NO. S-205095
VANCOUVER REGISTRY

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

Name of Applicant: Aviva Insurance Company of Canada

To: The Service List

TAKE NOTICE that an application will be made by the Applicant to the Honourable Madam Justice Fitzpatrick at the Courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on **July 22, 2022, at 2:00 p.m.** for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

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

    a. Abridging the time for service of this notice of application to the extent necessary, and that service upon any interested party, other than those parties on the service list maintained by the Petitioners and Ernst & Young Inc., in its capacity as court-appointed Monitor of the Petitioners (the "**Monitor**") in these proceedings is hereby dispensed with;

    b. Approving the Purchase and Sale Agreement entered into on July 22, 2022 (the "**PSA**") between Port Capital; Development (EV) Inc. and Evergreen House Development Limited Partnership as vendors (the "**Vendor**") and Solterra

Acquisition Corp. (the "**Purchaser**" or "**Solterra**"), attached as Exhibit A to the Affidavit of Rebecca Barclay Nguinambaye, articled student;

c. Enhancing the Monitor's powers to complete the sale transaction, including, among other things, to sell, and in each such case notice under Section 59(10) of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 shall not be required;

d. Authorizing the Monitor to incorporate a new subsidiary of Port Capital Development (EV) Inc. (the "**Residual Co**") who will be a party to which the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-356, as amended ("**CCAA**") applies;

e. Ordering and declaring that upon the filing of the Monitor's Certificate attached to the proposed form of Reverse Vesting Order, that all of the Excluded Assets (as defined in the PSA) shall be transferred and vested absolutely in the name of Residual Co.

Part 2: FACTUAL BASIS

2. The Petitioners Port Capital Development (EV) Inc. (the "**General Partner**") and Evergreen House Development Limited Partnership ("**Evergreen LP**"), own the "**Terrace House Project**", which consists of an ongoing development of a high-rise luxury residential strata development in the Coal Harbour neighborhood, located as 1250 West Hastings Street, Vancouver.

3. The General Partner is the Bare Trustee that holds title to the real property owned by the Petitioner, legally described as:

   PARCEL IDENTIFIER: 006-721-397
   LOT 18, EXCEPT THAT PART OF THE CANADIAN PACIFIC RAILWAY RIGHT-OF-WAY AS DESCRIBED IN ABSOLUTE FEE PARCELS BOOK, VOLUME 9, FOLIO 317, NO. 1154C, AND EXCEPT THE SOUTH 7 FEET NOW ROAD, BLOCK 29 DISTRICT LOT 185 PLAN 92

4. Aviva Insurance Company of Canada ("**Aviva**") holds the second ranking secured claim against the assets that are the subject of these proceedings. The security secures contingent obligations of the debtors in excess of $8 million.

Summary of Proceeding

5. On May 29, 2020, the Petitioners sought and obtained creditor protection under the *Companies' Creditors Arrangement Act*, RSC 1985 c. C-36, as amended (the "**CCAA Proceedings**") and the Honourable Madam Justice Fitzpatrick granted the Initial Order (the "**Initial Order**"), which established, among other things, a stay of proceedings (the "**Stay**

of Proceedings") effective until June 8, 2020. Ernest & Young, Inc. (the "**Monitor**") was appointed as Monitor of the Petitioners in these CCAA proceedings by the Initial Order.

6. Among other things, the Initial Order granted the Monitor enhanced powers, including the ability to execute control over the Petitioners, explore restructuring opportunities for the Terrace House Project and administer a "dual-track" sale and investment solicitation process (the "**SISP**"), to obtain an equity investment, a refinancing or alternatively a sale of the Terrace House.

7. The Stay of Proceedings has been extended to September 30, 2022, by various Orders of this Court dated June 8, 2022, February 24, 2021, April 16, 2021, June 11, 2021, and further extended by the Order of the Court of Appeal (Court of Appeal File No. CA-4585) pronounced as of September 22, 2021, and by further Orders of this Court pronounced April 29, 2022 and May 13, 2022.

8. On June 8, 2020, the Petitioners obtained an amended and restated initial order (the "**ARIO**") in these proceedings. Pursuant to the terms of the ARIO, the Monitor ran an extensive SISP process, but that process did not result in a completed sale or investment transaction.

9. The Monitor's original SISP process is summarized in the Monitor's Fifth Report dated April 13, 2021. The report sets out that the Monitor:

   a. "solicited the Terrace House Project to approximately 670 potential bidders, including local, national and international strategic and financial parties and real estate developers;

   b. "retained CBRE Limited in a limited capacity to market the Terrace House Project to its investor network in Asia as well as a newspaper advertisement that was published in a Hong Kong newspaper, the South China Morning Post;

   c. "populated an electronic data room (the "**Data Room**") with key financial, corporate, operational and other information including construction drawings, consultant reports and other business documents relevant to the Terrace House Project for Prospective Parties to evaluate following the signing of a CA; and

   d. "short-listed six (6) "**Qualified Offerors**" to participate in Phase II of the SISP and provided those parties a period of approximately six (6) weeks to acquire or refinance the Terrace House Project (those parties which submitted the offers, the "**Qualified Offerors**").

e. "The Monitor received six (6) Phase II Offers from the Qualified Offerors (the "**Phase II Bids**") and filed copies of these offers under seal in a Confidential Supplement to the November 27, 2020 Third Report;

f. "Following consultation with the Secured Creditors, the Monitor executed a "Bid Offer Agreement" on behalf of the Petitioners with Bosa Properties (OC) Inc. (the "**Bid Offeror**"). The execution of the Bid Offer Agreement was approved by this Honourable Court on December 1, 2020.

g. "The Bid Offer Agreement provided the Bid Offeror to February 16, 2021 (the "**Due Diligence Period**") to complete a satisfactory feasibility study and due diligence analysis (the "**Feasibility Study**") relating to the economics of the Terrace House Project, and to obtain construction financing."

10. The Monitor's Fourth Report describes that on February 16, 2021, the Bid Offeror provided the Monitor with a feasibility study (the "**Confidential Feasibility Study**") on the Terrace House Project, and put forward a proposal that varied from the Bid Offer that was not acceptable to CMLS. Accordingly, the Monitor in consultation with CMLS did not advance Bid Offer to a definitive agreement.

11. After the Bid Offer had failed to materialize into a definitive agreement, on April 16, 2021, the Court approved the Monitor entering into a purchase and sale agreement (the "**Landa PSA**") with Landa Global Acquisitions Ltd. ("**Landa**") which provided for the opportunity for third parties to submit competing bids. If no competitive proposals were received that were deemed superior to the Landa PSA, the Court would then be asked to grant an approval and vesting order in favour of Landa.

12. On June 15, 2021, the Petitioners sought and were granted an Order (the "**Order Approving Sale**") approving the Purchase and Sale Agreement dated for reference June 4, 2021 (the "**Sale Agreement**"), made between the Petitioners and Solterra Acquisitions Corp ("**Solterra**"), for the purchase of the Terrace House Project.

13. On September 22, 2021, 1296371 B.C. Ltd. ("**129**") appealed the Order Approving Sale to the British Columbia Court of Appeal (the "**BCCA**"). By way of an Order dated September 22, 2022 (the "**BCCA Order**"), the BCCA set aside the Order Approving Sale and granted an Order approving an offer (the "**129 Offer**") submitted by 1296371 B.C. Ltd. ("**129**") to purchase and take assignment of the loan and security held by CMLS and to repay the Construction Loan and the Original DIP Lender.

14. The BCCA Order further removed the Enhanced Powers granted to the Monitor and reverted operational control of the Terrace House Project back to the Petitioners.

The Mandate Loan

15. As set out in the Receiver's Twelfth Report to the Court:

a. "The 129 Offer was completed in three tranches with $14,700,000 provided by Domain Facility Corp. ("**Domain**") (the "**Initial Domain Loan**"), $8,399,060 provided by 129 and $2,150,000 provided by 1260780 B.C. Ltd. ("**126**" and together with 129, the "**Junior Lender**"). 126 and 129 are related to the Petitioners."

b. "The Initial Domain loan matured on May 1, 2022, however the Petitioners obtained an extension of the maturity date to July 1, 2022 for an extension fee of $98,000."

c. "The Initial Domain Loan was almost entirely used to complete the 129 Offer and left very little cash available to the Petitioners to pay for working capital and site preservation expenses. To fund these costs through to the expiry of the current Stay Period, on February 15, 2022 this Honourable Court granted the Further Amended and Restated Initial Order ("**FARIO**") and approved an additional $1,800,000 tranche to the Domain facility (the "**Second Domain Loan**" and collectively with the Initial Domain Loan, the "**Domain Facility**") to provide working capital to the Petitioners for this proceeding."

16. " .... the Petitioners have identified a development partner, Enso Holdings Ltd. ("**Enso**") that has agreed with the Petitioners that it will co-develop the Terrace House Project, become the majority General Partner, and provide its covenant and an equity investment to support the necessary construction financing to exit these proceedings. The Petitioners together with Enso negotiated a commitment letter dated April 19, 2022 (the "**Initial Mandate Commitment Letter**") with Mandate Management Corporation ("**Mandate**") which was attached to the Monitor's Tenth Report, for a proposed $20,000,000 mortgage financing (the "Proposed Mandate Loan") to repay the Domain Facility and provide working capital for these CCAA Proceedings."

17. On May 13, 2022, this Honourable Court granted an order approving the Proposed Mandate Loan and extending the Stay of Proceedings to September 30, 2022. The Proposed Mandate Loan has not yet completed and has not yet funded.

18. As the Proposed Mandate Loan has not yet funded, Aviva Insurance Company of Canada ("**Aviva**") is seeking an Order approving the PSA.

Proposed Transaction

19. As this court is aware, no successful transaction resulted from the SISP. As such, Aviva negotiated with various stakeholders and third parties in the hopes of reaching agreement

on a transaction. The most viable transaction, both in terms of consideration and closing certainty, appears to be from Solterra.

20. Proceeding by way of a Reverse Vesting Order is the preferred approach as it will result in the greatest recovery by the estate.

PART 3: LEGAL BASIS

21. The Petitioners have been unable to obtain financing to repay the Domain Facility, and the Domain Facility is in default. Domain is seeking to have a receiver appointed to, among other things, market and sell the Petitioner's assets and undertakings.

22. Pursuant to the Original SISP, the Monitor fully exposed these assets and undertakings to the market, and identified the parties most likely to acquire those asset and undertakings.

23. Aviva is of the view that a further SISP or marketing process administered by a receiver will not likely identify any interested parties not already known to the Monitor, and will not generate a significantly higher sale price. Conversely, a further SISP or marketing process administered by a receiver will incur significant professional and interest costs.

24. It is Aviva's position that the stakeholders will benefit most from a the proposed sale.

Approval of the Transaction Including Reverse Vesting Order

25. Section 36(1) of the CCAA provides jurisdiction to the Court to authorize the sale of a debtor company's assets out of the ordinary course of business. Section 36(3) sets out a non- exhaustive list of factors that courts are to consider in determining whether to approve a sale:

    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 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 in bankruptcy;

    d. the extent to which 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.

26. Courts applying section 36 of the CCAA have cited a number of factors that may be considered, but the essential role of the Court is to "look at the transaction as a whole and essential decide whether or not the sale is appropriate, fair andreasonable."

27. The Court's decision in *Royal Bank v. Soundair Corp.,* 1991 CanLII 2727 (**"Soundair"**) inform the Court's analysis under section 36 of the CCAA through the Soundair Factors which consider:

a. whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently;

b. the interests of all parties;

c. the efficacy and integrity of the process by which offers were obtained; and

d. whether there has been unfairness in working out the process.

28. Both the section 36 and Soundair factors favour the granting of the vesting order being sought as:

a. The process leading up to the proposed transaction has been the subject of approvals by the Court and overseen by the Monitor;

b. The Monitor is supportive of the proposed transaction;

c. The proposed transaction is supported by all fo the parties with a financial interest in the development;

d. This proposed transaction is in the best interest of the stakeholders as it represents the best option for fulfilling the goals of restructuring;

e. There has been no unfairness in the working out of the process;

f. The transaction results from extensive efforts to obtain the best price for the assets

29. This Court in *Quest University Canada (Re),* 2020 BCSC 1883 ("**Quest**"),1 has recognized that sections 11 and 36 of the CCAA provide for the jurisdiction to grant reverse vesting orders

30. In Quest, the Court noted that Courts have recognized reverse vesting orders as an innovative solution to challenges in a proceeding and that in exercising the Court's

discretion in this regard, the Court should consider (1) whether the order sought is appropriate in the circumstances, (2) whether the applicant has been acting in good faith; and (3) with due diligence.

31. A reverse vesting order is appropriate in this instance as it represents the best opportunity to realize value for the Petitioners' stakeholders and the alternative would be a greater shortfall for the secured creditors, to the prejudice of all stakeholders. Further, a reverse vesting order will enable the Purchaser to preserve a number of key agreements including a "Building Permit" issued by the City of Vancouver and other agreements in order to carry on and complete construction of the Terrace House Projects.

Adding Residual Co. As a Petitioner

32. The Monitor requires authorization to incorporate a subsidiary of Port Capital Development (EV) Inc. for the purpose of facilitating the reverse vesting order contemplated by the PSA.

33. Section 3 of the CCAA provides the-Court with authority with respect to both debtor companies and their affiliates. Courts have in other matters have authorized the addition of an entity to the CCAA proceedings for enabling a transaction involving a reverse vesting order.

Part 4: MATERIAL TO BE RELIED ON

Previous Court Orders

34. Initial Order pronounced May 29, 2020;

35. Amended and Restated Initial Order pronounced June 8, 2020;

36. Further Amended and Restated Order pronounced February 14, 2022;

37. Order made After Application pronounced May 13, 2022

Monitor's Reports to the Court

38. Monitor's Third Report to the Court, dated November 27, 2020;

39. Monitor's Fourth Report to the Court, dated February 23, 2021;

40. Monitor's Fifth Report to the Court, dated April 13, 2021;

41. Monitor's Sixth Report to the Court, dated May 20, 2021

42. Monitor's Twelfth Report to the Court, dated June 16, 2022

43. Such further and other material as counsel may advise and this Honourable Court may permit.

The Applicants estimate that the application will take 1 hour.

☒ 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.

1. file an Application Response in Form 33,
2. file the original of every affidavit, and every other document, that
    a. you intend to refer to at the hearing of this application, and
    b. has not already been filed in the proceeding, and
3. serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
    a. a copy of the filed Application Response;
    b. 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;
    c. if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated at the City of Vancouver, in the Province of British Columbia, this 22 day of July, 2022.

Lawson Lundell LLP
Solicitors for the Applicants

Filed by:

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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:

____

____

____

____

Date:

____
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:

- ☐ 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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