at paras 41-42):

> [41] Much was made in the submissions before me about maintaining the integrity of the receiver's sale process. I agree with those sentiments, but the rule is not absolute. In [*British Columbia v. Baron Enterprises Ltd.*, 2000 BCCA 317, at para. 40] the Court of Appeal said that deference to the receiver's sale process has its limits:
>
> > ...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. I will add that the view of Macdonald J.A. depended in large part upon the element of deference which has traditionally been shown to a court appointed receiver who usually is a professional person whose skill and experience in these matters must be established by evidence as a condition of his appointment....
>
> [42] In my view, according deference to the receiver's decision to accept and recommend approval of Royal Med's bid, in circumstances where another bidder appears to be willing to pay 37 percent more, would be to place excessive weight and too high a premium on the deference factor. The authorities make it clear that the interest of the creditors is still the primary factor. For those reasons I decline to approve the sale of the assets to Royal Med.

7. Landa recognizes that may be perceived as, in effect, seeking a "second kick at the can", to use this court's expression in *Cox v. Seymour Village Management Inc.*, 2015 BCSC 275, and that the court should look somewhat "askance" at late bidders. But that said, the court cannot ignore the issue of price, particularly where the improvement in one bid over another is "significant".

8. As the court said in *Cox*:

> [29] Does fairness dictate that, not having been successful, Mosaic should be allowed to have a second kick at the can? <u>As I have said, it is</u>

> not completely unheard of that these late offers are considered; but where they are truly considered, in terms of price being the primary factor, is where there has been a substantial increase in price beyond the price that has been garnered through the sales process. Again, this factor gains more prominence because it is likely indicative of the fact that the sales process did not work in the sense of bringing forward persons who were interested in a purchase and giving them an opportunity to participate in a fair sales process. There is no suggestion here that the sales process was unfair and, in particular, that Mosaic did not have the opportunity to present its bid in competition with other offers being submitted, such as from Polygon.

9. Landa is not suggesting that, here, the process put in place on April 16th was unfair. Rather, it is relying mainly on the issue of price. In *Cox*, the price difference was very modest – only about $100,000. Moreover, there were issues regarding the ability of the unsuccessful bidder, Mosaic, to bring about a successful redevelopment of the Seymour Estates property – whereas, here, there are no concerns about either party's ability to complete.

10. At the court's invitation, Landa has now submitted a further revised offer, which improves on its May 24th offer by a further $500,000. Assuming Solterra "stands pat" and does not submit a further offer, Landa's June 4th offer, on its face, exceeds Solterra's by $1,000,000. As well, if the Solterra offer is accepted, Landa will receive a break fee of $200,000. Still further, the closing date for Landa's offer would be 30 days after a final order approving it, whereas Solterra's offer would not close until September 15th, which could translate to an additional interest cost to the Petitioners of more than $250,000, depending on the timing of any final Order and whether there are any appeals.

11. In short, Landa's offer could be worth as much as $1,450,000 more than Solterra's.

12. Solterra argues that, on a percentage basis, this is not a significant difference. It is less than 10% of the price ($20,000,000) offered by Solterra. That may be so, but it is still a lot of money, in absolute terms. For example, it is substantially more than the amount Mr. Justice Blok considered significant (about $500,000) in the *Renuka Properties* matter.

13. 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 thePurchased Assets to such other party.

14. Finally, Landa would point out that allowing Landa to bid would be consistent with the terms of the SISP originally approved by this court on June 8, 2020, approximately one year ago, which contemplated that:

> 37. The Monitor, in consultation with the Debtor and the Secured Creditors, may bring one of the Phase 2 Qualified Bids to Court for approval, or may conduct an auction among two or more of the Phase 2 Qualified Bidders and bring the highest auction bid to Court for approval.

15. The process originally contemplated by the SISP may not have unfolded as the parties may have wished at the time, but the court now has the opportunity to substantially increase the ultimate realization price for the Petitioners' assets in a manner that is, it is submitted, consistent with the originally stated desire to have an "auction" process.

The 129 Offer

16. Landa understands that the 129 offer was received by the Monitor prior to the May 7th "Superior Offer" deadline under the Initial Landa PSA. In its Sixth Report to the Court, the Monitor advised the court that it recommended the Solterra offer because it is unconditional, whereas the 129 offer, at that time, was not.

17. Assuming the 129 offer remains conditional, Landa adopts the submissions of Solterra: the court should prefer either Landa's or Solterra's unconditional offers over a conditional one.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Balpreet Singh Khatra sworn May 25, 2021;
2. Affidavit #1 of Brandon Oye sworn June 4, 2021;
3. The Monitors' reports to the Court.

The application respondents estimate that the application will take 2 hours

[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
StVancouver, BC V6C
1T2

Attention: Scott A. Turner

Email:

sturner@turnerco.ca

Telephone: 604-336-

3071

Date: 04/JUN/2021

Signature of
lawyer for application respondent
Scott A. Turner