No. S205095
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 AND COMPROMISE AND ARRANGEMENT OF PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP

APPLICATION RESPONSE

Application response of: Centura Building Systems (2013) Ltd. ("**Centura**") and Solterra Acquisitions Corp. ("**Solterra**", and together with Centura, the "**Application Respondents**")

THIS IS A RESPONSE TO the Notice of Application of 1296371 B.C. Ltd. filed May 25, 2021 (the "**129 Notice of Application**").

Part 1:ORDERS CONSENTED TO

The Application Respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application on the following terms: N/A.

Part 2: ORDERS OPPOSED

The Application Respondents oppose the granting of ALL of the orders set out in Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondents take no position on the granting of the orders set out in paragraphs N/A of Part 1 of the Notice of Application.

Part 4: FACTUAL BASIS

1. Capitalized terms used and not otherwise defined herein have the meanings ascribed to them in the 129 Notice of Application.

2. Centura is related to Solterra.

3. Centura has a claim against the Petitioner Port Capital Development (EV) Inc. in the amount of $473,277 relating to the supply of exterior precast panels for the Terrace House Project, and has filed a claim of builders lien against the Terrace House Project.[1]

4. 129 seeks orders facilitating a refinancing of a portion of the Petitioners' debt, including specifically by way of the assignment to the New Lenders of the CMLS Facility and the CMLS Security, and the amendment of such security to increase the amount secured thereunder and the rate of interest thereunder.

5. Specifically, 129 seeks orders:

   (a) authorizing the Petitioners and the New Lender to enter into agreements amending the CMLS Security such that it then secures all amounts owing from the Petitioners to the New Lenders; and

   (b) that the CMLS Security become a court-ordered charge which "shall rank in priority to all other security interests, trust, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise, other than the Administration Charge… and those claims contemplated by Section 11.8(8) of the CCAA."

6. Currently, there is less than $21.5 million owing to CMLS under the CMLS Facility and secured under the CMLS Security. The rate of interest under the CMLS Facility is prime plus 2.25% per annum.[2]

7. 129 is seeking to have the CMLS Security amended such that it will then secure approximately $25 million in principal with interest thereon at no less than 10.5% per annum, compounding monthly, or as much as 24% per annum, compounding monthly.[3]

8. While there is evidence that Aviva has entered into an agreement with the Petitioners and 129 by which Aviva has agreed that the Petitioners and the New Lenders can amend the

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[1] Affidavit #1 of Suzanne Volkow sworn June 8, 2021, Exhibit "A".

[2] Affidavit #1 of Macario Reyes sworn May 18, 2020, Exhibit "C".

[3] Affidavit #3 of Macario Reyes sworn June 4, 2021, Exhibit "A".

CMLS Security in the manner proposed, there is no evidence that any of the builders' lien claimants (or other creditors) have similarly agreed.

9. Centura opposes the relief sought by 129.

Part 5: LEGAL BASIS

1. 129 seeks relief that this court ought not grant. Specifically, 129 seeks orders that:

> 7. The purchase and assignment of the CMLS Loan and the CMLS Security by Domain, for and on behalf of the New Lenders (the "**Security Assignment**"), is hereby authorized and approved, and following completion of the Security Assignment, the Petitioners are authorized, empowered and directed to execute and deliver such amending agreements or other documents as may be reasonably required by the New Lenders (collectively, the "**Amending Agreements**") to provide that the CMLS Security secures all indebtedness and obligations of the Petitioners to the New Lenders.
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> 8. The CMLS Security, as amended by the Amending Agreements, shall constitute a mortgage, security interest, assignment by way of security and charge on the "**Property**" (as defined in the ARIO) and such charge shall rank in priority to all other security interests, trust, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise, other than the Administration Charge (as defined in the ARIO) and those claims contemplated by Section 11.8(8) of the CCAA.

2. Practically, the court is being asked to create new, first-ranking security in favour of the New Lenders which secures approximately $25 million in principal at differing rates, but not less than 10.5% per annum, compounded monthly, and as much as 24% per annum, compounded monthly. Presently, the CMLS security secures less than $21.5 million and the interest rate is prime plus 2.25% per annum.

3. Let there be no mistake: 129 is not seeking an order simply authorizing the assignment of debt and security. Rather, it is seeking an order creating a court ordered charge on all of the Property ranking ahead of all other encumbrances other than the Administration Charge. That court-ordered charge would secure $3.5 million more than what is currently secured under the CMLS Security and at rates from approximately 6% to as much as approximately 20% per annum more than the current security in favour of CMLS.

4. 129 is seeking the aforementioned order and related relief on the basis of section 11 of the CCAA, which permits the court to "make any order that it considers appropriate in the circumstances."

5. With respect, while the court may have the jurisdiction to make the order sought by 129, it ought not to exercise its discretion to make such an order.

6. Simply put, the CCAA does not contemplate a debtor company – or any other party – obtaining a court order permitting or directing the debtor company to undertake any

restructuring transaction without the consent of affected creditors. That, in essence, is what 129 seeks to do.

7. After the initiation of a CCAA proceeding, there are two possible outcomes:

   (a) The assets of the debtor company (or, in the case of a reverse vesting order, its shares) are conveyed to a purchaser. In this instance, the debtor company (or its shareholders) retain no further interest in the assets. Secured creditors' interests are vested off by court order and proceeds of sale are distributed to creditors in order of priority.

   This outcome can be achieved either as part of a plan of arrangement put to the debtor company's creditors for approval, or by way of a court order.

   (b) The debtor company retains an interest in its assets, either because it is able to pay its creditors in full or because its creditors have agreed, individually or as part of a class voting on a plan of arrangement, to have their rights compromised.

8. The outcome urged upon this court by 129 is not one contemplated by the CCAA, namely, the debtor company retaining its interest in its assets without the agreement of creditors whose rights are being compromised. In this case, it is proposed that encumbrancers of the Terrace House Project be subordinated to new financing that is approximately $3.5 million more than the financing they were subordinated to upon the initiation of these proceedings without the opportunity for any consultation, let alone their approval.

9. There is no doubt that 129 seeks orders that will have the effect of compromising or confiscating the rights of the builders lien claimants, in this case by subordinating them to new financing. While the Petitioners could, in the ordinary course, agree with CMLS (or the assignee of its security) to amend its security in order to secure a greater amount at higher rates, such modifications would be ineffective as against subsequent encumbrancers, including lien claimants.[4]

10. 129 requires orders of this court in order to implement the restructuring transactions in the face of the subsequent encumbrancers' (i.e. lien holders) rights. The confiscation of those rights is, by definition, a "plan of arrangement".[5] Where there is a plan of arrangement, the court cannot sanction it unless it has been approved by the requisite majorities of the company's creditors.[6]

11. 129 seeks to simply do away with the need for creditor approval.

12. It is not sufficient for 129 (or anyone else) to say that the orders sought are appropriate simply on the basis that the alternative is a transaction whereby all of the creditors' interests are vested off in any event. This is so for two reasons:

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[4] *Land Title Act*, R.S.B.C. 1996, c. 250, sections 1 and 206.

[5] *9354 – 9186 Quebec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 102.

[6] *Calpine Canada Energy Ltd., Re*, 2007 ABQB 504 at para. 41.

(a) That argument could be applied in effectively every restructuring scenario proposed by a debtor. There is no difference in the debtor presenting to the court a plan to compromise creditors' claim at 10 cents on the dollar and asking the court to bless it without a vote of the creditors "because the alternative is those creditors will get nothing". In either scenario, creditors' rights are being compromised for the debtors' benefit without them having any say in the matter.

(b) Relating to the foregoing, it is entirely conceivable that the builders lien claimants would prefer that a new developer acquire the Terrace House Project and complete it, even if their lien claims are vested off title. In many cases, suppliers have leverage aside from their lien claims, including because they are required to sign off on completion for engineering reports and permits, or because their work is sufficiently advanced that hiring a replacement is economically impractical.

13. There is no doubt that in the context of a CCAA proceeding creditors' rights are limited. That is not to say they may be disregarded completely. Where the debtor company seeks orders of the court authorizing a restructuring transaction which necessarily compromises creditors' rights – let alone an order creating a charge in priority to those creditors – at the very least those creditors are entitled to agree whether to have their rights compromised.

14. This facts of this case are almost entirely similar to those in *Cliffs Over Maple Bay.*[7] In that case, on the comeback hearing the debtor company sought an extension of the stay of proceedings and authorization to borrow $2,350,000 by way of interim financing. The application was opposed by the secured lender. The court granted the orders sought, but was overturned on appeal.

15. In his decision, Tysoe J.A. held as follows:

> 31 The filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11: see *Fairview Industries Ltd., Re* (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (N.S. T.D.). In my view, however, a stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to its creditors...
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> ...
>
> 35 It was not suggested in the petition, nor in the Monitor's report before the chambers judge at the comeback hearing, that the Debtor Company intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. In my opinion, in the absence of such an intention, it was not appropriate for a stay to have been granted or extended under s. 11 of the CCAA...
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> ...
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> 38 I wish to add that it was open, and continues to be open, to the Debtor Company to propose to its creditors an arrangement or compromise along the

[7] *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 ("***Cliffs Over Maple Bay***").

> lines of the restructuring plan described in paragraph 47 of the petition, although it may be a challenge to make such a plan attractive to its creditors. The creditors could then vote on such an arrangement or compromise which would involve, on their part, the concession that their rights would remain frozen while the Debtor Company carried out its restructuring. What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The CCAA was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.
>
> [Emphasis added]

16. There is no distinction between what the debtor company proposed in *Cliffs Over Maple Bay* and what 129 is proposing in this case. Notably:

    (a) There is no suggestion anywhere in Mr. Reyes' Affidavits #2, #3 or #4 that 129, the Petitioners or any other party intends to put forward a plan of arrangement or compromise on which the Petitioners' creditors may vote.

    (b) What 129 is proposing is exactly what the Court warned against in *Cliffs Over Maple Bay*, namely freezing the rights of creditors while the Petitioners: (i) seek to secure additional "interim working capital" from their current investors and new third party investors; and (ii) "new construction financing that will allow the Petitioners to repay the New Loan Facility and exit *CCAA* proceedings."[8]

17. 129 is seeking nothing more than to use these *CCAA* proceedings to effect financings that are otherwise unavailable to the Petitioners. In essence, 129 is proposing simply that the Petitioners continue to simply borrow their way out of their current financial difficulties. That is not a restructuring, and it is not in keeping with the purpose of the *CCAA*.

18. With respect, to authorize the transactions and grant a super-priority charge to secure new financing as proposed by 129, all without providing creditors the opportunity to vote on a plan, would be contrary to the purpose of the *CCAA* and the relevant authorities.

19. For the foregoing reasons, the application of 129 should be dismissed.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Macario Reyes sworn May 18, 2020;

2. Affidavit #2 of Macario Reyes sworn May 21, 2021;

3. Affidavit #3 of Macario Reyes sworn June 4, 2021;

4. Affidavit #4 of Macario Reyes sworn June 7, 2021;

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[8] 129 Notice of Application, paras. 27-34 under "Restructuring Plan".

5. Affidavit #1 of Suzanne Volkow sworn June 8, 2021; and

6. Such further and other material as counsel may advise and as this Honourable Court deems admissible.

The Application Respondent estimates that the application will take 90 minutes.

The Application Respondent has filed in this proceeding a document that contains the Application Respondent's address for service.

Dated: 08-Jun-2021

Signature of Kibben Jackson
Lawyer for Application Respondent

The Solicitors for Solterra Acquisitions Corp. are Fasken Martineau DuMoulin LLP, whose office address and address for delivery is 550 Burrard Street, Suite 2900, Vancouver, BC V6C 0A3 Telephone: +1 604 631 3131 Facsimile: +1 604 631 3232. (Reference: Kibben Jackson/326726.00001)